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6/1/88

Second Supplement to Memorandum 88-43

Subject: Study L-1036/1055 - Compensation of Personal Representative
and Estate Attorney

Attached to this Supplement as Exhibit 1 is a letter from attorney Jeffrey Dennis-Strathmeyer objecting to proposed Section 10854 in the staff draft attached to the basic memo. Section 10854 permits the court to award compensation for extraordinary services before final distribution only (1) when likely that administration will continue for an unusually long time, (2) when present payment will benefit the estate or beneficiaries (e.g., for tax reasons), or (3) when other good cause is shown. This section is drawn from local court rules. Its effect is to require the personal representative or estate attorney to show good cause for an award of compensation for extraordinary services before final distribution.

Mr. Dennis-Strathmeyer's objection is that the section either undesirably limits judicial discretion, or, if it does not do so, is meaningless. The same objection may be made to the local court rules from which the section is drawn. The staff has no problem with codifying a rule that compensation for extraordinary services should ordinarily wait until final distribution, subject to court discretion to award it earlier for good cause. We may assume that a court finding of good cause will not be reversed on appeal except in the most extreme cases.

The staff agrees with Mr. Dennis-Strathmeyer's point that Section 10854 "makes no sense at all" if applied to compensation of another attorney hired to do litigation, tax returns, and the like. The staff would make clear that the section should not be so applied by adding the following to the Comment:

Section 10854 applies to compensation for extraordinary services of the personal representative and estate attorney, not to compensation of experts employed under Section 10804.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel



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

Re: Study L-1036/1055: Memorandum 88-43

Sirs:

I am confused by proposed Probate Code Section 10854. There are two possible interpretations:

1) The statute limits the discretion of judges with respect to the timing of payment of extraordinary attorney fees. If this is the case, I object to limiting judicial discretion. Absent a clear indication that judges have been acting inappropriately in this area, we should not gamble that we are not overlooking situations in which the limitation would be inappropriate.

2) The statute does not limit judicial discretion. If so, I object to the provision on the ground that it is meaningless.

If the provision is retained despite the foregoing thoughts, it should be modified so that it only applies to the "estate attorney." The statute makes no sense at all if we are talking about the compensation of another attorney hired to do litigation, tax returns, etc.

Very truly yours,


Jeffrey A. Dennis-Strathmeyer