

## Memorandum 86-85

Subject: Study L-1028 - Estate and Trust Code (Independent Administration of Estates)

**BACKGROUND**

The Tentative Recommendation Relating to Independent Administration of Estates was distributed to interested persons and organizations for review and comment in March 1986. A copy of the Tentative Recommendation is attached. This memorandum considers the comments we received on the Tentative Recommendation.

The Commission has been actively engaged in the study of this area of the law during the last few years. We have submitted two recommendations for revision of the law, both of which have been enacted. The Tentative Recommendation proposes only a few substantive changes in existing law. These changes are outlined in the preliminary portion of the Tentative Recommendation. See pages 1-6 of attached Tentative Recommendation.

We sent the Tentative Recommendation to more than 200 persons and organizations. Twenty-two letters containing comments on the Tentative Recommendation were received from the following:

- Exhibit 1 - Henry Angerbauer, CPA, Concord (referred to hereinafter as "Angerbauer")
- Exhibit 2 - San Mateo County Bar Association Probate Section (referred to hereinafter as "San Mateo Bar")
- Exhibit 3 - Beryl A. Bertucio, Senior Legal Writer, Matthew Bender (referred to hereinafter as "Bertucio")
- Exhibit 4 - Rawlins Coffman, Red Bluff lawyer (referred to hereinafter as "Coffman")
- Exhibit 5 - Charles A. Collier, Jr., Los Angeles lawyer (referred hereinafter as "Collier") (These are Mr. Collier's personal comments)
- Exhibit 6 - San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (referred to hereinafter as "San Diego Bar")
- Exhibit 7 - Jeffrey A. Dennis-Strathmeyer, writer for CEB on probate and estate planning and practicing probate lawyer (hereinafter referred to as "Dennis-Strathmeyer")
- Exhibit 8 - David B. Flinn, San Francisco lawyer (hereinafter referred to as "Flinn")

- Exhibit 9 - Irving Kellogg, Beverly Hills lawyer (hereinafter referred to as "Kellogg")
- Exhibit 10 - Justice Robert Kingsley, Court of Appeal, Los Angeles (hereinafter referred to as "Justice Kingsley")
- Exhibit 11 - John G. Lyons, San Francisco lawyer (hereinafter referred to as "Lyons")
- Exhibit 12 - Probate and Estate Planning Section of the Kern County Bar Association (hereinafter referred to as "Kern County Bar")
- Exhibit 13 - Ian D. McPhail, Santa Cruz lawyer (hereinafter referred to as "McPhail")
- Exhibit 14 - George F. Montgomery II and Dena Burnham Kreider, San Francisco lawyers with Pillsbury, Madison & Sutro, expressing their personal opinions and not necessarily the views of the firm (hereinafter referred to as "Montgomery and Kreider")
- Exhibit 15 - Herbert P. Moore, Jr., Orinda lawyer (hereinafter referred to as "Moore")
- Exhibit 16 - Robert H. Morgan, San Jose lawyer (hereinafter referred to as "Morgan")
- Exhibit 17 - Subcommittee for Title Insurance Companies (hereinafter referred to as "Title Insurance Companies")
- Exhibit 18 - Charles E. Ogle, Morro Bay lawyer (hereinafter referred to as "Ogle")
- Exhibit 19 - Jerome Sapiro, San Francisco lawyer (hereinafter referred to as "Sapiro")
- Exhibit 20 - California Newspaper Service Bureau (hereinafter referred to as "California Newspaper Service Bureau")
- Exhibit 21 - Harold Weinstock, Los Angeles lawyer (hereinafter referred to as "Weinstock")
- Exhibit 22 - Judge Robert R. Willard, Superior Court, Ventura, retired but on assignment to preside over probate calendar (hereinafter referred to as "Judge Willard")

#### RECOMMENDATION TO 1987 LEGISLATURE

The staff believes that a recommendation to the 1987 Legislature could be submitted on this subject. The subject is one that is not closely integrated with the other procedures under the Probate Code. There is, however, a close relationship between the Estate Management provisions and the independent administration provisions. It would be desirable, if at all possible, to include the Estate Management provisions in the bill introduced in 1987 so that the independent administration provisions and the Estate Management provisions would be consistent. The new independent administration provisions would be compiled commencing with Section 1400 of the existing Probate Code and could take effect on July 1, 1988.

If the Commission determines that independent administration should be the subject of a recommendation to the 1987 Legislature, the staff will revise the attached Tentative Recommendation to incorporate any changes made by the Commission as the result of the consideration of the comments we received on the Tentative Recommendation and make the necessary revisions so that the Tentative Recommendation can be printed and submitted as a separate recommendation to the 1987 Legislature. At a future meeting we will present the revised recommendation to the Commission for approval for printing and submission to the 1987 Legislature.

#### **GENERAL REACTION AND GENERAL COMMENTS**

The Tentative Recommendation was well received. There are still a few (primarily Jerome Sapiro and the California Newspaper Service Bureau, Inc. -- both of whom appeared at Commission meetings to express the same view) and Lyons (Exhibit 11) who are not in agreement with the Commission decision (already enacted as law) to permit use of independent administration authority for real property transactions.

The great majority of the letter writers approve of the changes the Tentative Recommendation would make in the existing law. Some writers expressed only general approval of the Tentative Recommendation and made no detailed comments on it. See Exhibits 1 (Angerbauer), 10 (Justice Kingsley), 13 (McPhail), 16 (Morgan), 21 (Weinstock).

General comments on the Tentative Recommendation include the following:

Angerbauer (Exhibit 1) ". . . keep up the good work. I am sure that all of us out here in the field depend upon the determined effort you make to give us a law that we can work with."

San Diego Bar (Exhibit 6) "I might also add that everyone on the Subcommittee finds it very useful to have the opening five to ten pages of the tentative recommendations compare and contrast the present law with proposed law. This background technique not only gives us all a quick idea of the changes to be made, but allows us to reflect on whether the proposal is a useful one in light of past experiences. It also makes voluminous materials much easier to digest."

Justice Kingsley (Exhibit 10) "I can see in them nothing objectionable; they merely fill in necessary gaps left by the 1984 legislation."

Montgomery and Kreider (Exhibit 14) "With the exception of the comments noted above, your tentative recommendations appear to be a welcome restatement of California law. We have not noted in this letter the many small improvements that the tentative recommendations propose."

Judge Willard (Exhibit 22) "In general, I heartily approve the restatements and changes suggested. They appear to be carefully drafted. My few specific comments relate to relatively minor matters. I mention them only because I have encountered the problems numerous times in presiding over Ventura County's probate calendar for more than 15 years. . . . Let me repeat that I think these drafts are excellent."

One writer, McPhail (Exhibit 13), comments:

2. Independent Administration of Estates

I have no particular objections to the proposed new rules. However, I wish the commission would recommend that California probate law move in the direction of the English probate system under which, as I understand it, the executor obtains a "grant of probate" after satisfying the England Revenue Service concerning death taxes, and then proceeds to administer the estate without any regular supervision of the Court. I am not sure whether the executor must render a final accounting before distributing assets to beneficiaries. However, I understand and assume that any beneficiary or other interested party has the right to object to any particular action taken and to question any work of the executor. This, I assume, enables the executor to function along the lines of the trustee of a revocable trust or of a testamentary trust, under the current California rules. It is difficult to justify the current California probate system other than as an attorney's retirement system. I say this in spite of the fact that I specialize in estate planning and estate settlement and am very appreciative of the probate fees I collect. However, I have felt it my task to assist as many clients who wish to avoid probate by the preparation of revocable living trusts and other devices.

**DETAILED COMMENTS**

The detailed comments we received are discussed below. The page references are to the attached Tentative Recommendation (dated March 1986).

§ 10400. Citation of this part (page 8)

Collier (Exhibit 5) approves this section. There were no objections to the section.

§ 10401. "Court supervision" defined (page 8)

Judge Willard (Exhibit 22) questions whether the definition of court supervision is sufficiently clear:

I have frequently been presented with the following situation. The representative who has independent powers contracts to sell real property. The title officer refuses to recognize his authority and demands a court order. The representative then seeks instructions or authority to convey or an order directed to the title officer. He does not seek to follow the court procedures for confirmation. He wants to avoid the delay necessary to secure an appraisal, or to avoid submitting real estate commission for court review. Section 10500, subdivision (b) gives the representative authority to "obtain court supervision" in very general terms. In my opinion it would be desirable to provide that "court supervision" mean compliance with statutory requirements that would exist in the absence of independent power.

In this connection I have frequently been presented with the question as to whether a representative possessing independent power to sell real property, but not so authorized by a will, may proceed with statutory court confirmation procedures in the absence of publication of notice of sale. Another way of stating the question is whether the grant of the independent power to sell authorizes sale in the same manner a will might authorize it. It would be helpful if this question were answered in the code.

The staff believes that the suggestion that "court supervision" be defined as suggested by Judge Willard is a good one. We would revise Section 10401 to read:

10401. As used in this part, "court supervision" ~~includes~~ means the judicial authorization, approval, confirmation, and or instructions that otherwise would be required if authority to administer the estate had not been granted under this part.

With respect to the question concerning whether a personal representative possessing independent power to sell real property can proceed with statutory court confirmation procedures in the absence of publication of notice of sale, the staff would add a statement to the Comment to Section 10500 (concerning subdivision (b) of that section) that if the personal representative obtains court supervision of a real

property sale, the notice of sale must be published as would be required if independent administration authority had not been granted.

Additional Definitions

Collier (Exhibit 5) suggests that the terms "full authority" and "limited authority" be used in the statute. See his comments 2 and 3 in his letter. He points out that these are the terms used in practice and on the Judicial Council forms for a petition for probate and for an order admitting the will to probate. The staff believes that this is a good suggestion. We suggest that the following additional definitions be added to the statute:

§ 1040-. "Full authority" defined

1040-. As used in this part, "full authority" means authority to administer the estate under this part with authority to do all of the following under the authority of this part:

- (a) Sell real property.
- (b) Exchange real property.
- (c) Grant an option to purchase real property.

§ 1040-. "Limited authority" defined

1040-. As used in this part, "limited authority" means authority to administer the estate under this part without authority to do any of the following under the authority of this part:

- (a) Sell real property.
- (b) Exchange real property.
- (c) Grant an option to purchase real property.

These definitions are consistent with the distinction made on the Judicial Council forms. For example, the Description of the Petition portion of the form for Petition for Probate of Will includes the following box:

[ ] Authorization to Administer Under the Independent Administration of Estates Act [ ] with limited authority

The text of the petition itself includes the following:

- 2. Petitioner (name of each):  
requests that

[portion omitted]

- (c) [ ] authority be granted to administer under the Independent Administration of Estates Act [ ] with full authority under the act [ ] without authority to sell,

exchange, or grant an option to purchase real property (limited authority).

The staff proposed definitions would merely recognize the use of the terms "full authority" and "limited authority" under existing practice and would make it easier to understand the statute. If these definitions are approved by the Commission, the staff will include them in the next draft and will use the defined terms where appropriate.

§ 10402. This part not applicable if will so provides (page 8)

There were no comments on this section.

§ 10403. Special administrator (page 9)

Under existing law, the independent administration statute does not apply to special administrators. The Tentative Recommendation permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator.

Dennis-Strathmeyer (Exhibit 7) suggests that the ability to grant independent administration powers (IAEA powers) to a special administrator should not be limited to special administrators with general powers:

If, for example, the only reason for the appointment is to perform an act on an emergency basis before an executor can be appointed, it might be critical for the special administrator to be able to accomplish the act immediately by getting the necessary consents to the proposed action and exercising the IAEA powers. (Looking at the special administrator proposal, it is not at all clear to me that the court otherwise has much power to authorize a special administrator to perform acts on little or no notice.

The staff does not know whether this is a real problem. Perhaps a better way to deal with the problem would be to give the court authority to reduce the time of notice by a general provision in the notice provisions. We would make that general provision applicable unless there is a particular provision that the time of notice can not be reduced. Or we could deal with the specific problem by giving the court authority to grant independent administration authority to a special administrator with respect to a specific matter or specific matters upon a finding that such authority is necessary under the circumstances of the particular case.

§ 10404. Application of part (pages 9-10)

Dennis-Strathmeyer (Exhibit 7) questions the need for Section 10404: "Perhaps we can now do without the transitional provisions in Prob. C §10404. They are not really needed for the new changes, and I don't see much point in worrying about the 1985 changes in 1988."

The new independent administration provisions probably would take effect on January 1, 1988. The staff recommends that we retain Section 10404 in the proposed statute, but that the Commission consider omitting this section from the new Estate and Trust Code when the entire new code is proposed for enactment.

Collier (Exhibit 3) notes that subdivision (a)(3) limits use of the new statute in cases where authority was granted prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act: The new statute can be used only if a petition is filed after January 1, 1985, and the personal representative is granted full authority under the Independent Administration of Estates Act.

Mr. Collier points out:

Both (A) and (B) [of subdivision (a)(3)] contemplate a petition for grant of "full authority" under the Act. This obviously contemplates the power to sell, exchange or grant options on real property without court confirmation. However, there are a number of other changes in the Act and a personal representative might want to petition for what is also referred to as limited authority under this revised Act. Therefore, perhaps both (A) and (B) should allow a petition for "full authority" or "limited authority."

This is an excellent point. The staff recommends that paragraph (3) of subdivision (a) of Section 10404 be revised to read:

10404. (a) This part applies to all of the following cases:  
[portion omitted]

(3) Where authority was granted prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act and one of the following requirements is satisfied:

(A) A petition was filed under former Section 591.1 of the Probate Code after January 1, 1985, requesting that the personal representative be ~~granted the full authority that could be granted~~ authorized to administer the estate under the Independent Administration of Estates Act in effect at the time the petition was filed, and the petition was granted.

(B) A petition is filed under this part requesting that the



personal representative be ~~granted the full authority that can be granted~~ authorized to administer the estate under this part, and the petition is granted.

§ 10450. Petition for order granting independent administration authority

In response to a suggestion by Collier (Exhibit 5), the staff recommends that subdivision (b) of Section 10450 be revised to read:

(b) A petition under this part may request either of the following:

(1) ~~Authority~~ Full authority to administer the estate under this part.

(2) Authority to administer the estate under this part without authority to sell, exchange, or grant an option to purchase real property ~~authority to do either of the following~~ under the authority of this part. ~~The authority requested pursuant to this paragraph is known as limited authority.~~

~~(A) Sell or exchange real property.~~

~~(2) Grant an option to purchase real property.~~

§ 10451. Notice of hearing (page 12)

Reference to giving notice in manner provided in Section 1200

Collier (Exhibit 5) correctly notes that the reference in brackets in subdivision (b) of Section 10451 to Section [1200] should be to Section 1200.5]. The staff plans to make the suggested change for the reason stated in the next paragraph.

The Commission recommended Assembly Bill 2625 to the 1986 legislative session to substitute references to Probate Code Section 1200.5 (giving notice of hearing by mail) for the references in various Probate Code sections to Probate Code Section 1200 (posting of notice of hearing). This same substitution should be made in Section 10451(b) which supersedes existing Probate Code Section 591.1 which contains the reference to Section 1200. (Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stats. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 10451 of a reference to notice by mail in place of the reference to notice by posting will effectuate legislative intent. Subdivision (d)

of Probate Code Section 1200 provides that notice by posting under that section is not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section.)

Contents of Notice of Hearing

The Tentative Recommendation proposes to add to the notice of hearing on a petition for independent administration authority a very brief statement of the authority granted under independent administration. This addition was opposed by the Executive Committee of the Estate Planning, Trust and Probate Law Section. The Executive Committee was of the view that experience under the existing law did not demonstrate any need for an expanded statement in the published notice of hearing. (The notice of hearing ordinarily is published in a newspaper as a portion of the notice of hearing on the petition for appointment of the personal representative.)

Kern County Bar (Exhibit 12) suggests that the notice of hearing also contain a description of the types of acts that the petitioner would be permitted to perform without court supervision.

Collier (Exhibit 7) notes the problem of providing a very brief but accurate statement in the notice of hearing of the effect of a grant of independent administration authority:

Paragraph (c) has a proposed statement in the notice of hearing. The second sentence of that statement, of course, is inaccurate in that it indicates that all action can be taken without court supervision, whereas certain actions, such as commissions, fees, accountings and distributions do require court supervision. However, this is perhaps too technical a modification of that sentence to be meaningful to those who receive the notice of hearing. However this sentence might be modified to state "This authority would permit the personal representative with certain exceptions to act without court supervision that would otherwise be required."

If additional language is to be added to the existing notice of hearing -- to expand the statement required by existing law which states only that authority to administer the estate under the Independent Administration of Estates Act is requested -- the staff recommends that the suggestion of Collier be adopted. We would not attempt to further expand the statement to describe acts that might be authorized under the independent administration authority because we

think that the addition might be more confusing than enlightening to the average heir or devisee and would further increase the text of the published notice.

§ 10452. Hearing; order; endorsement on letters (page 13)

There were no comments on this section.

§10453. Increase in amount of bond (pages 13-14)

Lyons (Exhibit 11) states:

I am concerned about proposed Section 10453. This concern applies, of course, to present Section 591.9. I feel that the amount of the bond should include the value of the real property sold. The purpose of the bond is as much applicable to real property as to other property.

The staff does not understand this comment. Section 10453 requires that the amount of the bond include "the estimated net proceeds of the real property authorized to be sold under this part." This requirement applies whether or not the property actually is sold under the independent administration authority; all that is required for an increased bond is that the real property is authorized to be sold under independent administration authority. If real property is not sold under independent administration authority, Probate Code Section 542 requires that the bond be increased before the sale is confirmed to include the amount of the expected proceeds of the sale.

§ 10454. Revocation of independent administration authority (page 14)

Collier (Exhibit 5) comments:

As I read this section, the only notice of hearing on a petition to revoke independent administration would be the notice given to the personal representative. Thus, it becomes a two-party proceeding, the petitioner and the personal representative. Others interested apparently receive no notice and would not be participants. While this is existing law, it is a little unusual because of the limited notice. All persons interested in the estate are obviously given notice of the petition for independent administration.

The staff believes that this is a good point. We recommend that the following be substituted for subdivision (b) of Section 10454:

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Section 1200.5. The personal representative shall be served with a copy of the petition and a notice of the time and place of the hearing at least 10 days prior to the hearing. Service on the personal representative shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other manner as may be authorized by the court.

This notice provision would be reviewed when the general notice provisions are drafted. However, we may not be able to include those provisions in the legislation we proposed for enactment in 1987, so we should include the provision set out above in the independent administration statute we recommend for enactment in 1987.

§ 10500. Administration without court supervision (pages 15-16)

A few of the writers continue to object to the extension of independent administration authority to include real property sales.

Collier (Exhibit 5) suggests that "exposure to the market" be added following the word "commissions" in Section 10500(a)(2):

This would cover the requirement of satisfying the court as to exposure to the market pursuant to Probate Code Section 785. . . . The comment might also be modified to make reference to the fact that exposure to the market requirements do not apply to independent sales.

The staff believes that it is clear under existing law that the exposure to the market requirement does not apply to sales made under independent administration authority. However, we will add a statement to that effect to the Comment to the section. It should be noted that in the draft statute for the Estate Management provisions the Commission has decided to substitute for the "exposure to the market" requirement a requirement that the court at the confirmation hearing "examine into the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable."

§ 10501. Matters requiring court supervision (pages 16-17)

Judge Willard (Exhibit 22) makes the following suggestion:

I suggest that consideration be given to the question as to whether a personal representative's own claims should be exempted from court supervision under section 10501, or in the alternative,

whether he should be required to give advice of proposed approval of his own claims pursuant to section 10551.

The staff believes that advice of proposed action should be required for these claims.

§ 10502. Specific independent administration powers (pages 17-18)

Exclusive right to sell

Title Insurance Companies (Exhibit 17) suggests concerning Section 10502(p) (exclusive right to sell):

That section as drafted indicates an exclusive right to sell for 90 days. In my experience in the last few years many real estate brokers will not take a listing of property unless it is at least a six month listing. I would suggest that the section be opened to allow a longer listing period.

Collier (Exhibit 5) states: "I believe that [subdivision (p)] is intended to allow a personal representative not only to grant an exclusive right to sell for a period not to exceed 90 days, but grant a renewal of that right for additional 90-day periods. Perhaps this can be clarified." The Commission has considered this question in connection with the Estate Management provisions and has clarified those provisions. See Section 10150(c) of the Tentative Recommendation Relating to Estate Management (prepared for the October meeting). The staff recommends that subdivision (p) of Section 10502 be revised to read:

(p) To grant an exclusive right to sell property, for a period not to exceed 90 days, where the personal representative determines that to be necessary and advantageous to the estate; to grant one or more extensions of an exclusive right to sell property, each extension being for a period not to exceed 90 days, where the personal representative determines that the particular extension is necessary and advantageous to the estate.

The staff also recommends that notice of advice of proposed action be required for each extension of an exclusive right to sell agreement. Although advice of proposed action is required for selling or exchanging real property, it would not appear that this necessarily would require advice of proposed action for the granting of an extension of an exclusive right to sell agreement.

Independent administration powers

Collier (Exhibit 5) and the Note to Section 10502 (page 19 of Tentative Recommendation) point out that the listing of powers in Section 10502 needs review and needs to be revised in light of the powers given to a personal representative without independent administration authority. We had originally planned to review the powers listed in Section 10502 after we had drafted the provisions relating to Estate Management. However, although we have a draft of the Estate Management provisions which we will consider at the October 1986 meeting, we cannot be sure at this time that those provisions will be recommended for enactment by the Legislature in 1987. Accordingly, unless we plan to include the Estate Management provisions in the same bill as the independent administration provisions, the staff believes that the independent administration provisions should not be drafted so that they are dependent upon the enactment of the Estate Management provisions.

Collier suggests in item 7 on pages 3-4 of his letter that the powers under Section 10502 be grouped into several categories to make the statute easier to understand. However, it would be a very difficult task to make sense out of the existing provisions without basing the revisions of the independent administration powers on the new Estate Management provisions. Accordingly, the staff recommends that we not seek to revise and clarify Section 10502 at this time and consider revision of this section in connection with the new Estate Management provisions. We do not want to duplicate in Section 10502 all the powers that the personal representative can exercise without prior court authorization under the new Estate Management provisions. Yet there are many inconsistencies between the existing independent administration powers and the new Estate Management provisions. And the new Estate Management provisions would make many technical and substantive improvements in the existing law which served as the basis for the drafting of the independent administration powers. For example, subdivision (b)(3) of Section 10502 governs investments in financial institutions, common trust funds, and certain mutual funds. The Estate Management provisions make improvements in the comparable provisions relating to investments by a personal representative who

does not have independent administration authority. Thus, subdivision (b)(1) of Section 10502 permits deposits in banks and insured savings and loan associations, but the comparable provision of the new Estate Management provisions adds credit unions to this authority and will, I believe, require that the account be an insured account. Subdivision (b)(4) of Section 10502 deals with investments in certain mutual funds, but Section 9730 of the Estate Management provisions replaces the existing provision governing these mutual funds with a provision that permits investment without prior court authorization in:

An interest in a money market mutual fund registered under the Investment Company Act of 1940 (15 U.S.C. Sec 80a-1 et seq.) or an investment vehicle authorized for the collective investment of trust funds pursuant to Section 9.18 of Part 9 of Title 12 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations.

The staff does not believe that it is worth the effort to seek to revise the independent administration provisions to make all of the substantive and technical revisions and corrections that would be made in the Estate Management provisions. We do not recommend, for example, that subdivision (e) Section 10502 which authorizes the personal representative to "abandon worthless assets or any interest therein" be conformed to the comparable provisions of the Estate Management provisions (§§ 9780-9789) which authorize the personal representative not only to dispose of or abandon valueless tangible personal property but also to "Dispose of or abandon tangible personal property where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value." Nor do we recommend that subdivision (c) of Section 10502 be revised to delete the word "surplus" which is not continued in the comparable provision of the Estate Management provisions.

The staff believes that we should make a major effort to include the new Estate Management provisions in the bill that the Commission will recommend for introduction in 1987 to revise certain portions of the Probate Code. The Estate Management provisions appear to be relatively independent of the provisions relating to probate of the

will, accounting, and distribution, and other procedural provisions that will not be perfected in time to be included in the bill. If we are able to submit the Estate Management provisions for enactment in 1987, we can make the necessary revisions in Section 10502. We plan to prepare a supplement to the material on Estate Management for the October meeting to indicate the necessary revisions in the independent administration provisions. If we are not able to submit the Estate Management provisions for enactment in 1987, it will be necessary to continue for a few years more the existing law.

§ 10550. Giving advice of proposed action (pages 20-21)

Technical revisions

In response to a suggestion from Collier (Exhibit 5), the staff recommends that the words "under Section 10502" be deleted from the second sentence of subdivision (a) of Section 10550.

In response to a suggestion from Collier (Exhibit 5), the staff suggests that subdivision (b) of Section 10550 be revised to read:

(b) A personal representative who has been granted authority to administer the estate under this part may give advice of any proposed action even if not described in Section 10551. Nothing in this subdivision requires that the personal representative give advice of proposed action where not required under subdivision (a) or authorizes a personal representative to take any action the personal representative is not otherwise authorized to take.

Use of independent administration procedure for proposed actions not requiring advice of proposed action

The Tentative Recommendation proposes a new procedure that permits the personal representative to give advice of proposed action even though the independent administration statute does not require that advice of proposed action be given before taking that action. Failure to object to the proposed action has the same effect as failure to object to a proposed action for which advice of proposed action is required.

San Diego Bar (Exhibit 6) "especially liked the idea of using proposed actions as an independent administration procedure even when not required."

Dennis-Strathmeyer (Exhibit 7) approves the new procedure: "I strongly approve the procedure permitting use of the IAEA when it is not mandatory. This solves a major problem with the Act."



Ogel (Exhibit 18) comments: "Generally, I approve the tentative recommendations as they stand. . . . Specifically, I endorse the procedure outlined on page 3, permitting the personal representative to give advice of a proposed action, even though not required to do so.

10551. Actions requiring advice of proposed action (pages 21-23)  
Selling certain over-the-counter securities without giving advice of proposed action

Under existing law, advice of proposed action must be given where securities are proposed to be sold, unless the securities are to be sold on an established stock or bond exchange. The Tentative Recommendation permits the sale without giving advice of proposed action for sale of an over-the-counter securities designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers.

Flinn (Exhibit 8) states: "I also concur with the change regarding the over-the-counter securities, as today they are really as susceptible of valuation as are those securities on a national exchange."

Kellogg (Exhibit 9) approves the expansion of exemptions to over-the-counter securities as proposed by the Tentative Recommendation.

Lyons (Exhibit 11) states: "I generally approve the changes proposed. In particular, proposed Section 10551(3) regarding over the counter sales seems an excellent proposal."

Collier (Exhibit 5) makes a number of technical suggestions concerning this section. The staff will consider these when we prepare a revised draft using the new definitions of "full authority" and "limited authority" (assuming that the Commission approves the use of those definitions) and the revised statement of the powers of the personal representative who has been given independent administration authority.

§ 10552. Persons to whom advice of proposed action must be given  
(pages 23-24)

The Tentative Recommendation adds a new requirement concerning the persons to be given advice of proposed action: Advice of proposed

action will have to be given to each person interested in a trust if the personal representative is the trustee of a trust that is a devisee under the will of the decedent.

The Kern County Bar (Exhibit 12) objects to this new notice requirement:

The change to require advice of proposed action to be given to each person interested in a trust which is a devisee under the will, including all contingent beneficiaries, where the personal representative is the trustee of the trust, is too burdensome on the personal representative and may result in technical grounds for later opposition to the action. Notice should be required only to named beneficiaries or their successors.

Montgomery and Kreider (Exhibit 14) make the following comment concerning Section 10552:

Section 10552 provides that trust beneficiaries are to be sent an advice of proposed action if the trustee (presumably including a nominated trustee) is the same person as the personal representative planning to take the action described in the advice. This section implies but should state more clearly that the personal representative need not send the advice to trust beneficiaries when the personal representative is not the trustee. (Current California law also would be improved by making clear whether other instances of notice must be given to trust beneficiaries or whether notice to the trustee (or nominated trustee) is sufficient. The trustee's fiduciary obligations to the trust beneficiaries should make notice to the trustee alone sufficient.

Collier (Exhibit 5) questions the advisability of subdivision (d) which requires notice to trust beneficiaries. He writes:

Section 10552(d): This notice requirement to persons interested in the trust seems inconsistent with the current definition found in Probate Code Section 34 of a devisee. Presumably, the trustee as devisee would be the only one normally required to receive notice of proceedings involving the probate estate. Perhaps that is being generally revised in accordance with the trust notices. However, the relationship is obviously different between the executor where the trustee is a beneficiary and where the trustee is giving notice to those beneficially interested in the estate. In short, I question the advisability of what is subsection (d).

The staff believes that Collier makes a good point. His point is that if there is a problem that is dealt with by subdivision (d), it is a general problem. This general problem of giving notice to trust beneficiaries where the personal representative is the trustee is one

that should be dealt with by a general notice provision, not by a special provision relating to one notice only. Montgomery and Kreider (Exhibit 14) also note that current California law would be improved by providing a general provision relating to when notice must be given to trust beneficiaries or whether notice to the trustee is sufficient. The staff suggests that subdivision (d) not be added to the independent administration statute but instead that a general provision be drafted that would in effect treat the trust beneficiaries as devisees where the trustee is the personal representative. We will draft such a provision as a part of the provisions relating to notice generally. When we draft the general provision we can consider such matters as unborn and contingent trust beneficiaries, beneficiaries who are minors or lack capacity, and the like. We will also consider whether notice to trust beneficiaries should be required where the trustee is a trustee nominated in the trust instrument.

§ 10553. Consent to proposed action (page 24)

There were no comments on this section.

§ 10554. Waiver of advice of proposed action (pages 24-25)

Statutory Waiver of Advice of Proposed Action Form

Desirability of statutory form. Existing law permits a person to waive the right to receive advice of a proposed action only with respect to a particular proposed action. The Tentative Recommendation provides for a Statutory Waiver of Advice of Proposed Action Form. Use of this form permits a person to waive the right to receive notice of all proposed actions or to waive the right to receive notice of particular kinds of proposed actions. The new form includes an appropriate warning to the person using the form of the consequences of signing the form.

Flinn (Exhibit 8) approves the concept of a statutory form:

As to independent administration, I heartily recommend the new statutory waiver of advice of proposed action form. Most executors or administrators making use of the independent administration provisions are doing so simply because they are in close relationship or contact with all of the beneficiaries and the proposed transaction, often a sale of securities or property, is already something that everyone has agreed to.

Kellogg (Exhibit 9) approves the concept of a statutory waiver of advice of proposed action form:

I commend the Commission's development of a Statutory Waiver of Advice of Proposed Action Form, . . .

The Commission should seek to insert more Statutory Forms into the Probate Code so that there will be uniformity by statute. This statutory uniformity should minimize lawyers' failures to comply accurately with requirements and recipients' challenges to carelessly prepared forms.

A majority of Kern County Bar (Exhibit 12) was in favor of the recommendation to create a new Statutory Waiver of Advice of Proposed Action Form.

Montgomery and Kreider (Exhibit 14) approve the concept of the statutory waiver form:

The revisions to the Independent Administration of Estates Act make independent administration more flexible and useful, especially in harmonious family situations. In particular, the Law Revision Commission should be congratulated for proposing the Statutory Waiver Advice of Proposed Action Form. In many family situations, the beneficiaries are aware of the personal representative's actions, but the formal requirements for complying with the statute can be onerous.

Dennis-Strathmeyer (Exhibit 7) objected to the concept of a statutory form:

I don't like the idea of having a statutory form for waiving the advice of proposed action. I strongly believe anyone can waive anything that is for their own benefit, but we don't need to come up with forms to help them. The very act of creating a form gives a transaction the appearance of legitimacy no matter how many warnings you write. When would a blanket waiver be appropriate? When it is necessary to give the personal representative flexibility while the heir is on African Safari? That problem could be solved with a power of attorney, and perhaps we should leave it at that.

The Commission determined that the statutory waiver form must be used for a general waiver because the Commission feared that otherwise an heir or devisee would give a general waiver without any knowledge of its effect. The Commission was unwilling to permit a general waiver unless the required warnings specified in the statute were included in the document executed by the person making the waiver. Despite Mr. Dennis-Strathmeyer's objection, the staff believes that the Commission decision to permit a general waiver only in a document that contains the required warnings is a sound decision.

Moore (Exhibit 15) expresses concern about the general waiver of the right to advice of proposed action. He suggests that a copy of Section 10551 (actions requiring advice of proposed action) be submitted with the solicitation of the general waiver. He also suggests that the box selected in the statutory form be initialed instead of checked, a suggestion the staff suggests be considered in connection with Section 10603 which prescribes the statutory form.

Real property sales. Coffman (Exhibit 4) suggests that waiver of advice of proposed action should not be made applicable to sales of real property. Under existing law enacted upon Commission recommendation, a waiver in writing of advice of any specific proposed action is permitted. The Tentative Recommendation also would permit a general waiver on a statutory form. Mr. Coffman appears to be one of those attorney who would not use independent administration authority for a sale of real property. He comments:

Only by giving the complete notice may the personal representative mitigate personal liability for violations of its fiduciary duties. For example: in my opinion, if a sale is made without court confirmation and the purchaser quickly resells the real property for a much greater price than that paid, the personal representative and its attorney are subject to suit by the heirs and/or devisees for the difference in price.

The staff would retain without change the provision permitting a waiver of advice of proposed action with respect to a real property sale. The staff believes that the written waiver provides greater protection to the personal representative than mere proof that the person bringing the suit was given advice of the proposed action and did not make a timely objection.

Revocation of waiver. The proposed legislation contained in the Tentative Recommendation contains no substantive provision indicating how a waiver can be revoked. The Statutory Form contains a statement in the WARNING stating that the waiver can be revoked orally or in writing.

Kern County Bar (Exhibit 12) would permit only a written revocation of the waiver and would eliminate the words "orally or" from the WARNING in the Statutory Form. Should a revocation be made only by a writing delivered to the personal representative? The staff recommends that this matter be covered by a specific substantive provision in the statute.

§ 10555. Form and contents of advice of proposed action (page 25)

No comments were received concerning this section.

§ 10556. Delivery or mailing of advice of proposed action and copy of form for objecting to proposed action

No comments were received concerning this section.

§ 10557. Objection to proposed action (page 27)

No comments were received concerning this section.

§ 10558. Restraining order (page 27-28)

At the suggestion of Collier (Exhibit 5), the staff will add to the first sentence of Section 10558, after the word "proceeding" in line 6, the following language: "at any time before the proposed action is taken."

Collier (Exhibit 5) makes the following comment:

The distinction in Section 10557 and 10558 between those who are actually given advice of proposed action and those who are entitled to advice but for some reason may not receive an advice is perhaps more confusing than helpful. To illustrate, if a person who is entitled to advice under 10552 learns of the proposed action but was not given a proper advice, presumably that person can only act through a court restraining order under Section 10558. Query if this limitation is appropriate.

The answer to this query is that the objection provision is drafted on the assumption that an advice of proposed action has been given. The official Judicial Council form includes the objection form and the consent form as a part of the advice of proposed action form. See Exhibit 23 attached. Under the Tentative Recommendation, an objection can be made only where the personal representative proposes to take an action that is described in the advice of proposed action and can be simply made using the Judicial Council form. See the form attached as Exhibit 23. Where the action is not so described, a restraining order should be drafted that is appropriately worded to deal with the particular situation. In addition, it should be noted that where no advice of proposed action has been given to the person, the person is not required to obtain a restraining order; the person

can chose instead to obtain later court review of the propriety of the action taken and can have the personal representative surcharged and removed from office if the personal representative acted improperly. We do not believe that the provisions will be confusing in practice. The statutory scheme is very simple for the ordinary case where the advice of proposed action is given and the person receive the advice seeks either to object or to consent. We do not want to complicate this simple scheme by seeking to adapt the statute to cover the situation where a person fears that the personal representative is going to take some action and wants to object in order to stop the action the person fears that the personal representative may be going to take. We recommend that no change be made in the statutory scheme set out in the tentative recommendation.

**§ 10559. Court supervision and notice of hearing required if objection made (pages 28-30)**

**Effect of objection**

Collier (Exhibit 5) comments:

Section 10559: There is some logical inconsistency between subparagraph (a) and subparagraph (d). Subparagraph (a) states that, if the personal representative has received a written objection or a restraining order, the personal representative shall submit the proposed action to the court and may take the proposed action only under such order as may be entered by the court." Yet, subparagraph (d) contemplates that the personal representative might in fact proceed with the transaction without filing a petition with the court but, if he did so, it would be a violation of his fiduciary duties. It is certainly the view of some practitioners that, notwithstanding an objection from the beneficiary in writing, the personal representative might proceed with the transaction at his own risk, subject to any possible surcharge. You might give further consideration to the interrelation of paragraphs (a) and (d). You will note in this regard Section 10561 which protects the third party notwithstanding the personal representative's failure to file a court petition under Section 10559.

First, regarding Section 10561, this section has nothing to do with the personal representative's duties and liabilities to the beneficiaries of the estate. The section is included so that a third person acting in good faith without any actual notice of the personal representative's failure to comply with the statutory independent

administration requirements can deal with the personal representative without any duty to inquire or investigate whether or not the personal representative has complied with those provisions. Absent this provision, the third person might have to check to see whether the statutory provisions were complied with; and that would seriously complicate the personal representative's ability to conduct transactions and might require that the real property records include proof that those statutory requirements were complied with. The section is included to make clear that the third person has no duty to inquire or investigate whether the personal representative has given advice of proposed action, has not received an objection, and the like. Accordingly, this section can be ignored when we are considering the personal representative's duties and liabilities to the beneficiaries of the estate.

Second, the Commission on several previous occasions has discussed whether the personal representative who has received a written objection should be permitted to go ahead with the proposed action without obtain prior court approval. The Commission was of the view that the personal representative should not be permitted to do so. The staff does not recommend that the personal representative be permitted to go ahead with the proposed action and ignore the objection, taking the risk of surcharge should the court later determine that the action taken was improper. Another approach to dealing with the Collier concern is indicated in the comment discussed immediately below.

Montgomery and Kreider (Exhibit 14) comment:

Under section 10559(a), a beneficiary's unilateral objection to an action automatically triggers court supervision, which is inconsistent with the standard set forth in section 10452 under which the objecting party must show good cause in order to prevent independent administration. A better remedy would be to allow the court to determine whether the personal representative may take the action described in the notice without further court supervision, or instead require court supervision of the proposed action.

There is merit to this suggestion. The staff suggestions that subdivision (a) of Section 10559 be revised to read:

10559. (a) If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under this part and the



personal representative has notice of a written objection made under Section 10557 or a restraining order issued under Section 10558, the personal representative shall, if the personal representative desires to take the proposed action, do one of the following

(1) ~~submit~~ *Submit* the proposed action to the court for approval following the provisions of this code dealing with court supervision of that kind of action and may take the proposed action only under such order as may be entered by the court.

(2) *Request instructions from the court concerning the proposed action and may take the proposed action only under such order as may be entered by the court, which order may dispense with the need to follow the provisions of this code dealing with court supervision of that kind of action.*

Paragraph (2) which is added above permits the court to determine whether the personal representative may take the action described in the advice of proposed action without further court supervision as suggested by Montgomery and Kreider (Exhibit 14) and, at the same time, makes clear that the personal representative is not authorized to ignore the objection and go ahead with the proposed action without any court review prior to the taking of the action. The staff is of the view that where there is an objection, it is better to obtain court review before the action is taken than it is to have the court review the transaction after it is taken. On the other hand, there may be no merit to the objection made to the proposed action, and the addition of paragraph (2) above will permit the court to approve the transaction in an appropriate case without the need to follow the procedure ordinarily applicable.

Subdivision (d) - failure to obtain court authorization as a breach of fiduciary duty

Section 10559 requires that the personal representative must obtain court approval before taking a proposed action if an objection is made to the proposed action. Subdivision (d) of Section 10559 provides that failure of the personal representative to obtain court approval under these circumstances is a violation of the personal representative's fiduciary duties and is grounds for removal from office. Concerning subdivision (d), Bertucio (Exhibit 3) comments:

Comment to §10559(d). Civ. Code § 3333 and existing case law seem to provide adequate definition of the liability for breach of fiduciary duty. Nevertheless, the more explicit standard proposed for trustee's liability in AB 2652 (§§ 16400-16465) [comprehensive

trust statute] seems reasonable. I see no need for different standards of fiduciaries and fear that any expansion of the standard or too explicit a description of it will discourage independent administration. This would be especially so if independent administrators' liability were broader or more explicitly set forth than regular administrators'. I'd prefer § 10559(d) said only that the independent administrator's liability to devisees is the same as a trustee's to beneficiaries under §§ 16400-16465.

Subdivision (d) of Section 10559 continues existing law which was enacted upon Commission recommendation. The staff believes that it is important and desirable that the independent administration law contain an express provision that taking a proposed action without court approval after an objection to the proposed action is received is a violation of the personal representative's fiduciary duties and grounds for removal from office. The staff is reluctant to rely on the general fiduciary standard for trustees to determine whether failure to obtain court approval after an objection is received is a violation of the fiduciary duty of the personal representative. Moreover, the staff believes that it is important that the statute make clear that court approval must be obtained before taking a proposed action if an objection is received. Subdivision (d) makes this clear. The staff recommends that this subdivision be retained without change.

Technical correction

Collier (Exhibit 5) suggests that with word "advice" be substituted for "notice" in the Comment, fourth paragraph, second line, second word. We will make this change.

§ 10560. Effect of failure to object to proposed action (pages 30-32)

There was considerable concern expressed about this section by the persons who commented on the tentative recommendation. There was general agreement among the persons who commented that the personal representative should be protected from an unhappy beneficiary who received an advice of proposed action and failed to object. Concern was expressed that the section as drafted might defeat this objective.

San Diego Bar (Exhibit 6) "approves of narrowing the Court's ability to review proposed actions when no one who has received notice of proposed action has filed a timely objection. This change appears

to preclude the disgruntled beneficiary who files no objection from coming to the Court and suggesting to the Court that on its own motion the proposed action be examined."

San Mateo Bar (Exhibit 2) group reached the following consensus:

We believe that the proposed language allowing a person the right to have the court review an action taken by the executor which had not been earlier objected to by the person may be too broad. We believe that while in principle, a "second look" at an executor's actions may be appropriate, it should be limited to situations in which there has been an intentional fraudulent misrepresentation on the original Advice of Proposed Action or a willful nondisclosure of a material fact which, had it been disclosed, would have led the recipient of the Advice to object.

Dennis-Strathmeyer (Exhibit 7) has the same concern as the San Mateo County Bar Association:

Regarding court review despite failure of an heir to object, I am not sure what we gain by requiring "clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action." I think the act should protect the honest executor who sells a \$100,000 house for \$95,000 no matter how convincing the evidence that the house is worth \$100,000. The issue here is not the clarity of the evidence, but the degree of culpability. The latter issue is related to the amount of disclosure in the notice.

Consider the common sort of case where the personal representative is one of the decedent's several children, and the representative sells the \$100,000 house to one of his issue for \$95,000. Obviously court review should be available if the identity of the buyer was not disclosed in the advice of proposed action and/or there was actual knowledge of value of the property which was not disclosed or known to the other heirs. But I am not sure review should be available if the entire family believed the property was worth \$95,000 and everyone consented.

I don't have a specific suggestion for revision of proposed Section 10560, but I am not comfortable with what we have.

Flinn (Exhibit 8) also believes that the Tentative Recommendation does not provide enough protection to the personal representative:

I do not think, however, that the new expansion of rights for one who fails to object to a proposed action is reasonable or necessary. The right exists, always, to make a claim of breach of fiduciary obligation, and this further language can only serve to confuse and lead people to believe that they can still set aside independent administration action, even if they fail to respond to a notice of proposed action. That is simply the opposite of what is intended by the giving of the notice.

The Kern County Bar does not approve of placing on an objecting party the burden of establishing breach of fiduciary duty by "clear and convincing evidence." The Kern County Bar believes that it unclear exactly what the effect of the burden of proof will have. The Kern County Bar states:

Our committee felt that the recommendation that a person who fails to object after receiving an advice of proposed action must show a violation of fiduciary duty by clear and convincing evidence in order to obtain court review of the action places too great a burden on the objecting party. It should be sufficient that the objecting party establishes by a preponderance of the evidence that a breach of fiduciary duty has occurred.

We also felt that the effect of this provision was unclear from the point of view of procedure. It implies that there is a two-step process in which the court first decides whether the objecting party has established by clear and convincing evidence that a violation of fiduciary duty has occurred and, if that is established, then conducts a hearing on the propriety of the action. Presumably, the burden of proof at the hearing on the propriety of the action is preponderance of the evidence, but this is obviously anomalous because the objecting party has already established by clear and convincing evidence that a breach of fiduciary duty has occurred. Some clarification should be made both as to procedure and as to the degree of proof required.

The staff believes that the intent of adding the "clear and convincing evidence" standard is to require that there be clear and convincing proof that the personal representative violated a fiduciary duty. In other words, unless it is clear that the action was improper, the action can not be reviewed. In view of the comment of the Probate and Estate Planning Section of the Kern County Bar Association and the other comments the Commission received on the Tentative Recommendation, the staff believes that the statute should be made more understandable and should better deal with the extent to which the court can review a matter where a person given notice fails to object. This could be accomplished by adopting the suggestion of the San Mateo Bar Probate Section that court review of an action by the personal representative where the person given notice failed to object be limited to the situations in which there has been an intentional fraudulent misrepresentation on the original Advice of Proposed Action or a willful nondisclosure of a material fact which, had it been disclosed, would have led the recipient of the Advice to object. But see also the revision set out below based on the suggestion of Mr. Collier.

Collier (Exhibit 5) expresses great concern about Section 10560. He is concerned that the section will invite a court review of any independent action whenever the beneficiary is unhappy with the action taken or the result. In response to his suggestion, the staff recommends that Section 10560 be revised to read in substance as follows:

10560. (a) *For the purposes of this section, A a person who has been given advice of proposed action may object to the proposed action only by one or both of the following methods:*

(1) Delivering or mailing a written objection as provided in Section 10557.

(2) Serving a restraining order under Section 10558 before the date specified in the advise of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

(b) ~~Except as provided in subdivisions (c) and (d), the failure to object as provided in subdivision (a) is a waiver of~~ any a person who has been given advice of a proposed action, as provided in Sections 10550 to 10556, inclusive, and who has failed to object as provided in subdivision (a) waives the right to have the court later review the proposed action or otherwise object to the proposed action after it has been taken.

(c) The court may review the action taken upon motion of a any interested person, including a creditor of the estate, who ~~(1) establishes that he or she did not actually receive the advice of proposed action before the time to object expired or~~ (2) ~~establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action.~~

(d) The court may review the action of the personal representative on its own motion where necessary to protect the interests of ~~any of the following:~~

~~(1) A creditor of the estate who did not actually receive advice of the proposed action.~~

~~(2) An~~

an heir or devisee who establishes both of the following:

(A) (1) At the time the advice was given the heir or devisee lacked capacity to object to the proposed action or was a minor.

(B) (2) No advice of proposed action was actually received by the guardian, conservator, or other personal representative of the heir or devisee.

The staff believes that the revised section will deal adequately with the concerns expressed by the various persons who commented on the section and at the same time not substantially undercut the finality of an advice of proposed action. Collier would also delete subdivision (a) of Section 10560 as unnecessary. However, this subdivision is necessary. The subdivision indicates when the restraining order must

be served in order to be considered a proper objection. Perhaps the subdivision should be the last subdivision of the section rather than the first.

One significant revision in subdivision (b) is to require that the advice of proposed action be given as provided in Sections 10550 to 10556, inclusive. This revision makes clear that the advice of proposed action must describe the proposed action in reasonably specific terms and contain the information required by the statute and must be properly delivered or mailed.

Title Insurance Companies (Exhibit 17) comment concerning Section 10560(c):

This section concerns that a court may review action taken by the personal representative upon motion of a person who establishes that they did not receive notice or who establishes a breach of the personal representative's fiduciary duty. I was concerned if there is a corresponding statute of limitations with respect to such a person bringing an action for review to the court's attention or does the Commission consider it necessary to have a statute of limitations. If the action taken by the personal representative could be upset, this might be of concern to bona fide purchasers for value. On page 32 under Section 10561 basic protection is given to bona fide purchasers for value but 10561 does not list for inclusions those actions by the personal representative which may now be objected to under Section 10560.

The staff believes that this suggestion should be considered when the Commission considers the general provisions relating to review by the court of actions taken by the personal representative. We not believe that it would be desirable to attempt to draft a special statute of limitations for review of actions taken under independent administration, since we anticipate that the review of those actions ordinarily will be in connection with accountings.

§ 10561. Protection of persons dealing in good faith with personal representative (page 32)

Title Insurance Companies (Exhibit 17) comment:

On page 32 under Section 10561 basic protection is given to bona fide purchasers for value but 10561 does not list for inclusions those actions by the personal representative which may now be objected to under Section 10560.

The staff does not see the need to add anything to Section 10561. The provisions listed in the section include all those that impose a

duty on the personal representative that might result in liability if the provision is not complied with. Section 10560 imposes no duty on the personal representative. We do not recommend any change in Section 10561.

**§ 10600. Judicial Council form for advice of proposed action (page 33)**

The Judicial Council has prescribed the form for the advice of proposed action. See Exhibit 23 attached. The staff believes that this form, which makes it easy to make an objection to the proposed action or to consent to the proposed action, should be used instead of some other form that makes it more difficult for the person receiving the form to object to the proposed action. Accordingly, we recommend that the following be substituted for Section 10600:

10600. The form used to give advice of proposed action shall be one of the following:

(a) The form prescribed by the Judicial Council for Advice of Proposed Action.

(b) A form that is the substantial equivalent of the form set set out in Section 10601, including the portion of the form which permits a person to object to the proposed action.

**§ 10601. Form for advice of proposed action (pages 33-35)**

Concerning the form for advice of proposed action, Kellogg (Exhibit 9) comments: "This is excellent. It reflects current Plain English principles in every respect."

The staff recommends that the Judicial Council form as it presently exists (set out in Exhibit 23 attached) be substituted in Section 10601 for the form now set out in Section 10601.

**§ 10602. Judicial Council form for objecting to proposed action (page 35)**

Collier (Exhibit 5) comments:

Since the Judicial Council now has a form for objecting to proposed action, it would be appropriate to incorporate the essence of that form in Section 10602 and allow an objection to be in a form substantially similar to either the Judicial Council Form or the statutory form.

This suggestion cannot be adopted. The Judicial Council form for making an objection is a part of the form for advice of proposed action. See Exhibit 23 attached. The entire form for making an objection consists of the following:

OBJECTION TO PROPOSED ACTION

[ ] I object to the action proposed above.

NOTICE Sign and return this form to the address in item 5. It must be received before the date in box in item 3, or before the proposed action is taken, whichever is later. (You may want to make a copy for your records.)

Date:

.....  
(Type or Print Name)

\_\_\_\_\_  
(Signature of Objector)

Recognizing that the Judicial Council has prepared a form for objecting to a proposed action, the staff recommends that Section 10602 be revised to delete subdivision (a).

§ 10603. Statutory form for waiver of advice of proposed action  
(pages 35-37)

Technical Improvements to Improve Readability

Kellogg (Exhibit 9) suggests improvements in the warning, stating: "I have, in my corrections, switched some passive voice structures to active voice and inserted personal pronouns so that readers identify themselves in the warning." To adopt these suggestions, the staff recommends that the Warning set out in the Tentative Recommendation as indicated below:

WARNING. THE LAW REQUIRES THAT YOU--BE--GIVEN THE PERSONAL REPRESENTATIVE GIVE YOU NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. ~~THIS NOTICE MUST BE GIVEN BEFORE THE PROPOSED ACTION IS TAKEN~~ THE PERSONAL REPRESENTATIVE MUST GIVE YOU THIS NOTICE BEFORE TAKING THE ACTION.

YOU HAVE THE RIGHT (1) TO OBJECT TO A PROPOSED ACTION AND (2) TO REQUIRE THAT ~~IT BE TAKEN ONLY UNDER THE SUPERVISION OF~~ THE COURT SUPERVISE THE PROPOSED ACTION. IF YOU DO NOT OBJECT BEFORE THE ACTION IS TAKEN, PERSONAL REPRESENTATIVE ACTS, THEN YOU LOSE THAT RIGHT AND YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU WAIVE--THE--GIVE UP YOUR RIGHT TO RECEIVE NOTICE. THIS MEANS THAT YOU GIVE THE PERSONAL REPRESENTATIVE THE RIGHT TO TAKE ACTIONS CONCERNING THE PROPERTY OF THE ESTATE WITHOUT FIRST



GIVING YOU THE NOTICE REQUIRED BY LAW, AND YOU CANNOT OBJECT AFTER THE ACTION IS TAKEN.

IF YOU SIGN THIS FORM, YOU MUST ALSO CHECK ONE OF THE BOXES BELOW TO INDICATE WHETHER YOU WAIVE *GIVE UP*:

(1) *THE YOUR RIGHT TO NOTICE OF ANY ACTION THE PERSONAL REPRESENTATIVE MAY DECIDE TO TAKE.*

(2) *THE YOUR RIGHT TO NOTICE OF ONLY ONE OR MORE PARTICULAR KINDS OF ACTIONS.*

YOU HAVE THE RIGHT TO REVOKE *CANCEL THIS WAIVER AT ANY TIME BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING OF--THE REVOCATION THAT YOU CANCEL THIS WAIVER.*

[Material Omitted - To be Retained Unchanged]

3. ~~I hereby waive the~~ *By signing below, I waive my right to advice of proposed action with respect to the following (Check only one box only to indicate your choice:*

[ ] (a) Any action the personal representative is authorized to take under the Independent Administration of Estates Act.

[ ] (b) Any of the kinds of transactions listed below that the personal representative is authorized to take under the Independent Administration of Estates Act.

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Dated: \_\_\_\_\_

(SIGNATURE OF PERSON EXECUTING SIGNING WAIVER)

Print your name: \_\_\_\_\_

Your address: \_\_\_\_\_  
\_\_\_\_\_

Collier (Exhibit 5) makes the following suggestion:

Under subdivision (b), the statutory form speaks throughout of giving "notice" of certain action but does not speak of an advice except in the caption. I would suggest for clarity that at the beginning of the second sentence of the warning, after the word "notice," the following language should be inserted: "known as an advice."

The staff would prefer to revise the caption to the form to substitute "WAIVER OF NOTICE OF PROPOSED ACTION" for the present language "WAIVER OF ADVICE OF PROPOSED ACTION." We should provide something the ordinary citizen can understand, even though we do not use the precise language used in the statute.

Moore (Exhibit 15) asks whether the box selected in the statutory form should be initialed instead of checked.

Examples of the Types of Notices Being Waived

The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 12) suggests that the Statutory Form include examples of the types of notices being waived. Does the benefit of the examples outweigh lengthening of the WARNING portion of the form? The staff recommends against adding examples to the WARNING portion of the form.

Collier (Exhibit 5) suggests:

Paragraph (3), dealing with a waiver of a right to advice in subparagraph (b), refers to various kinds of transactions listed below. That is not meaningful to a party executing the waivers. Perhaps there should be general categories of transactions listed which they could check, such as (a) real property transactions, (b) security transactions, (c) personal property transactions, (d) financial transactions and borrowing of funds, etc.

The staff had anticipated that the attorney for the personal representative would prepare the waiver form and insert in the form the types of transactions for which waiver is sought; the person executing the waiver would decide only whether or not to waive notice of those transactions. The Commission could, however, list various categories for which a waiver might be sought, as suggested by Mr. Collier,

including one "Other \_\_\_\_\_," so that the form could be completed and used by a person who does not have the benefit of legal counsel.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

HENRY ANGERBAUER, CPA  
1401 WILLOW GLEN CT.  
CONCORD, CA 94521

4/22/86

Law Revision Commission

Gentlemen:

Thank you for sending the two initial recommendations to the Estate and Trust code. Unfortunately I am not a full time probate practitioner. My comments probably would not be very meaningful. I do however have an interest in probate law and estate work and would like to be kept informed of its developments. I wish and hope you would take exception in my case and continue to send me the tentative recommendations every month throughout the year even though my comments might not be meaningful. I know it is  
over

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an extra cost to you but if you could make an  
exception in my case I would greatly appreciate  
the deed. Many thanks to all of you

there at the commission and keep up the  
good work. I am sure that all of us out  
here in the field depend upon the  
determined effort you make to give  
us a law that we can work with.

Best Personal Regards to all of you

Sincerely

HA

**CARR, MCCLELLAN, INGERSOLL, THOMPSON & HORN**

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 (415) 342-9600

May 30, 1986

California Law Revision Commission  
 400 Middlefield Road, Suite D-2  
 Palo Alto, California 94303-4739

Dear Ladies and Gentlemen:

Re: Comments on studies L-1010 and L-1028

A subcommittee of the San Mateo County Bar Association's Probate Section met in order to review and discuss the above-referenced studies and their recommendations. The subcommittee consisted of the following: William Penaluna, Esq., Phillip M. Lev, Esq., Michael P. Miller, Esq., and Keith P. Bartel, Esq.

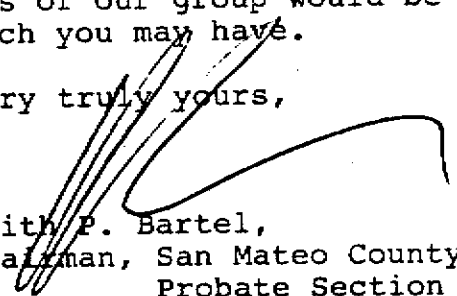
The following represent the group's consensus.

With respect to study L-1028:

We believe that the proposed language allowing a person the right to have the court review an action taken by the executor which had not been earlier objected to by the person may be too broad. We believe that while in principle, a "second look" at an executor's actions may be appropriate, it should be limited to situations in which there has been an intentional fraudulent misrepresentation on the original Advice of Proposed Action or a willful nondisclosure of a material fact which, had it been disclosed, would have led the recipient of the Advice to object.

Your attention and consideration of the above is appreciated and any of the members of our group would be pleased to respond to any inquiries which you may have.

Very truly yours,

  
 Keith P. Bartel,  
 Chairman, San Mateo County Bar Association  
 Probate Section

KPB:sh

enclosure

cc: Honorable Harlan K. Veal  
 William Penaluna, Esq.  
 Phillip M. Lev, Esq.  
 Michael P. Miller, Esq.

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 ALBERT J. HORN  
 DAVID C. CARR  
 ARTHUR H. BREDEBECK  
 NORMAN I. BOOK, JR.  
 QUENTIN L. COOK  
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May 7, 1986

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendations Relating to Probate:  
Independent Administration of Estates and Initiating  
Administration

Gentlemen:

Thank you for copies of the above-referenced proposals.

With respect to proposals regarding independent administration of estates, in addition to the comments above regarding the form of notice and the distinctions between financial institutions:

Comment to §10559(d). Civ. Code § 3333 and existing case law seem to provide adequate definition of the liability for breach of fiduciary duty. Nevertheless, the more explicit standard proposed for trustee liability in AB 2652 (§§ 16400-16465) seems reasonable. I see no need for different standards for different types of fiduciaries and fear that any expansion of the standard or too explicit a description of it will discourage independent administration. This would be especially so if independent administrators' liability were broader or more explicitly set forth than regular administrators'. I'd prefer § 10559 (d) said only that the independent administrator's liability to devisees is the same as a trustee's to beneficiaries under §§ 16400-16465.

Sincerely,

Beryl A. Bertucio  
Senior Legal Writer

POST OFFICE BOX 188

RAWLINS COFFMAN  
ATTORNEY AT LAW  
RED BLUFF, CALIFORNIA 96080

TELEPHONE 527-2021  
AREA CODE 916

April 25, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

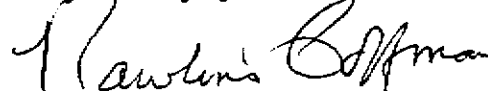
Gentlemen:

Thank you for your March 31, 1986 transmittal. I am leaving for the east coast in the immediate future and may not have an opportunity to write in greater detail.

First, with respect to the revision of INDEPENDENT ADMINISTRATION OF ESTATES ACT, may I suggest that the waiver of advice of proposed action should not be applicable to sales of real property. Only by giving the complete notice may the personal representative mitigate personal liability for violations of its fiduciary duties. For example: in my opinion, if a sale is made without court confirmation and the purchaser quickly resells the real property for a much greater price than that paid, the personal representative and its attorney are subject to suit by the heirs and/or devisees for the difference in price.

If possible, I will write to you further before the June 1st deadline. In any event, please keep me on your mailing list.

Very truly yours,



RAWLINS COFFMAN

RC:mb



EXHIBIT 5  
LAW OFFICES

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WRITER'S DIRECT DIAL NUMBER

June 5, 1986

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

Re: Study L-1028 - Tentative Recommendation  
on Independent Administration of Estates

Dear John:

I have reviewed the Tentative Recommendation relating to Independent Administration of Estates, which Recommendation is dated March 1986 and herein submit my personal comments with reference thereto. As you will recall, I had reviewed an earlier version of the sections dealing with independent administration and had submitted a letter thereon dated August 27, 1985, which is attached to the First Supplement to Memorandum 85-71.

My comments and observations are as follows:

1. Section 10400: Lowering the case on the word "the" seems appropriate in referring to the Act.
2. Section 10404(a)(3)(A) and (B): Both (A) and (B) contemplate a petition for grant of "full authority" under the Act. This obviously contemplates the power to sell, exchange or grant options on real property without court confirmation. However, there are a number of other changes in the Act and a personal representative might want to petition for what is also referred to as limited authority under this revised Act. Therefore, perhaps both (A) and (B) should allow a petition for "full authority" or "limited authority."
3. Section 10450(b)(1) and (2): The comment which follows refers to (b)(1) as "full authority" and (b)(2) as "limited authority." This differentiation, of course, already exists on the Judicial Council Forms for a petition for probate and for an order admitting the will to probate. The terms "full authority" and "limited authority" are also

Mr. John H. DeMouilly  
June 5, 1986  
Page Two

referred to in other comments, such as the comments following Sections 10501 and 10502. The word "full" might be added at the beginning of (b)(1), so that sentence would read "Full authority to administer the estate under this part." In (b)(2), the following phrase might be added at the end of that subparagraph "the authority granted pursuant to this paragraph shall be known as limited authority."

4. Section 10451(b): Should not the reference to Section [1200] be to Section [1200.5]? Paragraph (c) has a proposed statement in the notice of hearing. The second sentence of that statement, of course, is inaccurate in that it indicates that all action can be taken without court supervision, whereas certain actions, such as commissions, fees, accountings and distributions do require court supervision. However, this is perhaps too technical a modification of that sentence to be meaningful to those who receive the notice of hearing. However, this sentence might be modified to state "This authority would permit the personal representative with certain exceptions to act without court supervision that would otherwise be required." The reference in paragraph (b) to mailing notice to the person named as executor would rarely, if ever, apply in these situations. The person named as executor, if he or she has not declined, normally is going to be the petitioner. If the person has already declined to act, notice would not seem necessary. Further, it would seem unlikely that anyone other than the person petitioning for appointment as personal representative would ask for independent powers. The requirement of notice to the person named as executor, if not the petitioner, is probably an appropriate addition, although as noted it will almost never apply.

5. Section 10454: As I read this section, the only notice of hearing on a petition to revoke independent administration would be the notice given to the personal representative. Thus, it becomes a two-party proceeding, the petitioner and the personal representative. Others interested apparently receive no notice and would not be participants. While this is existing law, it is a little unusual because of the limited notice. All persons interested in the estate are obviously given notice of the petition for independent administration.

6. Section 10500(a)(2): This subparagraph would be more accurate if on the sixth line following the word "commissions" the following words were added: "exposure to the market." This would cover the requirement of satisfying the court as to exposure to the market pursuant to

Mr. John H. DeMouilly  
June 5, 1986  
Page Three

Probate Code Section 785. This subparagraph (2) also seems somewhat out of place but perhaps there is no other logical place for it to be at present. The comment might also be modified to make reference to the fact that exposure to the market requirements do not apply to independent sales.

7. Section 10502: I believe there has been confusion for some time over the very broad grant of independent powers under proposed Section 10502 (former Section 591.6) and the requirement of advice under proposed Section 10551 (former Section 591.3). The reason for this is that the general grant of powers includes essentially four types of powers, namely, (a) those which any personal representative can exercise without court supervision, whether or not independent administration exists; (b) those which can be handled under independent administration only by serving advice of proposed action; (c) those which can be handled under independent administration without advice of proposed action, but which formerly would have required a court petition; and (d) those where an advice is sometimes but not always required.

As to category (d), for example, the right to borrow money is mentioned both in 10502(d) and in 10551(j). Similarly the right to pay a family allowance is covered generally in 10502(n) and more specifically in 10551(g). Also, the right to continue a business is covered generally in 10502(m) and more specifically in 10551(f). Section 10502(c) gives general authority to invest surplus monies in accordance with the will, while 10551(h) requires an advice as to any investments with certain exceptions relating to cash accounts, government securities, etc.

Because all persons who read the statute are not perhaps careful enough to read related sections, there is, as noted, I believe some confusion as to which powers can be exercised without any advice. Therefore, if the powers under 10502 could be grouped into different categories as mentioned above, I am sure it would make the statute much easier to understand. For example, those specific powers mentioned above might be put in a subsection of 10502 which states that the following powers are subject to the provisions applicable to advice of proposed action to the extent provided in Section 10551 and then list the power to continue a business, the power to grant family allowance, the power to borrow and other similar provisions.

Mr. John H. DeMouilly  
June 5, 1986  
Page Four

The language found in 10502 and 10551 dealing with continuance of a business is not consistent. It would seem that those two definitions should be the same to avoid confusion.

While 10502 in the introductory clause does say that the powers listed "can be exercised in the manner provided in this part" the segregation suggested, I believe, would be helpful.

Section 10502(p), I believe, is intended to allow a personal representative not only to grant an exclusive right to sell for a period not to exceed 90 days, but grant a renewal of that right for additional 90-day periods. Perhaps this can be clarified.

In connection with the Note which follows Section 10502, the third sentence could be clarified, if following the last word of the sentence, the following was added: "which do not require court petitions."

8. Section 10550(a): In the last sentence the phrase "under Section 10502" is perhaps unduly restrictive unless all powers that can be exercised by a personal representative with or without a court petition and with or without advice are actually listed in Section 10502. A more general reference might be more appropriate.

Section 10550(b): I believe this first sentence could be clarified by rewording it to read at the end of the second line "give advice of any proposed action referred to in Section 10502 even if not described in Section 10551."

9. Section 10551(a) and (b): Since this advice is required only if full authority is granted, it might be appropriate to add at the end of both (a) and (b) the phrase "if full authority has been granted." Reference is made to the earlier discussion in this letter about using the phrases "full authority" and "limited authority."

Section 10551(f): The last phrase would be more accurate if it read "or selling or incorporating such a business." As you will note, each subparagraph is started with a word ending in "ing." For consistency, that should be incorporated in the last phrase in (f).

Mr. John H. DeMouilly  
June 5, 1986  
Page Five

Section 10551(g): Again, for consistency, (g) should start out with the word "paying" for the reasons mentioned with reference to subparagraph (f).

Section 10551(h): Since 10502(b) and 10551(h) in many ways parallel each other, I was not sure why the provisions found in 10502(b)(2) were not carried forward to 10551(h). All other provisions appear to be carried forward.

10. Section 10552(d): This notice requirement to persons interested in the trust seems inconsistent with the current definition found in Probate Code Section 34 of a devisee. Presumably, the trustee as a devisee would be the only one normally required to receive notice of proceedings involving the probate estate. Perhaps that is being generally revised in accordance with the trust notices. However, the relationship is obviously different between the executor where the trustee is a beneficiary and where the trustee is giving notice to those beneficially interested in the estate. In short, I question the advisability of what is subsection (d).

11. Section 10554, Comment: The word "proposed" in the second to the last line of the comment is misspelled.

12. Section 10558: The first sentence might be clarified by adding the following language after the word "proceeding" in line six, namely, "at any time before the proposed action is taken."

The distinction in Section 10557 and 10558 between those who are actually given advice of proposed action and those who are entitled to advice but for some reason may not receive an advice is perhaps more confusing than helpful. To illustrate, if a person who is entitled to advice under 10552 learns of the proposed action but was not given a proper advice, presumably that person can only act through a court restraining order under Section 10558. Query if this limitation is appropriate.

13. Section 10559: There is some logical inconsistency between subparagraph (a) and subparagraph (d). Subparagraph (a) states that, if the personal representative has received a written objection or a restraining order, the representative shall "submit the proposed action to the court and may take the proposed action only under such order as may be entered by the court." Yet, subparagraph (d) contemplates that the personal representative might in fact proceed with the transaction without filing a petition with the court but, if he did so, it would be a violation of his fiduciaries duties.

Mr. John H. DeMouilly  
June 5, 1986  
Page Six

It is certainly the view of some practitioners that, notwithstanding an objection from the beneficiary in writing, the personal representative might proceed with the transaction at his own risk, subject to any possible surcharge. You might give further consideration to the interrelation of paragraphs (a) and (d). You will note in this regard Section 10561 which protects the third party notwithstanding the personal representative's failure to file a court petition under 10559.

In the comment, fourth paragraph, second line, the second word, "notice" perhaps should be "advice" for consistency.

14. Section 10560: Paragraph (a), including subparagraphs (1) and (3), does not seem to be necessary in light of Sections 10557 and 10558. I would think that Section 10560 could merely start out with a new section (a) stating "Any person who has been given advice of a proposed action and who has failed to object as provided in Sections 10557 and 10558 waives the right to have the court later review the proposed action or otherwise object to the proposed action after it has been taken." The remaining paragraphs could be relettered.

The addition of subparagraph (2) in paragraph (c) it seems would invite a court review of any independent action whenever the beneficiary was unhappy with the action taken or the result. The beneficiary could obviously argue that for whatever reason the personal representative did not act in his or her best interest and thereby breached the fiduciary's duty to the beneficiary. While the example given in the comment is perhaps a fairly clear example, this type of provision, it would seem, will substantially undercut the finality of an advice of proposed action.

In the second paragraph of the comment, last full line, the word "against" is misspelled.

15. Section 10602: Since the Judicial Council now has a form for objecting to proposed action, it would be appropriate to incorporate the essence of that form in Section 10602 and allow an objection to be in a form substantially similar to either the Judicial Council Form or the statutory form.

Mr. John H. DeMouilly  
June 5, 1986  
Page Seven

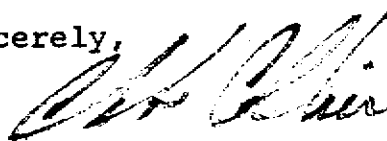
16. Section 10603(a): For consistency with Section 10600, should not the party have the right to use either the Judicial Council Form or a form substantially similar to the statutory form? The last sentence of (a) says that, if the Judicial Council prescribes a form, that form "shall be used." Section 10600 gives the option to use either the Judicial Council Form or a form substantially similar to the statutory form.

Under (b), the statutory form speaks throughout of giving "notice" of certain action but does not speak of an advice except in the caption. I would suggest for clarity that at the beginning of the second sentence of the warning, after the word "notice," the following language should be inserted: "known as an advice."

Paragraph (3), dealing with a waiver of a right to advice in subparagraph (b), refers to various kinds of transactions listed below. That is not meaningful to a party executing the waiver. Perhaps there should be general categories of transactions listed which they could check, such as (a) real property transactions, (b) security transactions, (c) personal property transactions, (d) financial transactions and borrowing of funds, etc. Also, in subparagraph (b), the word "representative" is misspelled.

As noted above, the foregoing are my personal comments and are intended to be of a technical nature in most instances. I hope they will be of assistance to the Commission and its Staff.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: James Willett, Esq.  
James Quillinan, Esq.  
James Devine, Esq.  
James Opel, Esq.  
Irwin Goldring, Esq.

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May 7, 1986

Mr. John H. DeMouilly, Esquire  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendation Relating to  
a) Independent Administration of Estates  
b) Opening Estate Administration

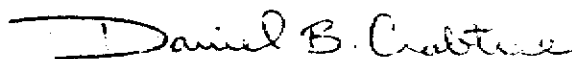
Dear Mr. DeMouilly:

On May 5, 1986, the San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation met to consider among other documents, the tentative recommendation in the new Estate and Trust Code regarding a) Independent Administration of Estates and b) Opening Estate Administration.

Regarding the tentative recommendations relating to Independent Administration of Estates, our comments are generally favorable and the Subcommittee especially liked the idea of using proposed actions as an independent administration procedure even when not required. The Subcommittee also approves of narrowing the Court's ability to review proposed actions when no one who has received notice of proposed action has filed a timely objection. This change appears to preclude the disgruntled beneficiary who files no objection from coming to the Court and suggesting to the Court that on its on motion the proposed action be examined.

I hope these observations will be useful in the re-draft of the new legislation, and I look forward to future tentative recommendations. I might also add that everyone on the Subcommittee finds it very useful to have the opening five to ten pages of the tentative recommendations compare and contrast present law with proposed law. This background technique not only gives us all a quick idea of the changes to be made, but allows us to reflect on whether the proposal is a useful one in light of past experiences. It also makes voluminous materials much easier to digest.

Very truly yours,



Daniel B. Crabtree, Chair





# CALIFORNIA CONTINUING EDUCATION OF THE BAR

2300 Shattuck Avenue, Berkeley, CA 94704  
 (415) 642-3973; Direct Phone: (415) 642-8317

April 21, 1986

Nathaniel Sterling, Esq.  
 Asst. Executive Secretary  
 California Law Revision Commission  
 4000 Middlefield Road #D-2  
 Palo Alto, CA 94303-4739

Re: Study L-1028; Independent Administration of Estates

Dear Nat:

I have the following thoughts in response to your request for comment:

A. The ability to grant Independent Administration of Estates Act (IAEA) powers to Special Administrators should not be limited to special administrators with general powers. If, for example, the only reason for the appointment is to perform an act on an emergency basis before an executor can be appointed, it might be critical for the special administrator to be able to accomplish the act immediately by getting the necessary consents to the proposed action and exercising IAEA powers. (Looking at the special administrator proposal, it is not at all clear to me that the court otherwise has much power to authorize a special administrator to perform acts on little or no notice.)

B. I strongly approve the procedure permitting use of the IAEA when it is not mandatory. This solves a major problem with the Act.

C. Regarding court review despite failure of an heir to object, I am not sure what we gain by requiring "clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action." I think the act should protect the honest executor who sells a \$100,000 house for \$95,000 no matter how convincing the evidence that the house is worth \$100,000. The issue here is not the clarity of the evidence, but the degree of culpability. The latter issue is related to the amount of disclosure in the notice.

Consider the common sort of case where the personal representative is one of the decedent's several children, and the representative sells the \$100,000 house to one of his issue for \$95,000. Obviously court review should be available if the identity of the buyer was not disclosed in the advice of proposed action and/or there was actual knowledge of value of the property which was not disclosed or known to the other heirs. But I am not sure review should be available if the entire family believed the property was worth \$95,000 and everyone consented.

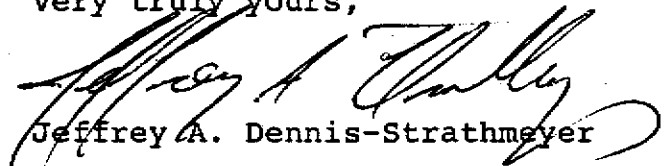
I don't have a specific suggestion for revision of proposed section 10560, but I am not comfortable with what we have.

Ltr to Nat Sterling, dtd 4-21-86, cont'd., p 2

D. I don't like the idea of having a statutory form for waiving the advice of proposed action. I strongly believe anyone can waive anything that is for their own benefit, but we don't need to come up with forms to help them. The very act of creating a form gives a transaction the appearance of legitimacy no matter how many warnings you write. When would a blanket waiver be appropriate? When it is necessary to give the personal representative flexibility while the heir is on African Safari? That problem could be solved with a power of attorney, and perhaps we should leave it at that.

E. Perhaps we can now do without the transition provisions in Prob C §10404. They are not really needed for the new changes, and I don't see much point in worrying about the 1985 changes in 1988.

Very truly yours,



Jeffrey A. Dennis-Strathmeyer

JAD-S:dp

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DAVID B. FLINN

May 23, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Gentlemen:

I have completed and enclose the questionnaire concerning probate practice which was sent to me. Earlier, I received for comment tentative recommendations regarding the independent administration of estates and opening of estate administration. I do have a few comments.

As to independent administration, I heartily recommend the new statutory waiver of advice of proposed action form. Most executors or administrators making use of the independent administration provisions are doing so simply because they are in close relationship or contact with all of the beneficiaries and the proposed transaction, often a sale of securities or property, is already something that everyone has agreed to. I also concur with the change regarding the over-the-counter securities, as today they are really as susceptible of valuation as are those securities on a national exchange. I do not think, however, that the new expansion of rights for one who fails to object to a proposed action is reasonable or necessary. The right exists, always, to make a claim of breach of fiduciary obligation, and this further language can only serve to confuse and lead people to believe that they can still set aside independent administration action, even if they fail to respond to a notice of proposed action. That is simply the opposite of what is intended by the giving of the notice.

Sincerely,



David B. Flinn

DBF:js

Enclosure

MEMORANDUM

Date: April 20, 1986

FROM: Irving Kellogg  
821 Monte Leon Drive  
Beverly Hills, CA 90210  
213-551-9127

To: California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, Ca 94303-4739

Subject: Study L-1028, Independent Administration of Estates,  
March 1986, and Study L-1010, Opening Estate Administration,  
March 1986.

## Comments:

## Study L-1028.

1. Page 4. I commend the Commission's development of a Statutory Waiver of Advice of Proposed Action Form, and the expansion of exemptions to over the counter securities as stated.

The Commission should seek to insert more Statutory Forms into the Probate Code so that there will be uniformity by statute. This statutory uniformity should minimize lawyers' failures to comply accurately with requirements and recipients' challenges to carelessly prepared forms.

2. Page 33. The form for advice of proposed action.

This is excellent. It reflects current Plain English principles in every respect.

3. Page 36. WAIVER OF ADVICE OF PROPOSED ACTION.

Having been the original draftperson of the Statutory Wills, and having struggled with my colleagues over the need to simplify the warning that appears on both of them, I am sensitive to this type of warning. The following is my suggestion about improvements in that warning. I have, in my corrections, switched some passive voice structures to active voice and inserted personal pronouns so that readers identify themselves in the warning.

WAIVER OF PROPOSED ACTION

WARNING. THE LAW REQUIRES THAT THE PERSONAL REPRESENTATIVE MUST GIVE YOU NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. THE PERSONAL REPRESENTATIVE MUST GIVE YOU THAT NOTICE BEFORE TAKING THAT ACTION.

YOU HAVE THE RIGHT (1) TO OBJECT TO A PROPOSED ACTION, AND (2) TO REQUIRE THAT THE COURT MUST SUPERVISE THAT PROPOSED ACTION. IF YOU DO NOT OBJECT BEFORE THE PERSONAL REPRESENTATIVE ACTS, THEN YOU LOSE THAT RIGHT AND YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU GIVE UP YOUR RIGHT TO.....

IF YOU SIGN THIS FORM, YOU MUST ALSO CHECK ONE OF THE BOXES BELOW TO INDICATE WHETHER YOU GIVE UP:

- (1) YOUR RIGHT....
- (2) YOUR RIGHT....

YOU HAVE THE RIGHT TO CANCEL THIS WAIVER AT ANY TIME, BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING THAT YOU CANCEL THIS WAIVER.

.....

3. BY SIGNING BELOW, I WAIVE MY RIGHT...(CHECK ONLY ONE BOX.....)

(SIGNATURE OF PERSON SIGNING WAIVER)

Print your name: \_\_\_\_\_

Your address: \_\_\_\_\_

Thank you for sending these reports.

Sincerely yours,

*Irving Kellogg*  
Irving Kellogg

STATE OF CALIFORNIA  
COURT OF APPEAL  
SECOND DISTRICT—DIVISION FOUR  
3580 WILSHIRE BOULEVARD  
LOS ANGELES, CALIFORNIA 90010

April 16, 1986

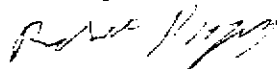
ROBERT KINGSLEY  
ASSOCIATE JUSTICE

California Law Revision Commission  
State of California  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Gentlemen:

This will acknowledge receipt of your first two tentative recommendations relating to probate law. I can see in them nothing objectionable; they merely fill in necessary gaps left by the 1984 legislation.

Sincerely,



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220 BUSH STREET  
SAN FRANCISCO 94104  
(415) 392-1423

May 22, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Study L 1028  
(Independent Administration of Estates)

Gentlemen:

Thank you for sending me the above study.

I generally approve of the changes proposed. In particular, proposed Section 10551(3) regarding over the counter sales seems an excellent proposal.

I am concerned about proposed Section 10453. This concern applies, of course, to present Section 591.9. I feel that the amount of the bond should include the value of the real property sold. The purpose of the bond is as much applicable to real property as to other property.

I am opposed to Section 10500(2) as it relates to sales of real property. So many real estate sales are bid up in court that the court supervision is of real public benefit. Court supervision greatly increases the likelihood of the best results for the estate.

Sincerely,



JOHN G. LYONS

JGL:mr

**MICHAEL P. MEARS**  
A PROFESSIONAL CORPORATION  
ATTORNEY AT LAW  
2001-22ND STREET, SUITE 210  
BAKERSFIELD, CALIFORNIA 93301

(805) 323-1816

May 29, 1986

John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middle Field Road, Suite D2  
Palo Alto, CA 94303

Dear Mr. DeMouilly:

I have been asked to send you the comments of the Probate and Estate Planning Section of the Kern County Bar Association on the tentative recommendations of the Commission relating to the provisions of the proposed Estate and Trust Code on opening estate administration and independent administration of estates. A number of the recommendations did not generate significant comment or were acceptable as written. Accordingly, this letter refers specifically only to those recommendations which were objectionable or generated significant comment.

**INDEPENDENT ADMINISTRATION OF ESTATES**

1. The recommendation to create a new Statutory Waiver of Advice of Proposed Action form split our committee, with a majority being in favor and a strong minority being opposed. The majority felt that the form could be an aid in streamlining the administration of estates, while the minority felt that, despite the warning to seek the advise of counsel, some interested parties would not make a knowing waiver of their right to notice.

Our committee would permit only a written revocation of the waiver and would eliminate the words "orally or" from the sentence relating to revocation. Also, we would recommend that examples of the types of notices being waived be included in the form so that that the person executing the waiver has a clearer idea of what is being waived.

2. Our committee felt that the recommendation that a person who fails to object after receiving an advice of proposed action must show a violation of fiduciary duty by clear and convincing evidence in order to obtain court review of the action places too great a burden on the objecting party.



MICHAEL P. MEARS

John H. DeMouilly  
May 29, 1986  
Page 2

It should be sufficient that the objecting party establishes by a preponderance of the evidence that a breach of fiduciary duty has occurred.

We also felt that the effect of this provision was unclear from the point of view of procedure. It implies that there is a two-step process in which the court first decides whether the objecting party has established by clear and convincing evidence that a violation of fiduciary duty has occurred and, if that is established, then conducts a hearing on the propriety of the action. Presumably, the burden of proof at the hearing on the propriety of the action is preponderance of the evidence, but this is obviously anomalous because the objecting party has already established by clear and convincing evidence that a breach of fiduciary duty has occurred. Some clarification should be made both as to procedure and as to the degree of proof required.

3. Our committee would expand the recommended language in the notice of hearing of the petitioner who requests authority to administer under the Independent Administration of Estates Act to include a description of the types of acts that the petitioner would be permitted to perform without court supervision.

4. The change to require advice of proposed action to be given to each person interested in a trust which is a devisee under the will, including all contingent beneficiaries, where the personal representative is the trustee of the trust, is too burdensome on the personal representative and may result in technical grounds for later opposition to the action. Notice should be required only to named beneficiaries or their successors.

Thank you for the opportunity to share our comments with you and we hope that they will be useful.

PROBATE AND ESTATE PLANNING SECTION,  
KERN COUNTY BAR ASSOCIATION

By



MICHAEL P. MEARS, Secretary

**IAN D. MCPHAIL**

A PROFESSIONAL CORPORATION

ATTORNEY AT LAW

331 SOQUEL AVENUE

SANTA CRUZ, CALIFORNIA 95062-2398

TELEPHONE (408) 427-2383

April 23, 1986

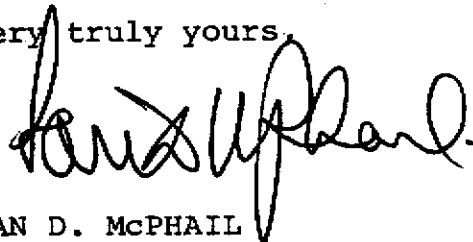
IAN D. MCPHAIL

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Proposed New Estate and Trust Code

2. Independent Administration of Estates.  
I have no particular objections to the proposed new rules. However, I wish the commission would recommend that California probate law move in the direction of the English probate system under which, as I understand it, the executor obtains a "grant of probate" after satisfying the England Revenue Service concerning death taxes, and then proceeds to administer the estate without any regular supervision of the Court. I am not sure whether the executor must render a final accounting before distributing assets to the beneficiaries. However, I understand and assume that any beneficiary or other interested party has the right to object to any particular action taken and to question any work of the executor. This, I assume, enables the executor to function along the lines of the trustee of a revocable trust or of a testamentary trust, under the current California rules. It is difficult to justify the current California probate system other than as an attorney's retirement system. I say this in spite of the fact that I specialize in estate planning and estate settlement and am very appreciative of the probate fees I collect. However, I have felt it my task to assist as many clients who wish to avoid probate by the preparation of revocable living trusts and other devices.

Very truly yours,



IAN D. MCPHAIL

IDM:lb

LAW OFFICES OF

## PILLSBURY, MADISON &amp; SUTRO

225 BUSH STREET

POST OFFICE BOX 7880

SAN FRANCISCO, CALIFORNIA 94120

TELEPHONE (415) 983-1000

## LOS ANGELES

700 SOUTH FLOWER STREET  
LOS ANGELES, CALIFORNIA 90017  
TELEPHONE (213) 629-9500

CABLE ADDRESS "EVANS"  
TELEX 34743  
TELECOPIER (415) 398-2096

WRITER'S DIRECT DIAL NUMBER

(415) 983-1948

WASHINGTON, D.C.  
1667 K STREET, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 867-0300

SAN JOSE  
333 WEST SANTA CLARA STREET  
SAN JOSE, CALIFORNIA 95113  
TELEPHONE (408) 947-4000

June 10, 1986

Tentative Recommendation Relating  
to Proposed New Estate and  
Trust Code (Opening Estate  
Administration) -- Study L-1010

Tentative Recommendation Relating  
to Proposed New Estate and  
Trust Code (Independent  
Administration of Estates) --  
Study L-1028

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

Ladies and Gentlemen:

We have read with interest your two recently published tentative recommendations described above, and we have the following comments:

10. Section 10552 provides that trust beneficiaries are to be sent an advice of proposed action if the trustee (presumably including a nominated trustee) is the same person as the personal representative planning to take the action described in the advice. This section implies but should state more clearly that the personal representative need not send the advice to trust beneficiaries when the personal representative is not the trustee. (Current California law also would be improved by making clear whether other instances of notice must be given to trust beneficiaries or whether notice to the trustee (or nominated trustee) is sufficient. The trustee's fiduciary obligations to the trust beneficiaries should make notice to the trustee alone sufficient.)


11. The revisions to the Independent Administration of Estates Act make independent administration more flexible and useful, especially in harmonious family situations. In particular, the Law Revision Commission should be congratulated for proposing the Statutory Waiver Advice Of Proposed Action Form. In many family situations, the beneficiaries are aware of the personal representative's actions, but the formal requirements for complying with the statute can be onerous.

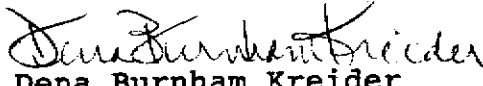
12. Under section 10559(a), a beneficiary's unilateral objection to an action automatically triggers court supervision, which is inconsistent with the standard set forth in section 10452 under which the objecting party must show good cause in order to prevent independent administration. A better remedy would be to allow the court to determine whether the personal representative may take the action described in the notice without further court supervision, or instead require court supervision of the proposed action.

With the exception of the comments noted above, your tentative recommendations appear to be a welcome restatement of California law. We have not noted in this letter the many small improvements that the tentative recommendations propose.

The views expressed in this letter are our own and do not necessarily reflect the views of Pillsbury, Madison & Sutro.

Very truly yours,

  
George F. Montgomery, II  
(415) 983-1948

  
Dena Burnham Kreider  
(415) 983-7224

LAW OFFICES OF  
**HERBERT P. MOORE, JR.**  
23 ORINDA WAY, SUITE 312  
ORINDA, CALIFORNIA 94563

TELEPHONE  
(415) 254-2850

June 13, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendation, Independent Administration  
of Estates, Sections 10400 et seq.

Gentlemen:

With respect to the above entitled tentative recommenda-  
tions, I generally approve with one concern.

Based upon my experience in connection with the probate of  
estates, I am not sure that I agree with the present procedures  
leading up to "a general waiver of the right to advice of  
proposed action" permitted in Section 10554(b)(1) and  
implemented by Section 10603.

I can foresee abuses in this area. I guess in many  
situations, we might solicit a general waiver at the same time  
as the notices of death/hearing are mailed.

I think most devisees solicited would execute the general  
waiver upon receipt of a sufficiently persuasive solicitation.

I see nothing in the law that requires the solicitation to  
specify with reasonable particularity what is being waived.

I hate to see more paperwork involved, but suggest that  
consideration be given to requiring the submission of a copy of  
Section 10551 with the solicitation.

I guess the biggest problem area with respect to a general  
waiver would be investing funds of the estate and selling  
personal property other than securities.

Also, is the mere checking of boxes on the statutory form  
satisfactory, or should there be an initialling of the box?

Because the general waiver is so all-encompassing, perhaps  
the box should be initialled.

Very truly yours,

  
Herbert P. Moore, Jr.

HPM:msr

MORGAN, MORGAN, TOWERY.

MORGAN & SPECTOR

ATTORNEYS AT LAW

FIFTH FLOOR PASEO BUILDING

210 SOUTH FIRST STREET

SAN JOSE, CALIFORNIA 95113

(408) 295-7677

June 26, 1986

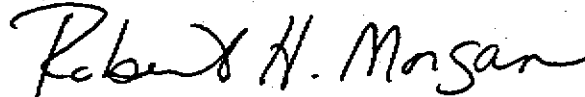
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

RE: The New Estate and Trust Code

Dear Sir or Madam:

I approve of the tentative recommendation relating  
to the New Estate & Trust Code.

Very Truly Yours,



Robert H. Morgan

RHM/clw

**J. Earle Norris**  
Vice President and  
Senior Claims Counsel

May 30, 1986

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94303-4739

Re: California Law Revision Commission  
Study L-1028 Tentative Recommendation  
(Independent Administration Of Estates)  
and Study L-1010 Tentative Recommendation  
(Opening Estate Administration)

Dear Mr. DeMouilly:

After receiving the above-captioned materials, I distributed them to the various members of the SubCommittee of which I am Chairman. After review and contact by the undersigned with each of those Subcommittee members, I am able to report to you that we do not find any of the provisions in the tentative recommendations that would now cause any difficulty with the conveyance of title or the issuance of title insurance. Of course, I would like to be kept apprised of any further changes or revisions that the Commission may make in the future.

On Study L-1028 (Independent Administration Of Estates) I did have a couple of comments for your reference although technically it does not apply to any title insurance issue. The first comment is on page 18 concerning Section 10502(p) exclusive right to sell. That section as drafted indicates an exclusive right to sell for 90 days. In my experience in the last few years many real estate brokers will not take a listing of property unless it is at least a six month listing. I would suggest that the section be opened to allow a longer listing period.

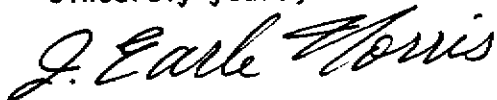
My other comment in this same study is on page 30 concerning Section 10560(c). This section concerns that a court may review action taken by the personal representative upon motion of a person who establishes that they did not receive notice or who establishes a breach of the representative's fiduciary duty. I was concerned if there is a corresponding statute of limitations with respect to such a person bringing an action for review to the court's attention or does the

Letter to John H. DeMouilly  
May 30, 1986  
Page Two

Commission consider it necessary to have a statute of limitations. If the action taken by the personal representative could be upset, this might be of concern to bona fide purchasers for value. On page 32 under Section 10561 basic protection is given to bona fide purchasers for value but 10561 does not list for inclusions those actions by the personal representative which may now be objected to under Section 10560.

I hope the comments in this letter are useful and if I could be of further assistance, please do not hesitate to contact the undersigned.

Sincerely yours,



J. Earle Norris

JEN:elm

cc:Nathaniel Sterling  
Robert Reyburn  
Clark Staves  
James Wickline  
--- Members of the Subcommittee



LAW OFFICES

**OGLE, GALLO & MERZON**

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHARLES E. OGLE\*  
RAY A. GALLO\*  
JAMES B. MERZON\*  
WILLIAM A. BOOTH  
SHARON K. GARRETT  
CHARLES G. KIRSCHNER

770 MORRO BAY BOULEVARD  
MORRO BAY, CALIFORNIA 93442  
(805) 772-7353 • 772-7379  
MAIL TO: POST OFFICE BOX 720

SAN LUIS OBISPO OFFICE  
(805) 543-1662

\*A PROFESSIONAL CORPORATION

July 18, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Review and comment on Tentative Recommendation  
relating to The New Estate and Trust Code  
(March, 1986)

Gentlemen:

Although I have missed your June 1, 1986, deadline,  
I, nonetheless, submit my review and comments, as follows:

1. Generally, I approve the tentative recommendations  
as they stand.

2. Specifically, I endorse the procedure outlined  
on page 3, permitting the personal representative to give  
advice of a proposed action, even though not required to  
do so.

Though my review and comments are tardy, I wish to  
remain on your mailing list.

Very truly yours,

CHARLES E. OGLE

CEO:CC

**JEROME SAPIRO**

ATTORNEY AT LAW  
SUTTER PLAZA, SUITE 605  
1388 SUTTER STREET  
SAN FRANCISCO, CA, 94109-5416  
(415) 928-1515

June 2, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA, 94303-4739

Re: Tentative Recommendations  
Proposed Estate and Trust Code  
Opening Estate Administration  
March, 1986

Dear Commissioners:

Although having missed the deadline for comments, I do want to acknowledge receipt of your tentative recommendations concerning both Opening of Estate Administration and Independent Administration of Estates.

Thank you for the opportunity to review same.

I certainly can live with all of same, recognizing that much still remains for your further consideration as indicated therein.

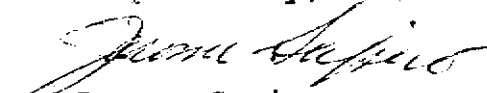
I do wish to make just a few comments:

3) I still believe that real property sales, exchanges and grants of option should be required to be under Court supervision for the protection of estates and all persons interested therein.

Please keep me on the mailing list, but correct the address to which some of your communications have been directed. My correct address is:

Jerome Sapiro  
Attorney at Law  
1388 Sutter Street, Suite 605  
San Francisco, CA, 94109-5416.

Respectfully,

  
Jerome Sapiro

JS:mes

# California Newspaper Service Bureau, Inc.

INCORPORATED 1934

120 WEST SECOND STREET  
P.O. BOX 31  
LOS ANGELES, CALIFORNIA 90053  
PHONE (213) 625-2541

PUBLIC NOTICE ADVERTISING

LOS ANGELES—SACRAMENTO  
SAN DIEGO  
SAN FRANCISCO—SANTA ANA

June 4, 1986

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California, 94303-4739

Gentlemen:

Subj: Study L-1028, new Estate and Trust Code,  
Independent Administration of Estates,  
March 1986, Comment.

The California Newspaper Service Bureau would be unfaithful to its experience of 52 years as a close ally and servant to California newspapers if it did not aver that it was error in 1985 to amend the Independent Administration of Estates Act (AB 196) to permit the conduct of the sale of real property in a deceased's estate without court supervision, and therefor out of public view.

The desirable avoidance of delay in settling estates is small gain compared with the large opening created for the cupidity of man to operate, unsupervised by the government agency charged to ensure justice in American affairs--our courts of law.

A deceased's estate takes on the character of "found money," a windfall, unearned, but accessible if an interested party (and many become interested) plays his cards right. Of the items in an estate difficult to value the most difficult is real property. The accepted, the only efficient way to determine what real property is worth is to put it on the open market. While it is claimed there are ways to accomplish this without the use of newspaper advertising, in the case of estates and the law's involvement, the use of newspaper advertisements is the one element that answers all questions that can be asked about whether or not market exposure was complete, and if true value has been determined.

California Law Revision Commission  
June 4, 1986  
Page Two

Whether or not newspaper advertising is accomplished through the agency of court supervision and the operation of the law that court supervision instigates, or through a requirement of the law that the personal representative certify to the court that the property was advertised, as was recommended by Douglas W. Kmiec in a critique of the IAEA in 1976 (Southern California Law Review Vol. 50, p 155 (1976)) is immaterial to the principle the Bureau believes important.

This comment to the subject Tentative Recommendation is submitted to ensure that it is on record, and to provide an observation on the issue for those who will deal with the experiences recorded as Californians use the provisions of the Independent Administration of Estates Act in the coming years as now enacted.

Sincerely,



Michael D. Smith  
General Manager

BRIAN G. MANION  
HAROLD WEINSTOCK\*  
BILL GENE KING  
L. GLENN HARDIE\*\*  
LOUIS A. REISMAN  
SUSSAN H. SHORE  
MARTIN A. NEUMANN

WEINSTOCK, MANION, KING, HARDIE & REISMAN

A LAW CORPORATION  
1888 CENTURY PARK EAST - SUITE 800  
CENTURY CITY  
LOS ANGELES, CALIFORNIA 90067

TELEPHONES (213)  
679-4481 OR 553-8844

\*CERTIFIED SPECIALIST - TAXATION LAW  
CALIFORNIA BOARD OF LEGAL SPECIALIZATION  
\*\*CERTIFIED SPECIALIST - FAMILY LAW  
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

May 14, 1986

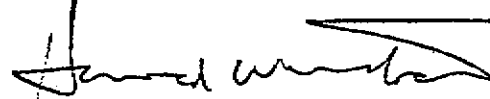
California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94303-4739

Gentlemen:

Thank you for sending me your tentative recommendations relating to the proposed new Estate and Trust Code regarding opening estate administration and also independent administration of estates, both dated March, 1986.

I am in agreement with your tentative recommendations.

Very truly yours,



Harold Weinstock

HW/sms

CHAMBERS OF  
**The Superior Court**  
VENTURA, CALIFORNIA  
ROBERT R. WILLARD, JUDGE

April 18, 1986

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94303-4739

Gentlemen:

I have received and thank you for a copy of your tentative recommendations relating to the new Estate and Trust Code, Studies L-1010 and L-1028.

In general, I heartily approve the restatements and changes suggested. They appear to be carefully drafted. My few specific comments relate to relatively minor matters. I mention them only because I have encountered the problems numerous times in presiding over Ventura County's probate calendar for more than 15 years.

Sections 10,500 and 10,401. I have frequently been presented with the following situation. The representative who has independent powers contracts to sell real property. The title officer refuses to recognize his authority and demands a court

order. The representative then seeks instructions or authority to convey an order directed to the title officer. He does not seek to follow the code procedures for confirmation. He wants to avoid the delay necessary to secure an appraisal, or to avoid submitting real estate commission to court review. Section 10,500, subdivision (b) gives the representative authority to "obtain court supervision." Section 10,401 defines "court supervision" in very general terms. In my opinion it would be desirable to provide that "court supervision" mean compliance with statutory requirements that would exist in the absence of independent power.

In this connection I have frequently been presented with the question as to whether a representative possessing independent power to sell real property, but not so authorized by a will, may proceed with statutory court confirmation procedures in the absence of publication of notice of sale. Another way of stating the question is whether the grant of the independent power to sell authorizes sale in the same manner a will might authorize it. It would be helpful if this question were answered in the code.

Section 10,501. I suggest that consideration be given to the question as to whether a personal representative's own claims should be exempted from court supervision under section 10,501, or in the alternative, whether he should be required to give advice of proposed approval of his own claims pursuant to section 10,551.

Let me repeat that I think these drafts are excellent.

Sincerely,



ROBERT R. WILLARD  
Judge of the Superior Court

*Retired, but on assignment to  
preside over probate calendar*

RRW:vm

PROBATE

DE-165

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address)		TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR (Name):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF			
STREET ADDRESS MAILING ADDRESS CITY AND ZIP CODE BRANCH NAME			
ESTATE OF (NAME):		DECEDENT	
ADVICE OF PROPOSED ACTION		CASE NUMBER:	

**NOTICE:** If you do not object in writing or obtain a court order preventing the action proposed below, you will be treated as if you consented to the proposed action and you may not object after the proposed action has been taken. An objection form is on the reverse.

- The executor or administrator of the estate of the deceased is (names):
- The executor or administrator has authority to administer the estate without court supervision under The Independent Administration of Estates Act (Probate Code sections 591-591.9)
  - with full authority under the act.
  - without authority to sell or exchange real property or to grant an option to purchase real property.
- On or after (date): , the executor or administrator will take the following action (describe in specific terms here or in attachment 3):
  - The proposed action is described in an attachment labeled attachment 3.
- Real property transactions only (Complete if the proposed action involves a sale or exchange or an option to purchase real property.)
  - a. The material terms of the transaction are specified in item 3, including any sale price and the amount of or method of calculating any compensation to an agent or broker.
  - b. \$ \_\_\_\_\_ is the value of the subject property in the probate inventory, if any.

**NOTICE:** A sale of real property without court supervision means that the sale will not be presented to the court for confirmation at a hearing at which higher bids for the property may be presented and the property sold to the highest bidder.

(Continued on reverse)





STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE NEW ESTATE AND TRUST CODE

(INDEPENDENT ADMINISTRATION OF ESTATES)

March 1986

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the provisions it will include in the new Estate and Trust Code which the Commission plans to recommend to the Legislature in 1987. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN JUNE 1, 1986.

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

# THE CALIFORNIA LAW REVISION COMMISSION

## COMMISSION MEMBERS

<b>EDWIN K. MARZEC</b> <i>Chairperson</i>	<b>ALISTER MCALISTER</b> <i>Member of Assembly</i>
<b>ARTHUR K. MARSHALL</b> <i>Vice Chairperson</i>	<b>TIM PAONE</b> <i>Member</i>
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<b>BION M. GREGORY</b> <i>Member</i>	<b>VACANCY</b> <i>Member</i>
<b>BILL LOCKYER</b> <i>Member of Senate</i>	<b>VACANCY</b> <i>Member</i>

## COMMISSION STAFF

### Legal

<b>JOHN H. DEMOULLY</b> <i>Executive Secretary</i>	<b>ROBERT J. MURPHY III</b> <i>Staff Counsel</i>
<b>NATHANIEL STERLING</b> <i>Assistant Executive Secretary</i>	<b>STAN G. ULRICH</b> <i>Staff Counsel</i>

### Administrative-Secretarial

<b>JUAN C. ROGERS</b> <i>Administrative Assistant</i>	
<b>EUGENIA AYALA</b> <i>Word Processing Technician</i>	<b>VICTORIA V. MATIAS</b> <i>Word Processing Technician</i>

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2  
PALO ALTO, CA 94303-4739  
(415) 494-1335



March 15, 1986

**LETTER OF TRANSMITTAL**

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The goal is to submit a new Estate and Trust Code to the Legislature for enactment in 1987. The new code would replace the existing Probate Code. The Commission is sending drafts of portions of the new code to interested persons and organizations for review and comment.

This tentative recommendation sets forth the Commission's tentative conclusions concerning the portion of the new code relating to independent administration of estates (existing Prob. Code §§ 591-591.9).

The preliminary portion of the tentative recommendation indicates the principal substantive revisions the proposed legislation would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other portions of the new code that are still being prepared and are not yet available.

A Comment follows each section of the proposed legislation. The Comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

Comments showing the disposition of each section of existing law that would be replaced by the proposed legislation can be found in the Appendix (green pages) at the end of the tentative recommendation.

0285a

## INDEPENDENT ADMINISTRATION

The Independent Administration of Estates Act,<sup>1</sup> enacted in 1974,<sup>2</sup> permits the court to authorize the personal representative to administer a decedent's estate with a minimum of supervision.<sup>3</sup> The personal representative may petition the court for authority to administer the estate under the Act.<sup>4</sup> The court must grant the authority unless good cause is shown why it should not be granted.<sup>5</sup>

If the authority is granted, many actions that otherwise would be taken under court supervision may be taken without court supervision.<sup>6</sup> However, the personal representative must give prior advice of many proposed actions to affected persons.<sup>7</sup> If an

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1. Prob. Code §§ 591-591.9.
  2. 1974 Cal. Stat. ch. 961. For subsequent amendments and additions to the 1974 act, see 1977 Cal. Stat. ch. 243; 1978 Cal. Stat. ch. 298; 1980 Cal. Stat. ch. 955; 1982 Cal. Stat. ch. 1521; 1983 Cal. Stat. ch. 17; 1984 Cal. Stat. chs. 144, 451, 1017; 1985 Cal. Stat. chs. 359, 982.
  3. The enactment was a response to public criticism of the probate process as requiring too much court involvement and attorneys' time, and being too complex and costly. See Note, Probate Reform: California's Declaration of Independent Administration, 50 S. Cal. L. Rev. 155 (1976).
  4. Prob. Code § 591.1.
  5. Prob. Code § 591.1. See also Prob. Code § 591.7 (revocation of authority where good cause shown). Independent administration authority may not be granted if the decedent's will provides that the decedent's estate shall not be administered under the Act. Prob. Code § 591.1.
  6. Prob. Code § 591.6.
  7. Prob. Code §§ 591.3-591.4, 591.8. Advice of the proposed action is required to be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and

interested person objects, the personal representative may take the proposed action only under court supervision.<sup>8</sup>

The Commission studied the Independent Administration of Estates Act during 1983-1985 and submitted recommendations proposing improvements in the Act.<sup>9</sup> The enactment of these recommendations<sup>10</sup> avoids the need to make further substantial changes in the Independent Administration of Estates Act. Accordingly, the new code merely reorganizes and restates and generally continues the existing provisions of the Act with the changes noted below.<sup>11</sup>

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to any persons who have filed a request for special notice pursuant to Probate Code Section 1202 (the persons who may request special notice include a creditor, a beneficiary under a trust, any other person interested in the estate, and the State Controller).

Advice of proposed action is required for the following actions: selling or exchanging real property, granting options to purchase real property, selling or exchanging personal property (with certain exceptions), leasing real property for more than a year, entering into any contract (other than a lease of real property) not to be performed within two years, selling, incorporating or operating for longer than six months an unincorporated business of the decedent, commencing payment of or increasing a family allowance or paying a family allowance for more than 12 months after the death of the decedent, investing funds of the estate (with certain exceptions), completing a contract of the decedent to convey real or personal property, borrowing money, executing a mortgage or deed of trust or giving other security, and determining specified claims to real or personal property. Prob. Code § 591.3.

8. Prob. Code § 591.5.
9. Recommendations Relating to Probate Law (Independent Administration of Decedent's Estate), 17 Cal. L. Revision Comm'n Reports 401, 405 (1984). See also 18 Cal. L. Revision Comm'n Reports 216, 370-373 (1986) (official Comments to 1985 revisions of the Independent Administration of Estates Act).
10. 1984 Cal. Stat. ch. 451; 1985 Cal. Stat. chs. 359, 982.
11. Some minor changes are not noted below but are indicated in the Comment to the pertinent provision of the new code.

Special administrators. Under existing law, the independent administration statute does not apply to special administrators.<sup>12</sup> The new code permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator.<sup>13</sup> This new authority will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets.

Use of independent administration procedure for proposed actions not requiring advice of proposed action. The new code includes a new procedure that permits the personal representative to give advice of a proposed action even though the independent administration statute does not require that advice of proposed action be given before taking that action. Failure to object to the proposed action has the same effect as failure to object to a proposed action for which advice of proposed action is required. This new procedure will permit the personal representative to determine whether an interested person objects to the proposed action and will protect the personal representative if no one objects. It will also encourage the personal representative to keep persons interested in the estate informed of proposed actions and will require court approval of the proposed action before it is taken if there is an objection.

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12. Prob. Code § 591.1.

13. The independent administration authority will be granted upon request unless (1) good cause is shown why the authority should not be granted or (2) the decedent's will provides that the decedent's estate shall not be administered under independent administration authority.

Statutory Waiver of Advice of Proposed Action Form. Existing law permits a person to waive the right to receive advice of a proposed action only with respect to a particular proposed action.<sup>14</sup> A general waiver of the right to receive advice of all proposed actions is not permitted. Nor is a waiver of the right to receive advice of proposed action for all transactions of a particular kind.

The new code provides for a Statutory Waiver of Advice of Proposed Action Form. Use of this form permits a person to waive the right to receive notice of all proposed transactions or to waive the right to receive notice of particular kinds of proposed actions. The new form includes an appropriate warning to the person using the form of the consequences of signing the form. Using the new form, a person can, for example, waive the right to receive notice of actions with respect to investing funds of the estate without waiving the right to receive notice with respect to sales of real property. Or a person not interested in the management of the estate who trusts the personal representative can waive the right to any notice at all with respect to any actions the personal representative might decide to take.

Selling certain over-the-counter securities without giving advice of proposed action. Under existing law,<sup>15</sup> advice of proposed action must be given where securities are proposed to be sold, unless the securities are to be sold on an established stock or bond exchange. The new code permits the sale without giving advice of proposed action of an over-the-counter security designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc. Quotations for these over-the-counter stocks are published daily in the Wall Street Journal and many regular daily newspapers.

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14. Prob. Code § 591.3(d).

15. Prob. Code § 591.3(b)(3).



Review of actions taken upon court's own motion. Under existing law, failure to object to a proposed action is a waiver of the right to have the court later review the action taken, unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired; but, even though there were no objections to the proposed action, the court on its own motion can review the action of the personal representative after the action is taken.<sup>16</sup>

The new code expands the rights of a person who fails to object to a proposed action to give the person a right to have the court later review the action taken if the person establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action.

The new code limits the court's power to review a proposed action on its own motion. The court may review the proposed action on its own motion to protect a creditor only if the creditor did not receive advice of the proposed action. The court may review the proposed action on its own motion to protect a heir and devisee who lacks capacity or is a minor unless the guardian, conservator, or other personal representative of the heir or devisee received advice of the proposed action and failed to object to the proposed action. The purpose of the advice of proposed action is to bind the persons who receive it if they fail to make a timely objection to the proposed action. Limiting the scope of review by the court on its own motion will further this purpose by protecting the personal representative from a later objection to the action taken where the person or the person's representative received the advice of proposed action and failed to make a timely objection.<sup>17</sup>

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16. Prob. Code § 591.5(d).

17. The new code will permit a guardian ad litem to be appointed to consent or object to proposed actions or to waive advice of proposed action on behalf of a heir or devisee who, at the time the advice was given, lacked capacity to object to the proposed action or was a minor or was unborn.

Notice of hearing. If a petition for appointment of a personal representative also requests authority to administer the estate under the Independent Administration of Estates Act, existing law requires that the published notice of hearing on the petition state that the petition requests that \_\_\_\_\_ be appointed as personal representative to administer the estate of the decedent "under the Independent Administration of Estates Act."<sup>18</sup> For the quoted phrase, the new code substitutes the following:

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

The notice of hearing also is given to the heirs, devisees, and each person named as personal representative who is not petitioning.<sup>19</sup> The additional language added to the notice of hearing gives information to these persons and to persons who read the published notice. This information describes the nature of independent administration authority in very general terms and sets out the standard used by the court to determine whether that authority should be granted.

Application to pending proceedings. Since the new independent administration provisions make only minor changes in existing law, the new provisions will apply to proceedings pending on the date the new code becomes operative.

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18. Prob. Code § 333. See also Petition for Probate - Form Approved by the Judicial Council of California. DE-111 (Rev. January 1, 1986).

19. Notice of the hearing must be personally served upon or mailed to these persons. See Est. & Trust Code § \_\_\_\_\_, superseding Prob. Code § 328.

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DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 6. INDEPENDENT ADMINISTRATION OF ESTATES

CHAPTER 1. GENERAL PROVISIONS

§ 10400. Citation of this part

10400. This part shall be known and may be cited as the Independent Administration of Estates Act.

Comment. Section 10400 continues former Probate Code Section 591 without substantive change.

§ 10401. "Court supervision" defined

10401. As used in this part, "court supervision" includes judicial authorization, approval, confirmation, and instructions.

Comment. Section 10401 continues a portion of the second sentence of subdivision (a) of former Probate Code Section 591.2 without substantive change. See also Section 10500(a)(2) (requirements applicable to court confirmation of sales of real property do not apply to sales under independent administration).

§ 10402. This part not applicable if will so provides

10402. The personal representative may not be granted authority to administer the estate under this part if the decedent's will provides that the estate shall not be administered under this part.

Comment. Section 10402 continues the second sentence of subdivision (a) of former Probate Code Section 591.1 without substantive change. For purposes of Section 10402, a provision in the decedent's will that the estate shall not be administered under former Article 2 of Chapter 8 of Division 3 of the Probate Code (former Sections 591 through 591.9, inclusive), or under the Independent Administration of Estates Act, is a provision that the estate shall not be administered under this part. See also Section 10502 (introductory clause) (will may restrict powers exercisable under independent administration authority).

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

§ 10403. Special administrator

10403. A special administrator may not be granted authority to administer the estate under this part unless the special administrator is appointed with the powers of a general administrator.

Comment. Section 10403 replaces the third sentence of subdivision (a) of former Probate Code Section 591.1. That sentence provided that the independent administration provisions did not apply to special administrators. Section 10403 permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator. See Section [465]. This new authority will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets. In such a case, the special administrator may obtain independent administration authority unless good cause is shown why the authority should not be granted.

An applicant for letters of special administration with powers of a general administrator can obtain independent administration authority only as provided in Sections 10450-10453, inclusive. The applicant must petition for the authority as provided in Section 10450; notice of the hearing must be given in compliance with the requirements of Section 10451; and the provisions of Sections 10452 and 10453 are applicable. If there is an urgent need for appointment of a special administrator, the petition for independent administration authority can be filed under Chapter 2 (commencing with Section 10450) after the special administrator has been appointed in order to avoid the delay that necessarily will result from the requirement that notice of hearing be given under Section 10451.

§ 10404. Application of part

10404. (a) This part applies to all of the following cases:

(1) Where authority to administer the estate is granted under this part.

(2) Where authority to administer the estate was granted under former Sections 591.1 to 591.9, inclusive, of the Probate Code on a petition filed after January 1, 1985.

(3) Where authority was granted prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act and one of the following requirements is satisfied:

(A) A petition was filed under former Section 591.1 of the Probate Code after January 1, 1985, requesting that the personal representative be granted the full authority that could be granted under the Independent Administration of Estates Act in effect at the time the petition was filed, and the petition was granted.

(B) A petition is filed under this part requesting that the personal representative be granted the full authority that can be granted under this part, and the petition is granted.

(b) Except as provided in paragraph (3) of subdivision (a), a personal representative who was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act shall continue to administer the estate under the provisions of the Independent Administration of Estates Act that were applicable at the time the petition was granted.

Comment. Section 10404 is a new provision that makes clear that this part applies to a pending proceeding where independent administration authority was granted subsequent to January 1, 1985, under the former Probate Code provisions that governed independent administration authority. Section 10404 also permits a personal representative who was granted independent administration authority prior to January 1, 1985, to exercise the authority granted by this part where a petition is filed under this part requesting such authority and the petition is granted.

#### CROSS-REFERENCES

##### Definitions

Personal representative § 58

#### CHAPTER 2. GRANTING OR REVOKING INDEPENDENT ADMINISTRATION AUTHORITY

##### § 10450. Petition for order granting independent administration authority

10450. (a) To obtain authority to administer the estate under this part, the personal representative shall petition the court for that authority either in the petition for his or her appointment or in a separate petition filed in the estate proceedings.

(b) A petition under this part may request either of the following:

(1) Authority to administer the estate under this part.

(2) Authority to administer the estate under this part without authority to do either of the following under the authority of this part:

(A) Sell or exchange real property.

(B) Grant an option to purchase real property.

Comment. Subdivision (a) of Section 10450 continues the first sentence of subdivision (a) of former Probate Code Section 591.1 without substantive change. Subdivision (b) continues subdivision (b) of former Probate Code Section 591.1 without substantive change.

Subdivision (b) of Section 10450 permits the petitioner either (1) to request authority to administer the estate under this part (this authority permits the personal representative to administer the estate using the full authority that may be granted under this part) or (2) to request authority to administer the estate under this part without independent administration authority with respect to the real property transactions listed in subdivision (b)(2). The petitioner might request the limited authority that excludes real property transactions in order to avoid the need for an increased bond to cover the estimated net proceeds of real property transactions (see Section 10453). Or the petitioner may request the limited authority because no real property transactions will take place in the course of administration of the estate.

The personal representative, despite the grant of independent administration authority, may seek court supervision of the transaction. See Section 10500(b). Hence, for example, even though the personal representative has been granted independent administration authority that encompasses real property transactions, the personal representative may sell real property under the statutory provisions that govern real property sales when independent administration authority has not been granted. Likewise, the personal representative may decide to seek court approval or instructions concerning a transaction rather than using independent administration authority because there is a lack of agreement as to the desirability of the transaction among the persons interested in the estate or because some of the heirs or devisees who would receive an advice of proposed action lack the capacity to object to the proposed action (see subdivision (d) of Section 10560) or for some other reason.

Authority to administer the estate under this part may not be granted where the decedent's will provides that the estate shall not be administered under this part. See Section 10402. Likewise, the authority of the personal representative to exercise particular powers under the Independent Administration of Estates Act may be restricted by the decedent's will. See Section 10502 (introductory clause). A special administrator may not be granted independent administration authority unless the special administrator is appointed with the powers of a general administrator. See Section 10403 and the Comment to that section.

#### CROSS-REFERENCES

##### Definitions

Personal representative § 58

Real property § 68

Verification of petition § 7203

§ 10451. Notice of hearing

10451. (a) If the authority to administer the estate under this part is requested in the petition for appointment of the personal representative, notice of the hearing on the petition shall be given to the persons and in the manner prescribed in Chapter 2 (commencing with Section 7230) of Part 2 of Division 7 and shall be included in the notice of hearing required by that chapter.

(b) Where proceedings for the administration of the estate are pending at the time a petition is filed under Section 10450, notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200]. At least 10 days before the date set for hearing of the petition by the court, the petitioner shall cause notice of the hearing to be mailed to the person named as executor in the will of the decedent if not the petitioner and to all devisees and to all known heirs of the decedent and to all persons who have requested notice as provided in Section [1202].

(c) The notice of hearing of the petition for authority to administer the estate under this part, whether included in the petition for appointment or in a separate petition, shall include the substance of the following statement: "The petition requests authority to administer the estate under the Independent Administration of Estates Act. This authority would permit the personal representative to act without court supervision that would otherwise be required. The petition will be granted unless good cause is shown why it should not be."

Comment. Subdivision (a) of Section 10451 continues subdivision (c) of former Probate Code Section 591.1 without substantive change. Subdivision (b) continues subdivision (d) of former Probate Code Section 591.1 with the addition of the requirement that notice of hearing be given to the person named as executor in the will of the decedent if not the petitioner. Subdivision (c) restates subdivision (e) of former Probate Code Section 591.1 with the addition of the last two sentences of the statement which are new.

**CROSS-REFERENCES**

Clerk to set petition for hearing § 7202

Definitions

Devisee § 34

Heirs § 44

Personal representative § 58

Proof of giving notice § 7308



*Note. The notice requirements of subdivisions (a) and (b) of Section 10451 will be reviewed by the Commission when the general notice provisions are drafted.*

§ 10452. Hearing; order; endorsement on letters

10452. (a) Any interested person may appear and object to the granting of authority to administer the estate under this part by filing at or before the hearing a written statement setting forth the objection.

(b) Unless the court determines that the objecting party has shown good cause why the authority requested in the petition should not be granted, the court shall grant the requested authority.

(c) The letters shall be endorsed to the effect that the letters are issued under this part and, if the authority granted does not include authority to sell or exchange real property or grant options to purchase real property under this part, that limitation shall be included in the endorsement.

Comment. Section 10452 continues subdivisions (f) and (g) of former Probate Code Section 591.1 without substantive change. The phrase "at or before the hearing" has been added in subdivision (a). Subdivision (c) recognizes that independent administration authority may exclude real property transactions. See Section 10450(b)(2).

GROSS-REFERENCES

Definitions

Interested person § 48

Letters § 52

Real property § 68

Limited independent administration authority § 10450(b)(2)

§ 10453. Increase in amount of bond

10453. If the personal representative is otherwise required to file a bond and is authorized to sell real property of the estate without court supervision under this part, the court, in its discretion, may fix the amount of the bond at not less than the estimated value of the personal property, the estimated net proceeds of the real property authorized to be sold under this part, and the estimated value of the probable annual gross income of all the property belonging to the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount.

Comment. Section 10453 continues subdivision (b) of Probate Code Section 591.9 without substantive change.

#### CROSS-REFERENCES

##### Definitions

Court supervision § 10401  
Personal property § 57  
Personal representative § 58  
Property § 62  
Real property § 68  
Limited independent administration authority §§ 10450(b)(2), 10452(c)

*Note.* Section 10453 will be reviewed when the general provisions relating to bonds are drafted.

##### § 10454. Revocation of independent administration authority

10454. (a) Any interested person who objects to continued administration of the estate under this part may file a petition setting forth the basis for revoking the authority of the personal representative to continue administration of the estate under this part.

(b) Notice of the hearing on the petition shall be served on the personal representative in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.

(c) If the court determines that good cause has been shown, the court shall make an order revoking the authority of the personal representative to continue administration of the estate under this part.

(d) Upon the making of an order under this section, new letters shall be issued without the endorsement described in subdivision (c) of Section 10452.

Comment. Section 10454 continues former Probate Code Section 591.7 without substantive change.

#### CROSS-REFERENCES

Clerk sets petition for hearing § 7202

##### Definitions

Interested person § 48  
Letters § 52  
Personal representative § 58  
Proof of giving notice § 7308  
Verification of petition § 7203

CHAPTER 3. ADMINISTRATION UNDER INDEPENDENT ADMINISTRATION AUTHORITY

§ 10500. Administration without court supervision

10500. (a) Except as provided in this chapter, and subject to Chapter 4 (commencing with Section 10550) and the applicable fiduciary duties, a personal representative who has been granted authority to administer the estate under this part may:

(1) Administer the estate without court supervision as provided in this part, but in all other respects the personal representative shall administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate under this part.

(2) Sell property of the estate either at public auction or private sale, and with or without notice, for such price and upon such terms and conditions as the personal representative may determine, and the requirements applicable to court confirmation of sales of real property, including publication of notice of sale, court approval of agents' and brokers' commissions, and sale at not less than 90 percent of appraised value, do not apply to sales made under authority granted under this part. This paragraph applies to any sale made under authority of this part on or after January 1, 1985.

(b) Notwithstanding subdivision (a), the personal representative may obtain court supervision as provided in this code of any action to be taken by the personal representative during administration of the estate.

Comment. Subdivision (a) of Section 10500 continues the first sentence and the first portion of the second sentence of former Probate Code Section 591.2 and subdivision (a) of former Probate Code Section 591.9 without substantive change. See also Section 10401 (defining "court supervision"). Paragraph (2) of subdivision (a) is designed to make clear that sales under independent administration authority are not subject to the statutory requirements that apply to sales made under court supervision. Thus, for example, the commission of the realtor who lists or obtains the purchaser of real property sold under independent administration authority is not subject to the approval of the court. Nor does the 90-percent-of-appraised-value requirement apply when a sale is under independent administration authority. Publication of notice of sale is not required where the sale is made under independent administration authority. Likewise, notice of sale, court confirmation, and approval of the commission of the agent, broker, or auctioneer is not required where a sale of personal property is made under independent administration authority.

Subdivision (b) of Section 10500 continues the first sentence of subdivision (b) of former Probate Code Section 591.2 without substantive change.

As the introductory clause of Section 10500 recognizes, a personal representative who has been granted only limited authority under this part may not exercise authority with respect to matters not included within the scope of the authority granted. See Section 10501(e). See also Sections 10450(b)(2) and 10452(c) (limited independent administration authority). The introductory clause also recognizes that independent administration authority must be exercised in compliance with the provisions of this part. See Chapter 4 (commencing with Section 10550) (giving advice of proposed action). And the exercise of the authority under this part is subject to the requirement that the personal representative act in a fiduciary capacity in exercising the authority. See Sections 10500 (introductory clause), 10560 (review of action taken on motion of person who failed to object to action where there is clear and convincing proof that the personal representative violated an applicable fiduciary duty in taking the action). See also Section \_\_\_\_\_ (fiduciary duty of personal representative).

#### CROSS-REFERENCES

##### Definitions

Court supervision § 10401

Personal representative § 58

Property § 62

Real property § 68

Limited independent administration authority §§ 10450(b)(2), 10452(c)

##### § 10501. Matters requiring court supervision

10501. Notwithstanding any other provision of this part, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(a) Allowance of commissions of the personal representative

(b) Allowance of attorney's fees.

(c) Settlement of accountings.

(d) Preliminary and final distributions and discharge.

(e) Sale or exchange of real property and grant of an option to purchase real property if the authority of the personal representative granted under this part specifically excludes the authority to take such action under the authority of this part.

Comment. Section 10501 continues the last portion of the second sentence of subdivision (a) of former Probate Code Section 591.2

without substantive change. In connection with subdivision (e) of Section 10501, see Sections 10450(b)(2) and 10452(c) (limited independent administration authority). See also Section 10502 (introductory clause) (will may restrict powers exercisable under independent administration authority).

#### CROSS-REFERENCES

##### Definitions

Court supervision § 10401

Personal representative § 58

Real property § 68

Limited independent administration authority §§ 10450(b)(2), 10452(c)

##### § 10502. Specific independent administration powers

10502. Unless restricted by the will and subject to Section 10501, a personal representative who has been granted authority to administer the estate under this part has all of the following powers, in addition to any other powers granted to a personal representative by this code, which powers can be exercised in the manner provided in this part:

(a) To manage, control, convey, divide, exchange, partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases; and to grant options to purchase real property for a period within or beyond the administration of the estate.

(b) To invest and reinvest money of the estate in any one or more of the following:

(1) Deposits in banks and in accounts in insured savings and loan associations.

(2) Eligible securities for the investment of surplus state moneys as provided for in Section 16430 of the Government Code.

(3) Units of a common trust fund described in Section [585.1].

(4) Mutual funds which are comprised of (A) direct obligations of the United States maturing not later than one year from the date of investment or reinvestment or (B) repurchase agreements with respect to direct obligations of the United States, regardless of maturity, in which the fund is authorized to invest.

(c) Invest and reinvest any surplus moneys in his or her hands in any manner provided by the will.

(d) To borrow; and to place, replace, renew or extend any encumbrance upon any property in the estate.

(e) To abandon worthless assets or any interest therein.

(f) To make ordinary or extraordinary repairs or alterations in buildings or other property.

(g) To vote a security, in person or by general or limited proxy.

(h) To sell or exercise stock subscription or conversion rights.

(i) To hold a security in the name of a nominee or in any other form without disclosure of the estate, so that title to the security may pass by delivery, but the personal representative is liable for any act of the nominee in connection with the security so held.

(j) To insure the assets of the estate against damage or loss and to insure the personal representative against liability with respect to third persons.

(k) To allow, pay, reject, contest, or compromise any claim by or against the estate; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible; and to institute, compromise, and defend actions and proceedings.

(l) To pay taxes, assessments, and other expenses incurred in the collection, care, and administration of the estate.

(m) To continue the operation of the decedent's business to the extent the personal representative determines that to be for the best interest of the estate and those interested therein.

(n) To pay a reasonable family allowance.

(o) To make a disclaimer.

(p) To grant an exclusive right to sell property, for a period not to exceed 90 days, where the personal representative determines that to be necessary and advantageous to the estate.

Comment. Section 10502 continues former Probate Code Section 591.6 without substantive change, but paragraphs (3) and (4) have been added to subdivision (b) of Section 10502 to conform Section 10502 to subdivision (h) of Section 10551.

The words "by compromise," which appeared at the end of the first clause of subdivision (j) of former Section 591.6, are omitted at the end of the first clause of subdivision (k) of Section 10502 because these words are as unnecessary and their omission does not make a substantive change in the meaning of the provision.

The personal representative must exercise the powers listed in Section 10502 in the manner provided in this part. Accordingly, if the action to be taken is one listed in Section 10551, the personal representative can take the action only if the requirements of Chapter 4 (commencing with Section 10550) (advice of proposed action) are satisfied. See Section 10550. The powers listed in this section are subject to any limitations on the powers granted to the personal representative to administer the estate under this part. See Section 10501(e) (real property transactions). See also Sections 10450(b)(2), 10452(c) (limited independent administration authority). The introductory clause of Section 10502 recognizes that the decedent's will may restrict powers otherwise exercisable under independent administration authority. The personal representative must also comply with the applicable fiduciary duties in exercising independent administration powers. See Section \_\_\_\_.

#### GROSS-REFERENCES

##### Definitions

Account in insured savings and loan association § 27.3  
Person § 56  
Personal representative § 58  
Property § 62  
Real property § 68  
Security § 70  
Will § 88

*Note. The listing of powers in Section 10502 is intended to supplement the other powers granted a personal representative under the provisions of the code relating to supervised administration. The introductory portion of Section 10502 gives the personal representative who has independent administration authority powers which are "in addition to any other powers granted by this code." Hence, it is not necessary to list in Section 10502 those powers that are granted to a personal representative under the supervised administration provisions of the code. The listing of the powers in Section 10502 should be limited to those powers that the personal representative may be granted by the court under provisions of the code relating to supervised administration, that is powers that the personal representative can obtain by petitioning the court for authority to exercise the particular power. Accordingly, the listing of powers in Section 10502 will be reviewed when the Commission drafts the estate management provisions of the code so that Section 10502 can be revised so that it does not list powers that the personal representative has under the supervised administration provisions but does list all the powers that the personal representative may obtain only upon petition to the court.*

## CHAPTER 4. ADVICE OF PROPOSED ACTION

### § 10550. Giving advice of proposed action

10550. (a) Prior to the consummation of any of the actions described in Section 10551 without court supervision, a personal representative who has been granted authority to administer the estate under this part shall give advice of proposed action as provided in this chapter. Nothing in this subdivision authorizes a personal representative to take an action under this part if the personal representative does not have the power under Section 10502 to take the action under this part.

(b) A personal representative who has been granted authority to administer the estate under this part may, but need not, give advice of proposed action prior to taking an action that is not described in Section 10551. Nothing in this subdivision authorizes a personal representative to take any action the personal representative is not otherwise authorized to take.

Comment. Subdivision (a) of Section 10550 continues paragraph (1) of subdivision (a) of former Probate Code Section 591.3 without substantive change.

The second sentence of subdivision (a) is new. This new sentence is merely clarifying and makes no substantive change in prior law. The sentence makes clear that if the powers of the personal representative do not include authority with respect to sales and exchanges of real property and grants of options to purchase real property (see subdivision (e) of Section 10501), the mere fact that the power is listed in Section 10551 gives the personal representative no right or authority to exercise the power using the procedure provided in this chapter. In such a case, the power may be exercised only pursuant to the provisions relating to court supervision of the sale or exchange of the real property or the grant of the option to purchase the real property, as the case may be, and the provisions of this part have no application to the transaction.

Subdivision (b) of Section 10550 is a new provision that permits a personal representative to use the procedure provided in this chapter with respect to an action that the personal representative proposes to take even though the action is not one for which advice of proposed action is required. For example, the personal representative may want to proceed under subdivision (b) where the proposed action is the compromise of a claim by or against the estate (see Section 10502(k)). This action is one that ordinarily does not require an advice of proposed action. See Section 10551 (actions requiring advice of proposed action). If the procedure provided by this chapter is used with respect to the proposed action, the person who fails to object to the proposed action waives the right to have the court later



review the action taken unless one of the exceptions to the waiver provision is applicable in the particular case. See Section 10560. See also Section 10559(b) and the Comment to that section. Use of the advice of proposed action procedure avoids the need to petition the court for instructions on the proposed compromise in order to preclude a later challenge to the accounts of the personal representative.

#### CROSS-REFERENCES

##### Definitions

Personal representative § 58

##### § 10551. Actions requiring advice of proposed action

10551. The actions requiring advice of proposed action are all of the following:

- (a) Selling or exchanging real property.
- (b) Granting options to purchase real property.
- (c) Selling or exchanging personal property, except for any of the following:
  - (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.
  - (3) Other assets referred to in [Sections 770 and 771.5] when sold for cash.
- (d) Leasing real property for a term in excess of one year.
- (e) Entering into any contract, other than a lease of real property, which by its provisions (1) cannot be terminated by the personal representative within two years and (2) is not to be fully performed within two years.
- (f) Continuing for a period of more than six months from the date of appointment of the personal representative of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death, or the sale or incorporation of such a business.
- (g) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(h) Investing funds of the estate, except depositing funds in any of the following:

(1) Banks and in accounts in insured savings and loan associations.

(2) Units of a common trust fund described in Section [585.1].

(3) Direct obligations of the United States maturing not later than one year from the date of investment or reinvestment.

(4) Mutual funds which are comprised of either or both of the following:

(A) Direct obligations of the United States maturing not later than one year from the date of investment or reinvestment.

(B) Repurchase agreements with respect to direct obligations of the United States, regardless of maturity, in which the fund is authorized to invest.

(i) Completing a contract entered into by the decedent to convey real or personal property.

(j) Borrowing money or executing a mortgage or deed of trust or giving other security.

(k) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, the property, or determining the decedent's claim to real or personal property title to or possession of which is held by another.

Comment. Section 10551 continues subdivision (b) of former Probate Code Section 591.3 without substantive change except:

(1) Paragraph (2) of subdivision (c), which authorizes the sale of an over-the-counter stock that is designated as a national market system security on an interdealer quotation system, or subsystem thereof, is new. Quotations for these over-the-counter stocks are published daily in the Wall Street Journal and many other daily newspapers. Under prior law, only a security sold on an established stock or bond exchange could be sold without giving advice of proposed action.

(2) Subdivision (e) makes clear that advice of proposed action need not be given if a contract is one that by its terms can be terminated by the personal representative within two years. There is no reason why a contract that can be terminated within two years should not be treated the same as a contract that is to be fully performed within two years.

(3) The last portion of subdivision (h) of Section 10551 substitutes "direct obligations of the United States" for "any obligation" which appeared in prior law. This change makes this provision reflect the apparent legislative intent in enacting the provision.

If the personal representative is not authorized to sell or exchange real property or grant options to purchase real property under this part (see subdivision (e) of Section 10501), those powers can be exercised only under the provisions relating to court supervision and the provisions of this part have no application to the transaction. See also the Comment to Section 10550.

#### GROSS-REFERENCES

##### Definitions

Account in insured savings and loan association § 27.3  
Personal property § 57  
Personal representative § 58  
Real property § 68  
Security § 70

*Note.* Section 10551 will be reviewed when the Commission drafts the estate management provisions of the new code. Section 10551 should not require advice of proposed action for those actions that the personal representative can take under supervised administration without prior court authorization.

Paragraph (4) of subdivision (h) (relating to mutual funds and repurchase agreements) will be conformed to the provision that the Commission will draft to include in the estate management portion of the new code relating to powers and duties of personal representatives.

#### § 10552. Persons to whom advice of proposed action must be given

10552. Except as provided in Sections 10553 and 10554, advice of proposed action shall be given to all of the following:

(a) Each devisee whose interest in the estate is affected by the proposed action.

(b) Each heir of the decedent if the estate is an intestate estate.

(c) Each person who has filed a request for special notice pursuant to Section [1202].

(d) If the personal representative is the trustee of a trust that is a devisee under the will of the decedent, each person interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804.

(e) The State of California if any portion of the estate is to escheat to it.

Comment. Section 10552 continues the introductory clause and paragraph (2) of subdivision (a) of former Probate Code Section 591.3 without substantive change other than the addition of subdivision (d) which is new.

## CROSS-REFERENCES

Consent to proposed action § 10553

Definitions

Devisee § 34

Heirs § 44

Person § 56

Waiver of right to receive advice of proposed action § 10554

*Note. Subdivision (d) of Section 10552 refers to Section 15804. This section is contained in Assembly Bill 2652 (new trust law) (introduced in the California Legislature on January 13, 1986). Section 15804 will supersede existing Probate Code Section 1215.1.*

### § 10553. Consent to proposed action

10553. Advice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

Comment. Section 10553 continues subdivision (c) of former Probate Code Section 591.3 without substantive change. Section 10553 provides a method that can be used to avoid the delay that otherwise would result from the requirement that a person given advice of proposed action be allowed a specified period of time—see Section 10556(b) and (c) and Section 10557—within which to object to the proposed action.

## CROSS-REFERENCES

Definitions

Person § 56

### 10554. Waiver of advice of proposed action

10554. (a) The advice of proposed action need not be given to any person who, in writing, waives the right to the advice of proposed action with respect to the particular proposed action. The waiver may be executed at any time before or after the proposed action is taken. The waiver shall describe the particular proposed action and may waive particular aspects of the advice, such as the delivery, mailing, or time requirements of Section 10556, or the giving of the advice in its entirety for the particular proposed action.

(b) The advice of proposed action need not be given to any person who has executed a Statutory Waiver of Advice of Proposed

Action Form that satisfies the requirements of Section 10603 and in that form has made either of the following:

- (1) A general waiver of the right to advice of proposed action.
- (2) A waiver of the right to advice of proposed action of all transactions of a type which includes the particular proposed action.

Comment. Subdivision (a) of Section 10554 continues subdivision (d) of former Probate Code Section 591.3 without substantive change. The subdivision permits waiver of advice of proposed action only with respect to a particular proposed action. A person entitled to advice of proposed action to execute a written waiver under subdivision (a) that would, for example, permit notice of a particular proposed real property transaction to be given to the person by telephone so that the proposed action can be expeditiously completed if the person does not object. In such a case, if the person is agreeable to the sale of the real property, the waiver could be drafted in terms that would permit the personal representative to call the person on the telephone to advise the person of an offer to buy the property and to permit the sale of the property at the price and on the terms offered if the person called is agreeable or at a price and on the terms of a counter-offer that is agreeable to the person called.

Subdivision (b) is new. Under this provision, a person could, for example, execute a statutory waiver in the form prescribed by Section 10603 to waive the right of advice of proposed action with respect to investing funds of the estate and borrowing money without waiving the right to advice of proposed action with respect to sales of real property. Or the person could waive the right to receive advice of proposed action with respect to any action the personal representative might decide to take.

#### CROSS-REFERENCES

Advice of proposed action, delivery or mailing requirement § 10556  
Definitions  
Person § 56

#### § 10555. Form and contents of advice of proposed action

10555. (a) The advice of proposed action shall be in a form that satisfies the requirements of Chapter 5 (commencing with Section 10600).

(b) The advice of proposed action shall contain the information required by Chapter 5 (commencing with Section 10600).

Comment. Section 10555 supersedes the third and fifth sentences of former Probate Code Section 591.4. Section 10555 makes no substantive change in the form and contents requirements for an advice of proposed action, but the requirement that the advice satisfy the form and information requirements of Chapter 5 (see the Comment to Section 10600) is substituted in Section 10555 for the duplicative and somewhat incomplete statement of the required contents that appeared in former Section 591.4.

#### CROSS-REFERENCES

Form for advice of proposed action §§ 10600, 10601

Time for mailing or delivery of advice § 10556

#### § 10556. Delivery or mailing of advice of proposed action and copy of form for objecting to proposed action

10556. (a) The advice of proposed action shall be delivered personally to each person required to be given advice of proposed action or be sent by first-class mail to the person at the person's last known address. If the advice of proposed action is mailed to a person who resides outside the United States, it shall be sent by air mail.

(b) If the advice of proposed action is delivered personally, it shall be delivered to the person not less than 15 days before the date specified in the advice of proposed action on or after which the proposed action is to be taken.

(c) If the advice of proposed action is sent by mail, it shall be deposited in the mail not less than 20 days before the date specified in the advice of proposed action on or after which the proposed action is to be taken.

(d) A copy of the form prepared by the Judicial Council for objecting to a proposed action, or the substantial equivalent of the Judicial Council form, shall accompany or be a part of the advice of proposed action.

Comment. Subdivision (a) of Section 10556 continues the first sentence of former Probate Code Section 591.4 without substantive change. Subdivisions (b) and (c) restate the fourth sentence of former Probate Code Section 591.4 without substantive change. Subdivision (d) continues the second sentence of former Probate Code Section 591.4 without substantive change other than to permit the substantial equivalent of the Judicial Council form to be sent instead of the Judicial Council form.

#### CROSS-REFERENCES

Consent to proposed action § 10553

Definitions

Person § 56

Form for objecting to proposed action § 10602

Waiver of advice of proposed action § 10554

§ 10557. Objection to proposed action

10557. A person given advice of proposed action who desires to object to the proposed action may deliver or mail a written objection to the personal representative at the address stated in the advice of proposed action, so that the objection is received before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

Comment. Section 10557 continues subdivision (a)(2) of former Probate Code Section 591.5 without substantive change, except that Section 10557 makes clear that only a person given advice of proposed action can object in the manner provided in Section 10557. Section 10558, on the other hand, permits a person to obtain a court order restraining the taking of a proposed action without court supervision whether or not the person has been given advice of proposed action.

Section 10557 applies whether the the advice of proposed action is given pursuant to subdivision (a) of Section 10550 (giving of advice mandatory) or under subdivision (b) of that section (giving of advice permissive). See also Section 10560 (effect of failure to object).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Mailing §§ \_\_\_\_\_

§ 10558. Restraining order

10558. If a proposed action would require court supervision if the personal representative had not been granted authority to administer the estate under this part and a person described in Section 10552 objects to the taking of the proposed action without court supervision, the person may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision under the provisions of this code dealing with court supervision of such action. The court shall grant the requested order without requiring notice to the personal representative and without cause being shown for the order. The person who obtained the order may serve it upon the personal representative in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

Comment. Section 10558 continues subdivision (a)(1) of former Probate Code Section 591.5 without substantive change.

With respect to a particular action, the person objecting to the action may:

(1) Mail or deliver a written objection to the proposed action under Section 10557 if the person has been given advice of proposed action.

(2) Apply for a restraining order under Section 10558, whether or not the person has been given advice of proposed action.

#### CROSS-REFERENCES

##### Definitions

Court supervision § 10401

Person § 56

Personal representative § 58

#### § 10559. Court supervision and notice of hearing required if objection made

10559. (a) If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under this part and the personal representative has notice of a written objection made under Section 10557 or a restraining order issued under Section 10558, the personal representative shall, if the personal representative desires to take the proposed action, submit the proposed action to the court for approval following the provisions of this code dealing with court supervision of that kind of action and may take the proposed action only under such order as may be entered by the court.

(b) If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under this part but the personal representative has given advice of the proposed action and has notice of a written objection made under Section 10557 to the proposed action, the personal representative shall, if he or she desires to take the proposed action, request instructions from the court concerning the proposed action and may take the proposed action only under such order as may be entered by the court.

(c) A person who objects to a proposed action as provided in Section 10557 or serves a restraining order issued under Section 10558 in the manner provided in that section shall be given notice of any



hearing on a petition for court authorization or confirmation of the proposed action.

(d) Failure of the personal representative to comply with this section is a violation of his or her fiduciary duties and is grounds for removal from office.

Comment. Subdivisions (a) and (d) of Section 10559 continue subdivision (b) of former Probate Code Section 591.5 without substantive change. In connection with subdivision (d), see Section (to be drafted) (liability of personal representative for breach of fiduciary duties).

Where advice of proposed action is required, subdivision (a) requires that the proposed action be taken only under court supervision if the personal representative has notice of a written objection or a restraining order with respect to the proposed action. And, when taking the proposed action under court supervision, the personal representative must comply with all the provisions that apply when an action of that kind is taken under court supervision, including but not limited to any applicable publication requirement. In this respect, subdivision (a) continues prior law.

Subdivisions (a) and (b) of Section 10559 implement subdivision (b) of Section 10550. Subdivision (b) of Section 10550 is a new provision that permits a personal representative who has been granted independent administration authority to give advice of proposed action with respect to a proposed action that could be taken without giving advice of proposed action. The personal representative may give advice of proposed action (although not required to do so) in order that the person receiving the advice will waive the right to object to the proposed action if the person fails to object within the time allowed after receipt of the advice. See Section 10560.

Subdivision (a) of Section 10559 applies to not only to a case where notice of proposed action is required but also to a case where advice of proposed action is not required to be given for a proposed action that would require court supervision if independent administration authority had not been granted. If the personal representative elects to give advice of proposed action in such a case, even though not required, subdivision (a) permits the personal representative to take the proposed action only under court supervision if the personal representative has notice of an objection to the proposed action or of a restraining order issued with respect to the proposed action.

Subdivision (b) of Section 10559 applies where the personal representative determines to give advice of proposed action in a case where the personal representative would be authorized to take the proposed action without court supervision even if the personal representative had not been granted independent administration authority. In such a case, subdivision (b) requires that the proposed action be taken only after court authorization on a petition for instructions if the personal representative has notice of a written objection to the proposed action.

The benefit of the new procedure under subdivision (b) of Section 10550 and subdivisions (a) and (b) of Section 10559 is that the new procedure permits a court review of the proposed action before it is taken if the personal representative has notice of an objection rather than having the objection first made after the action has been taken. For further discussion, see the Comment to Section 10550.

Subdivision (c) of Section 10559 continues subdivision (e) of former Probate Code Section 591.5 without substantive change. This subdivision requires that notice of hearing be given to a person who has made a written objection under Section 10557 or has served a restraining order under Section 10558. See Section 10560(a). Subdivision (c) requires that notice of hearing be given of the hearing of a petition for instructions authorizing a proposed action described in subdivision (b) as well as of a hearing on a petition for court authorization or confirmation of a proposed action described in subdivision (a).

#### GROSS-REFERENCES

##### Definitions

Court supervision § 10401

Personal representative § 58

##### § 10560. Effect of failure to object to proposed action

10560. (a) A person who has been given advice of proposed action as provided in Sections 10550 to 10556, inclusive, may object to the proposed action only by one or both of the following methods:

(1) Delivering or mailing a written objection as provided in Section 10557.

(2) Serving a restraining order obtained under Section 10558 before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

(b) Except as provided in subdivisions (c) and (d), the failure to object as provided in subdivision (a) is a waiver of any right to have the court later review the proposed action after it has been taken.

(c) The court may review the action taken upon motion of a person who (1) establishes that he or she did not actually receive the advice of proposed action before the time to object expired or (2) establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action.

(d) The court may review the action of the personal representative on its own motion where necessary to protect the interests of any of the following:

(1) A creditor of the estate who did not actually receive advice of the proposed action.

(2) An heir or devisee who establishes both of the following:

(A) At the time the advice was given the heir or devisee lacked capacity to object to the proposed action or was a minor.

(B) No advice of proposed action was actually received by the guardian, conservator, or other personal representative of the heir or devisee.

Comment. Subdivision (a) of Section 10560 continues the substantive effect of the first sentence of subdivision (d) of former Probate Code Section 591.5.

Subdivisions (b) and (c) continue the second sentence of subdivision (d) of former Probate Code Section 591.5 with the addition of the provision in subdivision (c) that permits a person who has failed to object to have the court later review the action if the person establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the proposed action. Thus, for example, the person could obtain court review if the person establishes by clear and convincing evidence that the personal representative violated Section [583] (purchase by personal representative of property of, or claim against, estate) in taking the action.

Subdivision (b) applies only where the advice of proposed action was given as provided in Sections 10550-10556. The advice must contain the information required by Chapter 5 (commencing with Section 10600), including a description of the proposed action in reasonably specific terms, with additional information if the proposed action involves a sale or exchange of real property or an option to purchase real property. See Sections 10555 and 10601.

Subdivision (d) supersedes the last sentence of subdivision (d) of former Probate Code Section 591.5. Subdivision (d) narrows the situations where the court can review the action of the personal representative on its own motion to cases where necessary to protect the interests of creditors of the estate or an heir or devisee who lacked capacity to object to the proposed action or was unborn. As to the right of a person who failed to object to the action to obtain court review, see subdivision (c). The court is not authorized to review the proposed action on motion of a person who consented to the proposed action (Section 10553) or waived the advice of proposed action (Section 10554). See the Comments to Sections 10553 and 10554. A guardian ad litem can be appointed to object, waive, or consent to proposed actions under the Independent Administration of Estates Act where the person entitled to advice of proposed action

lacks the capacity to act with respect to the proposed action. See Section (to be drafted) (general provision permitting appointment of guardian ad litem).

#### CROSS-REFERENCES

##### Definitions

Devisee § 34  
Heirs § 44  
Person § 56  
Personal representative § 58

*Note.* The time when an objection can be raised will be reviewed when the provisions relating to closing of estate administration are drafted. The objection could be raised upon a final accounting. Once the estate is closed, there could be no objection (except for fraud). The good faith purchaser or encumbrancer is protected. See Section 10561.

#### § 10561. Protection of persons dealing in good faith with personal representative

10561. (a) The failure of the personal representative to comply with subdivision (a) of Section 10550, with Sections 10552, 10555, 10556, and 10559, and with Chapter 5 (commencing with Section 10600), and the taking of the action by the personal representative without such compliance, does not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons dealing in good faith with the personal representative who changed their position in reliance upon the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions.

(b) No person dealing with the personal representative has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed in subdivision (a).

Comment. Section 10561 continues subdivision (b) of former Probate Code Section 591.4 and subdivision (c) of former Probate Code Section 591.5 without substantive change.

#### CROSS-REFERENCES

##### Definitions

Person § 56  
Personal representative § 58  
Property § 62

CHAPTER 5. FORMS

§ 10600. Judicial Council form for advice of proposed action

10600. If the Judicial Council prescribes a form for advice of proposed action, the form used to give advice of proposed action shall be one of the following:

(a) The form prescribed by the Judicial Council.

(b) A form that is in substantial compliance with either the requirements of the Judicial Council form or the requirements of the form set out in Section 10601.

Comment. Section 10600 is new. If the Judicial Council has not prescribed a form for advice of proposed action, the form prescribed by Section 10601 should be used, but a form may be used if the form either in in substantial compliance with the Judicial Council form or the statutory form set out in Section 10601.

§ 10601. Form for advice of proposed action.

10601. Except as provided in Section 10600, the advice of proposed action shall be in substantially the following form and shall contain the information required by the following form:

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

Estate of \_\_\_\_\_

No. \_\_\_\_\_

deceased

ADVICE OF PROPOSED ACTION  
(Probate Code Section 10601)

1. The personal representative of the estate of the deceased is:

\_\_\_\_\_  
(Name(s))

2. The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 10400-10603).

3. On or after \_\_\_\_\_, 19\_\_, the personal representative will take the following action:

[Enter the date on or after which the proposed action is to be taken. (The advice of proposed action must be delivered not less than 15 days before this date if it is personally delivered or must be deposited in the mail not less than 20 days before this date if it is sent by mail.)]

[Describe proposed action in reasonably specific terms. If the proposed action involves a sale or exchange of real property or an option to purchase real property, (1) state the material terms of the transaction, including any sale price and the amount of or method of calculating any compensation paid or to be paid to an agent or broker in connection with the transaction, (2) state the amount of any probate inventory valuation of the property on file with the court, and (3) set forth the following statement: "A sale of real property without court supervision means that the sale will not be presented to the court for confirmation at a hearing at which higher bids for the property may be presented and the property sold to the highest bidder."].

4. If you need more information, you may call:

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Telephone number)

5. If you object to the proposed action:

(a) Sign the enclosed objection form and deliver or mail it to the personal representative at the following address: [specify name and address]

OR

(b) Apply to the court for an order preventing the personal representative from taking the proposed action without court supervision.

6. Your written objection or the court order must be received by the personal representative before the date specified above, or before the proposed action is taken, whichever is later. If you object, the personal representative may take the proposed action only under court supervision.

7. IF YOU DO NOT OBJECT IN WRITING OR OBTAIN A COURT ORDER PREVENTING THE PROPOSED ACTION, YOU WILL BE TREATED AS IF YOU

CONSENTED TO THE PROPOSED ACTION AND YOU MAY NOT OBJECT AFTER THE PROPOSED ACTION HAS BEEN TAKEN.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of personal representative or  
attorney for personal representative)

Comment. Section 10601 continues subdivision (a) of former Probate Code Section 591.8 with the addition of an informational statement in the form concerning the time for delivery or mailing of the advice of proposed action. The form is designed to provide the person receiving an advice of proposed action with the information the person needs in order to react to the advice. The form prescribed by this section may be superseded by a Judicial Council form. If the Judicial Council has prescribed a form for advice of proposed action, the Judicial Council form should be used instead of the form prescribed by this section, but use of the form prescribed by this section does not invalidate the advice of proposed action. See Section 10600.

#### CROSS-REFERENCES

##### Definitions

Court supervision § 10401  
Personal representative § 58  
Real property § 68

#### § 10602. Judicial Council form for objecting to proposed action

10602. (a) The Judicial Council shall prepare a form that a person may use to object to a proposed action pursuant to Section 10557.

(b) A person who wishes to object to a proposed action either may use the Judicial Council form or may make the objection in any other writing that satisfies the requirements of this part.

Comment. Section 10602 continues subdivision (b) of former Probate Code Section 591.8 without substantive change.

#### CROSS-REFERENCES

Sending form for objecting with or as a part of advice of proposed action § 10556

#### § 10603. Statutory form for waiver of advice of proposed action

10603. (a) The Judicial Council may prescribe a Statutory Waiver of Advice of Proposed Action Form. A form prescribed by the Judicial

Council pursuant to this subdivision shall include the substance of the warning set out in subdivision (b). If the Judicial Council prescribes a form pursuant to this subdivision, that form shall be used instead of the form set out in subdivision (b).

(b) Except as provided in subdivision (a), a Statutory Waiver of Advice of Proposed Action Form shall be in substantially the form set out in this subdivision and shall include the warning set out in this section, either typed in all capital letters or printed in not less than 10-point bold-face type or a reasonable equivalent thereof:

SUPERIOR COURT OF CALIFORNIA

COUNTY OF \_\_\_\_\_

Estate of \_\_\_\_\_

No. \_\_\_\_\_

\_\_\_\_\_  
(deceased)

WAIVER OF ADVICE OF PROPOSED ACTION

(California Estate and Trust Code Section 10603)

WARNING. THE LAW REQUIRES THAT YOU BE GIVEN NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. THIS NOTICE MUST BE GIVEN BEFORE THE PROPOSED ACTION IS TAKEN. YOU HAVE THE RIGHT TO OBJECT TO A PROPOSED ACTION AND TO REQUIRE THAT IT BE TAKEN ONLY UNDER THE SUPERVISION OF THE COURT. IF YOU DO NOT OBJECT BEFORE THE ACTION IS TAKEN, YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU WAIVE THE RIGHT TO RECEIVE NOTICE. THIS MEANS THAT YOU GIVE THE PERSONAL REPRESENTATIVE THE RIGHT TO TAKE ACTIONS CONCERNING THE PROPERTY OF THE ESTATE WITHOUT FIRST GIVING YOU THE NOTICE REQUIRED BY LAW, AND YOU CANNOT OBJECT AFTER THE ACTION IS TAKEN.

IF YOU SIGN THIS FORM, YOU MUST ALSO CHECK ONE OF THE BOXES BELOW TO INDICATE WHETHER YOU WAIVE:

(1) THE RIGHT TO NOTICE OF ANY ACTION THE PERSONAL REPRESENTATIVE MAY DECIDE TO TAKE.

(2) THE RIGHT TO NOTICE OF ONLY ONE OR MORE PARTICULAR KINDS OF ACTIONS.

YOU HAVE THE RIGHT TO REVOKE THIS WAIVER AT ANY TIME BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING OF THE REVOCATION.



IF YOU DO NOT UNDERSTAND THIS FORM, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

1. The personal representative of the estate of the deceased is:

\_\_\_\_\_

2. The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 10400-10603)

3. I hereby waive the right to advice of proposed action with respect to the following (Check one box only to indicate your choice):

(a) Any action the personal representative is authorized to  
 take under the Independent Administration of Estates Act.

(b) Any of the kinds of transactions listed below that the  
 personal representative is authorized to take under the  
Independent Administration of Estates Act.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

Dated: \_\_\_\_\_

(Signature of Person Executing Waiver)

Comment. Section 10603 is new. See the Comment to Section 10554.

## APPENDIX

### DISPOSITION OF REPEALED PROBATE CODE SECTIONS

#### Probate Code § 591 (repealed). Short title

Comment. Former Section 591 is continued without substantive change in Section 10400.

#### Probate Code § 591.1 (repealed). Petition for independent administration authority

Comment. The first sentence of subdivision (a) of former Section 591.1 is continued in Section 10450(a) without substantive change. The second sentence is continued in Section 10402 without substantive change. The third sentence is replaced by Section 10403. See the Comment to Section 10403. The requirement that the clerk set the petition for hearing is continued in Section 7202, which is a general provision.

Subdivision (b) is continued without substantive change in subdivision (b) of Section 10450. Subdivisions (c) and (d) are continued without substantive change in subdivisions (a) and (b), respectively, of Section 10451. Subdivision (e) is continued without substantive change in subdivision (c) of Section 10451. Subdivision (f) is continued without substantive change in subdivision (a) of Section 10452. Subdivision (g) is continued without substantive change in subdivisions (b) and (c) of Section 10452.

#### Probate Code § 591.2 (repealed). Manner of administration; court supervision

Comment. The first two sentences of subdivision (a) of former Section 591.2 are continued without substantive change in paragraph (1) of subdivision (a) of Section 10500 except that the portion of the second sentence defining "court supervision" is continued without substantive change in Section 10401. The portion of subdivision (a) stating the matters that require court supervision is continued in Section 10501 without substantive change. The first sentence of subdivision (b) is continued in subdivision (b) of Section 10500 without substantive change. See the Comment to Section 10500. The second sentence of subdivision (b) is omitted as unnecessary. If the personal representative does not take the proposed action under independent administration authority, the action is taken under the procedures that apply where the personal representative does not have independent administration authority, and any publication requirement of the applicable procedure must be satisfied.

Probate Code § 591.3 (repealed). Advice of proposed action

Comment. Paragraph (1) of subdivision (a) of former Section 591.3 is continued in subdivision (a) of Section 10550 without substantive change. The portion of paragraph (2) of subdivision (a) defining "advice of proposed action" is omitted as unnecessary since the term "advice of proposed action" is uniformly used in the new statutory provisions. The remainder of paragraph (2) of subdivision (a) and the introductory clause of subdivision (a) are continued in Section 10552 without substantive change. Subdivision (b) of former Section 591.3 is continued in Section 10551 without substantive change. Subdivision (c) of former Section 591.3 is continued in Section 10553 without substantive change. Subdivision (d) is continued in Section 10554 without substantive change.

Probate Code § 591.4 (repealed). Notice of proposed action

Comment. The first sentence of former Section 591.4 is restated without substantive change in subdivision (a) of Section 10556. The second sentence is continued without substantive change in subdivision (d) of Section 10556. The third and fifth sentences are replaced by Section 10555. See the Comment to Section 10555. The fourth sentence is restated without substantive change in subdivisions (b) and (c) of Section 10556. Subdivision (b) of former Section 591.4 is continued without substantive change in Section 10561.

Probate Code § 591.5 (repealed). Objection to proposed action

Comment. Subdivision (a)(1) of former Section 591.5 is continued in Section 10558 without substantive change. Subdivision (a)(2) is continued without substantive change in Section 10557, but the former provision is made applicable to any case where advice of proposed action is given, whether or not the proposed action is one for which advice of proposed action is required. Subdivision (b) is continued without substantive change in subdivisions (a) and (d) of Section 10559. Subdivision (c) is continued in Section 10561 without substantive change. The substantive effect of the first sentence of subdivision (d) is continued in subdivision (a) of Section 10560. The remainder of subdivision (d) is replaced by subdivisions (b), (c), and (d) of Section 10560. See the Comment to Section 10560. Subdivision (e) is continued without substantive change in subdivision (c) of Section 10559.

Probate Code § 591.6 (repealed). Independent administration powers<sup>25</sup>

Comment. Former Section 591.6 is continued in substance in Section 10502 with clarifying revisions. See the Comment to Section 10502.

Probate Code § 591.7 (repealed). Revocation of independent administration authority

Comment. Former Section 591.7 is continued in Section 10454 without substantive change. The provision of former Section 591.7 requiring that the clerk set the petition for hearing is continued in Section 7202 which is a general provision.

Probate Code Section 591.8 (repealed). Form of advice of proposed action.

Comment. Subdivision (a) of former Section 591.8 is continued in substance in Section 10601 with some additions and revisions. See the Comment to Section 10601. Subdivision (b) is continued in Section 10602 without substantive change.

Probate Code Section 591.9 (repealed). Sales of property.

Comment. Subdivision (a) of former Section 591.9 is continued without substantive change in Section 10500(a)(2). Subdivision (b) is continued in Section 10453 without substantive change.