

Memorandum 88-81

Subject: Study L-1061 - Brokers' Commissions in Probate

Broker's Commission Where Broker is Purchaser

Attached to this Memorandum as Exhibit 1 is a letter from attorney Lloyd Homer of Campbell. He says the law is unclear whether a broker in an estate sale who purchases the property for himself or herself is entitled to a broker's commission. He says the Probate Code provisions on estate sales allow a commission only to an "agent or broker." Where the broker purchases for himself or herself, there is no true agency relationship and, arguably, no commission is authorized under the Probate Code. Mr. Homer takes no position on the policy question, but merely thinks the law should be made clear.

Under general agency law, a broker acting as agent for a seller may purchase the property for his or her own account and may receive a commission on the purchase, if the broker discloses all material facts which might affect the seller's decision. 1 H. Miller & M. Starr, Current Law of California Real Estate § 4:16, at 42 (rev. ed. 1975). If the broker fails to make complete disclosure, the broker may not receive a commission on a sale to himself or herself, or to his or her spouse, relative, partner, or employee. *Id.* at 40-41.

Mr. Homer is correct that in estate sales, unlike general agency law, mere disclosure is not enough to entitle the broker-purchaser to a commission: If there is complete identity between broker and purchaser, then there is no true agency relationship, and therefore no "agent or broker" to whom a commission is payable. Estate of Toy, 72 Cal. App. 3d 392, 394, 140 Cal. Rptr. 183 (1977). The Probate Code allows "compensation for services which produce a successful bid, not an automatic discount for any purchaser who happens to be a licensed broker." *Id.*

However, the Toy case has been limited by Estate of Levinthal, 105 Cal. App. 3d 691, 164 Cal. Rptr. 628 (1980). The *Levinthal* court distinguished between the case where there is complete identity between broker and purchaser, therefore no true agency and no entitlement to a

commission (the *Toy* case), and the case where the broker merely has some interest in the purchasing entity which may not be substantial enough to make them one and the same. The broker in *Levinthal* had an interest in the purchaser corporation. The court said that nothing in the Probate Code provisions on estate sales

mandates that if the broker and the bidding entity are separate entities, the broker is denied the right to a commission because of having some interest in the purchaser-bidder entity. . . . Unless the broker's interest in the purchasing entity is substantial, [the] Probate Code . . . would not constitute a bar to the broker's right to a commission. If, however, the broker has a substantial interest in the purchasing entity, there is then such a relationship between the broker and his principal -- the purchaser -- that it cannot be said that the broker has produced the successful bidder as an entity separate and apart from the broker himself.

105 Cal. App. 3d at 699-700. See generally 1 H. Miller & M. Starr, *Current Law of California Real Estate* § 2:51 (rev. ed. Supp. 1987).

The staff recommends adding the following to the Comment to Section 10161 as we prepare Comments for the new code:

If the broker is the purchaser of estate property, the broker may not be entitled to a commission on the sale: If there is complete identity between broker and purchaser, there is no true agency relationship, and the broker-purchaser is therefore not entitled to a commission. *Estate of Toy*, 72 Cal. App. 3d 392, 394, 140 Cal. Rptr. 183 (1977). However, if the broker has an insubstantial interest in the purchasing entity, there is no bar to the broker's right to a commission. *Estate of Levinthal*, 105 Cal. App. 3d 691, 699-700, 164 Cal. Rptr. 628 (1980). Concerning the broker's duty to make full and complete disclosure to his or her principal of all material facts which might influence the principal, see *Batson v. Strehlow*, 68 Cal. 2d 662, 675-76, 441 P.2d 101, 68 Cal. Rptr. 589 (1968); *Bate v. Marsteller*, 175 Cal. App. 2d 573, 580-83, 346 P.2d 903 (1959); 1 H. Miller & M. Starr, *Current Law of California Real Estate* § 4:16 (rev. ed. 1975).

Commission on Exclusive Right to Sell Contract Where Original Bidder Not Represented by an Agent or Broker

The provisions on compensation of an agent or broker in estate sales (Prob. Code §§ 10160-10166) fail to cover the following situation:

(1) The personal representative makes a contract with an agent or broker granting the exclusive right to sell the property.

(2) The contract also provides that if the estate sells the property to a particular person no commission is payable.

(3) The original bid returned to court for confirmation is from that person.

(4) Either sale is confirmed to that person, or another agent or broker brings in a successful overbidder.

In this situation, the statute is silent concerning the rights of the agent or broker holding the exclusive contract. This problem was brought to the staff's attention by a telephone call from an Orange County Court Commissioner, and it apparently occurs in practice with some frequency.

Where the original bid is by the person named in the exclusive contract but sale is confirmed to a third person represented by an agent or broker, the staff recommends applying the same rule as is applied to an agent or broker holding an exclusive contract where the original bid is returned by a purchaser procured by another agent or broker and the court confirms the sale to that person. In that case, the commission is divided between the agent or broker holding the exclusive right to sell contract and the agent or broker who produces the successful overbidder. Prob. Code § 10162.7. The staff would accomplish this by amending Section 10162.7 as set out in Exhibit 2.

Where the original bid is by the person named in the exclusive contract and sale is confirmed to that person, there should be no commission at all if that person is not represented by an agent or broker. If that person is represented by an agent or broker (which seems unlikely, since the reason for naming the person in the exclusive contract is avoid having to pay a commission), then the agent or broker should be entitled to the usual commission, as though there were no exclusive contract. See Section 10162.3. The staff would accomplish this by amending Section 10162.5 and adding a new Section 10162.6 as set out in Exhibit 2.

Respectfully submitted,

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RECEIVED

Mr. John DeMouly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: Broker's Commissions

Dear John,

This letter is pursuant to our telephone conversation regarding broker's who are purchasing for their own account. Often we have the situation where a broker is buying for his or her own account and also wants a commission. Using the references in the Comments, this could apply to Broker A, Broker B or Broker C.

This letter is not to recommend a policy position but only to suggest that we need clarification of the issue. Section 10161(b) would suggest that the broker must be procuring a buyer. If a person is a buyer, I question if they could act as a broker or agent for themselves since they are the principal.

If it is a policy decision that a broker should be able to receive a commission in these capacities, then I believe the code should so state.

If the policy decision is that they should not receive a commission, the code should be made clear. However, this position raises other issues. If the broker's spouse purchases the property, is the broker entitled to a commission? If the broker purchases for a child, is the broker entitled to a commission? What should be done if the broker purchases the property but uses a straw man as an intermediary? What if the broker states that he or she does not want a commission, but three percent of the sales price is fair compensation for handling the paper work and supervising the escrow?

See Batson v. Strehlow, 68 C.2nd 662 from analysis.

Mr. John DeMouilly
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If the code precludes a commission to a buyer/agent, does this prohibition apply under IAEA?

I have been advised that many Courts deny a commission to a buyer/agent.

If you have any questions regarding this inquiry, please give me a call.

Sincerely,

Lloyd W. Homer

LWH:ml

Exhibit 2

Probate Code § 10162.5 (amended). Compensation where there is an exclusive contract and no other broker or agent is involved

SEC. _____. Section 10162.5 is amended to read:

10162.5. ~~Where~~ Subject to Section 10162.6, where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the court shall allow to the agent or broker holding the contract the compensation determined under Section 10161 on:

(a) The full amount for which the sale is confirmed if both of the following circumstances exist:

(1) The bid returned to the court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale to that purchaser on that bid.

(b) The amount of the original bid if both of the following circumstances exist:

(1) The bid returned to court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

Comment. Section 10162.5 is amended to make the section subject to Section 10162.6 (no commission where exclusive contract provides that no commission is payable if sale is confirmed to particular person and court confirms sale to that person). See also the Comment to Section 10162.6.

Probate Code § 10162.6 (added). No compensation when contract so provides

SEC. _____. Section 10162.6 is added to the Probate Code, to read:

10162.6. Where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the contract provides that no compensation shall be payable to the agent or broker if sale is confirmed to a particular person named in the contract, and the court confirms sale to that person, no compensation is payable to the agent or broker holding the contract. If the purchaser is represented by another agent or broker, that agent or broker is entitled to the compensation provided by Section 10162.3.

Comment. Section 10162.6 is new, and makes clear that no compensation is payable in the following cases:

Example 1. Exclusive listing contract which provides for no compensation if sale is confirmed to a specified person; that person is not represented by a broker and that person's bid is returned to court; no overbid. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a particular person. The bid returned to the court for confirmation is made by that person, not represented by a broker. The court confirms the sale to that person. As provided in the contract, Broker A is not entitled to any commission. Section 10162.6.

Example 2. Exclusive listing contract which provides for no compensation if sale is confirmed to a specified person; that person is represented by another broker and that person's bid is returned to court; no overbid. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a particular person. The bid returned to the court for confirmation is made by that person, who is represented by another broker. That broker is entitled to the compensation determined under Section 10161 on the full amount for which the sale is confirmed. See Sections 10162.6, 10162.3. As provided in the contract, Broker A is not entitled to any commission. Section 10162.6.

Probate Code § 10162.7 (amended). Compensation where there is an exclusive contract and sale is made on bid returned to court by purchaser represented by another agent or broker

SEC. _____. Section 10162.7 of the Probate Code is amended to read:

10162.7. (a) This section applies if all of the following circumstances exist:

(1) There ~~there~~ is an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property + and either of the following circumstances exist:

(2) (1) The bid returned to court for confirmation is made by a purchaser procured by another agent or broker +

(3) The and the court confirms the sale to that purchaser on the bid returned to court for confirmation.

(2) The bid returned to court for confirmation is made by a purchaser who is not represented by an agent or broker and the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker other than the agent or broker holding the contract under Section 10150 granting the exclusive right to sell the property.

(b) If all the circumstances described in this section applies as provided in subdivision (a) exist , the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed. The compensation allowed by the court shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding the contract and the other agent or broker.

Comment. Section 10162.7 is amended to make it apply to the case where there is an agent or broker holding a contract granting the exclusive right to sell the property, the original bid returned to court for confirmation is made by a person who is not represented by an agent or broker, and there is a successful overbidder who is represented by some other agent or broker. This situation may arise in the following example (the references to Broker A and Broker C are drawn from the examples in the Comment to Section 10161):

Exclusive listing contract; bidder whose bid is returned to court not represented by broker; successful overbid by purchaser represented by another broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a particular person. The bid returned to the court for confirmation is made by that person, who is not represented by a broker. At the confirmation hearing, the highest bid is made by another bidder who is represented by Broker C. The court confirms the sale to the overbidder. The commission is divided equally between the two brokers, unless otherwise provided in an agreement between them. See Section 10162.7

Note. When the staff prepares Comments to the new code, the staff will include the two examples in the Comment to Section 10162.6, and the example in the Comment to Section 10162.7, as Examples 11, 12, and 13 in the Comment to Section 10161.