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12/20/89

Second Supplement to Memorandum 89-88

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney (Additional Comments of State Bar Team 4)

Attached as Exhibit 1 is a letter from Team 4 of the Estate Planning, Trust and Probate Law Section of the State Bar with more comments on the basic memo, and comments on the First Supplement.

§ 710. When attorney may accept a will for deposit

Section 710 in the staff draft (attached to the basic memo) is controversial:

> 710. (a) An attorney may accept a will for deposit from a depositor with whom the attorney has no family relationship only if the depositor has made a specific request, not solicited by the attorney, for the attorney to do so.
>
> (b) With the approval of the Supreme Court, the Board of Governors of the State Bar may provide by rule for the sanction for violation of this section.

Team 4 referred Section 710 to the Executive Committee. The Executive Committee unanimously opposes it, and wants it deleted. If the section is not deleted, the Executive Committee wants to authorize the attorney to initiate discussion of the attorney's keeping estate planning documents if "circumstances warrant." What are these circumstances? The Executive Committee appears to be asking, in effect, to authorize solicitation sometimes. The staff would rather delete Section 710 than expressly authorize what some attorneys think may be solicitation.

§ 730. Termination by depositor on demand

Section 730 permits the depositor to terminate a deposit. In its last letter, Team 4 was divided on whether an attorney in fact acting under a durable power of attorney should be able to demand and receive the depositor's will. Team 4's present letter does not say whether the impasse has been resolved, but it does say that "unless an agent operating under a durable power of attorney for property management is expressly authorized to do so under such a document, that agent does not have the right to obtain the estate planning documents of the principal." The staff agrees with this view, and thinks this is a

satisfactory state of the law.

In any event, whether an attorney in fact acting under a power of attorney, durable or nondurable, has authority to terminate a deposit should be decided by reference to the law governing powers of attorney, not the law here proposed for deposit of estate planning documents.

If the depositor has a conservator of the estate, the conservator may obtain the depositor's estate planning documents only under Probate Code Section 2586 (substituted judgment) (set out below). Under Section 2586, the court may order a person having an estate planning document of the conservatee to deliver it to the court for examination.

It seems desirable to authorize the court in an appropriate case to order that the estate planning document be turned over to some other custodian. This may be accomplished by revising Section 2586 as follows:

> 2586. (a) As used in this section, "estate plan of the conservatee" includes but is not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.
>
> (b) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee shall deliver such document to the court for examination by the court, and, in the discretion of the court, by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.
>
> (c) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person; and, if such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.
>
> <u>(d) For good cause, the court may order that a document produced pursuant to an order under this section shall be delivered to some other custodian for safekeeping. The court may specify such conditions as it deems appropriate for the holding and safeguarding of the document.</u>

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents produced pursuant to this section be delivered to some other custodian for safekeeping. See also Prob. Code §§ 700-734 (deposit of estate planning documents with attorney).

§ 733. Termination by attorney transferring document to another attorney or trust company

As revised in the First Supplement, Section 733(b) provides that if an attorney-depositary has died, the attorney's partner, personal representative, or person in possession of the attorney's property may terminate the deposit. Team 4 wants to provide that the deceased attorney's partner has first priority to do so. Team 4 also renews its earlier suggestion that authority be included for termination by a surviving shareholder where the deceased attorney is a law corporation. The staff agrees, and would revise subdivision (b) as follows:

(b) If the attorney has died, the ~~attorney's partner, personal representative, or person in possession of the attorney's property~~ following persons may terminate the deposit as provided in subdivision (a) ~~.~~ :

(1) The attorney's law partner, or, if the attorney is a law corporation, a shareholder of the corporation.

(2) If there is no person to act under paragraph (1), the attorney's personal representative.

(3) If there is no person to act under paragraph (1) or (2), the person entitled to collect the attorney's property.

Section 732 permits an attorney-depositary to terminate a deposit at any time, without cause, by returning the document to the depositor. But if the attorney-depositary wants to transfer the document to another depositary under Section 733, the attorney must show that he or she "intends to retire, resign, or become inactive," must give notice to the depositor, and must give the depositor time to reclaim the document. If the depositor fails to reclaim the document, the attorney-depositary may transfer it to another depositary.

Team 4, backed by the Executive Committee, wants to permit an attorney-depositary to transfer the document to another depositary without having to show that he or she intends to retire, resign, or become inactive. The staff did not accept this suggestion when it was made previously by Team 4. The staff was concerned that the suggestion

was contrary to the law of bailments: Deposit of an estate planning document with an attorney creates a bailment. 8 Am. Jur.2d *Bailments* § 4 (1980). Without some compelling reason, such as to protect the bailed property, a bailee may not transfer the property to someone else without consent of the bailor. *Id.* § 97. So the change being urged by Team 4 and the Executive Committee would be a significant change in the law.

On the other hand, perhaps there are sufficient safeguards in Section 733 in the requirement that the attorney-depositary must give notice to the depositor and wait a reasonable time before transferring the document. Does the Commission want to delete from Section 733 the requirement that to transfer the document to another depositary, the attorney must intend to retire, resign, or become inactive?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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PLEASE REFER TO FILE NO.
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November 17, 1989

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Re: Memorandum 89-88 - First Supplement - Deposit of Estate Planning Documents With Attorney (Comments of State Bar Team 4)

Dear Jim:

On November 2, 1989, Team 4 (Harley Spitler, Clark Byam, Bruce Ross, Lloyd Homer and I) discussed Memorandum 89-99 - First Supplement - Deposit of Estate Planning Documents With Attorney. In addition, certain issues discussed in this letter were presented to the entire Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section during its November 11, 1989 meeting. The order of these responses will be the same order as set forth in the First Supplement.

1. Section 710. When Attorney May Accept A Will For Deposit.

Proposed Section 710 was discussed with the entire Executive Committee during its November 11, 1989 meeting. The Executive Committee unanimously endorsed Team 4's position that an attorney should be entitled to discuss with her/his client the retention of estate planning documents by the attorney. In fact, if the circumstances warrant, then the attorney may be obligated to suggest that he/she retain those documents. The Executive Committee further strongly feels that such a discussion between attorney/client should not constitute a prohibited solicitation nor in any manner be, nor be deemed to be, a violation of State Bar rules of conduct.

The Executive Committee believed the best solution would be to delete the entire proposed Section 710; however, if the entire section is not deleted, then appropriate language should be added that would permit an attorney to discuss retention of estate planning documents where the circumstances so warranted.

2. Section 721. Attorney Standard Of Care.

Team 4 carefully considered the staff's comments as set forth in Memorandum 89-88 respecting the attorney's standard of care. Upon further consideration, Team 4 agrees with the staff that ordinary negligence should be the standard applicable to the retention of estate planning documents. As Team 4 has suggested that the staff do with Section 710 (discussed above), Team 4 reexamined proposed Section 721 with a view to the practicalities of the situation. In such a spirit of objectivity and practicality, Team 4 urges the staff to endorse and adopt thoroughly the unanimous opinion of the Executive Committee that an attorney should, and perhaps has a duty to discuss his/her retention of estate planning documents, and that Section 710 be redrafted accordingly.

3. Section 730. Termination By Deposit Or Demand.

Team 4 discussed the issues of the demand for estate planning documents by a conservator or an agent appointed under a durable power of attorney for property management. Team 4 further discussed the issue with the entire Executive Committee. Since this is an important question, Team 4 requested Clark Byam to further research the issue. A copy of Clark's excellent letter is enclosed with this letter.

Clark's written analysis confirms the positions taken by both Team 4 and the Executive Committee as a whole, specifically that a conservator without an express order of the court does not have the power to obtain the will of the conservatee. Likewise, unless an agent operating under a durable power of attorney for property management is expressly authorized to do so under such a document, that agent does not have the right to obtain the estate planning documents of the principal.

4. Section 733. Termination By Attorney Transferring Document To Another Attorney or Trust Company.

The entire Executive Committee discussed the issue of whether or not the attorney-depository should be entitled to terminate a deposit at any time. The Executive Committee overwhelmingly concurred in Team 4's position that an attorney-depository was entitled to terminate a depository at any time. The discussion of the Executive Committee focused upon the fact that the attorney's actions in this situation were not governed by the law of bailments, but by legal and ethical consideration having to do

with the conduct of an attorney with respect to his or her client.

Further, with respect to Section 733(b), Team 4 suggests that the section be rewritten so that it is clear that the attorney's partner has the highest priority with respect to the termination of such depository.

With respect to the comments set forth by the Commission in subparagraph (2), page 4, Team 4 feels that it is important that shareholders be added to deal with the situation where the depository is a law corporation. In fact, the corporation can be terminated by liquidation and must be terminated if the attorney has died or if the attorney was the sole shareholder of a law corporation. Language needs to be added to the section in order to take these situations into account.

5. Section 733.

With respect to Section 733(a)(3), if the document is not claimed, then the attorney-depository should not be required to retain the documents forever; rather, the attorney-depository ~~should be~~ entitled (after reasonable search and notice) to transfer the documents to another appropriate depository.

Thank you for your consideration. If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,

Kathryn A. Ballsun

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Enclosure

cc: Terry Ross, Esq.
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November 2, 1989

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Re: First Supplement to Memo 89-88
(Deposit of Estate Planning Documents
with Attorney)

Dear Kathy:

This letter is in reference to your request that I review California Civil Code Section 2467 as well as the issue of the rights of conservators to obtain the Will of a conservatee.

As we discussed in our phone call, in the First Supplement to Memorandum 89-88 the Staff indicates at the top of page 3 that they believe that an attorney-in-fact acting under a "durable power of attorney which confers general authority with respect to 'estate transactions' is now authorized [to obtain the Will] under Civil Code Section 2467."

In reviewing West's annotations to Code Section 2467, there are no cases that discuss this point. The California Law Revision Commission's comments to Probate Code Section 2586, dealing with substituted judgment, does indicate that as the holder of the attorney-client privilege that the conservator can effectively waive that privilege as to confidential information held by the conservatee's attorney. However, there are no cases indicating that that result would apply to C.C.C. 2467.

On the other hand, there are specific cases that have held that a conservator is not entitled to the Will of a conservatee held by an attorney. In Conservatorship of DuNah (1980) 106 Cal. App. 3d, 517, the Court of Appeal affirmed the order of the trial court that dismissed the citation the conservator had caused to be issued on a law firm for an order directing it to deliver to the conservator the Will and related documents prepared and retained at the conservatee's request. The citation had been issued pursuant to Probate Code Section 1903.

The Appellate Court in DuNah, referenced to prior cases that had also denied the rights of conservators to seeing Wills prepared by attorneys (see for example Vigne v. Superior Court (1940) 37 Cal.App. 2d 346 and Mastick v. Superior Court (1892) 94 Cal 347).

In discussing the Vigne decision, the Appellate Court in DuNah stated: "The Appellate Court concluded the Will was not an 'instrument in writing' for purposes of Section 1552 (which, except for its application to wards instead of conservatees, is similar to Section 1903), and it reasoned that a will 'cannot in any way relate to any matter within [the guardian's] power or duties, or in any manner effect his actions as the guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the Court authorize him to do so, and we are unable to see upon what ground he is entitled to its possession, or to a knowledge of its contents. If it were in his hands, of course, it would be his duty to preserve it; but here it appears that the maker of the Will before [he] became incompetent, selected [Vigne] as the custodian thereof, with special directions to retain the same until [the ward's] death . . . and upon [his] death to deliver it to [his] executor. The [custodian] is charged with the execution of this trust. It is a trust which could be revoked only by [the ward] . . . to hold that the subsequent incompetency of the maker of the Will entitles the guardian to possession of the instrument would defeat the evident purpose of the maker." (Citation). "(106 Cal.App. 3d 517 at 521-522).

The Appellate Court went on to state: "Under the authorities cited above, it is clear that a Will, valid or invalid, is not the type of 'instrument in writing' which a guardian or conservator is entitled to demand delivery of under the provisions of Probate Code Sections 1552 and 1903."

As noted, we now have specific provisions in the Probate Code for substituted judgment (Probate Code Section 2580). Absent a specific code provision relating to petitions of that sort, I do not believe that the staff is correct in asserting that California Civil Code Section 2467 authorizes an agent under a durable power of attorney to get a Will nor can a conservator get a Will unless pursuant to petitions re substituted judgment matters. Conservatorship of DuNah and the older cases would still seem to be good law. Unless the Staff can give us case authority to the contrary, it would seem that their statement at the top of page 3 of the First Supplement to their Memorandum 89-88 is not correct.

Please let me know if I can be of further assistance at this time on this matter.

Very truly yours,

Clark R. Byam

CRB:ra
8838L
cc: Bruce S. Ross, Esq.
Barbara Miller, Commissioner
Lloyd Homer, Esq.
James Willett, Esq.
Harley Spitler, Esq.