

rm50
1/26/89

First Supplement to Memorandum 89-23

Subject: Study L-1036/1055 - Hiring and Paying Attorneys, Advisors,
and Others; Compensation of Personal Representative

Attached is the narrative portion of the *Recommendation Relating to Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*. This narrative, together with the recommended legislation attached to the basic memo, completes the recommendation.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

jd773
01/25/89

#L-1036/1055

February 9, 1989

STATE OF CALIFORNIA
California Law Revision Commission

RECOMMENDATION

relating to

PROBATE LAW

Hiring and Paying Attorneys, Advisors, and Others
Compensation of Personal Representative

February 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

February 9, 1989

To: The Honorable George Deukmejian
Governor of California
and
The Legislature of California

In 1980, the Legislature directed the Commission to study whether "the California Probate Code should be revised, including but not limited to, whether California should adopt, in whole or in part, the Uniform Probate Code." 1980 Cal. Stat. res. ch. 37. The Legislature took this action at the request of persons who believed that the California statutory fee schedule for estate attorneys should be replaced by the "reasonable fee" system of the Uniform Probate Code.

After extensive study, the Commission recommends:

(1) The substance of the Uniform Probate Code "reasonable fee" system for the estate attorney should be substituted for the California statutory fee schedule.

(2) The existing statutory percentage fee provisions for the personal representative should be retained without significant change.

Although most probate practitioners prefer the existing California system to the Uniform Probate Code system for determining probate attorneys' fees, two important organizations representing the probate bar have advised the Commission that they do not object to the general concept of the Commission's recommendation: the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar, and the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. In addition, representatives of consumer groups appeared before the Commission and strongly supported the general concept of the Commission's recommendation. These included Deborah Chalfie for the national organization of HALT, representatives of several local chapters of HALT, and representatives of the California State Legislative Committee of the American Association of Retired Persons.

In its study, the Commission had the benefit of a comprehensive background study (unpublished) prepared by the Commission's staff. In addition, the Commission distributed a questionnaire to lawyers, judges, probate commissioners, probate referees, and others who had indicated an interest in the Commission's probate law study. Two hundred forty-five persons responded to the questionnaire. A majority (53 percent) preferred that no change be made in the manner of determining probate attorneys' fees. Almost one-fourth (24 percent) preferred the Uniform Probate Code scheme for fixing probate attorneys' fees.

In October 1988, the Commission distributed a tentative recommendation to interested persons for review and comment. The tentative recommendation proposed that the statutory percentage fee be kept in California, both for the estate attorney and for the personal representative, that the statutory fee be slightly reduced, and that the attorney be required to disclose to the personal representative that a lower fee could be negotiated.

Most probate practitioners who commented on the tentative recommendation approved it, but many urged that the statutory fee for small estates be increased. The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar opposed the tentative recommendation, taking the position that, with respect to attorneys' fees, the existing law should be retained without change or, if a change was to be made, that the Uniform Probate Code reasonable fee system be adopted for attorneys. The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association took the same view, a view that is shared by some prestigious probate practitioners who commented on the tentative recommendation. HALT and the American Association of Retired Persons also urged the Commission to adopt a reasonable fee system for attorneys in place of the statutory fee schedule which the tentative recommendation proposed to keep.

The Commission gave careful consideration to the comments of interested persons and organizations on the tentative recommendation. As a result of this consideration, the Commission now recommends that the reasonable fee approach of the Uniform Probate Code be adopted in California for the estate attorney. The recommended legislation contains provisions on the hiring and payment of persons by the personal representative, including the estate attorney, and provides for court review only if an interested person objects to the agreed compensation. Use of the independent administration notice of proposed action procedure would be permitted, but not required, for the hiring and paying of persons (including the estate attorney) by the personal representative.

In addition, the recommended legislation will reorganize, clarify, and make substantive improvements and fill gaps in existing law.

Respectfully submitted,

Forrest A. Plant
Chairperson

INTRODUCTION

Although this recommendation has a broader scope, its major impact is on the existing California provisions dealing with attorney fees in formal probate proceedings. These provisions present the most important policy issues involved in the Commission's study of California probate law. The considerations that the Commission considers important in making a recommendation concerning these provisions are outlined below.

In California, compensation of the estate attorney for conducting "ordinary probate proceedings" is determined using a statutory fee schedule.¹ In addition to this statutory fee for ordinary services, the attorney is entitled to "such further amount as the court may deem just and reasonable for extraordinary services."²

1. Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code § 901). The fee schedule applies only where there is a formal probate proceeding. Where there is no formal probate proceeding, the fee is determined by agreement between the parties and is not subject to court approval.

Decedent's will may provide for compensation of the attorney and that shall be "a full compensation" for the attorney's services unless by written instrument, filed with the court, the attorney renounces the compensation provided for in the will. If the attorney renounces the compensation provided in the will, the attorney is entitled to receive compensation as provided by statute. See Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code §§ 900, 901).

Usually the personal representative who is also an attorney may receive the personal representative's compensation but not the attorney fee. *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982). However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting in both capacities. *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958).

2. Prob. Code § 910.

The statutory fee schedule sets the attorney's fee as percentages of the "estate accounted for" by the personal representative,³ with higher percentages payable for smaller estates.⁴ The attorney is entitled to the statutory fee unless the attorney agrees to accept a lower fee.⁵

3. Prob. Code § 910 (incorporating Prob. Code § 901). The "estate accounted for" is based on the fair market value of the real and personal property of the estate without subtracting any encumbrances on the property. Prob. Code § 901 ("estate accounted for" is "the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate" whether or not a sale of property has taken place during probate). For a discussion of the property or values included in determining the "estate accounted for," see Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§ 20.16-20.24 (Cal. Cont. Ed. Bar 1986).

The setting of the attorney fee using the statutory rate schedule is within the "state action exemption" of the Sherman Antitrust Act and does not violate federal antitrust laws. *Estate of Efron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

4. See Prob. Code § 901. Section 901 provides that the attorney shall receive compensation upon the value of the estate accounted for, as follows:

- Four percent on the first \$15,000.
- Three percent on the next \$85,000.
- Two percent on the next \$900,000.
- One percent on the next 9 million dollars.
- One-half of one percent on the next 15 million dollars.
- For all above 25 million dollars, a reasonable amount to be determined by the court.

5. *Estate of Getty*, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). See generally *Estate of Efron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981). The right to receive the statutory fee is subject to Probate Code Section 12205, which permits the court to reduce the fee if the time taken for administration of the estate exceeds the time set forth by statute or prescribed by the court and the court finds that the delay in closing the estate was caused by factors within the attorney's control and was not in the best interests of the estate.

Consumers view the statutory fee system as "generally a ripoff."⁶ The California statutory fee system has been criticized on a number of grounds:

(1) A percentage fee is not necessarily related to the amount and difficulty of the legal work required for the particular estate.⁷ Thus, a percentage fee may undercharge an estate that presents difficult legal problems and overcharge an estate that does not. This is the reason a percentage fee often results in overcharging a large estate⁸ and undercharging a small estate.

(3) The percentage fee is only for "ordinary" services to the estate. The court may award additional fees for "extraordinary" services. Thus, if the estate is easy there is no discount, but if the estate is difficult the attorney may get more.

(4) Since the percentage fee may not provide the attorney with adequate compensation for the legal work needed to probate a small estate, it may be difficult to obtain a competent attorney to handle a small estate.

(5) The California statutory fee system imposes a significant burden on the courts.⁹ The court must review and fix reasonable fees for extraordinary services, even when no one objects.¹⁰

6. Estate of Effron, 117 Cal. App. 3d 915, 926, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981).

7. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984).

8. See, e.g., Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). The attorney and personal representative can, of course, agree on a fee lower than the statutory fee, but many personal representatives appear to be unaware that the fee can be negotiated.

9. See Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum* in California Local Probate Rules (8th ed. Cal. Cont. Ed. Bar 1987), at 19-89 ("A tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees").

10. Under existing law, the court must consider and fix fees for extraordinary services, whether or not there is a dispute. See Prob. Code § 910. A survey of probate practitioners conducted by the Commission indicates that most attorneys request extraordinary fees in a third or more of their probate estates.

(6) The statutory fee system is inconsistent with the general practice of fixing legal fees by private agreement. Not only are fees for other legal services fixed by agreement, but in most cases where a person dies in California the fee for legal services probably is fixed by agreement.¹¹

California is one of a small minority of states that use a statutory fee schedule to fix the fee of the estate attorney.¹² Most

11. In a significant number of cases where a person dies, no probate proceeding is required in California because all of the decedent's property is governed after death by the terms of a living trust or consists of joint tenancies, assets transferred upon death under pay-on-death provisions or under beneficiary designations in life insurance policies and employee benefit plans, and similar assets. If the services of an attorney are used in connection with these nonprobate transfers, the fee is determined by agreement and is not approved or reviewed by the court.

When one spouse dies and the surviving spouse takes all of the property of the deceased spouse, no formal probate proceeding is required in California. See Prob. Code §§ 13650-13660. The attorney fee in this situation is determined by private agreement between the attorney and client and is not subject to approval by the court. See Prob. Code § 13660.

Formal probate proceedings can also be avoided for small estates. See Prob. Code §§ 13100-13115 (affidavit procedure to collect or transfer decedent's personal property); *id.* §§ 13150-13157 (summary procedure to obtain court order determining succession to real property); *id.* §§ 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries). If one of these procedures are used, the attorney fee is determined by agreement between the attorney and client and is not subject to court approval.

12. California, Hawaii, and Wyoming use a statutory fee schedule to fix the fee of the estate attorney for ordinary services, without court discretion to vary the fee. See Cal. Prob. Code §§ 901, 910; Hawaii Rev. Stat. §§ 560:3-719, 560:3-721 (1985); Wyo. Stat. §§ 2-7-803, 2-7-804 (Supp. 1987).

Six states use a statutory fee schedule with considerable court discretion in fixing the fee. Four of these states compute the estate attorney's fee using what is essentially a reasonable fee system combined with a percentage fee schedule: Arkansas prescribes a "just and reasonable" fee, not to exceed a sliding percentage from three to ten percent of estate value. Ark. Stat. Ann. § 62-2208 (Supp. 1985). Iowa prescribes a reasonable fee, not to exceed a sliding percentage from two to six percent of the gross estate. Iowa Code Ann. §§ 633.197, 633.198 (West 1964). Missouri prescribes a sliding minimum percentage, but no maximum, from two to five percent of personal property and proceeds of real property sold. Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987). Montana prescribes a reasonable fee, not to exceed a sliding percentage from two to three percent of the estate, but not less than the smaller of \$100 or the value of the gross estate. Mont. Code Ann. § 72-3-631 (1985).

states now use the Uniform Probate Code system or something similar, which authorizes the personal representative to employ an attorney for the estate and to fix the attorney's compensation by private agreement with the attorney.¹³ Ordinarily, the fee agreement is not reviewed or

New Mexico prescribes a fee of not more than a sliding percentage from one to ten percent of the estate, unless otherwise ordered by the court. N.M. Stat. Ann. §§ 45-3-719, 45-3-720 (1978). Delaware uses a fee schedule established by court rule, subject to increase or decrease by the court. Del. Ch. Ct. R. 192 (1981).

13. Seventeen states permit the personal representative to agree on a reasonable fee with the state attorney without mandatory court review: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Maine, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, Utah, and Wisconsin. Alaska Stat. § 13.16.440 (1985); Ariz. Rev. Stat. Ann. § 14-3721 (1975); Ark. Stat. Ann. § 62-2208 (Supp. 1985); Colo. Rev. Stat. § 15-12-721 (1974); Conn. Gen. Stat. Ann. § 45-100e (1981); Fla. Stat. Ann. § 733.617 (West Supp. 1987); Idaho Code § 15-3-721 (1979); Me. Rev. Stat. Ann. tit. 18-A, § 3-721 (1981); Minn. Stat. Ann. § 524.3-721 (West 1975); Mont. Code Ann. §§ 72-3-631, 72-3-633 (1985); Neb. Rev. Stat. § 30-2482 (1985); Nev. Rev. Stat. § 150.060 (1986); *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942) (administrator must pay counsel fees as a personal expense and, if proper, will be allowed on settlement of accounts); N.D. Cent. Code § 30.1-18-21 (1976); S.C. Code Ann. § 62-3-721 (Law. Co-op. 1987); Utah Code Ann. § 75-3-718 (Supp. 1987); Wis. Stat. Ann. § 851.40 (West Supp. 1987).

In another 14 states, the court determines what constitutes reasonable compensation for the estate attorney: Alabama, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, Oregon, and Texas. Ala. Code § 43-2-682 (1982); Ill. Ann. Stat. ch. 110½, § 27-2 (Smith-Hurd 1978); *In re Estate of Grabow*, 74 Ill. App. 3d 336, 392 N.E.2d 980 (1979) (determination of reasonable attorney fee solely in court's discretion); Ind. Code Ann. § 29-1-10-13 (West 1979); Kan. Stat. Ann. § 59-1717 (1983); *In re Estate of Murdock*, 213 Kan. 837, 519 P.2d 108 (1974) (reasonableness of attorney fee is for court determination); Md. Est. & Trusts Code Ann. § 7-602 (1974); Mass. Ann. Laws ch. 206, § 16 (Michie/Law Co-op. 1981); *id.* ch. 215, §§ 39-39B; Mich. Comp. Laws § 700.543 (19xx) (Mich. Stat. Ann. § 27.5543 (Callaghan 1980)); *In re Estate of Weaver*, 119 Mich. App. 796, 327 N.W.2d 366 (1982); Miss. Code Ann. § 91-7-281 (1973); *In re Read's Estate*, 24 N.J. Misc. 305, 49 A.2d 138 (1946); N.Y. Surr. Ct. Proc. Act § 2110 (McKinney 1967); *In re Hickok's Estate*, 159 Ohio St. 282, 111 N.E.2d 925 (1953) (judicial determination is required to fix reasonable attorney fee); Or. Rev. Stat. § 116.183 (1985); *Morton's Estate v. Ferguson*, 45 S.W.2d 419 (1932) (reasonableness of attorney fee is for court to determine, not personal representative).

approved by the court, but an interested person can petition for and obtain court review of the reasonableness of the attorney's compensation.¹⁴

The Commission has concluded that the California statutory fee system should be abandoned in favor of the agreed fee system of the Uniform Probate Code. Court review of the agreed fee should be limited to cases where there is an actual dispute.

RECOMMENDATIONS

Hiring and Paying Attorneys, Advisors, and Others

Existing law authorizes the personal representative to hire tax assistants and pay them out of estate funds.¹⁵ Although there is no statutory authority for the personal representative to hire and pay assistants for other than tax matters, the courts have approved the hiring of a wide variety of assistants by the personal representative.¹⁶ The Commission recommends that this authority be codified, drawing on the Uniform Probate Code provision that authorizes

14. It is not clear whether states that have adopted the UPC fee system have, in the aggregate, achieved significant reductions of attorneys' fees in probate. See Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D.L. Rev. 523 (1974); Crapo, *The Uniform Probate Code -- Does It Really Work?*, 1976 B.Y.U.L. Rev. 395; Spelvin, *Of Wills and Probate*, Sylvia Porter's Personal Finance, June 1984, at 84.

15. Prob. Code § 902.

16. E.g., *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).

the personal representative to hire any person to perform any act of administration.¹⁷

Specifically, the Commission recommends that the personal representative be given express authority to hire persons to advise or assist in the administration of the estate, and that the compensation of these persons be determined by agreement between the personal representative and the person hired. This authority would permit the personal representative, acting reasonably for the benefit of the estate and in the best interest of interested persons, to hire attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

The hiring and compensation of these persons would not be subject to court approval or review by the court, unless an interested person objects to the fee and either petitions for court review of the fee or contests the fee when shown in the accounts of the personal representative.¹⁸

The provision of the Independent Administration of Estates Act¹⁹ that requires court supervision for allowance of attorney's fees²⁰ should be deleted, consistent with the Commission's recommendation that the court should not be required in every case to review the attorney fee in supervised administration.²¹ A provision should be added to

17. Uniform Probate Code § 3-715(21).

18. The Commission's recommendation requires the report of administration (Prob. Code § 10900) to include a report of the hiring and payment of persons hired to assist the personal representative, including attorneys, accountants, auditors, technical advisors, and investment advisors, and makes clear that the court can review the hiring and payment of such persons if contested at the time of settlement of the account (*id.* § 11001).

19. Prob. Code §§ 10400-10600. The Independent Administration of Estates Act permits the court to authorize the personal representative to administer a decedent's estate with a minimum of court supervision.

20. Prob. Code § 10501.

21. In cases where neither court supervision nor notice of proposed action is required under the Independent Administration of Estates Act, the personal representative may nonetheless give notice of proposed action. Prob. Code § 10580(b). A person given the notice who fails to object to the proposed action waives the right to have the court later review the action taken. *Id.* § 10590. Under the Commission's

the Independent Administration of Estates Act to permit (but not require) the personal representative to give a notice of proposed action with respect to the hiring and payment of a person hired to advise or assist in the administration of the estate. If the personal representative chooses give the optional notice of proposed action concerning attorneys' fees under the Independent Administration of Estates Act,²² and thereby to preclude a later objection,²³ the notice should be required to include an estimate of the amount of the fee, and have attached a copy of the fee contract.²⁴

The recommended legislation includes a provision that permits the court to grant relief from a provision of the decedent's will that provides for the hiring and compensation of the estate attorney or other persons hired to advise or assist in the administration of the estate. This will permit the court to grant relief when, because of the passage of time, the compensation provided in the will has become so inadequate that a competent lawyer cannot be obtained to handle the estate proceeding.

The recommended legislation includes a provision that makes clear that the personal representative may pay for assistants out of funds of the estate, including but not limited to tax matters, except that persons hired to perform duties for which the personal representative

recommendation, these provisions will apply to payment of compensation to the estate attorney by the personal representative.

22. Prob. Code § 10580(b).

23. Prob. Code § 10590.

24. For attorneys, a written fee contract is required by Section 6148 of the Business and Professions Code. For other assistants hired by the personal representative, a written fee contract is optional. Under the Commission's recommendation, if it appears that the fee will exceed the amount estimated in the notice of proposed action, the personal representative may give another notice with a higher estimate. If the person receiving the notice fails to object, he or she may obtain court review only of the fee in excess of the amount in the most recent estimate.

is compensated must be paid out of the personal representative's own funds, not funds of the estate.²⁵

Compensation of Personal Representative

Keeping Statutory Percentage Fee for Ordinary Services.

California is one of 26 states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the personal representative.²⁶ This contrasts with nine states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the estate attorney.²⁷ Thus, states are more likely to provide a percentage or hybrid fee for the personal representative than for the

25. This is consistent with existing law. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (volunteer who found bank account of decedent not entitled to compensation because this is statutory duty of public administrator).

26. Twelve states use a pure percentage formula to determine the fee of the personal representative. These are California, Hawaii, Louisiana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin, and Wyoming. See Cal. Prob. Code § 901 (West 1987); Hawaii Rev. Stat. § 560:3-719 (1985); La. Code Civ. Proc. Ann. art. 3351 (West Supp. 1987); Nev. Rev. Stat. § 150.020 (1986); N.J. Stat. Ann. §§ 3B:18-13, 3B:18-14 (West 1983 & Supp. 1987); N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1987); Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1987); Okla. Stat. Ann. tit. 58, § 527 (West 1965); Or. Rev. Stat. § 116.173 (1983 & 1985 reprint); S.D. Codified Laws Ann. § 30-25-7 (1984); Wis. Stat. Ann. § 857.05 (West Supp. 1987); Wyo. Stat. § 2-7-803 (Supp. 1987). Another 14 states use a hybrid of the percentage fee and reasonable fee methods. These are Alabama, Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, and Texas. Ala. Code § 43-2-680 (1982); Ark. Stat. Ann. § 62-2208 (Supp. 1985); Del. Ch. Ct. R. 192 (1981); Ga. Code Ann. §§ 53-6-140, 53-6-141, 53-6-143 (1982); Iowa Code Ann. § 633.197 (West 1964); Ky. Rev. Stat. Ann. § 395.150 (Baldwin 1978); Md. Est. & Trusts Code Ann. § 7-601 (Supp. 1984); Miss. Code Ann. § 91-7-299 (1973); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. § 72-3-631 (1985); N.M. Stat. Ann. § 45-3-719 (1978); N.C. Gen. Stat. § 28A-23-3 (1976 & Supp. 1983); S.C. Code Ann. § 62-3-719 (Law. Co-op. 1987); Tex. Prob. Code Ann. § 241 (Vernon 1980).

27. See *supra* note 12.

estate attorney. The reasons for this difference in treatment of personal representatives' fees and attorneys' fees appear to include the following:

(1) Where the personal representative is an individual, he or she is often both a major beneficiary of the decedent's estate and a member of the decedent's immediate family. If the fee of the personal representative is a negotiated fee, the personal representative is put in the undesirable position of having to negotiate with other family members, creating the possibility of unpleasant intrafamily disputes.

(2) If the decedent has a will, he or she can take into account the likely percentage fee of the executor when drafting dispositive provisions of the will.²⁸

(3) The personal representative is compensated for managing the estate. The larger the estate, the greater are the responsibilities assumed by the personal representative.

The Commission finds the first reason above the most persuasive. To minimize the possibility of intrafamily disputes, the Commission recommends keeping the statutory percentage fee system for the personal representative.

Factors in Fixing Personal Representative's Compensation for Extraordinary Services. If the personal representative performs extraordinary services for the estate, he or she is entitled to "just and reasonable" compensation for such services.²⁹ However, the statute does not give the court any guidance as to what factors should be considered in fixing just and reasonable compensation. With respect to the estate attorney, local court rules often fill this gap by listing the factors the court should take into account in fixing compensation for extraordinary services.³⁰

28. See, e.g., Estate of Getty, 143 Cal. App. 455, 461, 191 Cal. Rptr. 897 (1983).

29. Prob. Code § 902.

30. See, e.g., Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

The Commission recommends enactment of a statutory statement of the factors the court should take into account in fixing compensation of the personal representative for extraordinary services. The factors should include the nature and difficulty of the task performed, results achieved, benefit to the estate, hours spent, usual hourly rate of the personal representative, productivity of the hours spent, the expertise, experience, and professional standing of the personal representative, whether the percentage fee for ordinary services is adequate compensation for all the services provided, the total amount requested, size of the estate, and length of administration.³¹

The nonexclusive listing in the statute of examples of what constitutes extraordinary services³² should be deleted, and examples should be given in the official comment to the section instead.

Dual Compensation. Under case law, a personal representative who is an attorney may receive the personal representative's compensation, but not compensation for services as estate attorney, unless expressly authorized by the decedent's will.³³ The recommended legislation codifies this rule.

31. Cf. Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988) (estate attorney); Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

32. Prob. Code § 902.

33. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); Estate of Downing, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); Estate of Haviside, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980); Estate of Thompson, 50 Cal. 2d 613, 328 P.2d 1 (1958); Estate of Grouch, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966); Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.10 (Cal. Cont. Ed. Bar 1987). A representative-attorney may not circumvent this rule by failing to retain a separate attorney and then seeking extraordinary compensation for legal services. See Estate of Scherer, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); Feinfeld, *supra*. However, it may be that, in allowing compensation for extraordinary services by the personal representative, the court can give some weight to the representative's services as an attorney in conserving and preserving the estate. *Id.*

Relief From Provision of Will That Limits Compensation. Existing law permits the personal representative to "renounce" the compensation provided in the will and to receive the statutory compensation.³⁴ The recommended legislation includes a provision that permits the court to grant relief from a provision of the decedent's will that limits the compensation of the personal representative. This change will give effect to the testator's intent as to compensation; but, at the same time, it will permit the court to grant relief when, for example, the compensation provided in the will has become obviously inadequate because of the passage of time.

Allowance of Compensation by Court. The existing statute provides for a partial allowance of compensation to the personal representative,³⁵ but final compensation is governed by local court rules rather than by statute.³⁶ The recommended legislation includes provisions governing the allowance of both partial and final compensation of the personal representative.

34. Prob. Code §§ 900, 901.

35. Prob. Code § 904.

36. Alameda County Probate Policy Manual § 1002; Contra Costa County Probate Policy Manual §§ 603, 605; Fresno County Probate Policy Memoranda § 9.3; Humboldt County Probate Rules § 12.15(c); Lake County Probate Rules § 13.4(g); Los Angeles County Probate Policy Memorandum §§ 15.02, 16.01; Madera County Probate Rules §§ 10.14, 10.19; Marin County Rules of Probate Practice § 1203; Merced County Probate Rules §§ 1103, 1104, 1108; Monterey County Probate Rules § 4.31; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual §§ 706, 707, 708; San Bernardino County Probate Policy Memorandum § 906; San Diego County Probate Rules §§ 4.110, 4.111; San Francisco Probate Manual §§ 13.03, 13.04; San Joaquin County Probate Rules §§ 4-705, 4-706, 4-1001; San Mateo County Probate Rules, Rules 486, 487; Santa Barbara County Probate Rules § 414(H); Santa Clara County Probate Rules §§ 5.6(c), 5.7(d); Santa Cruz County Probate Rules § 405; Solano County Probate Rules § 8.11(d); Stanislaus County Probate Policy Manual §§ 11003, 1004, 1008(b), 1102(e); Tuolumne County Probate Rules, Rules 12.11(e), 12.14; Ventura County Probate Rules § 11.12(c); Yolo County Probate Rules § 20.5; Probate Rules of Third District Superior Courts, Rules 12.12(E), 12.15.

The recommended legislation codifies a provision found in local court rules that partial compensation may be allowed when it appears likely that administration of the estate will continue for an unusually long time, where present payment will benefit the estate or beneficiaries, or where other good cause is shown.³⁷

37. Lake County Probate Rules § 13.4(g); Marin County Rules of Probate Practice § 1203; Merced County Probate Rules § 1108; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual § 708; San Bernardino County Probate Policy Memorandum § 906; San Francisco Probate Manual § 13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules § 5.7(d); Santa Cruz County Probate Rules § 405; Stanislaus County Probate Policy Manual § 1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).