#L-2010

ns63v
11/23/88

First Supplement to Memorandum 88-68

Subject: Study L-2010 - 1989 Probate Cleanup Legislation (Urgency Bill--additional matters for inclusion)

Jeff Strathmeyer has written us (Exhibit 1) with a number of suggested revisions in the newly-enacted probate legislation. These suggestions are analyzed below, along with further comments on Section 8800 (inventory and appraisal).

§ 1023. Signing and verification by attorney

Section 1023 provides that in proceedings under the Probate Code, the attorney for a petitioner, objector, or respondent may sign the paper if the party is absent from the county or is otherwise unable to sign. This authority does not apply, however, where the party is a fiduciary. Mr. Strathmeyer criticizes this limitation: "The primary problem with the provision restricting the ability of attorneys to sign for fiduciary clients is that the court has no authority to waive the restriction if an emergency arises when the fiduciary is unavailable."

The Commission was aware of concerns of this type when it made the policy decision that an attorney should not be able to sign for a fiduciary. The decision originates in the theory that the personal representative must be treated differently from general litigants because the personal representative is a court officer, appointed and supervised by the court, and therefore should be personally responsible for signing court documents. But as Mr. Strathmeyer points out, Section 1023 as drafted appears overbroad, "applying not only to the fiduciaries appointed in the particular proceeding, but also to other fiduciaries, even those who are not court appointed." And, as he also points out, a statute based on theory may be carried to an extreme that causes problems in practice.

Does the Commission wish to reconsider this policy decision? The current draft of Section 1023 provides:

1023. If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to sign or verify a petition, objection, or response, the person's attorney may do either or both of the following:

(a) Sign the petition, response, or objection, if the petitioner, objector, or respondent is not a fiduciary.

(b) Verify the petition, objection, or response.

§ 7050. Jurisdiction and authority of court or judge

Procedural provisions governing administration of a decedent's estate are no longer located in a single division of the Probate Code, but are found in a number of different divisions, including Divisions 6 (wills and intestate succession), 7 (administration of estates of decedents), and 10 (proration of estate taxes). Mr. Strathmeyer is concerned that a number of general provisions that should be applicable broadly to estate administration have been improperly restricted in their application. He is specifically concerned about Sections 7050 (jurisdiction and authority of court or judge), 7060 (disqualification of judge), and 7200 (trial by jury).

The staff would address his concerns with the following amendments:

7050. (a) The superior court has jurisdiction of proceedings under this code concerning the administration of the decedent's estate.

(b) The court in proceedings under this ~~division~~ code concerning the administration of the decedent's estate is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Subdivision (b) of Section 7050 is amended to make clear that the subdivision applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

7060. (a) In addition to any other ground provided by law for disqualification of a judge, a judge is disqualified from acting ~~under this division~~ in proceedings under this code concerning the administration of the decedent's estate, except to order the transfer of a proceeding as provided in Article 3 (commencing with Section 7070), in any of the following cases:

(1) The judge is interested as a beneficiary or creditor.

(2) The judge is named as executor or trustee in the will.

(3) The judge is otherwise interested.

(b) A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

Comment. Subdivision (a) of Section 7060 is amended to make clear that the subdivision applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

7200. Except as otherwise expressly provided in this ~~division~~ code, there is no right to a jury trial in proceedings under this ~~division~~ code concerning the administration of the decedent's estate.

Comment. Section 7200 is amended to make clear that the section applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code.

§ 8270. Petition for revocation

Under Section 8270, if a will has been admitted to probate, any person may petition within 120 days to have the probate revoked ("contest after probate"). The 120 day limitation does not apply to a minor or incompetent person; such a person is given until entry of an order for final distribution to petition for revocation. Mr. Strathmeyer questions whether the law should allow such a petition to be brought that late in the proceeding. He would preclude a petition for revocation of probate once a petition for final distribution has been filed. Otherwise, "the result is procedural chaos with two petitions pending before the court subject to two different procedures." He also points out that the right of the minor or incompetent person to petition at that point in the proceedings conflicts on its face with the conclusive effect given by statute to a court order determining heirship. See Section 11705.

The staff agrees with Mr. Strathmeyer, and would revise subdivision (b) of Section 8270 thus:

(b) Notwithstanding subdivision (a), a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before ~~entry of~~ a petition is filed for an order for final distribution.

The staff notes that the Commission's earlier drafts of this provision were essentially as set out in the revision above. However, at some point the Commission extended the time because it did not feel that a late petition would be unduly disruptive. The staff recommends that the Commission reconsider this position in light of Mr. Strathmeyer's comments.

§ 8482. Amount of bond

Section 8482 gives the court discretion in setting the amount of the personal representative's bond, including authority to order a bond in "a fixed minimum amount." Mr. Strathmeyer questions the meaning of a "fixed minimum" bond.

Although the "fixed minimum" is a new statutory concept, it refers to the fact that most sureties require a minimum premium before they will issue any bond. According to Commissioner Stodden, the current minimum premium in the Los Angeles area yields a $6,000 bond. It makes little sense to order a bond in a lesser amount, since the estate will have to pay the minimum premium regardless how small the bond. It is theoretically possible that an estate may be smaller in value than the fixed minimum, but the chance of this is so remote that the staff believes it can be ignored in practice. If the Commission wishes to revise Section 8482 for technical accuracy, it could provide:

> 8482. (a) The court in its discretion may fix the amount of the bond, ~~including a fixed minimum amount,~~ but the amount of the bond shall be not more than the sum of:
>
> (1) The estimated value of the personal property.
>
> (2) The probable annual gross income of the estate.
>
> (3) If independent administration is granted as to real property, the estimated value of the decedent's interest in the real property.
>
> (b) Notwithstanding subdivision (a), if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer.
>
> ~~(b)~~ (c) If the bond is given by personal sureties, the amount of the bond shall be twice the amount fixed by the court under subdivision (a).
>
> ~~(c)~~ (d) Before confirming a sale of real property the court shall require such additional bond as may be proper, not exceeding the maximum requirements of this section, treating the expected proceeds of the sale as personal property.

Comment. Section 8482 is revised to make clear that the fixed minimum bond may exceed the maximum established by subdivision (a).

§ 8800. Inventory and appraisal required

Memorandum 88-64 includes a discussion of whether the inventory and appraisal should be filed within four months, or whether the inventory should be required within three months and the appraisal within six months. We have received a letter from Melvin C. Kerwin, a probate referee, on another matter that also includes comments on the inventory and appraisal. Mr. Kerwin states:

> The attorneys that I have discussed this matter with do not understand why this recommendation is made. Whether it's three months or four months required for filing the Inventory and Appraisement at the present time is largely irrelevant because it is observed more in the breach than the observance. Sometimes it takes three or four months just to get together the information to file the inventory let alone to complete the appraisal and why it would make any sense to have two documents, that is an Inventory and an Appraisal is not clear. The attorneys I spoke to regarding this matter were more interested in less paperwork, rather than additional paperwork and the concept of having an Inventory and Appraisal form that attorneys are familiar with, rather than two new forms and two new time limits, is not enthusiastically embraced.

The staff notes that we are not contemplating two new forms, but simply the one form used right now. The personal representative would, within three months, fill in the inventory form, exactly as is done right now, and file it with the court and deliver a copy to the probate referee. The probate referee would then fill in the appraised values, just as is done now, and return the form to the personal representative for filing within six months. There are no new forms, nothing the probate referee has to do any differently, and nothing the personal representative has to do any differently except for a single additional court filing; there is just more time for the personal representative to complete the inventory and for the probate referee to complete the appraisal. As Mr. Kerwin himself points out, the current three month period to complete both inventory and appraisal is often unrealistic and ignored in practice--"Sometimes it takes three or four months just to get together the information to file the inventory let alone to complete the appraisal." We rest our case.

§ 10950. Court-ordered account

The statute indicates when the personal representative is required to file an account, but does not clearly state that the personal representative is permitted to file an account even though not required. Mr. Strathmeyer states, "I suppose this right is implied, but it would be nice to have something specific. Frequently fiduciaries want to file accounts in order to get the account settled and cut off later claims."

A provision could be added along the following lines:

§ 10902. Procedure on account

10902. The personal representative shall file an account when required under Chapter 2 (commencing with Section 10950) and may file an account at any other time. Whether or not required, the filing of an account shall be deemed to include a petition for approval of the account.

Comment. Section 10902 is new.

§ 11641. Distribution under court order

Section 11641 provides that when an order for final distribution becomes final, the personal representative may distribute property in the estate. Mr. Strathmeyer's concern is that since an order is not final until the time for appeal has expired, this provision will delay distribution in every estate.

The staff believes Mr. Strathmeyer is correct. Section 11641 is drawn from existing Section 926, which is not limited to orders that have become final. The staff would revise Section 11641 to read:

11641. When an order settling a final account and for final distribution ~~becomes final~~ is entered, the personal representative may immediately distribute the property in the estate to the persons entitled to distribution, without further notice or proceedings.

General provisions in the Probate Code cover the matter of a stay in case of an appeal. See Section 7241.

§ 11801. Distribution despite death of beneficiary

Section 11801 precludes distribution to a beneficiary, even though the beneficiary survives the decedent's death, if there is a survival requirement in the decedent's will that the beneficiary fails to satisfy. Mr. Strathmeyer is concerned that this provision may have the

effect of losing a marital deduction for the beneficiary, since a marital deduction is available only if a survival requirement imposed by the will is limited to six months.

This problem is possibly cured by Section 21525, which provides that any survival requirement in a marital deduction gift that exceeds or may exceed six months is construed to be limited to six months. However, Section 11801 as drafted could be read to supersede this curative provision. We could make the interrelation clear by revising Section 11801(b) to read:

> (b) Distribution may not be made under this chapter if the decedent's will provides that the beneficiary is entitled to take under the will only if the beneficiary survives the date of distribution or other period stated in the will and the beneficiary fails to survive the date of distribution or other period, subject to Section 21525.
>
> Comment. Subdivision (b) of Section 11801 is revised to make clear that, in the case of a marital deduction gift, any survival requirement in the will that exceeds or may exceed six months is construed to be a six month limitation under Section 21525.

§ 12522. Admission of will admitted to probate in sister state

In the case of California property of a nondomiciliary decedent, Section 12522 requires the decedent's will probated in the state of domicile to be admitted to probate in California if due process was observed and the judgment was final in the state of domicile. Mr. Strathmeyer is concerned that this provision is too narrow; California may want to apply other doctrines such as collateral estoppel or forum non conveniens where a sister state judgment admitting a will to probate is involved, even though the requirements of Section 12522 are not strictly satisfied. He suggests we may at least want to mention this in the Comment.

The way the statutory scheme works is that if the Section 12522 requirements are satisfied, the will must be admitted in California. If the Section 12522 requirements are not satisfied, the will may be admitted in California under standard probate procedures. Whether collateral estoppel, forum non conveniens, or other doctrines may be available under standard probate procedures is a very complex matter

that the staff would be very reluctant to attempt to explain in a Comment. The most we would do is make a technical clarification in the Comment to Section 12520, as follows:

> 12520. (a) If a nondomiciliary decedent's will has been admitted to probate in a sister state or foreign nation and satisfies the requirements of this article, probate of the will in an ancillary administration proceeding is governed by this article.
>
> (b) If a nondomiciliary decedent's will has been admitted to probate in a sister state or foreign nation, but does not satisfy the requirements of this article, the will may be probated in an ancillary administration proceeding pursuant to Part 2 (commencing with Section 8000).
>
> Comment. Subdivision (a) of Section 12520 makes clear that the procedure of this article applies only where a sister state or foreign nation order admitting a will to probate satisfies the requirements of Sections 12522 or 12523. As provided in subdivision (b), the general provisions concerning opening administration apply where the sister state or foreign nation order is not entitled to recognition under this article. See Section 8000 et seq. This article does not address whether the order or any matter determined in the order may be entitled to recognition for other purposes under other principles. The general provisions also apply in any case where admission has not been sought in the sister state or foreign nation. See also Section 6113 (choice of law as to execution of will).

Respectfully submitted,

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November 18, 1988

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Re: AB 2841

Dear Nat:

I am in the midst of grinding out my annual legislative summary to the CEB Estate Planning and California Probate Reporter. I have a few observations, some of which may justify correcting legislation. I'm afraid the press of the current press deadline does not give me the opportunity to review these as carefully as I might otherwise, but I wanted to get this off as quickly as possible.

A. Final Distribution. New Probate Code 11641 states, "When an order settling a final account and for final distribution becomes final, the personal representative may immediately distribute the property in the estate to the persons entitled to distribution, without further notice or proceedings." Doesn't the decree become final only after the appeal period expires? If so, doesn't this provision delay distribution during that period?

B. Voluntary Accounting. Reviewing the repeal of the obligation to file a supplemental account made me realize that there is no provision in the code authorizing fiduciaries to voluntarily account at a time not required by law. I suppose this right is implied, but it would be nice to have something specific. Frequently fiduciaries want to file accounts in order to get the account settled and cut off later claims.

C. Deceased Beneficiary. New Prob C 11801(b) states that the share of a deceased distributee does not pass to the heirs or estate of the distributee if the distributee failed to survive until a time required by the will. I am concerned that in the case of a surviving spouse this provision conflicts with the marital deduction savings provision in Prob C 21525.

D. Determining Persons Entitled to Distribution. New Prob C 11705 provides that when an order determining the persons entitled to distribution becomes final it binds and is conclusive as to the rights of all interested persons. In those cases where

such a decree has the effect of ratifying a will, this provision conflicts with the Prob C 8270(b) provision allowing minors and incompetents to contest wills at any time prior to distribution.

Further, I do not follow the rationale of allowing such a petition to be filed after the filing of the petition for final distribution. In substance, such a petition is a response to the petition for final distribution. The result is procedural chaos with two petitions pending before the court subject to two different procedures. (For example, if I fail to file a response to the petition for determination of rights to distribution, I am supposedly barred from the proceeding, but I still have the right to appear at the time of hearing on the petition for final distribution--which will probably be consolidated for hearing.)

E. Wills Probated in Sister States. Prob C 12522 specifies when admission of a will to probate in a sister state will have binding effect in California. The statute (and underlying study) are based on full faith and credit constitutional concerns and ignore the fact that other policies of the State of California may require honoring the foreign decree--particularly a decree rendered in a state which is not a state of domicile. These policies include collateral estoppel and forum non conveniens. At a minimum, the comment to the final reenacted code should make clear that the statute does not exclude application of these concepts.

Example: Decedent dies domiciled in New York, leaving real property in Florida and California. There is no probate in New York (perhaps the NY assets were in joint tenancy). If there is a will contest in Florida and all interested persons are given notice, shouldn't California follow the Florida judgment? But the statute does not require this result, because Florida is not the state of domicile. It also would not honor the Florida judgment before it became final (although one would hope that a California court would delay California proceedings on forum non conveniens grounds if finality was the only issue).

F. Power of the Court; etc.. Prob C 7050, regarding the general jurisdiction power of the court, states that it applies to proceedings under "this Division" (Division 7). It should also apply to Division 8 (small estate and spousal property proceedings) and Division 10 (tax apportionment). The same problem applies to Prob C 7200, (elimination of jury trials), and Prob C 7060 (disqualification of judge who is interested in estate or drafted the will).

G. Fixed-minimum bond. New Prob C 8482 refers to a "fixed-minimum" bond. I don't have the slightest idea what a fixed-minimum bond is. Does anyone else?

H. Verification by Attorney. Perhaps more in the pet peeve department than anything else, I am concerned about the Probate Code 1023 prohibition on an attorney signing a pleading on behalf of a "fiduciary." The following is a quote from the forth coming article:

"The prohibition against signing on behalf of a fiduciary seems overbroad, applying not only to the fiduciaries appointed in the particular proceeding, but also to other fiduciaries, even those who are not court appointed. Thus it appears to be the law of California that an attorney for a foreign trust can sign a million dollar civil action without the signature of his client, but cannot similarly sign an objection to a $500 dollar item in a probate accounting. The requirement is apparently based on Los Angeles County Probate Policy Memorandum 2.05 which dubiously reasons that, "To allow an attorney to sign for [the fiduciary] would be an unauthorized delegation of authority." If this position was followed in other contexts, it would be an unauthorized delegation of authority to delegate the task of preserving estate property to a moving and storage company, or to delegate daily operation of a decedent's business to a business manager.

"The primary problem with the provision restricting the ability of attorneys to sign for fiduciary clients is that the court has no authority to waive the restriction if an emergency arises when the fiduciary in unavailable. This may force the attorney to file an otherwise unnecessary civil action if affirmative relief is needed (e.g. a restraining order to protect estate property). If the fiduciary is responding to a petition, the unavailable client problem can be solved by making an oral objection at hearing."

Without checking, I suspect that there is also a conflict with the Prob C 10953 provisions which permit the court to require an attorney to file an account.

Hope some of the foregoing suggestions are helpful. On balance, I think the Probate Code reform project has been a monumental achievement.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer