

Memorandum 88-9

Subject: Study L-2009 - Transitional Provisions for AB 2841
(1988 Probate Legislation)

This memorandum is a revised version of, and supersedes, Memorandum 88-3, which the Commission considered briefly at the January 1988 meeting.

General Approach

The Commission has decided that AB 2841 should have a deferred operative date of July 1, 1989. The Commission also decided that the bill should apply to the maximum extent possible to administration proceedings pending on that date. Exceptions should be made where necessary (e.g., a petition filed before the operative date should be heard and decided under the law applicable at the time of filing). However, an effort should be made to keep transitional provisions simple, so that broad blocks of the statute would be governed by a few basic transitional rules without detailed applicability rules. The operative date and transitional provisions should be codified in appropriate places in the statute.

Consistent with these decisions, the staff recommends the transitional provisions outlined in this memorandum. The recommended provisions consist of general operative date and transitional rules applicable to the bulk of the 1988 legislation, together with specific exceptions to the general rules that would be codified in connection with the specific matters to which they relate.

The general operative date would appear at the end of the bill and would be referred to in Comments to appropriate sections of the Code when the Commission publishes the complete new Probate Code:

Operative date (uncodified)

On page 190, following line 26, insert:
SEC. 120. This act becomes operative on July 1, 1989.

For the general transitional provision, supplemented by specific transitional provisions where appropriate, the staff recommends the following:

Probate Code § 3 (added)

On page 24, between lines 34 and 35, insert:

SEC. 24.5. Section 3 is added to the Probate Code, to read:

3. (a) As used in this section:

(1) "New law" means a change in this code, whether effectuated by amendment, addition, or repeal of any provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date" means the operative date of the new law.

(b) This section governs the application of a new law except to the extent otherwise expressly provided in the new law.

(c) Subject to the limitations provided in this section, a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including but not limited to creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action.

(d) If a petition, account, report, inventory, appraisal, or other document or paper is filed before the operative date, the contents of, notice of, objection or response to, hearing on, order concerning, or other matter relating to the petition, account, report, inventory, appraisal, or other document or paper is governed by the old law and not by the new law.

(e) If an order is made before the operative date, including an order appointing a personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary or officer, or any action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made or alter a course of action commenced before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.

(f) No personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary, officer, or person is liable for any action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and such a person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.

(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal by the new law.

(h) Notwithstanding any other provision of this section or of a new law, if in the opinion of the court application of a particular provision of the new law or of the old law in the manner required would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, the court may modify the application of the provision to the extent reasonably necessary.

Comment. Section 3 provides general transitional rules applicable to changes in the Probate Code. The general rule prescribed in subdivision (c) is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by the exceptions listed in subdivisions (d) (hearings are governed by the law applicable when the hearing was initiated), (e) (orders are governed by the law applicable when the order was made, subject to any applicable modification procedures in the new law), and (f) (acts are governed by the law applicable when the act was done).

Where a new law fails to address a matter that occurred before its operative date, subdivision (g) makes clear that old law continues to govern the matter.

The rules stated in Section 3 are general provisions that apply absent a special rule stated in the new law. Special rules may defer or accelerate application of the new law despite the general rules stated in Section 3. See subdivision (b).

Because it is impractical to attempt to deal with all the possible transitional problems that may arise in the application of the new law to various circumstances, subdivision (h) provides a safety-valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests.

In addition to governing other substantive provisions, Section 3 also governs itself. It therefore becomes operative on July 1, 1989, and applies to provisions enacted and operative before, on, or after that date.

It should be noted that no matter how much detail and guidance we attempt to provide on transitional matters, there will always be uncertainties and ambiguities. For example, as a general rule we apply the new law to all actions that occur after its operative date; but one provision of the new law grants increased compensation to a public

administrator for an action taken "under this article." Does this mean the increased compensation applies only to an action taken after the operative date (under "this article"), or is the increased compensation available for an identical action taken under old law before the operative date where compensation is awarded after the operative date? Because of the sheer size of the statute and the multitude of problems such as this, the best we can do (short of drafting transitional provisions that rival the statute itself in size) is to give general guidance and hope the parties will work out any problems without having to go to court for a resolution.

Opening Estate Administration

The staff suggests no special transitional rules for the opening administration recommendation; the general provisions of proposed Section 3 relating to petitions filed before the operative date and to notices, orders, appointments, and other proceedings should be sufficient.

Inventory and Appraisal

Some of the most complex transitional problems occur in the area of inventory and appraisal and appointment of probate referees. The staff suggests a number of special provisions to deal with this area.

Because some of the procedures, terms, and other matters relating to the State Controller's selection of probate referees have been changed, it is important to make clear that the change does not affect any selection of a referee made under prior law. The staff would add to the draft a new Section 407:

§ 407. Appointment of probate referee before operative date

On page 32, between lines 12 and 13, insert:

407. No appointment of a probate referee by the State Controller before July 1, 1989, is invalidated by any change in law made by enactment of this chapter. Appointment of a probate referee before July 1, 1989, may be revoked under this chapter only if revocation would otherwise be proper under this chapter.

Comment. Section 407 is new. It is a transitional provision intended to save an appointment made under the old law that could not necessarily be made under the new law. Revocation of an appointment under the new law is authorized only if there are independent grounds for revocation, under the revocation provisions of the new law.

The new law also changes somewhat the standards governing political activities by probate referees, and imposes an annual reporting requirement on probate referees. Special transitional provisions are necessary here, not only for practical reasons but also to avoid possible ex post facto problems. We would revise Section 406 to add a transitional provision as indicated in Memorandum 88-8 (AB 2841--1988 Probate Legislation).

If a probate referee is appointed to appraise an estate but the operative date of the new law occurs during the appraisal process, it makes sense to allow the referee to complete the appraisal under old law, without trying to reallocate appraisal tasks between the referee and the personal representative or an independent expert under the new law. This is true both for practical reasons and because the probate referee appraisal is a short-term operation. The staff would add a provision along the following lines:

§ 8805. Transitional provision

On page 112, between lines 24 and 25, insert:

8805. If a probate referee is designated by the court before July 1, 1989, to make an appraisal of property in an estate, all matters relating to the appraisal by the referee, including the property to be included in the appraisal, waiver of the appraisal, and compensation of the referee, are governed by the applicable law in effect before July 1, 1989, and are not governed by Chapter 3 (commencing with Section 8900).

Comment. Section 8805 is an exception to the general rule that all provisions of this part apply immediately on its operative date to pending proceedings. See Section 3.

Accounts

The provisions governing accounts impose a new balance-sheet type account requirement. This may present problems for a personal representative who does not have the accounts readily available in this form. During the first year of operation of the new law the staff would extend the time for an account in order to enable personal representatives to reorganize their books.

§ 10955. Transitional provision

On page 135, following line 37, insert:

10955. Notwithstanding any other provision of this chapter, a personal representative required by this chapter or by court order to file an account before July 1, 1990, has

an additional 90 days after the time required within which to file the account, unless the court for good cause orders otherwise.

Comment. Section 10955 recognizes that additional time may be required to prepare an account in the new form prescribed in this part.

Abatement

The Commission has previously adopted a special transitional provision applicable to abatement provisions--the new rules govern only gifts made on or after July 1, 1989. See Section 21406 on page 181, line 36, of the bill. Since abatement is precipitated by the character of a testator's gift, it is appropriate to defer application of the new law where the gift was made before the new law took effect.

Interest and Income Accruing During Administration

The Commission has previously adopted a special transitional provision applicable to interest and income accruing during administration. The changes in these provisions affect the substantive rights of the beneficiaries, and are subject to the control of the testator, settlor, or other donor. The transitional provision states that the new rules do not apply where the donor died before July 1, 1989, since the donor in that case would not have had an opportunity to revise the terms of the gift. See Section 12007 on page 152, line 32, of the bill.

The recommendation on interest and income also provides rules governing trust distributions. In some cases this could present the issue of whether the new law affects rights of parties where, before the operative date, a distribution was not made but the new law would now seem to require it. The staff would add a transitional provision along the following lines:

Probate Code § 16315 (added). Transitional provision

On page 179, between lines 32 and 33, insert:

SEC. 107.3. Section 16315 is added to the Probate Code, to read:

16315. The changes made in this chapter by the act that enacted this section apply to a trust created before July 1, 1989, but the changes apply to the trust as if created on that date and do not affect any aspect of the trust administration that occurred, or rights of beneficiaries that existed, before that date.

Rules of Procedure

There do not appear to be any major transitional problems arising out of the rules of procedure recommendation. However, the Commission may wish to consider whether the new technical rules regarding signing and verification by attorneys should apply to papers filed after the operative date even though the petition was filed before the operative date, and whether the new rules governing the determination of oral objections or continuance of hearings should be applied to a proceeding where the petition was filed before the operative date. We have not drafted such a transitional provision, since the concept of simplicity dictates that all proceedings on a petition filed before the operative should be governed by the one body of law applicable at the time the petition was filed.

A special transitional rule is provided in Section 7242 on page 68, line 2, of the bill, concerning appeals from orders under Sections 1190-1192 (determination of heirship or persons to whom distribution should be made) and orders fixing inheritance tax.

Litigation Involving Decedents

The Commission has previously adopted the rule that the new provisions governing litigation involving a decedent apply to actions against decedents who die after the operative date. See Section 555 on page 34, line 39, of the bill. For consistency, this rule should also be applied to claims in litigation:

§ 9357. Application of chapter

On page 129, between lines 11 and 12, insert:

9357. (a) This chapter applies only to an action against a person who dies on or after July 1, 1989.

(b) The applicable law in effect before July 1, 1989, continues to apply to an action against a decedent who died before July 1, 1989, notwithstanding its repeal by the act that enacted this chapter.

Is this rule too limiting? We could apply the new rules to actions commenced after the operative date, rather than turning the new law on the date of the decedent's death. If application of the new statute is based on the date of commencing an action, the parties in some cases would conceivably find an advantage in delaying commencement of an action. Similarly, a party who is unaware of the new law, might

be at a disadvantage by commencing the action before the operative date instead of waiting. In this type of situation in the past, it has been suggested that there may be some malpractice exposure. It is difficult to specify the exact nature of an advantage or disadvantage that might arise from inopportune commencement of an action under the new law. The new law will eliminate a host of complications, inconsistencies, and overlapping provisions, largely of a procedural nature. However, the new law relating to insured claims probably applies to some cases where existing law may not. The new law applies to all insured claims, whereas existing law is not so broad. Thus, a substantive right to proceed under the statute may depend upon the nature of the transitional provision. The date of death is, for all practical purposes, unpredictable. Applying the new law only to cases where the decedent dies after the operative date thus avoids the temptation to connive or the penalty from suffering a connivance.

In short, the approach previously adopted (applying these provisions only where the decedent in question has died after the operative date) avoids the risk of benefiting one party or the other and avoids the race to the courthouse (or its converse). The staff is not suggesting that we apply the new rules to all actions filed after the operative date, but only that the Commission should consider this alternative.

Public Guardians and Public Administrators

The changes in the public guardian and public administrator statutes can generally be handled by the broad general operative date and transitional provisions of Section 3 without the need for special rules. However, one area that presents difficulties is where the public guardian takes immediate possession of property for protective purposes, without being appointed guardian of the estate. Our general transitional provisions are really designed with estate administration in mind and do not adequately deal with issues such as changes in the public guardian's jurisdiction, authority, and compensation and the impact of these changes on existing proceedings. This is a complex matter, and the staff would resolve it simply by providing that the new rules on seizing property apply only to activities that occur after the operative date.

§ 2903. Transitional provision

On page 53, between lines 17 and 18, insert:

2903. This chapter applies only to possession or control of property by a public guardian on or after July 1, 1989. Possession or control of property by a public guardian before July 1, 1989, is governed by the applicable law in effect before July 1, 1989.

Comment. Section 2903 is a specific application of portions of the general operative date and transitional provision.

Nondomiciliary Decedents

The nondomiciliary decedent recommendation should apply to all petitions filed or actions taken after the operative date, but should not displace proceedings commenced under the former law. Hence, the sister state personal representative should be able to take advantage of the affidavit procedure for collection of personal property, but should not be required to abandon proceedings under Sections 1043-1043a where the personal representative has published notice before the operative date of the new law. The staff thus recommends that a transitional provision be applied to Sections 1043-1043a as follows:

§ 12574. Transitional provision

On page 162, between lines 14 and 15, insert:

12574. If the first notice has been published pursuant to former Section 1043 before the July 1, 1989, the procedure provided by former Sections 1043 and 1043a may be pursued to its conclusion notwithstanding the repeal of Sections 1043 and 1043a by the act that enacted this section.

The new procedural standards applicable to recognition of a sister state or foreign nation adjudication (see Sections 12522-12523) differ from those provided in Section 362. We do not believe that there is any vested interest that would be affected by the change. The new law should apply to any petition for ancillary administration filed after the operative date.

The new law also imposes some conditions on distribution to a sister state personal representative. See Sections 12540 (conditions for distribution), 12541 (distribution of real property proceeds), 12542 (distribution where estate in sister state is insolvent). Again, we can identify no vested interest on the part of a sister state personal representative in the old law. In other words, neither the

date of death of the decedent nor the date of commencement of ancillary proceedings in this state should immunize the sister state personal representative from these rules. These are rules that fall into the public policy category and should be applied to all pending proceedings unless the court determines that it would be unfair to do so under the circumstances.

Section 118 of the Bill

Section 118 on page 190, line 8, of the bill continues Section 1055 of existing law as an uncodified provision. However, the Commission's basic policy is to retain transitional rules such as this as codified provisions. The staff has implemented this policy in Section 6179 on page 59, line 34, of the bill. Therefore, we will delete Section 118, which is superfluous, in the next set of amendments.

Respectfully submitted,

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