

Second Supplement to Memorandum 88-70

Subject: Study 1036/1055 - Personal Representative and Attorney Fees in Probate

Attached is a letter from Commissioner Stodden requesting that consideration of the meeting material on the fees of the attorney and personal representative be deferred until a future meeting. She also makes a suggestion concerning the substance of the recommendation. The State Bar Section has advised that Chuck Collier will not be able to attend the October meeting, but would be able to attend the December 1-2 meeting in Los Angeles. We are not sure that we will be able to hold a meeting on December 1-2, since already two members of the Commission have indicated they will be unable to attend.

Should Consideration of Tentative Recommendation be Delayed Until a Future Meeting?

It is essential that the recommendation on attorney fees be presented to the 1989 legislative session if we wish to avoid controversy with respect to the bill we will introduce to enact a new Probate Code. Unless the controversy concerning the attorney fee issue is resolved before the bill to enact the new Probate Code is presented for enactment, it is likely that the controversy will make it impossible to enact the bill proposing the new code.

Accordingly, the Commission needs to approve a tentative recommendation for distribution to interested persons and organizations for review and comment as soon as possible. We need to allow time for those persons and organizations to review the tentative recommendation and to prepare and submit their comments to the Commission. And we need to allow time for the Commission to consider the comments we receive and to make any needed revisions in its recommendation before the recommendation is approved for submission to the 1989 legislative session. There is a bill introduction deadline (March 6) and the bill must be in the hands of the Legislative Counsel a sufficient time prior

to that date (about one month) in order to have the bill in hand for introduction on the deadline date. This means that we need to have the bill in the form in which the Commission recommends it drafted for submission to the Legislature Counsel by about February 1, 1989. The Commission will need to approve the recommendation and the bill at its January meeting in order to meet this deadline. To allow time for interested persons to review and comment on the tentative recommendation and to permit the Commission to review those comments, the tentative recommendation should be distributed for comment after the October meeting. Comments can then be reviewed at the December meeting (if we can obtain a quorum for that meeting) or the January meeting, at the latest.

Commissioner Stodden's Suggestion Concerning Tentative Recommendation

Commissioner Stodden suggests that the terminology of the "disclosure statement" be revised to state that the statutory fee is the "standard" fee and that the attorney may "waive a portion of his statutory fee." The statute does not state that the statutory fee is a standard fee. Perhaps the concise disclosure statement required by the basic draft ("The California Probate Code sets the maximum limits on the fee of the attorney, but the attorney and client may agree to a lower fee.") is not a sufficient statement. The disclosure statement set out on pages 2-3 of the First Supplement to Memorandum 88-70 may be a more adequate statement. The Commission is, of course, aware that the reason the Commission was directed to study probate law is because of the concern of consumer groups about the statutory fee. The staff believes that the tentative recommendation (with the more adequate disclosure statement contained in the First Supplement) is a recommendation that can be supported and should be acceptable to the legislative committees that will consider this bill. If the Commission does not do anything significant to meet the concern of consumer groups, the staff fears that they will object to the bill introduced to effectuate the Commission's recommendation and that the legislative committees will adopt an amendment to provide for a reasonable fee system in place of the statutory fee system we now have. This is a risk that the Commission and other interested persons and organizations should take into account in reacting to the tentative recommendation.

Commissioner Stodden also is opposed to permitting persons who are not parties to the fee agreement contract to obtain a court review of the reasonableness of the attorney fee.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



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The Superior Court
111 NORTH HILL STREET
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RECEIVED

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ANN E. STODDEN
PROBATE COMMISSIONER

September 27, 1988

Mr. Forrest A. Plant, Jr.
Chair, Law Revision Commission
300 Capitol Mall, 17th Floor
Sacramento, CA 95814

Dear Forrest:

I wish to apologize for not attending the last meeting and to notify you that I will also be unable to attend the October meeting since I will be in New Zealand.

I am writing about Memorandum 88-70 and the First Supplement thereto because I feel very strongly on these issues.

I believe firmly in a statutory fee since it saves the court from hours of work and further keeps an arms-length between the personal representative and the attorney and the personal representative and the beneficiaries.

Throughout 88-70 the reference is to the fact that the statutory fee is a maximum fee. Not only do I believe this is erroneous in that we may also have fees for extraordinary services but I believe it would confuse all parties. Therefore I suggest that the term "standard" fee be used rather than the "maximum" fee.

I am firmly convinced that we should have a written fee agreement between the attorneys and the personal representative. I also believe that the personal representative should be made aware that in many cases attorneys will waive a portion of their statutory fee. I believe that to refer to this as a negotiated fee is going to cause the personal representative to be in a position of conflict with the beneficiaries of the estate. Therefore I believe that the terminology should be revised to provide that the personal representative must be notified that in some instances an attorney may waive a portion of his statutory fee.

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The suggestion contained in the First Supplement to Memo 88-70 which requires the personal representative to negotiate a fee in any instance and allows any person interested in the estate who did not sign the agreement to object to a petition for fees would, in effect, create a system of reasonable fees which would be required to be determined by the court in each instance greatly increasing the time requirements of the court.

It would be my hope that the consideration of Memorandum 88-70 and its supplement can be deferred until the November meeting which it is my plan to attend. If not, I would appreciate your making my comments known to the other commissioners.

Sincerely,



Ann E. Stodden

AES:eh

cc: Mr. N. Sterling

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October 4, 1988

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

Re: LRC October Meeting

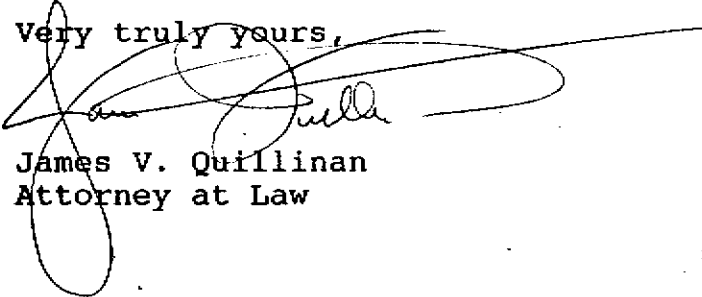
Dear John:

Nat has informed me that the LRC meeting for October may be moved to October 24, 1988. Neither Chuck Collier nor I will be able to attend that meeting. Chuck cannot attend on the 27th or 28th either. Since you have attorney's fees on the schedule for those dates, I am concerned that neither Chuck nor I, especially Chuck who has followed the study throughout, will be able to attend. Chuck informs me that he is available for the December 1-2 meeting in LA. I am therefore requesting that the Commission defer consideration of the attorney's fee memo until the December meeting. I do not believe this would cause any hardship or delay in getting the memo into Final Recommendation. The TR is far along and should not take much staff or commission time to complete the review.

Since this is obviously a matter of importance to the Section and to the Bar, I hope you will extend another courtesy and defer the consideration of the memo until December.

Your cooperation is most appreciated.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/hl
cc: Chuck Collier Valerie Merritt
Irv Goldring Terry Ross

CA LAW REVISION
OCT 05 1988
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