

First Supplement to Memorandum 88-23

Subject: Study L-950 - Effect of Homicide

Attached to the basic memorandum (88-23) is a letter from attorney Daniel Crabtree expressing his concern that the words "final judgment of conviction" used in Probate Code Section 254 are not defined. That section gives conclusive effect to a criminal conviction in a later civil proceeding to disqualify a killer from taking property from the victim. Mr. Crabtree's questions were: (1) If the killer is convicted but appeals, may the conviction be used with conclusive effect while the appeal is pending? (2) If the conviction may not be used during the appeal, is the civil court precluded from deciding the civil issue until the appeal is decided?

In the basic memo, the staff acknowledged some ambiguity in Section 254, but pointed out that it uses uniform language, enacted in many states and construed in many cases. In addressing Mr. Crabtree's second question, the staff concluded that a criminal appeal does not deprive the civil court of jurisdiction to decide the civil issue.

Mr. Crabtree has read the staff memo and has written us again. A copy of his letter is attached to this Supplement as Exhibit 1. It is his view that the meaning of "final judgment of conviction" as used in Probate Code Section 254 is governed by Penal Code Section 1237. Penal Code Section 1237 provides that an appeal may be taken from a "final judgment of conviction." The section goes on to say that a criminal sentence "shall be deemed to be a final judgment *within the meaning of this section*" (emphasis added). In the staff's view, the definition of "final judgment" in Penal Code Section 1237 does not control the meaning of the term in Probate Code Section 254. To pick up that definition by a cross-reference in Probate Code Section 254 as Mr. Crabtree suggests might well be a substantive change in the Probate Code section.

There are two policy questions:

(1) Should it be permissible to use a criminal conviction with conclusive effect in the civil proceeding while the conviction is on

appeal? The staff thinks a conviction should have no force for this purpose during an appeal. If the conviction is reversed, it should not affect the civil proceeding. To allow use of a conviction that may later be reversed causes more administrative headaches than it solves by simplifying proof. This suggests that "final judgment" in Probate Code Section 254 should mean after completion of the appeal, not when sentence is imposed as under Penal Code Section 1237.

(2) Should we depart from uniform language by defining "final judgment" in the Probate Code to mean when the criminal appeal is completed? The staff recommends against doing so. We should use uniform language where, as here, substantive property rights are involved. Also, there is not agreement as to how the term should be defined, since the staff would define it the opposite of the way Mr. Crabtree suggests.

Respectfully submitted,

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EX LAW REV. COMMISSION

MAY 31 1988

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

Re: Probate Code 250 et. seq. - Effect of Homicide

TMemo 88-23

Dear John:

Since the time of my August 4, 1987 letter I have litigated the issue of a final judgment of conviction for felonious and intentional killing under Probate Code 254. Unfortunately, at no place in the Probate Code is the words, "final judgment of conviction" defined. Apparently the issue does not come up very frequently and not doing criminal work myself I was at a loss for the definition of final judgment of conviction. However, upon reviewing the Penal Code, I came across Penal Code 1237 which states that upon sentencing a conviction shall be deemed a final judgment of conviction. This is to say despite any appeals being taken from the conviction and sentencing, it is still considered a final judgment of conviction. Therefore, many problems under Probate Code 254 would be more easily answered if there was some reference in Probate Code 254 to Penal Code 1237. We could obviously save some practitioner in the future from doing the same research through the Penal Code that I did.

With Penal Code 1237 in mind, it would appear that the loophole I referred to in my August 4, 1987 letter has been plugged. It would still appear, however, as the staff has concluded, that Probate Code Section 254(b) should included the words "final judgment of conviction" in place of the words conviction of a felonious and intentional killing in order to have some continuity between section (a) and (b) of Probate Code 254.

Thank you for your consideration in this area.

Very truly yours,

Daniel B. Crabtree

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DBC/tlm