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7/6/89

Memorandum 89-30

Subject: Study L-1037 - Sale of Decedent's Interest in Cotenancy; Enforcement of Liability on Bond

Attached to this Memorandum as Exhibit 1 is a letter from attorney Robert Blanchard of Glendale. Mr. Blanchard raises two problems in probate law, discussed below.

Sale of Decedent's Interest in Cotenancy

If decedent owns an undivided interest in property as joint tenant or tenant in common and the personal representative wants to sell the estate's interest, the PR needs the cooperation of the cotenants. For real property, the only way the estate can get a good price for the decedent's interest is if the other cotenants are willing to sell their interests also, so the buyer can become sole owner. This is complicated by the requirement that, under supervised administration, sale of the decedent's interest is subject to courtroom overbidding and court approval. The problem is less acute with fungible personal property such as stocks, because the property can be divided in kind and only the decedent's interest sold.

Mr. Blanchard recommends a new statute to authorize the living cotenants voluntarily to subject their interests to the overbid and court approval procedure. This would assure the successful bidder that he or she could obtain the entire property. This proposal seems sound, and may be accomplished by enacting the following section:

Probate Code § 10006 (added). Cotenants' consent to sale or partition

> 10006. If property in the estate to be sold is an undivided interest in a cotenancy, the cotenants may file in the estate proceeding written consent to either of the following:
>
> (a) To have their interests sold pursuant to this chapter. Thereafter, the court's orders made pursuant to this chapter are as binding on the consenting cotenants as on the personal representative.
>
> (b) To have the court make a partition, allotment, or other division of the property under Chapter 7 (commencing with Section 11950) of Part 10.

Comment. Section 10006 is new and is to facilitate estate sales of decedent's interest in a joint tenancy or tenancy in common. Section 10006 is consistent with existing practice. See 1 California Decedent Estate Practice § 6.19 (Cal. Cont. Ed. Bar 1989) (probate court may by stipulation consider any matter in connection with and in aid of proceeding).

Enforcement of Liability on Bond

Mr. Blanchard wants to add a section to the Probate Code to give the probate court "summary jurisdiction to require immediate payment by the surety in situations where a final order for distribution calls for payment of a specific sum of money." The staff thinks this is adequately covered by existing statutes and case law, and would address Mr. Blanchard's problem by adding a discussion to the relevant Comment.

If the personal representative defies the court's order for final distribution by absconding with estate property, estate beneficiaries may recover on the bond. But first the liability of the absconding personal representative must be fixed: Ordinarily, liability on the bond may not be enforced until the personal representative has made a final accounting, the probate court has made an order surcharging the personal representative, and the order has become final. Alexandrou v. Alexander, 37 Cal. App. 3d 306, 311, 112 Cal Rptr. 307 (1974). However, this is not necessary where the personal representative dies or is removed before final accounting, or where the amount of liability is ascertainable without accounting. *Id.*

The *Alexandrou* case was a civil action for fraud against a former administrator, his wife, and the surety company. In the earlier estate proceeding, the administrator claimed to be decedent's son, obtained distribution of the whole estate to himself, and was discharged from liability. The surety was exonerated. The civil action resulted in judgment against the former administrator, and against the surety on the bond. On appeal, the surety argued that the beneficiary could not proceed against it without a final order of the probate court surcharging the administrator. The appellate court disagreed, saying that a surcharge order would accomplish nothing. The case fit within recognized exceptions to the surcharge requirement: The amount owing to the rightful beneficiary had been fully determined by the accounting and final decree of distribution. Piecemeal litigation was not required. *Id.* at 311-12.

Mr. Blanchard says legislation is needed because surety companies are reluctant to accept the *Alexandrou* case. The *Alexandrou* case is discussed in the C.E.B. practice book, 1 California Decedent Estate Practice § 8.37 (Cal. Cont. Ed. Bar 1989), so the case is available to lawyers.

Moreover, the Bond and Undertaking Law permits the beneficiary to enforce liability on the bond either by motion in the probate court or by separate civil action. Code Civ. Proc. §§ 996.430, 996.440; 1 California Decedent Estate Practice, *supra*, § 8.38. If the beneficiary elects to proceed by motion in the probate court, the motion may not be made until final determination of the personal representative's liability on settlement of the account, and either the time for appeal has expired or the appeal has been finally determined. Code Civ. Proc. § 996.440. This seems like a necessary limitation: The surety should not be required to pay before the personal representative's liability is determined.

Rather than trying to codify *Alexandrou*, the staff recommends adding the following to the Comment to Section 8487 (which applies the Bond and Undertaking Law to probate proceedings):

> The Bond and Undertaking Law permits the beneficiary to enforce liability on the bond either by motion in the probate court or by separate civil action. Code Civ. Proc. §§ 996.430, 996.440. Ordinarily, liability on the bond may not be enforced until the personal representative has made a final accounting, the probate court has made an order surcharging the personal representative, and the order has become final. Alexandrou v. Alexander, 37 Cal. App. 3d 306, 311, 112 Cal Rptr. 307 (1974). However, this is not necessary where the personal representative dies or is removed before final accounting, or where the amount of liability is ascertainable without accounting. *Id.* See also Section 8488 (limitation period for action against sureties on personal representative's bond is four years after discharge).

Respectfully submitted,

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March 29, 1988

Judge Arthur K. Marshall
300 South Grand Avenue, 29th Floor
Los Angeles, California 90071

Dear Judge Marshall,

In reviewing the Daily Journal report on probate law changes, I observed that you are a member of the Law Revision Commission. My purpose in writing is to call attention to two areas of probate procedure which the Commission might find it useful to study.

When an estate must sell an undivided interest in real property, the most effective exposure to the market is achieved and the highest price will be obtained only if there is a simultaneous sale of all of the undivided interests. This is a cumbersome transaction at best, involving numerous parties, complex documents and double escrows, but becomes almost unworkable when the possibility of overbidding is considered. Neither the executor nor the non-probate seller can reach a prior agreement with an overbidder who is not identifed until the morning of the hearing. The potential overbidder finds it difficult if not impossible to learn whether the non-probate interest will actually become available to him or whether he may have purchased a partition suit instead of a clear piece of property. Furthermore, trial judges and probate attorneys do not seem to be of one mind as to how far an executor can go in limiting overbidders to those who will make a concurrent agreement to buy the non-probate portion of the property.

Such uncertainties make it difficult for either the estate or the individual co-owner to obtain the best possible price for their respective interests. It would be extremely helpful to all concerned if the Probate Code contained express provisions under which the owners of all such undivided interests could subject the entire property to the proceedures required for an estate sale.

Secondly, I am currently engaged in a matter in which a decree of distribution has been made providing expressly for the distribution of a specific amount in cash to an heir. However, after the time for appeal had run, the executor has absconded without making this payment. I was surprised to find how unsettled the law is with respect to a recovery from the surety.

Some early cases suggest that when the order for distribution becomes final, jurisdiction of the probate court to enforce it ceases. Others conclude that the probate court retains jurisdiction over the executor but refer only to holding him in contempt, a remedy which is futile if he has disappeared and, in any event, would not bind the surety. There is no specific authority as to whether such a probate order is one upon which execution could be issued, and to do so would be a futile act for the same reasons.

Alexandrou v. Alexander, 37 C.A.(3rd) 112 CR 307 (1974), an opinion written by my former partner Jim Hastings, holds that, when the decree of distribution fixes a specific sum payable to the heir, no further application to the probate court for a surcharge is necessary and that an action may be commenced at once against the surety. However, surety companies seem reluctant to accept such a holding voluntarily, thereby exposing an heir to the expense and long delay of a separate civil action.

It would seem highly desireable to add to the probate code a section expressly vesting the probate court with summary jurisdiction to require immediate payment by the surety in situations where a final order for distribution calls for payment of a specific sum of money.

I would be interested to learn what you think of these suggestions.

Yours very truly,

Robert G Blandy

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