

Memorandum 90-69

Subject: Study L-1029 - Distribution and Discharge (Distribution under Independent Administration of Estates Act)

Attached to this memorandum is a letter from John L. McDonnell, Jr., of Oakland (Exhibit 1), concerned about Section 11623 of the Probate Code. That section provides that if a personal representative is proceeding under the Independent Administration of Estates Act, the personal representative may obtain an order for preliminary distribution of up to 50% of the estate on limited notice:

11623. Notwithstanding any other provision of this chapter, if authority is granted to administer the estate without court supervision under the Independent Administration of Estates Act, Part 6 (commencing with Section 10400):

(a) The personal representative may petition the court for an order for preliminary distribution on notice as provided in Section 1220. Notwithstanding subdivision (f) of Section 1220, the court may not dispense with notice unless the time for filing creditor claims has expired.

(b) The aggregate of all property distributed under this section shall not exceed 50 percent of the net value of the estate. For the purpose of this subdivision, "net value of the estate" means the excess of the value of the property in the estate, as determined by all inventories and appraisals on file with the court, over the total amount of all creditor claims and of all liens and encumbrances recorded or known to the personal representative not included in a creditor claim, excluding any estate tax lien occasioned by the decedent's death.

Mr. McDonnell states that some practitioners are misconstruing this section to provide that if a personal representative has Independent Administration authority, the personal representative must act under this section and may not make fuller distribution under general provisions other than this section. This reading is obviously not intended, and Mr. McDonnell suggests that the Commission propose some clarifying language.

This could easily be done by adding a subdivision to the section along the following lines:

Nothing in this section limits the authority of the personal representative to make preliminary distribution under provisions of this chapter, whether or not authority is granted to administer the estate without court supervision under the Independent Administration of Estates Act, Part 6 (commencing with Section 10400).

The staff believes that to some extent this is overkill, since it takes a strained reading to misconstrue the section in the way some apparently are doing it. If the Commission is interested in making this clarification, we could add it to legislation now pending so that it will appear in the new Probate Code. Alternatively, we could make the clarification in the Comment rather than the section so that it will appear in the annotations to the new Probate Code.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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Dear John:

In teaching a CEB course on Fundamentals of Estate Administration recently, my lecturing partners and I came upon what appears to be an anomaly in the Probate Code.

Probate Code Section 11623 is being interpreted by some lawyers to preclude distribution of more than 50% of the net value of an estate where the personal representative possesses authority under the Independent Administration of Estates Act, even where the personal representative petitions for preliminary distribution on notice. In other words, simply possessing the authority to administer the estate under the Act would, under this reading of the section, preclude the personal representative from making a preliminary distribution of more than 50% of the net value of the estate under any circumstances.

As one of the many lawyers who assisted in the drafting of the Independent Administration of Estates Act, I am absolutely sure that the legislature did not intend to restrict personal representatives in this manner. I would suggest that the Commission propose some clarifying language to Section 11623.

Although I know of no court which has interpreted the section in the manner suggested, I know of one case where the lawyer feels he must petition the court to withdraw his client's power to administer the estate under the Act, in order that a preliminary distribution of more than 50% of the assets can occur.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY

By *John L. McDonnell, Jr.*
John L. McDonnell, Jr.