

First Supplement to Memorandum 90-114

Subject: Study L-1036 - Probate Attorney Fees (Assembly Bill 831)

BACKGROUND

The primary reason the Commission was directed to study probate law is the objections consumer groups have to the statutory fee schedule. Consumer groups were able to persuade the Legislature to direct the Commission to study the Uniform Probate Code, which requires that the compensation of the probate attorney be reasonable and contains no statutory fee schedule.

The legislation recommended by the Commission on probate attorney fees was not enacted in 1990, having been withdrawn by its author before it was put to a vote by the Senate Judiciary Committee.

In this supplement, the staff recommends that the Commission not sponsor legislation on probate attorney fees in 1991, leaving the field to the consumer groups that plan to sponsor such legislation in 1991. The staff further recommends that the Commission publish a revised draft (revised in light of the provisions of the earlier recommendation already included in the new Probate Code) with official Comments (set out as Exhibit 1 to this supplement), together with an explanation of the recommended legislation (set out as Exhibit 3 to this supplement). The explanation and the official Comments will be useful to members of the bench and bar should the Legislature enact the recommended legislation.

THE DISCLOSURE STATEMENT APPROACH

The Commission devoted a number of years to the study of probate attorney fees. A tentative recommendation was distributed in October 1988 that proposed to retain the statutory fee system with a modest revision that reduced the top fee from four percent to three percent. The significant change proposed in this tentative recommendation was that the attorney be required to obtain a signed disclosure statement from the personal representative. The required disclosure statement made clear that the statutory fee is subject to negotiation. A revised version of the disclosure statement approach is attached as Exhibit 2. Most of the individual probate attorneys who commented on the tentative

recommendation had no objections to it. However, the tentative recommendation was opposed by representatives of consumer groups, who want to eliminate the statutory fee schedule entirely. Organizations representing the probate bar also opposed the tentative recommendation, taking the view that the proposal would create controversy concerning the fee of the probate attorney. Organizations in opposition included the Executive Committee of the Estate Planning, Trust and Probate Law Section and the Executive Committees of the probate and trust law sections of the Los Angeles County Bar Association and the Beverly Hills Bar Association.

In view of the objections from the consumer groups and the organized probate bar, the Commission decided to abandon the disclosure statement approach.

THE AGREED FEE APPROACH

Having abandoned the disclosure statement approach, the Commission prepared and submitted to the 1989 legislative session a recommendation proposing that the statutory fee system be replaced by an agreed fee system. The proposal was originally a part of Assembly Bill 158, carried by Assembly Member Friedman, which included the proposal when the bill was passed by the Assembly. However, when the matter became controversial, he deleted the proposal from his bill. Assembly Member Harris then amended the proposal into his Assembly Bill 831, which had already passed the Assembly. Assembly Bill 831 was carried over into the 1990 session, but the bill was never voted on by the Senate Judiciary Committee. The bill was ultimately dropped by Assembly Member Harris in compliance with a request from Senator Lockyer. A revised version of the Commission's recommended legislation is attached as Exhibit 1. The revised version is the same in substance as the latest version of Assembly Bill 831, but the revisions reflect the enactment of the new Probate Code and the changes that the staff proposes be made in the new Probate Code by urgency legislation in 1991.

FUTURE ACTION WITH RESPECT TO PROBATE ATTORNEY FEES

Senator Lockyer (Chairman of the Senate Judiciary Committee and Senate Member of the Law Revision Commission) opposed Assembly Bill 831 because he believes the bill would have increased the fees for small estates. He has said that he asked Assembly Member Harris to drop the

bill because the Commission failed to deal with the concern he and others had about this aspect of the bill. I believe that Senator Lockyer (and Assembly Member Friedman) would favor the Disclosure Statement Approach, but that approach was opposed by representatives of consumer groups and organizations representing the probate bar.

There is general support from consumer groups and organizations representing the probate bar for the agreed fee approach as was proposed in Assembly Bill 831 recommended by the Commission. (The organizations representing the probate bar would, of course, prefer to retain the existing statutory fee system without any substantive change, but would not oppose the agreed fee approach.)

The following organizations supported the bill:

American Association of Retired Persons

HALT - An Organization of Americans for Legal Reform

Consumer Action

Nolo Press

Consumer Advocates for Legal Justice

Executive Committee of State Bar Estate Planning, Trust and Probate Law Section

Legislative Committee of the Beverly Hills Probate, Trust and Estate Planning Section

Most individual probate attorneys are opposed to changing the existing law. A San Francisco organization representing probate attorneys in that city objected to the bill and wants to retain existing law without change. The Los Angeles County Superior Court opposed the bill. A few probate commissioners and judges expressed their concern about the bill to members of the Legislature. The commissioners and judges believe that the bill will increase the attorney fees for probating small estates. An empirical study by the American Association of Retired Persons takes the position that the recommended legislation would reduce probate fees for simple small estates.

Senator Lockyer asked Assembly Member Harris to drop AB 831 because he said the Commission failed to eliminate the opposition to the bill. However, there is general support for the bill from consumers and organizations representing probate lawyers. The staff

does not believe that we can modify our recommendation without losing the support of the consumers or the probate organizations. The staff believes we have made a careful study of the alternatives and have submitted a sound recommendation to the Legislature. Consumer groups have advised the staff that they plan to submit their own proposal dealing with probate attorney fees to the 1991 Legislature. If the consumers submit their own proposal, the Commission will have no control over the revisions that might be made in the legislation ultimately adopted.

The Commission may want to request that the Senate Judiciary Committee hold an interim hearing on the probate attorney fee issue. This would provide the few members of the committee who would attend an interim hearing with an opportunity to explore in some depth the issue.

The staff believes that the best course of action is for the Commission not to sponsor a bill on this subject in 1991. If this is the Commission's decision, we would not request an interim hearing on the issue. A bill dealing with probate attorney fees would require considerable staff time during the 1991 session. In addition, we believe that it is more likely that the legislation in this field will be enacted if it is sponsored by the consumer groups. If legislation is not enacted in 1991 on this matter, the Commission can consider whether it will again introduce its recommended legislation.

We also recommend that the Commission publish a revised draft of the recommended legislation with official Comments (set out as Exhibit 1 to this supplement), together with the explanation of the recommended legislation (set out as Exhibit 3 to this supplement) in a report to the 1991 session so that the text of the statute and the official Comments will be available for use by the bench and bar should the proposal be enacted in 1991. The publication of the draft statute and explanation would encourage consumer groups to propose the Commission recommended legislation. The explanation and the official Comments will be useful to members of the bench and bar should the Legislature enact the recommended legislation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

AGREED FEE SYSTEM FOR PROBATE ATTORNEY FEES**OUTLINE OF PROPOSED LEGISLATION****HIRING AND PAYING ATTORNEYS, ADVISERS, AND OTHERS**
Probate Code §§9680-9686 (added)

- Chapter 2.5. Hiring and Paying Attorneys, Advisers, and Others
- §9680. Authority to hire attorneys, advisers, and others
 - §9681. Compensation determined by agreement
 - §9682. Relief from limiting provision of decedent's will
 - §9683. Payment out of funds of estate
 - §9684. Court review of employment and compensation
 - §9684.5. Proceeding to obtain order requiring refund
 - §9685. Attorney's right to decline employment
 - §9686. Application of chapter

INDEPENDENT ADMINISTRATION OF ESTATES ACT

- Probate Code §10404.5 (added). Hiring and paying attorney and others authorized whether or not independent administration authority granted
- Probate Code §10406 (amended). Application of provisions for independent administration
- Probate Code §10501 (amended). Matters requiring court supervision
- Probate Code §10565 (added). Hiring and paying attorneys, advisers, and others
- Probate Code §10585.5 (added). Estimated amount of compensation to be included in notice of proposed action; copy of contract
- Probate Code §10589 (amended). Court supervision and notice of hearing required if personal representative has notice of objection

CONFORMING REVISIONS

- Probate Code §7622 (amended). Manner of administration; compensation of public administrator
- Probate Code §7666 (amended). Compensation of public administrator
- Probate Code §8547 (amended). Compensation of special administrator
- Probate Code §8907 (amended). Extraordinary services compensation
- Probate Code §10801 (amended). Compensation for extraordinary services
- Probate Code §10830 (amended). Partial allowance of compensation
- Probate Code §10810 (repealed). Compensation of estate attorney
- Probate Code §10831 (amended). Final compensation
- Probate Code §10850 (amended). Application of provisions of this part
- Probate Code §20900 (amended). Contents of account
- Probate Code §10954 (amended). When account not required
- Probate Code §11000 (amended). Notice of hearing
- Probate Code §12205 (amended). Sanction for failure timely to close estate

TRANSITIONAL PROVISION

PROPOSED LEGISLATION

HIRING AND PAYING ATTORNEYS, ADVISERS, AND OTHERS

Probate Code §§9680-9686 (added)

SEC. Chapter 2.5 (commencing with Section 9680) is added to Part 5 of Division 7 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, to read:

CHAPTER 2.5. HIRING AND PAYING ATTORNEYS, ADVISERS, AND OTHERS

§9680. Authority to hire attorneys, advisers, and others

9680. Except as restricted or otherwise provided by the will or by court order and subject to subdivision (b) and to Section 10804, the personal representative, acting reasonably for the benefit of the estate and in the best interest of interested persons, may hire persons to advise or assist the personal representative in the administration of the estate, including attorneys, accountants, auditors, technical advisers, investment advisers, or other experts or agents, even if they are associated or affiliated with the personal representative.

(b) A provision in the will directing the personal representative to hire a particular person to advise or assist the personal representative in the administration of the estate is not binding on the personal representative, and the personal representative may, but is not required to, hire that person.

Comment. Subdivision (a) of Section 9680 is a new provision drawn from paragraph (21) of Section 3-715 of the Uniform Probate Code (1982) and from California trust law (Section 16247). The broad authority granted by Section 9680 covers all aspects of estate administration from opening estate administration to closing estate administration, including but not limited to tax work. The authority may be exercised by the personal representative without prior court authorization (Section 9610), unless otherwise provided by the will or by court order. As to the right of an interested person to obtain court review of the reasonableness of the hiring and compensation, see Section 9684 and the Comment to that section.

Subdivision (b) is new.

The notice of proposed action procedure under the Independent Administration of Estates Act may be used for the hiring and payment of persons under Section 9680. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

The introductory clause of Section 9680 makes clear that the personal representative must act reasonably in exercising the power granted. The reference to Section 10804 in the introductory clause makes clear that the right of the personal representative who is an attorney to receive compensation for services as the estate attorney as well as the personal representative is governed by Section 10804. The introductory clause also recognizes that the authority granted by Section 9680 may be restricted or otherwise modified by the testator's will or by court order. However, the court may grant relief from a limiting provision of the decedent's will. See Section 9682.

Section 9680 merely deals with the authority of the personal representative to employ persons to advise or assist in the administration of the estate. The question of whether the person hired is to be paid out of estate funds or out of the personal representative's own funds is governed by Section 9683.

As to the law applicable to a proceeding commenced before January 1, 1992, see Section 9686. See also Section 10406(d).

§9681. Compensation determined by agreement

9681. (a) The compensation of persons hired under Section 9680, including the attorney for the personal representative, shall be determined by agreement between the personal representative and the person hired, and, except as provided in Section 9684 and in Chapter 3 (commencing with Section 11000) of Part 8, is not subject to approval or review by the court.

(b) Subject to Section 9682, if the decedent's will makes provision for the compensation of a person hired under Section 9680, including the attorney for the personal representative, the compensation provided by the will shall be the full and only compensation for the services of that person.

Comment. Subdivision (a) of Section 9681 is a new provision that makes clear that the compensation of persons hired under Section 9680, including the attorney for the personal representative, is determined by agreement between the personal representative and the person hired. The policy reflected in subdivision (a) is consistent with Sections 13157 (court order determining succession to real property) and 13660 (confirming property to surviving spouse).

Subdivision (b) recognizes that the decedent's will may fix the compensation or provide the manner for determining the compensation. If this is the case, the person hired is entitled to the compensation provided in the will or compensation determined as provided in the will, as the case may be, and the court may not reduce the compensation so determined. But see Section 9682 (relief from limiting provision of decedent's will).

Subdivision (b) supersedes a portion of former Section 900 and a portion of the first sentence of former Section 901 of the repealed Probate Code insofar as those provisions were made applicable to estate attorneys by the first sentence of former Section 10810 of the new Probate Code.

As to the right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person, see Section 9684 and the Comment to that section. See also Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

The notice of proposed action procedure under the Independent Administration of Estates Act may be used. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

As to the law applicable to a proceeding commenced before January 1, 1992, see Section 9686.

§9682. Relief from limiting provision of decedent's will

9682. (a) The personal representative or a person hired under Section 9680, including the attorney for the personal representative, may petition the court to be relieved from a provision of the decedent's will that provides for the compensation of a person hired under Section 9680 or for relief from some other restriction or other limiting provision of the will on the hiring of persons by the personal representative.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate would be affected by the petition.

(3) Each known devisee whose interest in the estate would be affected by the petition.

(4) The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

(c) If the court determines that it is to the advantage of the estate and in the best interest of the interested persons, the court may make an order:

(1) Granting relief from the restriction or other limiting provision of the will upon the terms and conditions the court specifies in the order.

(2) Authorizing compensation for the person hired under Section 9680 in an amount greater than provided in the will.

Comment. Section 9682 is a new provision that is comparable to Section 10802 (personal representatives).

The court may make an order granting relief from a provision of the will fixing the compensation of the estate attorney, for example, because the passage of time has made the compensation provided in the will so inadequate that a competent lawyer can not be obtained to handle the estate proceeding. If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

Notice of hearing under this section is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(f).

Section 9682 supersedes the portions of former Sections 900 and 901 of the repealed Probate Code, made applicable to estate attorneys by the first sentence of former Section 10810 of the new Probate Code, that permitted the estate attorney to renounce the compensation provided by the will and to receive the statutory compensation. Instead, Section 9682 imposes a requirement that court approval be obtained before the estate attorney may be relieved from provisions of the will governing compensation.

As to the law applicable to a proceeding commenced before January 1, 1992, see Section 9686.

§9683. Payment out of funds of estate

9683. (a) Except as otherwise provided in this section, the personal representative may pay persons hired under Section 9680 out of funds of the estate as a proper expense of administration.

(b) If a person, including an attorney, is hired to assist the personal representative in the performance of the services of the personal representative for which the personal representative is compensated under Part 7 (commencing with Section 10800), the person hired shall be paid out of the personal representative's own funds and not out of the funds of the estate, except that, at the request of the personal representative, the court may order payment out of the estate directly to the person assisting the personal representative in the performance of these services, the payment to be charged against and deducted from the compensation that otherwise would be paid to the personal representative.

(c) Nothing in subdivision (b) limits the authority of the personal representative to pay out of funds of the estate for services of tax counsel, tax auditors, accountants, or other tax experts hired for the providing of services in the computation, reporting, or making of tax returns, or in negotiations which may be necessary for the final determination and payment of taxes.

Comment. Subdivision (a) of Section 9683 states the general rule that persons hired by the personal representative are paid out of estate funds. Subdivision (b) states an exception to this rule where the person is hired to assist the personal representative in performing the duties the personal representative is expected to perform.

Subdivision (b) codifies a distinction that existed under prior law. If the personal representative hires another person (including the estate attorney) to assist the personal representative in performing the duties the personal representative is expected to perform, the person hired is paid out of the personal representative's own funds. 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 out of funds of the estate because this is statutory duty of public administrator). On the other hand, if the search for estate assets had required an extraordinary effort, Section 9683 would permit the personal representative to pay the investigator out of estate funds. Likewise, the duty to prepare the accounts is a service for which the personal representative is compensated. If the personal representative hires another to keep the accounts, the personal representative must pay that person out of the personal representative's own funds. However, to the extent that the nature of the estate presents exceptionally complex accounting requirements, the person keeping the accounts may be paid out of funds of the estate. The personal representative also may pay out of the funds of the estate persons hired to assist in the operation of a business of the estate. As to court review of the propriety of paying a person hired under Section 9683 out of funds of the estate, see Section 9684 and the Comment to that section.

Subdivision (c) makes clear that a tax expert hired under Section 9680 is paid out of funds of the estate; the compensation to which the personal representative is entitled under Sections 10800-10805 is not reduced because the tax expert is employed to assist the personal representative to perform duties in connection with taxes. Subdivision (c) restates without substantive change the second sentence of former Section 902 of the repealed Probate Code, which will be continued in substance in subdivision (b) of Section 10801 of the new Probate Code. Subdivision (b) of Section 10801 is superseded by Sections 9680 and 9683.

The estate attorney is paid out of funds of the estate except to the extent that the attorney is hired to perform the duties the personal representative is expected to perform. The authority to make an agreement with the estate attorney to assist the personal representative in performing the duties the personal representative is expected to perform was recognized under prior practice. See Fresno

County Probate Policy Memoranda §9.4(c), reprinted in California Local Probate Rules (11th ed., Cal. Cont. Ed. Bar 1990).

The court does not review the hiring or compensation when the person hired (including the estate attorney) is paid by the personal representative from the personal representative's own funds. See Section 9684 (court review limited to cases where the person hired has been or is to be paid out of estate funds). This changes the former practice in at least one court. See Fresno County Probate Policy Memoranda §9.4(c), reprinted in California Local Probate Rules, supra (court approval of contract required).

§9684. Court review of employment and compensation

9684. (a) Subject to Section 10590 and to subdivision (f) of this section, on petition of the personal representative or an interested person, the court shall review the following as requested in the petition:

(1) The propriety of employment by the personal representative of any person under Section 9680 who has been or is to be paid out of funds of the estate.

(2) The reasonableness of the agreed compensation under subdivision (a) of Section 9681 of any person who has been or is to be paid out of funds of the estate.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) The person whose employment or compensation is in question.

(2) Each person listed in Section 1220.

(3) Each known heir whose interest in the estate would be affected by the petition.

(4) Each known devisee whose interest in the estate would be affected by the petition.

(5) The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

(c) On hearing the petition, the court shall approve the agreed compensation unless the court determines that the agreed compensation is unreasonable in light of the necessary work to be performed for the estate. If the work has already been performed and the court has not previously reviewed the agreed compensation, the court shall determine

whether the agreed compensation is unreasonable in light of the necessary work actually performed for the estate. In making the determination as to the reasonableness of the compensation in the case of the attorney for the personal representative, the court shall be guided by Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation.

(d) If the court determines that the attorney for the personal representative has received excessive compensation, the court shall order the attorney to make an appropriate refund. If the court determines that a person other than the attorney for the personal representative has received excessive compensation, an order for the refund of the excessive compensation may be obtained only in a proceeding under Section 9684.5.

(e) Except as provided in subdivision (f), nothing in this section limits the right to contest the account of the personal representative under Chapter 3 (commencing with Section 11000) of Part 8.

(f) The petitioner and all persons to whom notice of the hearing on the petition was given pursuant to subdivision (b) are bound by the determination of the court under this section.

Comment. Section 9684 is drawn in part from Section 3-721 of the Uniform Probate Code (1982).

In determining whether the compensation for the estate attorney is unreasonable, the court may consider any relevant factors, including but not limited to those set out in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). Subdivision (d) avoids the need for a separate action or proceeding to recover an excess payment of compensation, thus providing a quick and efficient remedy.

Notice of hearing under this section is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(f).

The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person may be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

Section 11001 provides an alternative procedure to the procedure provided in Section 9684. Under Section 11001, the court may review, in a contest on settlement of the final account, the propriety of employment and reasonableness of compensation of any person employed under Section 9680, including the estate attorney. But see subdivision (e) of Section 9684. See also Section 10900 (report of administration to show hiring and payment of persons hired under Section 9680).

If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

As to the law applicable to a proceeding commenced before January 1, 1992, see Section 9686.

§9684.5. Proceeding to obtain order requiring refund

9684.5. (a) Any interested person may commence a proceeding under this section to obtain an order that a person determined by the court to have received excessive compensation make an appropriate refund. The proceeding under this section may be combined with the proceeding brought to determine whether the compensation is excessive. There shall be no additional filing fee if the petition under this section is combined with the other proceeding.

(b) A proceeding under this section shall be commenced by filing a petition requesting that an order be made under this section and referring to the other proceeding brought to determine whether the compensation is excessive.

(c) Not less than 30 days before the hearing, the petitioner shall do both of the following:

(1) Cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to any other petitioner in the other proceeding to determine whether the compensation is excessive.

(2) Cause a summons and a copy of the petition to be served on the person whose compensation is claimed to be excessive. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

(d) If the court determines that the person who received excessive compensation should make an appropriate refund, the court shall so order. The order is a judgment that may be enforced against the person ordered to make the refund.

(e) An order that the attorney for the personal representative make an appropriate refund may be made without compliance with the requirements of this section.

§9685. Attorney's right to decline employment

9685. Nothing in this chapter limits the right of an attorney to decline to be the attorney for the personal representative or the right of an attorney to withdraw as the attorney for the personal representative, and, in such case, the attorney is entitled to reasonable compensation for the necessary legal services actually provided.

Comment. Section 9685 is a new provision that makes clear, for example, that an attorney may withdraw as attorney for the personal representative if the court disapproves the written fee contract between the attorney and the personal representative and lowers the compensation of the attorney. As to the law applicable to a proceeding commenced before January 1, 1992, see Section 9686.

§9686. Application of chapter

9686. (a) This chapter does not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1992.

(b) The applicable law in effect before January 1, 1992, governing the subject matter of this chapter continues to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1992, notwithstanding its amendment or repeal by the act that enacted this section.

Comment. Section 9686 is a new provision that limits the application of this chapter to proceedings commenced on or after January 1, 1992. Accordingly, the allowance of attorney fees in a proceeding commenced before January 1, 1992, is governed by the applicable law in effect before January 1, 1992. See also Section 10406(d) (use of independent administration procedure for attorney compensation).

INDEPENDENT ADMINISTRATION OF ESTATES ACT

Probate Code §10404.5 (added). Hiring and paying attorney and others authorized whether or not independent administration authority granted

SEC. . Section 10404.5 is added to the Probate Code enacted by Chapter 79 of the Statutes of 1990, to read:

10404.5. Notwithstanding any provision of the decedent's will, the personal representative is authorized to exercise under the provisions of this part the power granted by Section 10565, whether or not the personal representative has been granted authority to administer the estate under this part.

Comment. Section 10404.5 is a new provision that permits the notice of proposed action procedure to be used with respect to the hiring and compensation of persons hired under Section 10565, even though the personal representative has not been granted authority to administer the estate under this part. This section avoids the need to petition for authority to administer the estate under this part, or to obtain such authority, in order to use the procedure under this part for the exercise of the power granted by Section 10565. The section does not apply in a proceeding commenced before January 1, 1992. See Section 10406(d).

Section 10550 permits the exercise of the power granted by Section 10565 without giving notice of proposed action under Chapter 4 (commencing with Section 10580). However, subdivision (b) of Section 10580 permits a personal representative to use the notice of proposed action procedure provided in Chapter 4 with respect to the exercise of that power even though the action is not one for which notice of proposed action is required. If the procedure provided by Chapter 4 is used with respect to the proposed exercise of the power granted by Section 10565, a person who fails to object to the proposed action waives the right to have the court later review the action taken. See Section 10590 and the Comment to that section. See also Section 10589(b) and the Comment to that section. Use of the notice of proposed action procedure avoids the need to petition the court under Section 9684 for approval of the hiring and the contract in order to preclude a later challenge to the accounts of the personal representative. See also Section 10585.5 (estimated amount of compensation to be included in notice of proposed action; copy of contract governing hiring and compensation to be attached to notice of proposed action).

Probate Code §10406 (amended). Application of provisions for independent administration

SEC. . Section 10406 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 28 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10406. (a) Subject to subdivision (b), this part applies in any case where authority to administer the estate is granted under this part or where independent administration authority was granted under prior law.

(b) If the personal representative was granted independent administration authority prior to July 1, 1988, the personal

representative may use that existing authority on and after July 1, 1988, to borrow money on a loan secured by an encumbrance upon real property, whether or not that existing authority includes the authority to sell real property.

(c) Sections 10404.5, 10565, and 10585.5, added by the act that added this subdivision, do not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1992. Notwithstanding its amendment by the act that added this subdivision, Section 10501, as that section existed on December 31, 1991, continues to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1992.

Comment. Section 10406 is amended to add subdivision (d). This subdivision limits the use of independent administration for attorney's fees to proceedings commenced on or after January 1, 1992. Thus, independent administration procedures cannot be used for the allowance of attorney fees in a proceeding commenced before January 1, 1992. The allowance of attorney fees in a proceeding commenced before January 1, 1992, is governed by the applicable law in effect before January 1, 1992. See also Section 9686.

Probate Code §10501 (amended). Matters requiring court supervision

SEC. . Section 10501 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 29 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10501. (a) Notwithstanding any other provision of this part, whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(1) Allowance of the personal representative's compensation.

~~(2) Allowance of compensation of the attorney for the personal representative.~~

~~(3)~~

(2) Settlement of accounts.

~~(4)~~

(3) Preliminary and final distributions and discharge.

~~(5)~~

(4) Sale of property of the estate to the personal representative or to the attorney for the personal representative.

~~(6)~~

(5) Exchange of property of the estate for property of the personal representative or for property of the attorney for the personal representative.

~~(7)~~

(6) Grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative.

~~(8)~~

(7) Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.

~~(9)~~

(8) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.

~~(10)~~

(9) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate.

(b) Notwithstanding any other provision of this part, a personal representative who has obtained only limited authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(1) Sale of real property.

(2) Exchange of real property.

(3) Grant of an option to purchase real property.

(4) Borrowing money with the loan secured by an encumbrance upon real property.

(c) Paragraphs ~~(5)~~ (4) to ~~(10)~~ (9), inclusive, of subdivision (a) do not apply to a transaction between the personal representative as such and the personal representative as an individual where all of the following requirements are satisfied:

(1) Either (A) the personal representative is the sole beneficiary of the estate or (B) all the known heirs or devisees have consented to the transaction.

(2) The period for filing creditor claims has expired.

(3) No request for special notice is on file or all persons who filed a request for special notice have consented to the transaction.

(4) The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

(d) Subdivision (a) does not apply to the hiring and paying of persons, including the attorney for the personal representative, hired under Section 9680 to advise or assist the personal representative in the administration of the estate.

Comment. Section 10501 is amended to delete from subdivision (a) the former requirement that court supervision be obtained for allowance of attorney's fees and to add subdivision (d). These revisions are consistent with the new provision in supervised administration that compensation of the attorney for the personal representative is fixed by private agreement and that court approval is not required. See Section 9681. See also Section 9684 and the Comment to that section (court review of compensation of attorney). Independent administration procedures cannot be used for the allowance of attorney fees in a proceeding commenced before January 1, 1992. See Section 10406(d).

Probate Code §10565 (added). Hiring and paying attorneys, advisers, and others

SEC. . Section 10565 is added to the Probate Code enacted by Chapter 79 of the Statutes of 1990, to read:

10565. (a) Subject to Section 10804, the personal representative has the power to hire persons to advise or assist in the administration of the estate, including attorneys, accountants, auditors, technical advisers, investment advisers, or other experts or agents, even if they are associated or affiliated with the personal representative.

(b) The personal representative has the power to agree to and pay the compensation of the persons described in subdivision (a) out of funds of the estate unless the person is hired to assist the personal representative in the performance of services of the personal representative for which the personal representative is compensated under Part 7 (commencing with Section 10800).

Comment. Section 10565 is a new provision. The power granted by this section may be exercised whether or not independent administration authority is granted to the personal representative. See Section 10404.5. Section 10565 does not apply in any proceeding commenced before January 1, 1992. See Section 10406(d). For the comparable provisions under supervised administration, see Sections 9680-9684. Concerning the exercise of the powers described in this chapter, see

Sections 10502 and 10550 and the Comments to those sections. Notice of proposed action is not required to exercise the power granted by Section 10565. See Section 10550. But the personal representative may use the notice of proposed action procedure if the personal representative so desires. See Section 10580(b) and the Comment to Section 10550. If notice of proposed action is given to a person who fails to object to the proposed action, that person waives the right to have the court later review the action. Section 10590. But see Section 10585.5 (another notice of proposed action required if compensation exceeds estimate in notice of proposed action).

Probate Code §10585.5 (added). Estimated amount of compensation to be included in notice of proposed action; copy of contract

SEC. . Section 10585.5 is added to the Probate Code enacted by Chapter 79 of the Statutes of 1990, to read:

10585.5. (a) If, pursuant to subdivision (b) of Section 10580, the personal representative gives notice of proposed action with respect to the exercise of the powers granted by Section 10565 (hiring and paying attorneys, advisers, and others to advise or assist in the administration of the estate):

(1) The notice of proposed action shall include, in addition to the information required by Section 10585, an estimate of the total amount of compensation to be paid to the person hired.

(2) If the person hired is an attorney, each person given notice of proposed action shall also be provided with a copy of the written fee contract made pursuant to Section 6148 of the Business and Professions Code.

(3) If the person hired is not an attorney, each person given notice of proposed action shall also be provided with a copy of the written contract, if any, governing the hiring and compensation.

(b) If it appears that the total amount of compensation to be paid to the person hired will exceed the amount of the last previous estimate given in a notice of proposed action, the personal representative may give another notice of proposed action stating a new estimate of the total amount of compensation to be paid to the person.

(c) Section 10590 does not apply to the extent that the compensation paid or to be paid exceeds the amount of the estimate contained in the notice of proposed action most recently given.

Comment. Section 10585.5 is a new provision governing the permissive notice of proposed action under Section 10565 with respect

Sections 10502 and 10550 and the Comments to those sections. Notice of proposed action is not required to exercise the power granted by Section 10565. See Section 10550. But the personal representative may use the notice of proposed action procedure if the personal representative so desires. See Section 10580(b) and the Comment to Section 10550. If notice of proposed action is given to a person who fails to object to the proposed action, that person waives the right to have the court later review the action. Section 10590. But see Section 10585.5 (another notice of proposed action required if compensation exceeds estimate in notice of proposed action).

Probate Code §10585.5 (added). Estimated amount of compensation to be included in notice of proposed action; copy of contract

SEC. . Section 10585.5 is added to the Probate Code enacted by Chapter 79 of the Statutes of 1990, to read:

10585.5. (a) If, pursuant to subdivision (b) of Section 10580, the personal representative gives notice of proposed action with respect to the exercise of the powers granted by Section 10565 (hiring and paying attorneys, advisers, and others to advise or assist in the administration of the estate):

(1) The notice of proposed action shall include, in addition to the information required by Section 10585, an estimate of the total amount of compensation to be paid to the person hired.

(2) If the person hired is an attorney, each person given notice of proposed action shall also be provided with a copy of the written fee contract made pursuant to Section 6148 of the Business and Professions Code.

(3) If the person hired is not an attorney, each person given notice of proposed action shall also be provided with a copy of the written contract, if any, governing the hiring and compensation.

(b) If it appears that the total amount of compensation to be paid to the person hired will exceed the amount of the last previous estimate given in a notice of proposed action, the personal representative may give another notice of proposed action stating a new estimate of the total amount of compensation to be paid to the person.

(c) Section 10590 does not apply to the extent that the compensation paid or to be paid exceeds the amount of the estimate contained in the notice of proposed action most recently given.

Comment. Section 10585.5 is a new provision governing the permissive notice of proposed action under Section 10565 with respect

to the hiring and paying of attorneys, advisers, and others to advise or assist in the administration of the estate. The section requires that the notice of proposed action contain the information required by Section 10585 and, in addition, the information required by Section 10585.5. Section 10585.5 is designed to give the person receiving notice of proposed action sufficient information so that the person can determine whether or not to object to the proposed action. The section does not apply in a proceeding commenced before January 1, 1992. See Section 10406(d).

The notice of proposed action must include an estimate of the total amount of compensation to be paid to the person hired. Another notice of proposed action may be given if it appears that the total amount of compensation may exceed the amount estimated in a previous notice of proposed action. The provisions of Section 10590 that preclude court review of the hiring and paying of the agreed compensation will apply so long as the compensation does not exceed the amount estimated in the latest notice of proposed action. However, to the extent that the compensation paid or to be paid exceeds the amount estimated in the latest notice of proposed action, Section 10590 does not apply, and the court may review the excess to determine whether it is reasonable.

Section 10585.5 also requires that a copy of the contract be attached to the notice. In the case of an attorney, a copy of the written fee contract required by Section 6148 of the Business and Professions Code must be attached to the notice of proposed action.

Probate Code §10589 (amended). Court supervision and notice of hearing required if personal representative has notice of objection

SEC. . Section 10589 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as proposed to be amended by Assembly Bill XX [Commission's 1991 urgency bill] of the 1991-92 Regular Session, is amended to read:

10589. (a) If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under this part and the personal representative has notice of a written objection made under Section 10587 to the proposed action or a restraining order issued under Section 10588, the personal representative shall, if the personal representative desires to take the proposed action, take the proposed action under the provisions of this code dealing with court supervision of that kind of action.

(b) If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under this part but the personal representative has given notice of the proposed action and has notice

However, the compensation of the public administrator and the public administrator's attorney shall not be less than the compensation in effect at the time of appointment of the public administrator.

Comment. Section 7622 is amended to delete the provision relating to the compensation of the attorney for the public administrator. The compensation of the attorney for the public administrator is determined by agreement between the public administrator and the attorney. See Sections 9680-9686.

Probate Code §7666 (amended). Compensation of public administrator

SEC. . Section 7666 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 19 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

7666. (a) Except as provided in Section 7623 and in subdivision (b), the compensation payable to the public administrator ~~and the attorney, if any, for the public administrator~~ for the filing of an application pursuant to this article and for performance of any duty or service connected therewith is that set out in Part 7 (commencing with Section 10800).

(b) The public administrator is entitled to a minimum compensation of three hundred fifty dollars (\$350).

Comment. Section 7666 is amended to delete the reference to compensation of the attorney for the personal representative, this matter being covered by Section 9681.

Probate Code §8547 (amended). Compensation of special administrator

SEC. . Section 8547 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 22 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

8547. (a) Subject to the limitations of this section, the court shall fix the compensation of the special administrator ~~and the compensation of the attorney of the special administrator.~~

(b) The compensation of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's compensation or the court in its discretion so allows. Compensation for extraordinary services of a special administrator may be allowed on settlement of the final account of the special administrator. The total compensation paid to the special

administrator and general personal representative shall not, together, exceed the sums provided in Part 7 (commencing with Section 10800) for compensation for the ordinary and extraordinary services of a personal representative. If the same person does not act as both special administrator and general personal representative, the compensation shall be divided in such proportions as the court determines to be just or as may be agreed to by the special administrator and general personal representative.

~~(e) The total compensation paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in Part 7 (commencing with Section 10800) as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the compensation shall be divided between the attorneys in such proportions as the court determines to be just or as agreed to by the attorneys.~~

~~(d) Compensation of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of compensation to the attorney may be made on settlement of the final account of the special administrator.~~

Comment. Section 8547 is amended to delete the reference to the compensation of the attorney for the special administrator from subdivision (a) and to delete subdivisions (c) and (d) which also are concerned with the compensation of the attorney. The compensation of the estate attorney is now governed by Sections 9681-9686.

Probate Code §8907 (amended). Extraordinary services compensation

SEC. . Section 8907 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as proposed to be amended by Assembly Bill XX [1991 Commission urgency bill] of the 1991-92 Regular Session, is amended to read:

8907. Neither the The personal representative ~~nor the attorney for the personal representative~~ is not entitled to receive compensation for extraordinary services by reason of appraising any property in the estate.

Comment. Section 8907 is amended to delete the reference to the compensation of the attorney for extraordinary services. The concept of compensation of the attorney for extraordinary services is no longer used. Attorneys' compensation is now governed by Sections 9681-9686.

Heading for Part 7 of Division 7 (amended)

SEC. . The heading of Part 7 (commencing with Section 10800) of Division 7 of the Probate Code enacted by Chapter 79 of the Statutes of 1990 is amended to read:

PART 7. COMPENSATION OF PERSONAL REPRESENTATIVE AND-ESTATE-ATTORNEY

Heading for Article 1 of Chapter 1 of Part 7 of Division 7 (repealed)

SEC. . The article heading for Article 1 (commencing with Section 10800) of Chapter 1 of Part 7 of Division 7 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as added by Chapter XXX of the Statutes of 1990 [SB 1775], is repealed.

~~Article 1.--Compensation of Personal Representative~~

Probate Code §10801 (amended). Compensation for extraordinary services

SEC. . Section 10801 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as proposed to be amended by Assembly Bill XX [1991 Commission urgency bill] of the 1991-92 Regular Session, is amended to read:

10801. (a) Subject to the provisions of this part, in addition to the compensation provided by section 10800, the court may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable.

~~(b) The personal representative may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services.~~

Comment. Section 10801 is amended to delete subdivision (b) which is superseded by Section 9683(c).

Article 2 of Chapter 1 of Part 7 of Division 7 (repealed)

SEC. . Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as added by Chapter XXX of the Statutes of 1990 [SB 1775] and as proposed to be amended by Assembly Bill XX [1991 Commission urgency bill] of the 1991-92 Regular Session, is repealed.

Probate Code §10830 (amended). Partial allowance of compensation

SEC. . Section 10830 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 35 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10830. (a) At any time after four months from the issuance of letters, the +

~~(1) The personal representative may file a petition requesting an allowance on the compensation of the personal representative.~~

~~(2) The personal representative or the attorney for the personal representative may file a petition requesting an allowance on the compensation of the attorney for the personal representative.~~

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate would be affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate would be affected by the payment of the compensation.

(4) The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

(c) On the hearing, the court may make an order allowing the portion of the compensation of the personal representative ~~or the attorney for the personal representative, as the case may be,~~ on account of services rendered up to that time, that the court determines is proper. The order shall authorize the personal representative to charge against the estate the amount allowed.

Comment. Section 10830 is amended to delete the reference to the compensation of the attorney. Attorneys' compensation is now governed by Sections 9681-9686.

Probate Code §10831 (amended). Final compensation

SEC. . Section 10831 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 36 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10831. (a) At the time of the filing of the final account and petition for an order for final distribution, the +

~~(1) The personal representative may petition the court for an order fixing and allowing the personal representative's compensation for all services rendered in the estate proceeding.~~

~~(2) The personal representative or the attorney for the personal representative may petition the court for an order fixing and allowing the compensation of the attorney for all services rendered in the estate proceeding.~~

(b) The request for compensation may be included in the final account or the petition for final distribution or may be made in a separate petition.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate would be affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate would be affected by the payment of the compensation.

(4) The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

(d) On the hearing, the court shall make an order fixing and allowing the compensation for all services rendered in the estate proceeding by the personal representative. ~~In the case of an allowance to the personal representative, the~~ The order shall authorize the personal representative to charge against the estate the amount allowed, less any amount previously charged against the estate pursuant to Section 10830. ~~In the case of the attorney's compensation, the order shall require the personal representative to pay the attorney out of the estate the amount allowed, less any amount paid to the attorney out of the estate pursuant to Section 10830.~~

Comment. Section 10831 is amended to delete the reference to the compensation of the attorney. Attorneys' compensation is now governed by Sections 9681-9686.

Probate Code §10850 (amended). Application of provisions of this part

SEC. . Section 10850 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 37 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10850. (a) This part does not apply in any proceeding for administration of a decedent's estate commenced before July 1, 1991.

(b) Notwithstanding its repeal, the applicable law in effect before July 1, 1991, governing the subject matter of this part continues to apply in any proceeding for administration of a decedent's estate commenced before July 1, 1991.

(c) The amendments of Sections 10830 and 10831 and the repeal of Article 2 (commencing with Section 10810) of Chapter 1, made by the act that added this subdivision, do not apply to any proceeding for administration of a decedent's estate commenced before January 1, 1992, and the law applicable to a proceeding commenced before January 1, 1992, shall continue to apply notwithstanding those amendments and repeal.

Comment. Subdivision (c) is added to Section 10850 to limit the application of the amendments and repeal of provisions of this part that were made by the act that added subdivision (c). Subdivision (c) limits the application of those amendments and repeal to proceedings commenced on or after January 1, 1992. Accordingly, the allowance of compensation of the attorney for the personal representative in a proceeding commenced before January 1, 1992, is governed by the applicable law in effect before January 1, 1992.

Probate Code §10900 (amended). Contents of account

SEC. . Section 10900 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 38 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10900. (a) An account shall include both a financial statement as provided in subdivision (b) and a report of administration as provided in subdivision (c).

(b) The financial statement shall include a summary statement, together with supporting schedules, of:

(1) Property in all inventories.

- (2) Receipts, excluding property listed in an inventory.
- (3) Gains on sales.
- (4) Other acquisitions of property.
- (5) Disbursements.
- (6) Losses on sales.
- (7) Other dispositions of property.
- (8) Property remaining on hand.

(c) The report of administration shall state the liabilities of the estate, including creditor claims, the hiring and payment of any persons under Section 9680 who have been or are to be paid out of funds of the estate, and all other matters necessary to show the condition of the estate.

(d) The statement of liabilities in the report of administration shall include the following information:

- (1) Whether notice to creditors was given under Section 9050.
- (2) Creditor claims filed, including the date of filing the claim, the name of the claimant, the amount of the claim, and the action taken on the claim.
- (3) Creditor claims not paid, satisfied, or adequately provided for. As to each such claim, the statement shall indicate whether the claim is due and the date due, the date any notice of rejection was given, and whether the creditor has brought an action on the claim. The statement shall identify any real or personal property that is security for the claim, whether by mortgage, deed of trust, lien, or other encumbrance.

Comment. Subdivision (c) of Section 10900 is amended to require the report of administration to include a report concerning the hiring and payment of any persons hired under Section 9680 (persons hired to assist personal representative, including attorneys, accountants, auditors, technical advisers, and investment advisers).

Probate Code §10954 (amended). When account not required

SEC. . Section 10954 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 39 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

10954. (a) Notwithstanding any other provision of this part, the personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate:

(1) The person has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied.

(2) Adequate provision has been made for satisfaction in full of the person's interest. This paragraph does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

(b) A waiver or acknowledgment under subdivision (a) shall be executed as follows:

(1) If the person entitled to distribution is an adult and competent, by that person.

(2) If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver or acknowledgment is executed by a guardian of the estate of the minor, the waiver or acknowledgment may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court. In the case of a trust that is subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9, the waiver or acknowledgment may be executed without the need to obtain approval of the court.

(5) If the person entitled to distribution is an estate, by the personal representative of the estate. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the estate is being administered.

(6) If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to represent the person entitled to distribution, by the guardian ad litem.

(7) If the person entitled to distribution has designated an attorney in fact who has the power under the power of attorney to execute the waiver or acknowledgment, by either of the following:

(A) The person entitled to distribution if an adult and competent.

(B) The attorney in fact.

(c) Notwithstanding subdivision (a):

(1) The personal representative shall file a final report of administration at the time the final account would otherwise have been required. The final report shall include the amount of compensation paid or payable to the personal representative ~~and to the attorney for the personal representative~~ and shall set forth the basis for determining the ~~amounts~~ amount.

(2) A creditor whose interest has not been satisfied may petition under Section 10950 for an account.

Comment. Subdivision (c)(1) of Section 10954 is amended to delete the reference to the compensation of the attorney. Attorneys' compensation is now governed by Sections 9681-9686. Subdivision (c) of Section 10900 requires the report of administration to include a report concerning the hiring and payment of any persons hired under Section 9680 (persons hired to assist personal representative, including attorneys, accountants, auditors, technical advisers, and investment advisers).

Probate Code §11000 (amended). Notice of hearing

SEC. . Section 11000 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 40 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

11000. (a) The personal representative shall give notice of the hearing as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate would be affected by the account.

(3) Each known devisee whose interest in the estate would be affected by the account.

(4) The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest would be affected by the account.

(5) If the estate is insolvent, each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part.

(b) If the petition for approval of the account requests allowance of all or a portion of the compensation of the personal representative ~~or the attorney for the personal representative~~, the notice of hearing shall so state.

(c) If the account is a final account and is filed together with a petition for an order for final distribution of the estate, the notice of hearing shall so state.

Comment. Subdivision (b) of Section 11000 is amended to delete the reference to the compensation of the attorney. Attorneys' compensation is now governed by Sections 9681-9686.

Probate Code §12205 (amended). Sanction for failure timely to close estate

SEC. . Section 12205 of the Probate Code enacted by Chapter 79 of the Statutes of 1990, as amended by Section 42 of Chapter XXX [Senate Bill 1775] of the Statutes of 1990, is amended to read:

12205. (a) The court may reduce the compensation of the personal representative or the attorney for the personal representative by an amount the court determines to be appropriate if the court makes all of the following determinations:

(1) The time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court.

(2) The time taken was within the control of the personal representative or attorney whose compensation is being reduced.

(3) The delay was not in the best interest of the estate or interested persons.

(b) An order under this section reducing compensation may be made regardless of ~~whether the~~ either of the following conditions:

(1) The compensation otherwise allowable under Part 7 (commencing with Section 10800) would be reasonable compensation for the services rendered by the personal representative ~~or attorney~~.

(2) The compensation otherwise paid or to be paid to the attorney for the personal representative would be considered reasonable compensation for the services rendered by the attorney.

(c) An order under this section may be made at any of the following hearings:

(1) The hearing for final distribution.

(2) The hearing for an allowance on the compensation of the personal representative ~~or~~ attorney.

(3) The hearing under Section 9684 to review the compensation of the attorney for the personal representative.

(d) In making a determination under this section, the court shall take into account any action taken under Section 12202 as a result of a previous delay.

(e) If the court determines that the attorney for the personal representative has received compensation in excess of the reduced amount allowed under this section, the court shall order the attorney to make an appropriate refund.

Comment. Section 12205 is amended to reflect the new provisions relating to compensation of the attorney for the personal representative. Attorneys' compensation is now governed by Sections 9681-9686 and is no longer subject to the statutory fee provisions.

TRANSITIONAL PROVISION

SEC. . The amendments made by this act to Sections 10954, 11000, 12205 of the Probate Code do not apply to any proceeding commenced before January 1, 1992.

DISCLOSURE STATEMENT THAT PROBATE ATTORNEY FEE IS NEGOTIABLE

Note. This draft assumes that the urgency bill recommended by the Commission is enacted.

Business and Professions Code § 6147.5 (added). Agreement concerning attorney fees in formal probate proceeding

6147.5. (a) This section applies only where an attorney agrees to serve as the attorney for a personal representative and the compensation for the attorney's services is subject to the limitations imposed by Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code.

(b) The attorney who agrees to serve as the attorney for the personal representative shall, at the time the agreement concerning the providing of legal services is entered into, provide a duplicate copy of the agreement, signed by both the attorney and the personal representative, to the personal representative.

(c) The agreement shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the general nature of the legal services to be provided pursuant to the agreement.

(2) A statement of the compensation the personal representative and attorney have agreed upon:

(A) If the compensation agreed upon is to be determined in the manner provided by Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code, the agreement shall state the substance of the following:

"For ordinary services, the attorney shall receive compensation upon the value of the estate, as follows:

- (1) Four percent on the first \$15,000.
- (2) Three percent on the next \$85,000.
- (3) Two percent on the next \$900,000.
- (4) One percent on the next 9 million dollars.
- (5) One-half of one percent on the next 15 million dollars.

(6) For all above 25 million dollars, a reasonable amount to be determined by the court.

"(The value of the estate is the fair market value of the property included in the decedent's probate estate as shown by an appraisal of the property, plus gains over the appraised value on sales, plus receipts, less loses from the appraised value on sales.)"

"For extraordinary services, the attorney shall receive additional compensation in the amount the court determines to be just and reasonable."

In addition, the agreement may, but need not, include a statement of the hourly rates or other standard rates, fees, or changes for extraordinary services, including rates, fees, or charges for paralegal services; and, if the agreement includes such a statement, the court shall consider but is not bound by the statement in determining the amount to be allowed as compensation for extraordinary services.

(B) If the compensation agreed upon for the services of the attorney for the personal representative is not to be determined in the manner provided by Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code, the agreement shall state the hourly rate or other standard rates, fees, or charges for the legal services to be provided pursuant to the agreement or other method of determining the compensation for those services, including rates, fees, or charges for paralegal services, but the compensation so provided shall not exceed the amount allowed under Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code.

(3) A statement of the respective responsibilities of the attorney and the client as to the performance of the contract.

(4) The following statement which shall be on a separate page and shall be separately signed by the personal representative:

DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE

The California statutes govern the compensation of the estate attorney and require that this disclosure statement be provided to you and be signed by you.

For ordinary services, the Probate Code provides that your attorney is entitled to compensation determined by a statutory fee schedule. This statutory fee schedule provides that your attorney shall receive compensation upon the value of the estate, as follows:

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

(The value of the estate is the fair market value of the property included in the decedent's probate estate as shown by an appraisal of the property, plus gains over the appraised value on sales, plus receipts, less losses from appraised value on sales.)

For extraordinary services, the statute provides that your attorney shall receive additional compensation in the amount the court determines to be just and reasonable.

THE COURT WILL USE THE STATUTORY FEE SCHEDULE SET OUT ABOVE TO COMPUTE THE FEE OF YOUR ATTORNEY FOR ORDINARY SERVICES. YOU AND YOUR ATTORNEY MAY AGREE TO A LOWER FEE BUT MAY NOT AGREE TO A HIGHER FEE.

IF YOU AND YOUR ATTORNEY AGREE TO A LOWER FEE FOR ORDINARY SERVICES, THE COURT WILL NOT AWARD A HIGHER FEE FOR ORDINARY SERVICES THAN THE AMOUNT PROVIDED IN YOUR AGREEMENT. THE COURT MAY, HOWEVER, AWARD AN ADDITIONAL AMOUNT FOR EXTRAORDINARY SERVICES.

Date: _____

Personal Representative

(d) Failure to comply with any provision of this section renders the agreement voidable at the option of the personal representative or any beneficiary of the estate whose interest in the estate would be affected by the agreement, and the attorney shall, upon the agreement being voided, be entitled to collect compensation in an amount determined by court to be reasonable for the necessary services

actually provided, but the compensation shall not exceed the amount allowed under Article 2 (commencing with Section 10810) of Chapter 1 of Part 7 of Division 7 of the Probate Code.

(e) This section does not apply in any of the following cases:

(1) Where the personal representative knowingly states in writing, after full disclosure of this section, that a writing concerning compensation of the attorney is not required.

(2) Where the personal representative is a corporation.

(3) Where the personal representative is a public officer or employee acting in the scope of the public office or employment.

(f) This section applies only to agreements described in subdivision (a) that are entered into after January 1, 1992, and Section 6148 does not apply to those agreements.

CONFORMING REVISIONS

Business and Professions Code § 6148 (technical amendment). Attorney fees

6148. (a) ~~In~~ Except as otherwise provided in subdivision (d), in any case ~~not coming within Section 6147~~ in which it is reasonably foreseeable that total expense to a client, (including attorney fees) will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing and shall contain all of the following:

(1) The hourly rate and other standard rates, fees, and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All bills for services rendered by an attorney to a client shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees; and, upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request. The client is entitled to similar requests at intervals of no less than 30 days following the initial request.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(5) A case coming within Section 6147 or 6147.5.

(e) This section applies prospectively only to fee agreements following its operative date.

EXPLANATION OF AGREED FEE RECOMMENDATION

The recommended legislation is substantially the same as a portion of the proposed legislation contained in a February 1989 Commission recommendation. See Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative, 20 Cal. L. Revision Comm'n Reports 31 (1990). The portion of the recommended legislation relating to hiring and paying attorneys, advisers, and others was not enacted.

The portion of the recommended legislation that was not enacted has been revised (see draft set out in Exhibit 1) to reflect the enactment of the new Probate Code and to incorporate revisions the Commission made in the bill introduced to effectuate its recommendation.

The recommended legislation eliminates the existing statutory fee schedule for probate attorney fees. Under the statutory fee schedule, the attorney gets a fee for ordinary services based on a percentage of the estate. The attorney gets the percentage fee without regard to how much work is required for the particular estate. In addition to the percentage fee, the attorney may receive an additional fee fixed by the court for "extraordinary services." The courts spend a great deal of time reviewing probate attorney fees, since the fee for extraordinary services must be fixed by the court, even if all the beneficiaries of the estate are satisfied with the fee requested by the attorney. However, unless the personal representative makes an agreement for a lower fee, the attorney is entitled to the statutory fee for ordinary services, even though one or all of the beneficiaries of the estate object to the fee.

In practice, the statutory fee is the minimum fee charged. More than 93 percent of the attorneys who responded to a Law Revision Commission questionnaire reported they ordinarily charge the full statutory fee.

The statutory fee for ordinary services is substantial. The fee is computed using the full value of the estate property, not the decedent's equity in the property. On a \$300,000 estate, the fee is

\$7,150. On a \$500,000 estate, the fee is \$11,150. If the estate does not present any problems, a paralegal (under the general supervision of the attorney) can do almost all of the work in connection with the estate.

In place of the statutory fee, the recommended legislation requires that the estate attorney make a contract with the personal representative. The contract must state the attorney fee or the manner of computing the fee (such as an hourly rate or a flat fee). The court does not review the attorney fee unless a beneficiary of the estate objects to the fee.

The recommended legislation allows the personal representative to use the Independent Administration of Estates Act for attorney fees. Using this procedure, the personal representative sends each beneficiary of the estate a notice of the fee agreement. The notice must include an estimate of the total amount to be paid to the attorney under the fee agreement. If a beneficiary objects to the fee, the personal representative must obtain court approval of fee. If there is no objection, the court will not review the fee except on petition of a person not given the notice. However, a person who was given notice but did not object may obtain court review of the fee if the actual fee exceeds the amount estimated in the notice.

The following is a brief statement of the justification for the recommended legislation:

(1) A percentage fee is not necessarily related to the amount and difficulty of the legal work required for the particular estate. Thus, a percentage fee may undercharge an estate that presents difficult legal problems and overcharge an estate that does not.

(2) The percentage fee is only for "ordinary" services to the estate. The court may not reduce the percentage fee for ordinary services, but the court may award additional fees for "extraordinary" services. Additional fees are awarded in about 25 percent of the cases. Thus, if the estate is easy there is no discount, but if the estate is difficult the attorney may get more.

(3) Since the percentage fee may not provide the attorney with adequate compensation for the legal work needed to probate a small estate that presents legal problems, it may be difficult to obtain a

competent attorney to handle the estate. In addition, it is unfair to the attorney to expect the attorney to handle such an estate at a loss.

(4) Most estates are relatively small in value--less than \$300,000. Under the statutory fee system, a simple small estate (one that can be handled by a paralegal in a short time) may subsidize the difficult small estate (one that will require considerable time of the attorney), assuming that the attorney will agree to handle the complex small estate. It is unlikely, however, that large estates (those over \$600,000) actually subsidize small estates, since the small estates are rarely handled by the law firms that specialize in handling these large estates. Also, the personal representative of a large estate will frequently negotiate for a legal fee less than the statutory fee.

(5) The California statutory fee system imposes a significant burden on the courts because the court must review and fix the additional fees for "extraordinary" services even when no one objects to the fee.

(6) The statutory fee system is inconsistent with the general practice of fixing legal fees by private agreement. Moreover, in most cases where a person dies in California the fee for legal services in connection with the person's property already is fixed by agreement. These are the cases where there is no formal probate proceeding because the estate is so small probate is not required or where the decedent has a living trust or where the estate goes to a surviving spouse or where the decedent's estate (such as insurance and employee benefit plans) is transferred by pay-on-death provisions.

(7) Most states that had a statutory fee schedule have abandoned it. California is one of three states that still use a statutory fee schedule to fix the fee of the estate attorney for ordinary services, without court discretion to vary the fee. Six other states use a statutory fee schedule with considerable court discretion in fixing the fee. Most of the other states use the Uniform Probate Code scheme, which is the generally the same as the scheme provided in the recommended legislation.

The recommended legislation also includes provisions dealing with the hiring and paying of advisers and other experts to assist the personal representative in administering the estate.