

First Supplement to Memorandum 89-68

Subject: Study L-1061 - Brokers' Commissions for Sale of Estate Property (Limited Exclusive Listing Contract)

The staff has conferred with Lloyd Homer concerning draft Section 10162.6 governing the compensation of brokers where the personal representative makes an exclusive listing contract to sell estate property and the contract provides that no commission is due to the exclusive listing broker if the property is sold to a particular person named in the contract (Bidder X).

Attached to this supplement is a new version of Section 10162.6 that keeps the simpler approach suggested by Mr. Homer (as discussed in Memorandum 89-68), but improves the policy of the section. In short, where a sale is made to a bidder named in the contract between the personal representative and the exclusive listing broker, the commissions due any brokers involved are computed under the normal rules, except that the commission that would be payable to the broker holding the contract is not paid. Thus, the estate gets the benefit of the provision excluding compensation to the listing broker where a sale is made to Bidder X. The application of this rule is illustrated in the examples following the draft section in Exhibit 1.

As in the earlier draft, where the property is not sold to Bidder X, draft Section 10162.6 applies the usual rules concerning brokers' commissions as provided in Sections 10160-10167.

The staff proposes to amend draft Section 10162.6, as set out in Exhibit 1, into AB 759 (the new Probate Code), replacing the earlier, more complicated version of Section 10162.6, and to make the conforming revisions noted in Exhibit 1.

Respectfully submitted,

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EXHIBIT 1

Probate Code § 10162.6 (added). Exclusive contract providing that no compensation payable if sale confirmed to particular purchaser named in contract

10162.6. (a) This section applies if both of the following circumstances exist:

(1) An agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(2) The contract provides that no compensation is payable to the agent or broker holding the contract if sale is confirmed to a particular purchaser named in the contract.

(b) If the court confirms the sale to the purchaser named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of any agents or brokers involved in the sale is determined as provided in this article, except that no compensation is payable to the agent or broker holding the contract.

(c) If the court confirms the sale to a purchaser other than the person named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of the agent or broker holding the contract, and of any other agents or brokers involved in the sale, is determined as if the limitation in the contract did not exist.

Comment. Section 10162.6 is new, and deals with the situation where the personal representative makes an exclusive listing contract with a broker (Broker A) to sell estate property, but the contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser named in the contract. See subdivision (a). Special rules apply in this situation, as provided in subdivisions (b) and (c).

Subdivision (b) applies to the situation where the sale is made to the purchaser named in the contract. In this case, Broker A is not entitled to any commission, even if Broker A produced the original bid returned to the court. Under subdivision (b), if sale is confirmed to the named person, the commission that would have been paid to Broker A, except for the limitation in the contract, is not paid. In this case, the estate receives the benefit of the commission, just as if the estate were acting as the agent with the exclusive listing contract. The compensation due any other brokers involved in the sale is

determined under the normal rules that apply where there is a broker with an exclusive listing contract.

Subdivision (c) makes clear that the limitation in the exclusive listing contract does not affect the compensation of the broker holding the contract or any other brokers in a case where the sale is not made to the person named in the exclusive listing contract. In such case, the rules governing compensation where there is an exclusive listing contract apply and the limitation concerning the person named in the contract is ignored.

The following examples illustrate the application of this section. In these examples, Broker A refers to the broker holding the exclusive listing contract with the limitation that no compensation is due if sale is made to Bidder X. Broker B refers to a broker who does not hold a contract with the personal representative and who produces the bid returned to the court for confirmation. Broker C refers to a broker who does not have a contract with the personal representative and who produces a successful overbid.

Example 1. Exclusive listing contract excluding compensation if sale to Bidder X; Bidder X is original bidder, not produced by broker; no overbid. The original bid returned to court for confirmation is made by Bidder X who is not represented by a broker. The sale is confirmed to the original bidder on that bid. Under subdivision (b) and Section 10162.5(a), no commission is payable. This example is comparable to Example 11 in the Comment to Section 10161, except that Broker A receives no compensation.

Example 2. Exclusive listing contract excluding compensation if sale to Bidder X; Bidder X produced by Broker B; no overbid. The original bid returned to court for confirmation is made by Bidder X produced by Broker B. The sale is confirmed to that bidder on that bid. The reasonable compensation allowed by the court on the amount for which the sale is confirmed is divided equally. Under subdivision (b) and Section 10162.7, one-half of the commission is paid to Broker B and the other half, which would have been paid to Broker A except for the limitation in the contract, is not paid. This example is comparable to Example 14 in the Comment to Section 10161, except that Broker A receives no compensation.

Example 3. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder not produced by broker; successful overbid by Bidder X, not produced by broker. The original bid returned to court for confirmation is made by a bidder who is not represented by a broker. At the confirmation hearing, the highest bid is made by Bidder X who is not produced by a broker. The court confirms the sale to Bidder X. Under subdivision (b) and Section 10162.5(b), no commission is payable. This example is comparable to Example 12 in the Comment to Section 10161, except that Broker A receives no compensation.

The result would be the same where the original bidder in this example is produced by Broker A.

Example 4. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder not produced by broker; successful overbid by Bidder X produced by Broker C. The original bid returned to court for confirmation is made by a bidder who is not represented by a broker. At the confirmation hearing, the highest bid is made by Bidder X who is produced by Broker C. The court confirms the sale to Bidder X. Under subdivision (b), and subject to Section 10162, Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid; the other half of the commission on the original bid is not paid. See Section 10165(a)(2), (b), (c)(4). This example is comparable to Example 13 in the Comment to Section 10161, except that Broker A receives no compensation.

The result would be the same where the original bidder in this example is produced by Broker A.

Example 5. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder produced by Broker B; successful overbid by Bidder X not produced by broker. The original bid returned to court for confirmation is made by a bidder produced by Broker B. At the confirmation hearing, the highest bid is made by Bidder X who is not produced by a broker. The court confirms the sale to Bidder X. Under subdivision (b) and Section 10164(c), Broker B is entitled to half of the commission on the original bid. The other half of the commission on the original bid is not paid. This example is comparable to Example 3 in the Comment to Section 10161, except that Broker A receives no compensation.

Example 6. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder produced by Broker B; successful overbid by Bidder X produced by Broker C. The original bid returned to court for confirmation is made by a bidder produced by Broker B. At the confirmation hearing, the highest bid is made by Bidder X who is produced by Broker C. The court confirms the sale to Bidder X. Under subdivision (b), Broker B is entitled to one-fourth of the commission on the original bid and Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid. The other fourth of the commission on the original bid is not paid. See Section 10165(a)(1), (b), (c)(3). This example is comparable to Example 8 in the Comment to Section 10161, except that Broker A receives no compensation.

Example 7. Exclusive listing contract excluding compensation if sale to Bidder X; original bid by Broker X, not produced by broker; successful overbidder not produced by broker. The original bid returned to court for confirmation is made by Bidder X who is not represented by a broker. At the confirmation hearing, the highest bid is made by a different bidder not produced by a broker. The court

confirms the sale to the overbidder. Under subdivision (c) and Section 10162.5(b), Broker A receives a commission on the amount of the original bid and the limitation in the contract has no effect. This result in this example is the same as Example 12 in the Comment to Section 10161.

Example 8. Exclusive listing contract excluding compensation if sale to Bidder X; original bid by Broker X produced by Broker B; successful overbidder not produced by broker. The original bid returned to court for confirmation is made by Bidder X produced by Broker B. At the confirmation hearing, the highest bid is made by a different bidder not produced by a broker. The court confirms the sale to the overbidder. Under subdivision (c), the commission on the original bid is divided equally between Broker A and Broker B. The limitation in the contract has no effect. This result in this example is the same as Example 3 in the Comment to Section 10161.

Conforming Revisions

(1) The introductory language of Section 10162.5 should be "Subject to Section 10162.6,"

(2) The introductory language of Section 10162.7 should be "Subject to Section 10162.6,"

(3) The introductory language of Section 10163 should be "Subject to Sections 10162 and 10162.6,"

(4) The introductory language of Section 10165 should be "Subject to Section 10162.6,"