

Memorandum 89-19

Subject: Study L-1037 - Authority for Personal Representative to Hire Assistants

At the September meeting, the Commission considered the following language from the Uniform Probate Code (Memo 88-43):

3-715. Except as restricted or otherwise provided by the will or by an order in a formal proceeding . . . , a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

There was some Commission sentiment to adopt a similar provision. The Commission asked for more analysis.

Existing Law

Authority to hire. The only statutory authority for the personal representative to hire assistants is for tax matters. Prob. Code § 902. However, courts have approved the hiring of a wide variety of assistants by the personal representative. Estate of McMillin, 46 Cal. 2d 121, 131, 292 P.2d 881 (1956) (carpenters, painters, electricians, plumbers, janitors, and others to carry on decedent's business); Estate of Costa, 191 Cal. App. 2d 515, 520-21, 12 Cal. Rptr. 920 (1961) (handwriting expert to analyze holographic will). See generally 3 California Decedent Estate Practice §§ 22.98, 23.13, 30.24 (Cal. Cont. Ed. Bar 1988).

Some local court rules authorize the personal representative to hire the estate attorney or other agent to perform ordinary duties of the personal representative and to pay for that out of the personal representative's own funds. Fresno County Probate Policy Memoranda § 9.4(c); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1.

A practice book recommends that, because there is no statutory authority to hire investment counsel, will drafters should include

authority for the executor to employ professional investment counsel without prior court approval. California Will Drafting Practice §§ 13.41, 13.42, at 617 (Cal. Cont. Ed. Bar 1982). Without such a will provision, recommended practice is for the personal representative to petition the court for authority to employ investment counsel. 3 California Decedent Estate Practice § 30.24 (Cal. Cont. Ed. Bar 1988). A UPC-type provision would eliminate doubt arising from the lack of statutory authority, and would make clear that the personal representative may retain investment advisers without prior court approval unless the will provides otherwise. This would be consistent with the scheme of the estate management provisions, under which the personal representative may act without prior court approval unless court approval is specifically required by statute. Prob. Code § 9610.

The UPC authority for the personal representative to hire someone associated with him or her is consistent with California law: A personal representative who is a lawyer may hire an attorney from his or her law firm if the personal representative does not share in the fee. *In re Estate of Parker*, 200 Cal. 132, 137, 251 P. 907 (1926).

Liability for acting on advice of assistant. The UPC permits the personal representative to "act without independent investigation" on recommendations of assistants, if the personal representative is "acting reasonably." The requirement that the personal representative must act reasonably avoids the risk that he or she might refuse to investigate when prudence requires an investigation.

The UPC appears to be consistent with California case law: If the personal representative uses due care in selecting the agent, the personal representative is not liable for money lost by the agent unless the personal representative is careless in dealing with the agent. *Estate of Barbikas*, 171 Cal. App. 2d 452, 459, 341 P.2d 32 (1959); see *In re Estate of Taylor*, 52 Cal. 477 (1877); Annot., 28 A.L.R.3d 1191 (1969). A lay personal representative may rely on advice of an attorney unless the situation is such that a lay person exercising common prudence would do otherwise. *Estate of Barbikas*, *supra*. Enactment of the UPC language would codify *Barbikas* and leave California law essentially unchanged.

Assistant performing statutory duty of PR. The last clause of the UPC language quoted on page 1 permits the personal representative

"instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary." This is presently covered by Section 10804 (Memo 89-3), which authorizes the personal representative to hire any qualified person to perform ordinary or extraordinary services. (For ordinary services, compensation must come from the personal representative.)

Section 10804 does not refer to "discretionary" acts as does the UPC, but it seems unnecessary to do so, since the staff has found no case making this distinction with respect to the personal representative delegating duties. It seems better not to legislate when we are unaware of a problem in the law.

Trust law. California trust law has a provision similar to the first portion of paragraph (21) of the UPC section, permitting a trustee to "hire persons, including accountants, attorneys, auditors, investment advisers, or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties." Prob. Code § 16247 (Exhibit 2). This is essentially what the staff proposes to codify for personal representatives in subdivision (a) of proposed Section 9658 (Exhibit 1).

Under California law, a trustee may not delegate to others the performance of acts the trustee can reasonably be required personally to perform, and may not delegate the entire administration of the trust. *Id.* § 16012 (Exhibit 2). The staff has found no case law to the effect that some duties of the personal representative may be nondelegable, so the staff does not propose to codify such a rule for personal representatives. This appears to be adequately covered by the language in proposed Section 9658 (Exhibit 1) that the personal representative may hire assistants if the personal representative is "acting reasonably for the benefit of the estate or of interested persons."

California law has a section on trustees' liability for acts of agents. *Id.* § 16401 (Exhibit 2). The staff does not propose to codify a similar rule for personal representatives. The question of the personal representative's liability for acts of agents appears to be adequately covered by case law as discussed above, and by the language in proposed Section 9658 (Exhibit 1) which requires the personal

representative to be "acting reasonably for the benefit of the estate or of interested persons" when the personal representative acts without independent investigation on the recommendations of assistants.

Personal Representative's Authority Under Independent Administration

Under the Independent Administration of Estates Act, the personal representative must obtain court approval to pay attorney's fees (Prob. Code § 10501), but may pay non-attorney tax experts without court approval and without giving notice of proposed action (*id.* §§ 902, 10550, 10551). Proposed Section 10804 in the attorney fee TR (see Exhibit 1 to this memo for text of section) has a new provision for court review of experts' fees at the final account. If this is adopted without revising the Independent Administration of Estates Act, it will impose a new requirement that notice of proposed action be given before paying experts' fees out of the estate.

Beverly Hills attorney Gerald Gerstenfeld recommends preserving existing law by making clear that notice of proposed action is not required when paying fees of non-attorney experts. (A copy of Mr. Gerstenfeld's letter is attached to Memo 89-3 as Exhibit 20.) A staff draft of new Section 10565 (Exhibit 1) will do this.

Staff Recommendations

The staff recommends adopting proposed Section 9658, set out in Exhibit 1, authorizing the personal representative to hire assistants, drawn from the UPC and from Section 16247 of California trust law. If the Commission approves proposed Section 9658, Section 10804 in the *Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative* (Memo 89-3) should be revised as shown in Exhibit 1. In any event, proposed Section 10565 should be approved as set out in Exhibit 1, and be included in the attorney fee TR.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

Staff Draft

Probate Code § 9658 (added). Authority to hire agents

SEC. _____. Section 9658 is added to the Probate Code, to read:

9658. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of the estate or of interested persons, may:

(a) Hire persons, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative, to advise or assist the personal representative for the providing of ordinary or extraordinary services to the estate.

(b) Act without independent investigation on their recommendations.

Comment. Section 9658 is new and is drawn from paragraph (21) of Section 3-715 of the Uniform Probate Code and from California trust law (Section 16247). The authority given by Section 9658 may be exercised by the personal representative without prior court authorization (Section 9610), unless otherwise provided by the will or by court order.

The introductory clause of Section 9658 makes clear that the personal representative must act reasonably in exercising the power granted by Section 9658. Thus, although Section 9658 gives the personal representative the power to act without independent investigation on the recommendations of assistants, the circumstances may be such that they require the personal representative to investigate. This is consistent with California case law. See *Estate of Barbikas*, 171 Cal. App. 2d 452, 459, 341 P.2d 32 (1959) (lay personal representative may rely on attorney's advice unless "a lay person exercising common prudence would do otherwise").

Under subdivision (a), the personal representative may make an agreement with the estate attorney that the estate attorney will assist the personal representative in performing the ordinary services of that office. This is consistent with existing practice. See Fresno County Probate Policy Memoranda § 9.4(c), *reprinted in California Local Probate Rules* (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, *reprinted in California Local Probate Rules, supra*; Rules of Professional Conduct of the State Bar of California, Rule 5-101.

Section 9658 merely deals with the authority of the personal representative to employ agents. The question of whether the agent is to be paid out of estate funds or out of the personal representative's own funds is governed by Section 10804.

Probate Code § 10565 (added). Hiring and paying experts, technical advisors, and other assistants

SEC. _____. Section 10565 is added to the Probate Code, to read:

10565. The personal representative has the power to:

(a) Hire persons, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative, to advise or assist the personal representative for the providing of ordinary or extraordinary services to the estate.

(b) Act without independent investigation on their recommendations.

(c) Pay out of funds of the estate for the services of persons who are not attorneys and are hired to provide services in the computation, reporting, or making of tax returns, or in negotiations which may be necessary for the final determination and payment of taxes.

(d) Pay out of funds of the estate for the services of persons who are not attorneys and are hired to provide extraordinary services to the estate.

(e) Pay out of the personal representative's own funds for the services of persons who are hired to provide ordinary services to the estate.

Comment. Section 10565 adds authority comparable to that added in supervised administration. See Sections 9658, 10804. Although fees of experts are subject to court review under Section 10804 (supervised administration), fees of non-attorney experts under Section 10565 (independent administration) may be paid without giving notice of proposed action. Section 10550. This is consistent with former law. See Sections 10501, 10550, 10551; former Section 902.

Although the personal representative may act under Section 10565 without giving notice of proposed action, notice may be given under Section 10580. If notice is given to a person who fails to object to the proposed action, that person waives the right to have the court later review the action. Section 10590.

Fees of experts who are attorneys are subject to court supervision under the Independent Administration of Estates Act. Section 10501(a)(2).

Probate Code § 10804. Payment of experts, technical advisors, and other assistants

10804. (a) The If the personal representative may employ employs tax counsel, tax auditors, accountants, or other tax experts for the providing of services in the computation, reporting, or making of tax

returns, or in negotiations which may be necessary for the final determination and payment of taxes, and the personal representative may pay for such services out of funds of the estate.

(b) ~~The~~ If the personal representative may employ employs any expert, technical advisor, or other qualified person when necessary for the providing of to provide extraordinary services to the estate, and the personal representative may pay for the services of that person out of funds of the estate.

(c) ~~The~~ If the personal representative may employ any employs a qualified person, including a member of the State Bar of California, to assist the personal representative in the performance of the ordinary services of the personal representative, and the personal representative may pay for the services of that person out of the personal representative's own funds. At the request of the personal representative, the court may order payment out of the estate directly to the person assisting the personal representative in the performance of the ordinary services, the payment to be charged against and deducted from the compensation that otherwise would be paid to the personal representative.

(d) If not previously authorized or approved by the court, the amounts paid out of funds of the estate pursuant to subdivisions (a) and (b) are subject to court review at the time of the final account. The employment and payment of a person under subdivision (c) need not be authorized or approved by the court.

~~(e) The employment of a person under this section does not relieve the personal representative from any liability arising out of the performance of, or the failure to perform, the duties of a personal representative.~~

Comment. Subdivision (a) of Section 10804 restates without substantive change the last portion of the second sentence of former Section 902 relating to payment for the services. The authorization to hire tax experts is in Section 9658. The tax expert employed pursuant to Section 9658 is paid out of funds of the estate; the compensation to which the personal representative is entitled under Section 10800 is not reduced because the tax expert is employed to assist the personal representative to perform duties in connection with taxes. This is because the services in connection with the taxes are extraordinary services. See the Comment to Section 10831.

The attorney for the personal representative also is paid out of funds of the estate and the compensation under Section 10800 is not

reduced because of such payment.

Subdivisions (b), (c), and (d) are new. If the personal representative hires another to assist in the performing of the duties of the personal representative, the person hired is paid out of the personal representative's own funds if the person is assisting the personal representative in performing ordinary services. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (expenditure to compensate an investigator for locating estate assets not allowable because this is a statutory duty of the representative). However, if the execution of the particular duty requires extraordinary services, then the personal representative may be allowed additional compensation for the extraordinary services (Section 10801) which could include an allowance to the personal representative to cover the cost of compensating another to assist in performing the extraordinary services or the person assisting in performing the extraordinary services could be paid out of estate funds and the allowance to the personal representative for performing the extraordinary service reduced accordingly. For example, a manager may be needed to run the decedent's business. The reasonable salary of the manager may be paid from estate funds, and the allowance to the personal representative for managing the business reduced to recognize the payment to the business manager from funds of the estate. On the other hand, the business may, for example, be managed by an employee of the personal representative, and the personal representative may request an allowance for the extraordinary management services that covers the entire cost of providing those services.

An expert employed under Section 9658 may include, for example, an attorney hired to bring a law suit to collect a debt owed by a third person to the estate or to handle litigation against the decedent or the estate, or to do other extraordinary legal services for the estate. Subdivision (b) permits the personal representative to pay for the services rendered by the lawyer out of the estate. See the examples of litigation concerning the estate in the Comment to Section 10831. See also the Comment to Section 10854. If not previously authorized or approved by the court, the need for the lawyer and the fee of the lawyer are subject to review by the court at the time of the final account. See subdivision (d) of Section 10804. See also Sections 11001 and 11004.

Under Section 9658, the personal representative may make an agreement with the estate attorney that the estate attorney will assist the personal representative in performing the ordinary services of that office. This is consistent with existing practice. See *Fresno County Probate Policy Memoranda § 9.4(c)*, reprinted in *California Local Probate Rules* (9th ed., Cal. Cont. Ed. Bar 1988); *Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1*, reprinted in *California Local Probate Rules, supra*; *Rules of Professional Conduct of the State Bar of California, Rule 5-101*. Court authorization or approval is not required when the attorney is paid by the personal representative from the personal representative's own funds. This changes the former practice in at least one court. See *Fresno County Probate Policy Memoranda § 9.4(c)*, reprinted in *California Local Probate Rules, supra* (court approval of contract required). Compare *Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1*, reprinted in *California*

Local Probate Rules, *supra*.

Subdivision (d) indicates when court authorization or approval is required. Amounts paid out of estate funds under subdivisions (a) and (b) are subject to court review. Payment may not be made to the estate attorney unless authorized by the court. See Sections 10831, 10850, 10851. But court authorization or approval is not required when an attorney or other person is hired under subdivision (c) to assist the personal representative in performing ordinary services.

Nothing in Section 10804 changes the rule that necessary expenses in the administration of the estate, including but not limited to necessary expenses in the care, management, preservation, and settlement of the estate, are to be paid from the estate. See Section 11004 which permits expenses such as insurance, gardening, pool maintenance, and maintenance of property pending sale or distribution to be paid from the estate.

Note. Section 10804 is contained in the Commission's Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative (Memo 89-3). The revisions shown above are to the section as it appears in the Tentative Recommendation. The proposed deletion of subdivision (e) relating to liability of the personal representative is because the question of liability is covered by the introductory clause of proposed Section 9658, which requires the personal representative to act "reasonably for the benefit of the estate or of interested persons."

Exhibit 2

PROVISIONS IN EXISTING CALIFORNIA TRUST LAW

Probate Code § 16012. Trustee's duty not to delegate

16012. (a) The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person.

(b) In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

Probate Code § 16247. Trustee's hiring of agents

16247. The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

Probate Code § 16401. Trustee's liability for acts of agents

16401. (a) Except as provided in subdivision (b), the trustee is not liable to the beneficiary for the acts or omissions of an agent.

(b) The trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if committed by the trustee under any of the following circumstances:

(1) Where the trustee has the power to direct the act of the agent.

(2) Where the trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.

(3) Where the trustee did not use reasonable care in the selection of the agent or the retention of the agent selected by the trustee.

(4) Where the trustee does not exercise proper supervision over the agent's conduct in a case where the trustee has the power to supervise the agent.

(5) Where the trustee conceals the act of the agent.

(6) Where the trustee neglects to take reasonable steps to compel the agent to redress the wrong in a case where the trustee knows of the agent's acts or omissions.

(c) The liability of a trustee for acts or omissions of agents that occurred before July 1, 1987, is governed by prior law and not by this section.