

Memorandum 88-42

Subject: Study L-2009 - AB 2841 (Probate Referees and other problems)

This memorandum presents suggestions for changes in AB 2841 raised by interested persons and groups concerning the portions of the bill that do not deal with probate referees. If, as a result of any agreements reached with the probate referees, the Commission reconsiders its decision to let AB 2841 die this session we will also need to incorporate the changes in other portions of the bill that appear appropriate. If the Commission does not reconsider its decision, we still need to review the suggested changes so that the bill will be in good shape for introduction on the first day of next session.

The staff recommends the following amendments to the portions of AB 2841 that do not relate to probate referees. The relevant letters proposing these amendments are attached to this memorandum as Exhibits. For material relating to probate referees, see the First Supplement to Memorandum 88-42.

The staff does not in this memorandum raise any points other than points the staff thinks are, or may be, good ones. The Commission should therefore review the attached letters to see whether there are any other amendments it wishes to add. The Commission should also review the latest amended version of the bill, April 19, 1988, to be sure that all amendments already made appear satisfactory.

We hope to approve the proposed amendments at the meeting without further discussion unless a Commission member or other interested person raises an issue.

§ 3. Transitional provision

On page 25, line 3, our general Probate Code transitional provision gives the court broad authority to vary the operative dates of old and new law in case of substantial interference with the rights of persons or the effective conduct of the proceedings. The Legislative Counsel informs us that the effect of the enactment might

be limited or nullified as constituting an undue delegation of legislative authority to the courts. (Sec. 3, Art. 3, and Sec. 1, Art. IV, Cal. Const.)

In response, we would tighten up the language somewhat, thus:

~~(h) Notwithstanding any other provision of this section or of the new law, if in the opinion of the court~~ If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may modify the application of the provision notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

§ 1215. Manner of mailing

The staff plans to make the following amendment to the general notice provisions on page 12, line 32:

1215. Unless otherwise expressly provided:

(a) If a notice or other paper is required or permitted to be mailed to a person, notice shall be mailed as provided in this section or personally delivered as provided in Section 1216.

(b) The notice or other paper shall be sent by:

(1) First-class mail if the person's address is within the United States. First-class mail includes certified, registered, and express mail.

(2) Airmail if the person's address is not within the United States.

(c) The notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed.

(d) The notice or other paper shall be addressed to the person at the person's place of business or place of residence, if known, or, if neither address is known, to the person at the county seat where the proceedings are pending.

~~(d)~~ (e) When the notice or other paper is deposited in the mail, mailing is complete and the period of notice is not extended.

We have used the phrase "the person's place of business" instead of "his or her office", as suggested by State Bar Study Team 1. See Exhibit 3. A parallel change should be made in Section 1220(d), from which Section 1215(d) is drawn.

§ 7060. Disqualification of judge

A new subdivision should be added to the judge disqualification statute on page 69, line 35, to preserve a transitional provision in existing law that would otherwise be lost.

(c) The amendments made to former Section 303 by Assembly Bill 708 of the 1987-88 Regular Session do not apply in any proceeding commenced before July 1, 1988.

§ 7660. Summary disposition authorized

On page 80, lines 10 and 11, Charles Schulz, a member of State Bar Team 3 (Exhibit 5), points out an ambiguity that should be clarified.

(b) Summary disposition may be made ~~whether or not there is a will of the decedent in existence,~~ notwithstanding the existence of the decedent's will if the will does not name an executor, or if the named executor refuses to act.

§ 7664. Liability for decedent's unsecured debts

Charles Schulz (Exhibit 5) questions the policy of this section, which appears on page 81 at line 14 of the bill. The section allows a creditor to recover the decedent's debts from beneficiaries who receive property under public administrator summary disposition authority. The reason the Commission added beneficiary liability is that creditors receive no notice under summary disposition--it is analogous to the affidavit procedure and thus the liability of beneficiaries is made analogous to liability under the affidavit procedure.

On the other hand, it can be argued that there are significant differences here from the affidavit procedure. The affidavit procedure can be exercised immediately, whereas the Commission's draft requires the public administrator to wait four months and pay claims that come to the public administrator's attention before paying out funds to beneficiaries. The affidavit procedure is exercised by the

beneficiaries themselves, whereas the summary disposition procedure by the public administrator involves a public official in control of the estate.

An alternative approach raised by State Bar Study Team 1 (Exhibit 3) is to require notice to be given to creditors. The staff does not believe this is a viable alternative--it would convert a summary procedure into a full probate proceeding, thereby destroying its usefulness.

§ 8002. Contents of petition

Charles Schulz (Exhibit 5) points out that it may be useful to file a typewritten copy of a handwritten will whether or not the handwritten will is holographic. We would expand the relevant provision on page 83, line 8, thus:

The petitioner shall attach to the petition a photographic copy of the will. In the case of a holographic will or other will of which material provisions are in the handwriting of the testator, the petitioner shall also attach a typed copy of the will.

§ 8113. Notice involving foreign person

We would revise this section, which appears on page 87, line 16, in accordance with a suggestion of Anne Hilker (Exhibit 6).

8113. If a citizen of a foreign country dies without leaving a will or leaves a will without naming an executor, or if it appears that property will pass to a citizen of a foreign country, notice shall be given to the recognized diplomatic or consular official of the foreign country in the United States, if any.

The staff believes this addition is appropriate, but that Ms. Hilker's suggestion that the word "recognized" be deleted is not. The State Department felt that recognition was important to avoid having to deal with unrecognized diplomatic entities such as the PLO office in New York.

§ 8121. Publication of notice

The law requires that notice of opening probate "shall be published for at least 15 days," with a minimum of three publications and at least 5 days intervening between the first and last publication dates. At the March meeting the Commission asked the staff to check with the newspaper publishers to see whether the phrase "published for at least 15 days" might not be clarified.

The staff has consulted with the California Newspaper Service Bureau (Michael D. Smith, General Manager) on this matter. The newspaper publishers believe the law requires the first publication to occur at least 15 days before the hearing.

The staff would clarify the statute to conform to existing practice, as suggested by the Beverly Hills Bar Association. CNSB has no problem with this. The staff would amend Section 8121(a) on page 87, line 34, to read:

~~Notice shall be published for at least 15 days. The~~
first publication date of the notice shall be at least 15
days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.

§ 8252. Trial

Charles Schulz suggests the following clarification in Section 8252 on page 92, line 28, which the staff would make.

If the will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate.

§ 8466. Priority of creditor

Anne Hilker (Exhibit 4) points out an ambiguity in the provisions on page 102, line 34, relating to priority of a creditor for appointment as administrator. The statute should make clear that a person who has a higher priority (i.e., a relative of the decedent) does not lose the high priority if that person also happens to be a creditor.

8466. If a person whose only priority is that of a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person.

§ 8482. Amount of bond

Charles Schulz points out that the provision on page 104, line 3, that refers to the amount of a personal representative's bond under independent administration is inconsistent with the independent administration statute. He is correct, and the general bond statute should be conformed to the independent administration statute.

(3) If independent administration is granted as to real property, the estimated ~~value of the decedent's interest in the real property~~ net proceeds of the real property authorized to be sold under Part 6 (commencing with Section 10400).

§ 9053. Immunity of personal representative or attorney

The Commission has decided as a temporary measure, in order to alert practitioners to the requirements of the United States Supreme Court in the Tulsa case, to add language to the Section 9053(c) of the notice statute. This would appear at page 129, between lines 12 and 13.

(c) Nothing in this chapter imposes a duty on the personal representative or attorney for the personal representative to make a search for creditors of the decedent that are not reasonably ascertainable.

Comment. Subdivision (c) of Section 9053 is revised consistent with the holding of the United States Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope (No. 86-1961, April 19, 1988), that termination of a claim in probate without actual notice to a known or reasonably ascertainable creditor violates due process of law.

§ 9399. Transitional provision for claims in litigation

The Commission has adopted the rule on page 133, line 35, that a claim on an action pending against the decedent or commenced against a decedent's estate before July 1, 1989, is governed by the applicable law before July 1, 1989, and a claim on an action commenced after that date is governed by new law. Mr. Elmore believes that as drafted the statute is ambiguous, since the reference to "action" could be construed to refer to the probate proceeding rather than the action on the claim. This could be clarified in a Comment, thus:

Comment. Section 9399 is an exception to the general rule of Section 3 that the new law applies on its operative date to pending probate proceedings. Where there has been litigation commenced before the operative date either against the decedent or against the personal representative, any claim requirements applicable to the litigation are governed by the relevant law in effect before the operative date and not by the new law.

§ 10953. Account where personal representative dies, absconds, or becomes incapacitated

The Beverly Hills Bar Association (Exhibit 7) points out that this section on page 138, line 23, inadvertently omits the following language which was added to the law in 1987:

Extraordinary services for which a fee shall be allowed to the attorney under this subdivision include those services rendered by any paralegal performing the services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

The staff would add this provision to the statute, but will review the provision in connection with the probate attorney's fee study generally.

§ 12201. Report of status of administration

If an estate is not promptly wound up, the personal representative must file a report of the status of administration. The Beverly Hills Bar Association (Exhibit 8) points out that in this situation the personal representative may also have committed financial improprieties that should be stopped and corrected before further time elapses. They suggest that it is appropriate in the status report to inform interested persons of the right to petition for an account, and that it is proper for the court to require an account in an appropriate case in connection with its hearing on the report. They would revise Section 12201 on page 138, line 158, to read substantially as follows:

12201. If a report of status of administration is made under Section 12200:

(a) The report shall show the condition of the estate, the reasons why the estate cannot be distributed and closed, and an estimate of the time needed to close administration of the estate.

(b) The report shall be filed with the court. Notice of hearing of the report shall be given as provided in Section 1220 to persons then interested in the estate, and shall

include a highlighted statement in substantially the following words: "YOU HAVE THE RIGHT TO PETITION FOR AN ACCOUNT UNDER SECTION 10950 OF THE CALIFORNIA PROBATE CODE."

(c) On the hearing of the report, the court may order either of the following:

(1) That the administration of the estate continue for the time and on the terms and conditions that appear reasonable, including an account under Section 10950, if the court determines that continuation of administration is in the best interests of the estate or of interested persons.

(2) That the personal representative must petition for final distribution.

The Comment should point out that the court may not order an account if the waiver or satisfaction provisions of Section 10954 (when account is not required) are satisfied. The Comment also should point out that verification is required under general statutory provisions; this is a point that has troubled Lynn P. Hart (Exhibit 2).

§ 12202. Failure to make petition or report

For clarity, on page 159, line 5, the introductory clause of Section 12202(a) should be revised to read, "If the personal representative does not petition for final distribution or make a report within the time required by this chapter or prescribed by the court." This is a point made by Lynn P. Hart (Exhibit 2).

§ 12205. Sanction for failure to timely close estate

Lynn P. Hart (Exhibit 2) requests more precision in this section, which we would achieve on page 160, line 7, by providing that the court may reduce the commissions of the personal representative or fees of the attorney "if the court determines that the time taken was within the control of the personal representative or attorney whose commissions or fees are being reduced and was not in the best interest of the estate or interested persons."

§ 12206. Testamentary limitation of time for administration

The staff would make a slight revision in Section 12206 on page 160, line 12, to change an awkward reference, as suggested by Lynn P. Hart (Exhibit 2).

12206. A limitation in a will of the time for administration of an estate is directory only and does not limit the power of the personal representative or the court to continue administration of the estate beyond the time ~~limited~~ limitation in the will if the continuation is necessary.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

COPY CALIFORNIA LAW REVISION COMMISSION
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Current: P. O. Box 643
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April 25, 1988-

Hon. Elihu Harris
Author and Chair
Room 6000
State Capitol
Sacramento, CA.
94814

Re: Opposition to parts of A. B. 2841- Creditor Claims

Dear Mr. Harris:

The enclosed proposed amendments (draft form) with backup memorandum are being sent to the California Law Revision Commission, attention of Mr. Demouilly and Mr. Sterling.

With the exception of my proposed Section 9356 (Amendment 8), I believe this material is directly relevant to the form of your bill

Proposed Section 9356 seems material for a future study. However, the remainder is seriously urged, as a thoughtful approach.

Respectfully,

Garrett H. Elmore
Garrett H. Elmore

CC: California Law Revision Commission

Contact: Garrett Elmore, Esq. Tel. 415-3047
P. O. Box 643
Burlingame, CA. 94011

RE: A. B. 2841 (Harris) Creditor Claims Am. Bill 3-15-88

Suggested amendments (draft form)

Amendment 1

In Probate Code Section 554, subdivision (a), after "estate," insert "Coverage" includes sums recoverable from the insurer for failure of the insurer to perform its obligations.

Amendment 2

In Probate Code Section 8964, after "referees." insert:
Sec. 83. Section 9000.5 is added to the Probate Code, to read:

9000.5 (a) The provisions of this chapter are directory as to each of the following:

(1) A claim for contribution, indemnity or reimbursement by a person who is or may be claimed to be secondarily liable, such as a surety or guarantor or employer or principal, or who is or may be claimed to be a joint tortfeasor or a joint obligor, under contract or statute, when, at the time of decedent's death, the claim is contingent and unliquidated and has not been reduced to the form of a specific money demand that is presently due.

(2) Subject to express or implied statutory requirements to the contrary, a cause of action or claim for relief that first comes into existence because of acts, events or transactions that occur after decedent's death.

(b) This part does not limit the jurisdiction of the court having jurisdiction of the estate to apply equitable principles to avoid manifest injustice and extreme hardship, whether or not the granting of relief is specifically provided for by this part.

Amendment 3

In Probate Code Section 9001, strike out "Sec.83" and insert:

Sec. 83.5

Amendment 4

In Probate Code Section 9002, strike out "Sec. 83.5" and insert:
Sec. 85.55.

Amendment 5

In Probate Code Section 9103, strike out sub paragraph (1) and sub paragraph (2) of subdivision (a) and insert:

(1) Neither the creditor nor the attorney representing the creditor in the probate matter had actual knowledge of the administration of the estate within 15 days of the expiration of the time provided in Section 9100.

(2) The claim relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business or profession in this state under circumstances that compel an inference of actual knowledge of administration of the estate within the time specified in sub paragraph (1).

(3) The petition is filed within 30 days after the creditor has actual knowledge or, if actual knowledge is imputed under sub paragraph (2), within 30 days after the date knowledge is imputed, or within such additional time, not exceeding 30 days, as the general personal representative or the court, upon petition, with or without notice, may allow.

Amendment 6

In Probate Code Section 9103, subdivision (d) after "payment" insert:

(e) This section is cumulative to other remedies.

*Insert: of the administration of the estate.

Amendment 7

In Probate Code Section 9355, strike out subdivision (c) and insert:

(c) If an insurer defending an action under Section 550 pays out money for the benefit of the decedent or the estate of the decedent after the death of the decedent and claims the right of reimbursement under the insurance contract, the matter is one for disposition as an estate administration matter and no claim is required. As to sums paid out or expenses incurred prior to the decedent's death, the need for and form of claim depends upon the circumstances. Except as required by law, amounts claimed by the insurer as reimburseable by the insured shall not reduce the amount of insurance coverage.

Amendment 8

In Probate Code Section 9356, after "estate" insert:

9357. A claim is permitted but not required in any of the following circumstances:

(a) When the cause of action or claim for relief is used solely by way of set off as provided in Section 431.70 of the Code of Civil Procedure or similar law.

(b) When the cause of action or claim for relief is asserted by answer or cross complaint in an action brought by the decedent or the estate and relates to the same transaction, occurrence or series of occurrences as the cause of action which is alleged in the complaint.

(c) When the cause of action or claim for relief is one for contribution, indemnity or reimbursement with respect to the underlying liability issues in an action or proceeding pending

at decedent's death and a claim on the liability issues in the action or proceeding is timely filed by the plaintiff or another party.

(d) When the cause of action or claim for relief is one for contribution, indemnity or reimbursement with respect to a contract or statutory obligations on which the creditor and decedent are co-obligors or on which the liability of the creditor is secondary, as between the creditor and the decedent, and a claim on the obligation is timely filed by the obligee or other person holding the obligation.

Amendment 9

In Probate Code Section 9357, in the April text, after "filed." insert:

9358. Except as otherwise required by statute, a claim is not required for alleged damages for injuries to, or death of a person, for which no action is pending at decedent's death, when, during the entire claim period, the creditor did not, and in the exercise of reasonable diligence diligence could not, know of the injury or death, and the cause of action or claim for relief was not an accrued, cause of action or accrued claim for relief. Within 30 days after discovery of the cause of action or claim for relief the creditor shall give written notice to the general personal representative or, if none, such persons as the court may designate, of claim. The notice shall be entitled Special Notice of Claim and shall state the claim in reasonable detail. The matter shall thereafter be handled as a matter arising after the death of the decedent, as to which the claims procedure does not apply.

Any action or proceeding under this section must be commenced within 180 days after the decedent's death.

ADDENDUM

Probate Code Section 9370 (as per April Bill text) ~~strike out~~
Section 9370 and insert:

9370. (a) An action or proceeding pending against the decedent at the time of death may be continued against the decedent's personal representative, if it survive, upon condition that

(1) A claim shall be filed as in other cases.

(2) Within three months after notice of rejection of claim or notice of formal suggestion of fact of death in the action or proceeding, whichever is earlier, the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative as a party.

(b) No recovery shall be allowed against decedent's estate unless proof is made of the filing of the claim.

(c) The personal representative may apply to the court having jurisdiction of the action or proceeding for an order of temporary abatement upon the ground that (1) no claim has been filed, or (2) a claim has been filed but has not been rejected, or (3) application has not been made for substitution, or 4) any other ground warranting temporary abatement.

(d) The requirements of this section are waived by failure to plead non compliance as an affirmative defense of temporary abatement in the trial court.

Alternative
9370

In subdivision (a), strike out "first" in sub paragraph (1)

Strike out sub paragraph (2)

Strike out "all" and insert "both" in subdivision (a)

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April 24, 1988

Re: A. B. 2841 (Harris)- Creditor Claim Part

Remaining Criticisms And Explanation of Suggested Amendments *

The writer's views, as an individual attorney trying to act pro bono, were expressed in a diffuse statement, copy to the LRC.

At the March 2 Assembly Judiciary hearing, the writer spoke very briefly in opposition, particularly expressing concern about loss of contribution and indemnity rights under the new Claims statutes.

The LRC response to the writer's diffuse statement was disappointing.

However, clarifications in drafting are understood to have been made. What is left, as to the writer's objections to improve the bill and basic procedures, appears in this Memorandum and attached draft amendments.

Whether groups that seem to have a direct interest such as trial lawyers, lenders and collection agencies, would agree or disagree is unknown.

POINTS AND SUGGESTED IMPROVEMENTS

Affirmative

This part of A. B. 2841 in its expected April form represents a very desirable change, on the whole. The LRC form removes overlapping provisions, organizes the new material well, and brings clarity of statement.

Negative

Present Probate Code Section 720, relating to damages for injuries to person or wrongful death, should not be repealed as proposed, without being retained in a less broad form.

The procedure being proposed (April text) as to pending actions (see new Sec. 9370) has provisions that unfairly burden plaintiffs in pending civil actions such for example as provisions that "stay" the civil action (which may be on the eve of trial) until the plaintiff "first" files a claim, the personal representative goes through the claim and approves or rejects, and a limited time substitution is made.

*
References are to code sections per March 15 bill text. The April amended form is not available to the writer yet.

Section 9000 enacted in 1987 as part of LRC work is a new broad "claims" definition. It is integral to understanding how the new claim procedure will work.

Unless it is clarified and unless the court's power to treat some claims as arising after death (not subject to claim) is retained, the whole subject will remain a courtroom battle ground, in my opinion, for years to come. Litigation is expensive as well as a consumer of judicial resources. A few code sections can avoid much of it, in the writer's opinion.

The specific area of ambiguity is what is a "contingent" claim, that will be "barred," unless timely filed. As illustrated by the well known Learjet case in Florida, contribution and indemnity claims can be barred even though there seemed no occasion for their filing and even though the claimant may not have known his product was involved in an accident. -----

The amendments here offered are intended to provide a proper balance between creditor and heir interests. There seems some judicial support for the writer's concern over "irongate laws." After numerous appellate decisions applying the "irongate" Florida version of the Uniform Probate Code, with reluctance, the Florida Supreme Court now seems to have made a sharp turn, by construing the 1974 Florida statute as being no more than "rules of practice" and providing a "statute of limitations" rather than a "bar."

A. B. 2841 now seems to present an opportunity to simplify the paperwork by cutting down on certain types of "contingent" claims. See draft amendments attached. The Paperwork Reduction Act principles are notably in point. Claim filing can be reduced in certain areas without putting any substantial additional burden on the personal representative, in acquiring knowledge of the potentials.

Amendment Proposed

Sec. 554 (am.)

Brief Explanation

Makes clear the creditor is entitled to any damages recoverable even though policy limit is exceeded.

Sec. 9000.5 (proposed)
Sec. 9357 "

Makes filing "directory" as to general contingent claims for contribution (etc.)

Another section would skip claim of this type if claim is filed as to main pending action. If P. R. knows of main action, the potential of related claims should be assumed. A similar skip is provided where parties are co obligors (etc.) of the main obligation for which a claim was filed. The Borba Farms case (Jan. 1988) involves these facts.

Proposed Section 9000.5 includes a provision permitting the court to apply equitable principles, even if the relief is not specifically provided for. The court in probate is now a court of general jurisdiction (Prob. C. 7050) Flexibility is permitted by recognizing inherent power. It probably would not be us-

Sec. 9103. Am.

- 1) Insert "probate" before matter there may be different attorneys
- 2) ~~the~~ exclusion of a "trade (etc in this state fair, wording added. The exclusion rests upon questionable assumptions, and (2) should be completely removed, as arbitrary and discriminatory, in the writer's opinion.
- 3) wording added that allows 30 day extension. Assembling information, temporary absences, etc., make extension power needed.
- 4) Wording added to make clear Sec. 9103 is not intended to be the sole source of relief power.

Sec. 9355. Am.

This is an attempt to state a rule. The preferred wording, in the writer's opinion, would preclude a set off these monies against the creditor (deductible is another matter), and let the insurer go without statutory guidance in other respects. Its contract provisions are not generally available and may vary. The insurer has dual interests, including contribution claims, and "defending" its "duty

Sec. 9357 (proposed)

See also supra

It may be frankly conceded that this section will be seen as "too radical" and needs study. However, it is basically simple to understand. It represents a modest attempt to break the stranglehold that following ancient statements blindly could produce. Not only is paperwork reduced but the filing of a claim in (1) and (2) puts the creditor in what may be called the "endangered litigant" class without any real reason.

Sec. 9358 (Proposed)

This section is a new version of present Prob. C. Sec. 720. In the famous Hurliman case, involving an injury not discovered until after the claims period, an appellate court held the claim "bar" in its then form constitutional, without much discussion. Some comment has been made that Sec. 720 was enacted to change the Hurliman rule. As in the case of Learjet (Florida) cited above, it does not appeal to one's sense of fairness to bar a claim that could not reasonably be known and that had not "accrued" at decedent's death. The new version omits the cut off of one year after "accrual" and proposes a 180 days after decedent's death cut off. Procedure after the "notice" could be worked in but is not included.

Sec. 9370. am.

The amended form proposed by the Commission and included in the April text does not state existing law. In addition it includes a new creditor requirement, i. e., that application be made for substitution of the personal representative within 90 days after rejection of claim. The last was added by the Commission at its March meeting which considered and did not take affirmative action on any of the Elmore proposed legislative changes, save a minor one.

The substitution requirement is an arbitrary one and intervenes in what are civil procedure matters. The matter is one for estate administration not for a claim "bar." The "condition" wording is contrary to California cases. These create non claim in a pending action as ground for a special defense of temporary abatement that is waived unless promptly made. See page 5 of attached draft amendments, for present

MPY 03 '88 14:32 HOWARD, RICE

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May 3, 1988

Re: AB 2841 as Amended in Senate 4/19/88

Dear Jim:

Of the changes suggested in my letter to Valerie of March 8, 1988, only two were incorporated into the revised version of AB 2841. The suggestions which were not adopted were relatively minor, and are described in paragraphs 1 (pertaining to §12200), 2 (pertaining to §12201), 5 (pertaining to §12206), and 6 (pertaining to §12250) of my previous letter, a copy of which is attached for your convenience. The only substantive comment pertains to §12201 and concerns the deletion of the current requirement that a status report be verified. I don't know that I have a problem if the LRC is deleting this requirement, but I do want to be certain the deletion is intentional.

Please call me if you have any questions.

Very truly yours,



LYNN P. HART

LPH:bis
Enclosures

cc: Charles A. Collier, Jr.
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JUDY V. BAICE
OF COUNSEL

*Admitted in the Courts
of California

March 8, 1988

FEDERAL EXPRESS:

Valerie J. Merritt, Esq.
Kindel & Anderson
555 So. Flower Street, 26th Floor
Los Angeles, CA 90071-2498

Dear Valerie:

I apologize for my delay in forwarding these comments to you. I was on vacation when my assignment arrived from Bill. My comments on pages 153 through 157 of AB 2841 follow:

1. Section 12200. The language "the following times" found on line 13 is awkward. This sentence might be revised to read: "The personal representative shall either petition for an order for final distribution of the estate or make a report of status of administration as follows:".
2. Section 12201. Current law requires that a status report be verified. Proposed Section 12201 does not include this requirement. Is this a deliberate omission?
3. Section 12202. I recommend that the words "for final distribution" be inserted after the word "petition" found on line 39.
4. Section 12205. This section provides for the reduction of commissions and fees if the time taken for administration of the estate exceeds the time allowable. It is not clear under the proposed language whether only the commission or fee of the party responsible for the

Valerie J. Merritt
March 8, 1988
Page 2

delay may be reduced or whether the commission or fee of either party may be reduced as a result of delay within the control of only one party. For instance, it is arguable that the attorney's fee may be reduced as a result of delay within the control of the executor (and not the attorney). I believe the language contained in the current statute is more clear in specifying that the commission or fee of the responsible party only may be reduced.

5. Section 12206. The reference on line 10 to "time limited" is awkward. I recommend a change to "time limitations stated in the will".
6. Section 12250. Line 17 refers to appropriate "receipts", while line 18 refers to the filing of "a receipt". The use of the plural or singular form should be consistent.

Please call me if you have any questions.

Very truly yours,


LYNN P. HART

LPH:joh

cc: Charles A. Collier, Jr.
James D. Devine
James C. Opel
Theodore J. Cranston
James V. Quillinan
Irving D. Goldring
William V. Schmidt

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*Section Administrator*PRES ZABLAN-SOBERON, *San Francisco*

May 2, 1988

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MAY 03 1988

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Mr. John H. DeMouilly
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Palo Alto, CA 94303

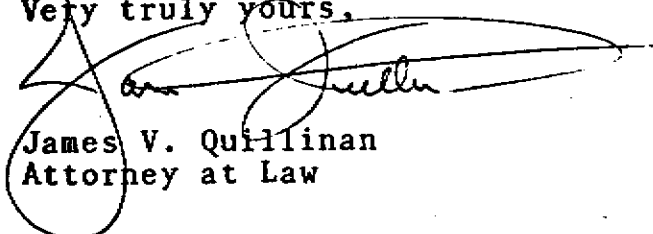
Re: LRC Memo 88-31 & AB 2841

Dear John:

I have enclosed a copy of Team 1's report on Memo 88-31 and AB 2841 and Anne Hilker's Report of AB 2841. The reports have not been reviewed by the Executive Committee. The reports are to assist in the technical and substantive review of those sections involved.

Your cooperation is most appreciated.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine
 Irv Goldring Ted Cranston

ESTATE PLANNING, TRUST AND
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April 26, 1988

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Section Administrator
PRES ZABLAN-SOBERON, San Francisco

James V. Quillinan, Esq.
Diemer, Schneider, Luce
& Quillinan
444 Castro Street, Suite 900
Mountain View, California 94041

Dear Jim:

This is a follow up to your request for line by line comments on the amended version of AB2841. The amendments as made are acceptable; we only have remaining the question of changes we had previously requested as to which the amendments have not been made. As you indicated at the meeting, I will still look for the next round of amendments.

Best regards.

Sincerely,


Anne K. Hilker

cc: D. Keith Bilter, Esq.
Irwin D. Goldring, Esq.
Charles G. Schulz, Esq.
Leonard W. Pollard, II, Esq.
H. Neal Wells, Esq.
John A. Gromala, Esq.
James C. Opel, Esq.
James D. Devine, Esq.
Valerie J. Merritt, Esq.

7062m

R E P O R T

TO: JAMES V. QUILLINAN
CHARLES A. COLLIER, JR.
VALERIE J. MERRITT
D. KEITH BILTER
IRWIN D. GOLDRING
JAMES D. DEVINE
JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: APRIL 29, 1988

SUBJECT: LRC MEMORANDUM 88-31
AB 2841 (1988 PROBATE LEGISLATION -- AMENDMENTS)

The members of Study Team No. 1 held a conference call on April 29, 1988. Charles Collier, Richard S. Kinyon, Sterling S. Ross, Jr., Michael Vollmer and William V. Schmidt participated. Lynn P. Hart did not participate.

We have the following comments:

Status of Portion of AB 2841 Relating to Probate Referees:

The members of our committee read and reviewed this portion of the memorandum with interest. However, we feel that the Commission should make the decision and that it is inappropriate for our Study Team to take a position.

We do feel it is appropriate to comment on some of the changes made from the Bill as introduced. Most importantly we feel that the existing waiver procedure should not be

changed. We do not feel strongly about the \$250 cap and we would not object to its elimination. We also do not feel strongly about this separate inventory and appraisal. We feel, and we believe that the majority of the members of the Executive Committee of our Section feel, that the combined inventory and appraisal system has worked well over the years and we certainly would not object to its retention.

§ 401. Qualifications for Appointment:

Satisfactory.

§ 404. Standards for Probate Referee:

We agree with the staff and the Controller.

§406. Political Activities of Probate Referee:

Again we agree with the staff.

§ 1215. Manner of Mailing:

We basically have no objection with the addition of new subdivision (d). We would, however, suggest the words "his or her" be removed and be replaced with the word "person's". Please note that the words "person" or "person's" are used in other portions of the statute. Also, if the person to whom notice is given is an entity such as a corporation the words "his or her" would be inappropriate.

We also feel that the words "place of business" are preferably to the word "office." We would therefore suggest that the section be modified to read substantially as

follows: "The notice or other papers shall be addressed to the person at the person's place of business or place of residence..."

§ 7050. Jurisdiction and Authority of Court or Judge:

Satisfactory

§ 7060. Disqualification of Judge:

Satisfactory

§ 7660. Summary Disposition Authorized:

Satisfactory

We would like to commend Charles Schulz on his good work as it appears throughout the memo.

§ 7664. Liability for Decedent's Unsecured Debts:

Dick Kinyon suggests that consideration be given to changing the statute to require that notice be given to creditors. If this makes sense it could solve the dilemma posed by the staff. Otherwise, we are faced with a policy decision which seemingly chooses us to favor either the creditor or the beneficiary. If this decision is to be made we feel that it should be made by the Commission.

§§ 8000, 8002, 8113, 8121, 8252, 8270, 8466, and 8482 are all satisfactory. We again commend the work of the staff, Anne Hilker and Charles Schulz.

§ 8903. Waiver of Appraisal by Probate Referee:

This new subdivision (d) proposed by the staff necessarily touches upon the changes made in the Bill at its first amendment concerning the probate referees. We prefer the provisions of § 8903 as they appeared in the Bill as originally introduced and before the March 15, 1988 amendment.

We feel that the March 15 amended provisions set the groundwork for an adversarial system between the referees and the attorneys. We may well be fighting with each other in court on numerous occasions. This would have a detrimental affect on the relationship of those same referees and attorneys in subsequent matters. Ideally, the attorneys and referees should work smoothly together in a friendly atmosphere. We are fearful that this ideal will degenerate into an unfriendly, perhaps hostile, adversary system. Our first preference therefore, is that § 8903 be restored to its original language as introduced.

If the provisions of § 8903 cannot be restored to its original provisions as introduced, then we feel that the modification proposed by the staff is proper to put some teeth in the statute and to prevent referees from routinely and arbitrarily opposing all, if not most, petitions for their waiver. We sincerely believe that some referees would be inclined to do so.

We also feel that limiting the new language to real property only does not solve the problem. This could easily

be changed by another amendment or by subsequent legislation to include all property.

SS 8904, 9350, 11004 and 11951:

Satisfactory.

Respectfully submitted,

STUDY TEAM NO. 1



By: William V. Schmidt

WVS/ds

R E P O R T

TO: JAMES V. QUILLINAN
CHARLES A. COLLIER, JR.
VALERIE J. MERRITT
D. KEITH BILTER
IRWIN D. GOLDRING
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THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: APRIL 29, 1988

SUBJECT: ASSEMBLY BILL 2841 AS AMENDED APRIL 19, 1988

This report is prepared pursuant to the April 26, 1988 memorandum from James V. Quillinan to each of the members of Study Team No. 1 as well as Anne Hilker, Ted Cranston, K. Balsam and Charles Schulz. A copy of the Bill as amended April 19, 1988 was enclosed with the memo.

I have asked each member of Study Team No. 1 to report separately in regard to that portion of the original Bill which was previously assigned to them. Chuck Collier has the material covered on pages 1 through 15 and pages 25 through 33; Terry Ross, pages 36 through 52 of the original Bill; Michael Vollmer pages 55 through 69; Richard Kinyon, pages 138 through 151; Lynn Hart, pages 153 through 157.

This report will cover the material contained within pages 111 through 127 of the original Bill. It follows up on

my earlier report dated February 19, 1988 on the same matter. I have reviewed our earlier report and all of the matters set forth therein have been implemented with one exception which now has been satisfactorily explained to me by Nathaniel Sterling in his letter to me dated March 21, 1988.

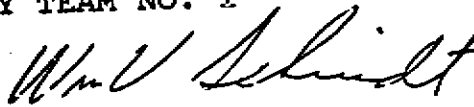
I am happy to conclude therefore that Chapter 1, Chapter 2 and Articles 1, 2, 3 and 4 of Chapter 3 of Part 3 entitled "INVENTORY AND APPRAISAL" (Sections 8800 through 8964 appearing on pages 115 through 128 of AB 2841 as amended April 19, 1988) appear to have eliminated the typographical mistakes. However, such sections have otherwise clearly been modified from the original Bill. The amendment on March 15, 1988 changed several portions of the sections dealing with the Probate Referee and the Inventory and Appraisal which have been discussed by the staff in the first portion of Memorandum 88-31.

In my February 19, 1988 report on AB 2841, pages 111 through 127, I stated that Sections 9001 through 9257 (which now appear on pages 128, 129 and 130 of the Bill as amended April 19, 1988) dealt with the subject of creditor's claims which was not a subject that Study Team No. 1 had previously been assigned to review. To my knowledge this general topic had been consistently assigned to Study No. 3. I expressed my discomfort in trying to review these sections. I have therefore today called Anne Hilker, Captain of Study Team No. 3, and requested that she report to you on these sections.

She agreed to do so and will report directly on them and in her report which will cover those portions of AB 2841 previously assigned to her team.

Respectfully submitted,

STUDY TEAM NO. 1



BY: William V. Schmidt

WVS/ds

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April 4, 1988

Mr. John H. DeMouilly
Executive Director
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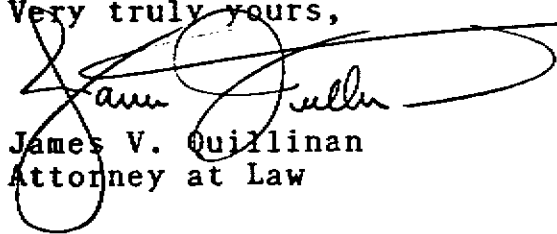
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Re: AB 2841 (Partial)

Dear John:

I have enclosed a copy of Anne Hilker's technical report on AB 2841. The report represents the opinions of the author only. The Executive Committee has not reviewed the report. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine
 Irv Goldring Ted Cranston

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JANET L. WRIGHT, Fresno

March 30, 1988

Reply to:

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333 South Grand Avenue
Los Angeles, CA 90071

James V. Quillinan, Esq.
Diemer, Schneider, Luce
& Quillinan
444 Castro Street
Suite 900
Mountain View, California 94041

Re: Line by Line of Draft Version of
AB 2841

Dear Jim:

I have reviewed the draft of AB 2841, pages 77 to 111, with respect to our line-by-line comments prepared in November of 1987. I have not been able to review whether our requested changes to the legislative comments have been incorporated. However, almost all of our changes have been included with respect to the statute, and I will note here only the exceptions:

1. For section 8000, we requested that the second sentence of subparagraph (b) have its own section, to be headed "Effect of Loss of Will on Petition for Probate." This was not included. However, I do not see it as a major difficulty.

2. An item about which I think we should be concerned is the failure in Section 8270 to include a cross reference to Section 8225 with respect to the date of the entry of the minute order. Section 8270 contains the period of the running of the will contest. Without at least a cross reference or other emphasis, the fact that the date of the entry of the minute order may differ from the entry of the court order may continue to be a trap.

James V. Quillinan, Esq.
March 30, 1988
Page 2

3. We had earlier asked for use of residence instead of domicile within the jurisdictional sections. The new sections retain both concepts. Since we have lived with this for some time, I do not think this is a significant problem.

4. In Section 8466, we had asked that the section preserve the priority of a relative who is also a creditor. This was not picked up, but again may not be a substantial problem.

Respectfully submitted,

Anne K. Hilker
Captain, Team 3

cc: D. Keith Bilter, Esq.
Irwin D. Goldring, Esq.
Charles G. Schulz, Esq.
Leonard W. Pollard, II, Esq.
H. Neal Wells, Esq.
John A. Gromala, Esq.
James C. Opel, Esq.
James D. Devine, Esq.
Theodore J. Cranston, Esq.
Hermione K. Brown, Esq.
Valerie J. Merritt, Esq.

AKH:kt
NY:2062I

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April 4, 1988

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Mr. John H. DeMouilly
Executive Director
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4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: AB 2841 (Partial)

Dear John:

I have enclosed a copy of Charles Schulz's, a member of Team 3, technical report on AB 2841. The report represents the opinions of the author only. The Executive Committee has not reviewed the report. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/h1
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine
 Irv Goldring Ted Cranston

LAW OFFICE OF
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517 BYRON STREET
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PALO ALTO, CALIFORNIA 94302
TELEPHONE (415) 328-8080

April 1, 1988

James B. Quillinan, Esq.
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444 Castro Street, Suite 900
Mountain View, CA 94041

Re: Line by Line of Draft Version of AB 2841

Dear Jim:

Having received Ann Hilker's letter to you, March 30, 1988, and not knowing how much of this has already been covered, I am writing just to you and her with some of my own observations.

I am referring to the March 15, 1988 version of AB 2841.

1. Section 7660(b). The way this sentence reads, it is unclear whether there are three separate situations in which summary disposition may be made (no will, will does not name an executor, or named executor refuses to act) or whether the last two "if" clauses modify the situation in which a will exists.

2. Section 7664 states that a person to whom property is summarily distributed is personally liable for the unsecured debts of the decedent. But section 7662 directs the Public Administrator to pay claims presented before distributing the decedent's property. Why should personal liability continue to the distributees? This sounds like a mini-probate without the normal protections. Probably, the creditor would be unsuccessful in pursuing a claim part of which (or perhaps all of which) had already been paid by the Public Administrator, but some collection bureaus are quite aggressive.

3. Section 8002(b)(1) refers to attaching a typed copy of a holographic will. What about a will which is handwritten but witnessed? I sometimes have to do this, in emergency situations. Would it be better to refer to a will in which substantial portions are in handwriting, as well as a holographic will?

4. Section 8252(a). In line 30, I suggest the word "will" be added so that the line will read "shall be determined first whether the later will is entitled to probate".

James V. Quillinan, Esq.
Page two

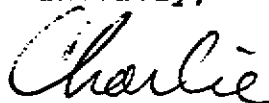
April 1, 1988

5. Section 8401(a). "Appointment" is misspelled in line 32.

6. Section 8404(c). Does this change indicate that the comma has been removed after the word "is"?

7. Section 8482(a)(3). The question is whether the estimated value of the decedent's interest in real property, for bonding purposes under IAEA, should be the net or gross value of the decedent's interest? Probate Code § 10453(a), effective July 1, 1988, uses the concept "estimated net proceeds of the real property authorized to be sold under this part". I prefer the concept of "estimated net proceeds" because it is simpler to calculate: estimated value less encumbrances. However, the current law for bonds, I believe, is ~~that~~ the court generally considers gross values. The only exception which is creeping into the law has to do with the setting of bond for representatives who have the power to sell real property without going through the court confirmation process.

Sincerely,



CHARLES G. SCHULZ

CGS:bh

cc: Ann K. Hilker, Esq.
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**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**



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May 3, 1988

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BY FEDERAL EXPRESS

James V. Quillinan, Esq.
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Dear Jim:

The following reviews changes in pages 77 through 111 of the amended version of 2841 as well as pages 128-30, per Bill Schmidt's request.

First, please note that none of the changes commented on in my letter to you of March 30, 1988, have been made.

Of the substantive changes in the amended version, I had the following questions and comments:

1. Section 8113, page 87: This prescribes notice to a foreign county's "recognized diplomatic or consular official." While this is an improvement in that it no longer requires ascertainment of the existence of "treaty rights," the type of recognition contemplated is still unclear. Perhaps elimination of the word "recognized" and insertion of the words "if any" at the end of the sentence would solve this problem.

2. Section 8441(b): The addition of priority, in the court discretion, to a statutory taker entitled under intestacy to more than a nominee who takes under a will, is a substantial change. Its major difficulty is

James V. Quillinan, Esq.
May 3, 1988
Page 2

that it is not a priority at all, but an exception to the general rule of priorities. For this reason it might be an improvement to restate the italicized language to apply the priority "unless a person who does not take under the will is entitled to statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will. In that case the foregoing priority does not apply."

3. Page 112, Section 8547(b): This change permits the special administrator to receive commissions for extraordinary services on settlement of the special administrator's final account. This appears to solve an ambiguity that existed in the prior draft.

4. Pages 129-30, amending section 9103: Why has the standard of proof (clear and convincing) been eliminated? Now the creditor must "establish" the elements of the claim, but no standard is indicated. "Clear and convincing" should be returned to the statute.

5. Page 130, line 29: This is an apparent change in cross reference in light of the addition of Sections 9350 et seq. to the code. Since these sections add the claim litigation procedure, this is an appropriate change.

Sincerely,


Anne K. Hilker

AKH:bm

cc: Charles A. Collier, Jr.
James D. Devine
James C. Opel
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7162m

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May 3, 1988

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

Attn: Nathaniel Sterling, Esq.,
Assistant Executive Secretary

Re: Study L-2009 - AB 2841 (1988 Probate Legislation)
Section 10953 - Accounting for deceased pers rep

Dear Commissioners:

In transferring former §932 (yellow copy attached) to new §10953, it appears that the addition made by Chapter 358, §3, Statutes of 1987, was inadvertently left out. We see that another part of Chapter 358 has been retained, with amplification, in new §10823, Services of Paralegal Performing Extraordinary Services, as shown in memorandum 88-32 dated 4-4-88 (pink copy attached).

We would therefore suggest that the §10823(b) language either be added to §10953(d) or be a separate subsection (e) of §10953.

Respectfully submitted,



PHYLLIS CARDOZA
Executive Vice Chair, Legislative Committee
Probate, Trust and Estate Planning Section
BEVERLY HILLS BAR ASSOCIATION

PC:lc

cc: All members

Bruce D. Sires, author of AB 1334 (Chapter 358)

whom it was made; but the total amount of such allowances in all his accounts must not exceed two thousand five hundred dollars (\$2,500). (Stats.1931, c. 281, § 930. Amended by Stats.1968, c. 58, § 1.)

Cross References

Approval or rejection of claims by judge, see §§ 710, 711.
Presentation and payment of claims, see § 700 et seq.
Special administrator, verified account of, see § 467.
Verification of claims, see § 705.
Vouchers, requirements, see § 925.

§ 930.5. Repealed by Stats.1939, c. 761, § 6
See, now, §§ 541.5, 1127, 1556.5.

§ 931. Order settling and allowing account; conclusiveness; rights of persons under legal disability; order as prima facie evidence

The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account. (Stats.1931, c. 281, § 931.)

Cross References

Appealable orders, see § 1240.
Decree of distribution, conclusiveness, see § 1021.
Determining heirship, conclusiveness of decree, see § 1192.
Final distribution, generally, see § 1020 et seq.
Judgment or final order, conclusiveness, see Code of Civil Procedure § 1908.
Judicial orders, disputable presumption, see Code of Civil Procedure § 1909.
Jurisdictional facts, recital of unnecessary in orders and decrees, see § 1220.
Letters of administration, conclusiveness of order granting, see § 302.
Order, definition, see Code of Civil Procedure § 1003.
Probate of will, conclusiveness, see § 384.
Settlement of account, showing of embezzlement, waste or mismanagement, see § 524.
Statute making one fact prima facie evidence of another fact, see Evidence Code § 602.
Subsequent administration following final settlement of estate, see § 1067.

§ 932. Accounting for deceased or incompetent executor or administrator; accounting by attorney; fees; services of paralegals

(a) If the executor or administrator dies or becomes incompetent, his or her accounts may be presented by his or her personal representative or conservator to, and settled by, the court in which the estate of which the person was executor or administrator is being administered, and, upon petition of the successor of the deceased or incompetent executor or administrator, the court shall compel the personal representative or conservator of the deceased or incompetent executor or administrator to render an account of the administration of his or her testator or intestate, and shall settle the account as in other cases.

(b) In the event the executor or administrator dies or becomes incompetent and there is no personal representative or conservator appointed for his or her estate, or he or she absconds, then the court may compel the attorney for the absconding, deceased, or incompetent executor or administrator or attorney of record in the estate proceeding to render an account of the administration of the absconding, deceased or incompetent executor or administrator to the extent that the attorney has information or records available to him or her for the purpose. The account of the attorney need not be verified. A fee shall be allowed to the attorney by the court for this extraordinary service.

Extraordinary services for which a fee shall be allowed to the attorney under this subdivision include those services rendered by any paralegal performing the services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal (Stats.1931, c. 281, § 932. Amended by Stats.1933, c. 969, § 9; Stats.1949, c. 1343, § 1; Stats.1963, c. 750, § 1; Stats.1979, c. 730, § 105; Stats.1987, c. 358, § 3.) *AB 1934*

Cross References

Accounting after authority revoked or ceases, see § 923.
Attorney's fees, generally, see §§ 910, 911.
Compensation of guardian, conservator, and attorney, see § 2640 et seq.
Conservatorships, see § 1800 et seq.
Fee for attorney rendering account for dead, incapacitated or absconding guardian or conservator, see § 2632.
Incompetency, see § 401.
Issuance of letters of administration with will annexed on death or incompetency of executor, see §§ 406, 512.
Special administrators, appointment, see § 460.

§ 933. Waiver of accounting or acknowledgment of receipt of entitlement; execution; report of fees or commission

(a) The executor or administrator is not required to render an account when all persons entitled to distribution of the estate have executed and filed one of the following:

- (1) A written waiver of accounting.
- (2) A written acknowledgment that the person has received the share of the estate to which he or she is entitled.

(b) The waiver or acknowledgment under subdivision (a) shall be executed as follows:

- (1) If the distributee is adult and competent, by the distributee.
- (2) If the distributee is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver is executed by a guardian of the estate of the minor, the waiver may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.
- (3) If the distributee is a conservatee, by the conservator of the estate of the distributee. The waiver may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the named representative of the court.

(5) If the named representative.

(c) Notwithstanding the foregoing, the account would not be a condition of the executor or administrator setting forth the account.

(d) If any fee for an accounting is allowed, see c. 451, § 20.)

**ARTICLE
EX**

Section	
950.	Expenses, c.
951.	Time for payment of debts and debts and
951.1.	Funeral and
952.	Order for payment of debts and
953.	Future, contingent and distribution of estate
953.1.	Contingent distribution of estate
954.	Liability on
955.	Claim omitted
956.	Closing or settlement

Article 4
§ 48, operational
For another
Expenses, an
923, § 48.5,
post.

Presentation and payment

§ 950. Expenses

The debts of the estate and the charges thereon shall be paid in the following order:

- (1) Expenses of the estate.
- (2) Funeral expenses.
- (3) Expenses of the estate.
- (4) Family allowances.
- (5) Debts having priority.
- (6) Wages, to the extent of \$900, of each employee or personal service rendered by the estate, and death of the employee.

§ 10823. Services of paralegal performing extraordinary services

10823. The attorney for the personal representative may be allowed compensation for extraordinary services by a paralegal

performing the extraordinary services under the direction and supervision of an attorney. The petition for allowance of compensation for extraordinary services shall include a statement of the hours spent and services performed by the paralegal. In determining the amount of compensation to be allowed, the court shall take into consideration the extent to which the services were provided by the paralegal and the extent of the direction, supervision, and responsibility of the attorney.

Comment. The first two sentences of Section 10823 restate without substantive change the second and third sentences of former Section 910. The third sentence, which is new, makes clear that the compensation awarded to the attorney for extraordinary services is to take into consideration the extent to which the services were performed by the paralegal and the fact that the attorney is responsible for directing and supervising the paralegal and for the work produced by the paralegal.

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May 3, 1988

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

Re: Study L-2009 - AB 2841 (1988 Probate Legislation)
Section 12201, Report of Status of Administration

Dear Commissioners:

In the October 8, 1987 comments to the staff draft of July 23, 1987 of §10950 (pink copy attached) there was a comment by a Red Bluff attorney suggesting an account be required as a way to show the condition of the estate when reporting the reasons for delay in closing the estate. While the minutes for that meeting (yellow copy attached) don't reflect what the Commission decided on that issue, apparently that suggestion was not approved.

There is another reason why an accounting should be provided (unless waived by the beneficiaries) at the time a status report is rendered: The personal representative may have committed financial improprieties which should be stopped and corrected before any further time elapses.

Thus, we would suggest adding the following to §12001:*

(b) The report shall be filed with the court. Notice of hearing of the report shall be given as provided in Section 1220 to persons then interested in the estate, with the addition of substantially the following language in bold type, all capital letters: "YOU HAVE THE RIGHT TO PETITION FOR AN ACCOUNTING UNDER PROBATE CODE SECTION 10950(a)."

(c) On the hearing of the report, the court may order either of the following:

(1) That the administration of the estate continue for the time and on the terms and conditions that appear reasonable, including an accounting pursuant to Section 10950(a), (unless an accounting is waived under §10954), if the court determines that continuation of administration is in the best interests of the estate of or interested persons.

(2) That the personal representative shall petition for final distribution.

Respectfully submitted,

*additions underlined

PHYLLIS CARDOZA
Executive Vice Chair, Legislative Committee
Probate, Trust and Estate Planning Section
BEVERLY HILLS BAR ASSOCIATION
PC:lc
cc: All members

Memorandum 87-79

Subject: Study L-1027 - Accounts (Review of Comments on Tentative Recommendation)

This summer the Commission distributed for comment its tentative recommendation relating to distribution and discharge. We have received the letters attached as Exhibits 1 to 18 that include specific comments on the recommendation. The comments are analyzed in the attached draft of the recommendation following the sections to which they relate.

A number of these 18 letters also include general support for the recommendation. In addition, we have received several other letters expressing general approval of the recommendation without further comment. The persons expressing general support or approval are:

Henry Angerbauer, Concord
Wilbur L. Coats, Poway
Judge William E. Fox, Paso Robles ("I feel that these amendments will be a great improvement over the old law and will save a lot of time, trouble and expense.")
Sandra S. Kass, Los Angeles (Exhibit 11)
Richard E. Llewellyn II, Los Angeles (Exhibit 16)
Executive Committee of the Probate and Trust Section of the Los Angeles County Bar (Exhibit 7) ("With these few minor exceptions, this Recommendation appears in excellent form for presentation to the Legislature.")
John G. Lyons, San Francisco (Exhibit 10) ("I believe the proposed changes would be very helpful.")
Charles E. Ogle, Morro Bay
Ruth A. Phelps, Burbank (Exhibit 5)
Jeffrey A. Dennis-Strathmeyer, California Continuing Education of the Bar (Exhibit 13)
Judge Robert A. Willard, Ventura (Exhibit 9) ("In my opinion they have substantial merit in both clarification and improvement of the statutes involved.")
(Exhibit 9)

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Tentative Recommendation
relating to

ACCOUNTS

The provisions of existing law governing accounts¹ are generally restated in the proposed law without substantive change. There are a few specific changes worthy of note:

Contents of account. The existing probate account includes a number of items that are of limited value and fails to require some information that would make the account a more descriptive and useful document. The proposed law revises the account contents somewhat to make the probate account more analogous to a standard type of balance sheet.²

The account will include a summary statement of the significant aspects of the administration.³ The summary will be supported by schedules that break down each summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown will vary, depending on the nature of the estate. It will be unnecessary to show in the

1. Prob. Code §§ 920-933.

2. The concepts are derived from Craig, California Probate Accounting Procedures, 39 S. Cal. L. Rev. 316 (1966).

3. The summary includes, in addition to a report of administration, a statement of property in the estate, receipts, gains and losses on sales, and other acquisitions and dispositions of property.

10901. On court order, or on request by an interested person filed with the clerk and a copy served on the personal representative, the personal representative shall produce for inspection and audit by the court or interested person the documents specified in the order or request that support an account.

Comment. Section 10901 supersedes former Section 925, extending the voucher procedure to supporting documents generally.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Note. John G. Lyons, San Francisco (Exhibit 10), notes that this section omits much of the detail of the former voucher provisions. "How long should vouchers be retained? Can we withdraw a voucher by substituting a certified copy?" The Commission replaced the voucher procedure with the court order for production of documents under this section in order to avoid all this detail and because the voucher procedure is not used in many counties. Under this section any supporting documentation should be retained by the personal representative until an order for final distribution becomes final, since the order settling an account could possibly be challenged at any time until then.

The staff has incorporated drafting changes suggested by Mr. Lyons and by Irving Kellogg, Los Angeles (Exhibit 15).

CHAPTER 2. WHEN ACCOUNT REQUIRED

§ 10950. Court-ordered account

10950. (a) On its own motion or on petition of an interested person, the court may order an account at any time.

(b) The court shall order an account on petition of an interested person made more than one year after the last account was filed or, if no previous account has been filed, made more than one year after issuance of letters to the personal representative.

(c) The court order shall specify the time within which the personal representative must file an account.

Comment. Section 10950 supersedes portions of the first sentences of former Sections 921 and 922. The section is subject to Section 10954 (waiver of account).

CROSS-REFERENCES

Actions in chambers, Code Civ. Proc. § 166

Defined terms

Interested person § 48

Letters § 52

Personal representative § 58

Note. Rawlins Coffman, Red Bluff (Exhibit 12), suggests that in addition to the other situations in which an interim account is required, one should be required when reporting the reasons for delay in distribution under Section 1025.5. We do require the report of status of administration to "show the condition of the estate." Perhaps, as Mr. Coffman suggests, an account is a more precise way to "show the condition" of the estate.

§ 10951. Final account

10951. The personal representative shall file a final account and petition for an order for final distribution of the estate when the estate is in a condition to be closed.

Comment. Section 10951 supersedes the second sentence of former Section 922 and is consistent with Section 11640 (petition and order for final distribution) [to be drafted]. The section is subject to Section 10954 (waiver of account).

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. Rawlins Coffman, Red Bluff (Exhibit 12), observes that a supplemental account is necessary in almost every probate after final distribution, and suggests that this be required by statute. No approval by the court or hearing would occur for the supplemental account unless requested by an interested distributee.

The Commission has developed a scheme in connection with distribution and discharge that takes care of after-acquired property by sending it in accordance with an omnibus clause in the order for distribution or on a petition for instructions. The omnibus clause method is supplemented by the authority of the court, in an appropriate case, to require a supplemental account.

§ 10952. Account after authority terminated

10952. A personal representative who resigns, is removed from office, or whose authority is otherwise terminated, shall unless court extends the time, file an account not later than 60 days after termination of authority. If the personal representative fails to so file the account, the court may compel the account pursuant to Chapter 4 (commencing with Section 11050).

requirement) ~~with the addition of~~ , but makes express the implied requirement implied in former law that the claim was first be rejected in whole or in part."

Liability of Successors

The staff should develop a proposal dealing with the liability of a successor who takes property under the affidavit procedure where probate is later commenced and the creditor fails to make a claim. Either this statute or the affidavit procedure should be revised so that barred creditor claims are not enforceable against successors who take property by affidavit.

STUDY L-1027 -- ACCOUNTS

The Commission considered Memorandum 87-79, analyzing comments received on the tentative recommendation relating to accounts. The Commission made the following changes in the recommendation.

§ 10900. Contents of account

The material in subdivision (b) relating to creditor claims should be replaced by a provision along the following lines.

The account shall include a statement of liabilities of the estate. The statement shall include the following information concerning creditor claims:

(1) Whether notice to creditors was given under Section 9050.

(2) Creditor claims filed, including the date of filing the claim, the name of the claimant, and the action taken on the claim.

(3) As to creditor claims not paid or provided for, whether the claim is due and the due date, if the claim is rejected the date notice of rejection was given, whether the creditor has brought an action on the claim, and any property that is security for the claim by mortgage, deed of trust, or other lien.

The Comment should note that the account may, but is not required to, include additional information such as a separate account as to specific gifts, allocation of principal and income, taxable income and distributable net income, and a statement of current value of property in the estate.

§ 10951. Final account

The Comment should refer to the availability of a supplemental account on court order.

§ 10954. Waiver of account

The requirement of creditor waiver should be deleted from the section, and a provision added to the effect that notwithstanding a waiver, a creditor whose interest has not been satisfied may petition for an account under Section 10950.

Subdivision (b)(1) should be revised to read, "If the person entitled to payment or distribution is an adult and competent, by that person ~~the person entitled to payment or distribution.~~"

§ 11000. Notice of hearing

This section should require notice of hearing to be given to creditors who have approved claims that are unpaid in an insolvent estate.

§ 11001. Contest of account

Subdivision (b), providing for an award of litigation expenses, should be revised to make clear that the contestant is personally liable for the expenses. The provision should also be revised to impose personal liability on a personal representative who opposes a contest without reasonable cause and in bad faith.

§ 11002. Hearing on account

Subdivision (a), providing that the personal representative may be examined on oath at the hearing, should be replaced by a provision that corresponds with procedures used at other hearings.

§ 11004. Settlement of claim not properly made or allowed

Subdivision (c) should be revised to recognize that the personal representative may pay a different amount than the "true indebtedness" if necessary to satisfy the claim, and should receive a credit for the payment.