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12/17/87

Memorandum 88-2

Subject: Study L - Bill to Effectuate Recommendations to 1988 Legislature (Suggested Changes)

There have been a number of suggestions made for changes in the Commission's recommended probate legislation for the 1988 session. This memorandum analyzes the suggestions received so far.

§ 8200. Delivery of will

Attached as Exhibit 1 is a letter from Michael Harrington on behalf of Wells Fargo Bank urging that the Commission excuse the filing fee where a will is delivered by the custodian of the will to the court clerk on the decedent's death pursuant to statutory mandate. The Commission has considered this matter and determined to recommend no change in existing law, which is silent on this point.

§ 8251. Responsive pleading

The portion of the proposed legislation relating to responsive pleadings in a will contest includes provisions the Commission added to cover the situation where a party fails to respond. If we wish to conform these provisions to decisions made at the December meeting in connection with determination of heirship, we would revise proposed Section 8251(c) as follows.

> (c) If a person fails timely to respond to the summons:
>
> (1) The case is at issue notwithstanding the failure~~,~~ and ~~no entry of default is necessary. The case~~ and may proceed on the petition and other documents filed by the time of the hearing, and no further pleadings by other persons are necessary.
>
> (2) The person may not participate further in the contest, but the person's interest in ~~the proceeding or~~ the estate is not otherwise affected.
>
> (3) The person is bound by the decision in the proceeding.

§ 8402. Qualifications

The proposed legislation includes qualifications for a person acting as personal representative. One statutory disqualification is that the person is incapable of executing, or is otherwise unfit to execute, the duties of the office. The State Bar has raised the issue of whether appointment of a conservator of a person's estate should preclude the person from acting as a personal representative, or perhaps create a presumption that the person is not qualified to serve as a personal representative. The Commission discussed this matter briefly at the November 1987 meeting but deferred action on it because the matter was not disposed of easily.

The staff believes appointment of a conservator should preclude a person from acting as personal representative, without further inquiry; a person who cannot manage his or her own affairs should not be entrusted with the affairs of others. The existing law assumes this when it provides that if a person entitled to act as administrator has a conservator of the estate appointed, the court "may" appoint the conservator or another person to act as administrator, or the conservator's nominee. Probate Code §§ 423 and 426; see proposed Sections 8464 (minors and incompetent persons) and 8465 (nominee of person entitled to appointment). The staff believes it would be useful to state directly that appointment of a conservator of the estate is a disqualification:

> 8402. (a) Notwithstanding any other provision of this chapter, a person is not competent to act as personal representative in any of the following circumstances:
>
> (1) The person is under the age of majority.
>
> (2) The person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute, the duties of the office.
>
> (3) There are grounds for removal of the person from office under Section 8502.
>
> (4) The person is not a resident of the United States.
>
> (5) The person is a surviving partner of the decedent and an interested person objects to the appointment.
>
> (b) Paragraphs (4) and (5) of subdivision (a) do not apply to a person named as executor or successor executor in the decedent's will.

§ 9050. Notice required

Legislation enacted on Commission recommendation that takes effect July 1, 1988, requires the personal representative give actual notice of administration to known creditors. Exhibit 2 is a letter from Jerome Sapiro of San Francisco pointing out that the Missouri Supreme Court has held the Missouri publication and 6-month claim statute constitutional. Mr. Sapiro says, "Perhaps restructuring of our applicable code section may eliminate the need for special notice to known creditors." The staff believes this point has already been put to rest; the Commission's recommendation was based on grounds of public policy and fairness as well as on constitutional infirmity.

§ 16315. Income on specific gift

In connection with revision of the statutes governing interest and income accruing on devises during estate administration, the Commission decided to provide parallel rules governing trust administration. At the December meeting the Commission decided to limit proposed Trust Law Section 16314 to interest on general pecuniary gifts in trust. That leaves specific gifts in trust unaccounted for. If we were to parallel the estate administration rules for specific devises, we would add a provision to the Trust Law along the following lines.

§ 16315. Income on specific gift

16315. (a) If property that is the subject of a specific gift under a trust is not distributed on the date the gift is required to be distributed, the gift carries with it income on the property from the date the gift is required to be distributed, less taxes and other expenses attributable to the property after the date the gift is required to be distributed.

(b) If income on property that is the subject of a specific gift under a trust is not sufficient to pay expenses attributable to the property, including taxes on the property, the deficiency shall be paid out of the trust until the property is distributed to the beneficiary or the beneficiary takes possession of or occupies the property, whichever occurs first. To the extent a deficiency paid out of the trust is attributable to the period that commences one year after the gift is required to be distributed, whether paid before or after expiration of the one year period to which the expense is attributable, the amount paid is a charge against the share of the beneficiary, and the trustee has an equitable lien on the property that is the subject of the specific gift as against the beneficiary in the amount paid.

Comment. Section 16315 is new. It provides rules for a specific gift under a trust comparable to those applicable to a specific devise. See Section 12002 (income on and expenses of specific devise). The trust instrument may vary the rules provided in this section. See Section 16302.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Study L

WELLS FARGO BANK

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November 16, 1987

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

Re: First Supplement to LRC Memorandum 87-74; Opening Estate Administration (Fee for Depositing Wills with Court Clerk)

Dear John:

On behalf of Wells Fargo Bank, I agree with the staff recommendation that a filing fee should not be charged for wills which are "deposited" by the custodian with the County Clerk pursuant to proposed Probate Code Section 8200, formerly Probate Code Section 320. Over the years, Wells Fargo, Crocker National Bank, and Bank of America accepted thousands of wills as custodian. Generally, a fee was not collected if the will was deposited by the testator or the attorney who prepared the documents.

Proposed Section 8200 would require a custodian of an original will in all cases to "deposit" the document with the County Clerk. Wells Fargo do not see any reason why the custodian of the will should be required to pay a fee for complying with a statutory duty. Given the substantial number of wills held by Wells Fargo, the filing fees suggested by the Los Angeles County Clerk would impose a significant financial burden not anticipated by the Bank at the time the wills were received.

Wells Fargo joins in the recommendation of the Law Revision Commission staff that Section 8200 be amended to substitute a requirement that the custodian "deliver" rather than "deposit" the

original will with the County Clerk. In addition, the Comment to that Section should state that no filing fee will be charged when a custodian deposits a will with the County Clerk.

Very truly yours,

Michael J. Harrington

Michael J. Harrington
Senior Counsel

MJH:kr

cc: David Lauer, Wells Fargo Bank
L. Bruce Norman, Security Pacific National Bank
James V. Quillinan, Esq.

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November 27, 1987

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

Re: Notice to Creditors as a Statute of Limitations against Claim of Denial of Due Process

Hon. Commission Members:

Herewith is extract copy of page 47, of the November-December, 1987, issue of Case & Comment, concerning Busch v. Ferrell-Duncan Clinic, Inc. (Mo.) 700 SW2d 86, 56 ALR4th 451.

Therein the Court treated the probate notice to creditors as a statute of limitations barring creditor, as against claim of denial of due process.

It is worthy of consideration.

Perhaps restructuring of our applicable code section may eliminate the need for special notice to known creditors.

Happy holidays.

Sincerely,

Jerome Sapiro

JS:mes
Enc. 1

policy and constitutional constraints support protection to newspapers for a negligent misstatement of fact such as the error made in this case. The court held that a complaint alleging that a newspaper reader or subscriber relied to his detriment in making securities investments based on a negligent and inaccurate report in a newspaper did not state a cause of action in tort against the newspaper's publisher for negligent misrepresentation, since in such a case, the competing public policy and constitutional concerns tilted decidedly in favor of the press when mere negligence was alleged. The court held that the trial court had properly dismissed the complaint for failure to state a claim.

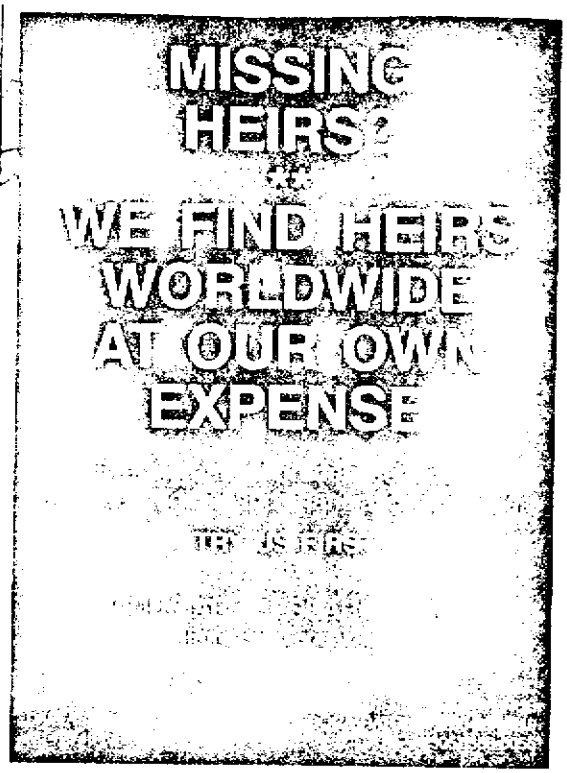
ALR4th covers the point: see 56 ALR4th 1162, discussing newspaper's liability to reader-investor for negligent but nondefamatory misstatement of financial news.

● **Notice by publication: Probate**

Busch v Ferrell-Duncan Clinic, Inc. (Mo) 700 SW2d 86, 56 ALR4th 451.

A creditor which had provided medical services to a decedent before his death filed a claim against the estate more than 6 months after the administration of the decedent's estate was commenced in the Probate Division of the Circuit Court, and after notice of letters of administration and notice to creditors were first published. The Probate Court held that the claim was barred under the nonclaim statute which provided that all claims against the estate of a deceased person that were not filed within 6 months after the first published notice of letters of administration were barred forever.

The Supreme Court affirmed. Rejecting the due process challenge of the creditor, the court held constitutional the nonclaim statute and the statute governing notice, which provided that the clerk of the probate court, as soon as letters testamentary or of administration were issued, should cause to be published in some newspaper a notice of the appointment of the personal representative, in which should be included a notice to creditors of the decedent to file their claims in the court or be forever barred. The court held that when rights or interests of a person are sought to be affected by judicial or



quasi-judicial decree, due process requires that the person be given notice reasonably calculated to inform that person of the pending proceeding and an opportunity to appear and object. However, the court held that the nonclaim statute, and its potential for barring a creditor's claim, did not constitute an ajudicatory proceeding. The creditor's claim in this case was cut off by the operation of the statute of limitations created by the nonclaim statute, the court held, not by an action of a judicial body, and a creditor's right may be cut off by a nonclaim statute without the creditor being notified that the statute is about to run, just as in any other statute of limitations. Publication of letters of administration merely commences the running of the statute of limitations, the court held, and due process does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run.

ALR4th covers the point: see 56 ALR4th 458, discussing validity of nonclaim statute or rule provision for notice by publication to claimants against estate—post-1950 cases.