

#L-812, 3010, 3051, 3052

ns113
05/31/91

Memorandum 91-42

Subject: Study L-812, 3010, 3051, 3052 - Comments of State Bar on
Various Meeting Materials

Enclosed are Comments of Team 1 of the State Bar Estate Planning, Trust and Probate Law Section on various matters on the Commission's agenda for the June 1991 meeting. The comments will be discussed in separate memoranda for the meeting or will be raised orally at the meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memo 91-42

Study L-812, 3010, 3051, 3052

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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Section Administrator

SUSAN M. OHLOFF, San Francisco

REPLY TO:

May 31, 1991

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Re: Team 1's Report to LRC Memorandums 91-33, 91-36, 91-37 and 91-39

Gentlemen:

Enclosed please find a copy of Team 1's Report on LRC Memos 91-33, 91-36, 91-37 and 91-39.

After receipt of Team 1's Report, Valerie J. Merritt transmitted the Report to the State Bar of California for approval under the *Keller* decision. Unfortunately, the State Bar both misplaced and mismanaged the approval process. We just received approval yesterday. I apologize for any inconvenience the delay in transmitting this Report may cause the Commission.

Sincerely,

Robert E. Temmerman, Jr.
RET/gmd (lrc531.let)

cc: Valerie J. Merritt
Bruce Ross
Robert L. Sullivan, Jr.

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MAY 06 1991

Ans'd.....

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REPLY TO:

LRC REPORT

DATE: May 3, 1991

TO: Valerie J. Merritt

FROM: Robert L. Sullivan, Jr.
Captain, Team 1

RE: LRC Memos 91-33, 91-36, 91-37 and 91-39

SUMMARY

<u>Memo</u>	<u>Subject</u>	<u>Recommendation</u>
91-33	Preliminary distribution without court supervision	Support as modified
91-36	Transfer of unintentionally omitted property by conservator	Support as modified, subject to comment
91-37	Trustee fees--notice of increase (\$15686)	Oppose
	Notice to beneficiaries (\$15804)	Support
91-39	Nonprobate transfers to testamentary trust	Support

DISCUSSION

Team 1 conferred by conference call on May 2, 1991. Sandra Chan, Monica Dell'Osso, Richard S. Kinyon, William V. Schmidt and Robert L. Sullivan, Jr. participated and developed the recommendations summarized above with respect to the following California Law Revision memoranda.

91-33 - Independent Administration of Estates Act (Preliminary Distribution without Court Supervision)

The memorandum was considered by the Executive Committee at its March, 1991 meeting at which specific conceptual and drafting modifications were recommended. These modifications were incorporated by the staff into a revised statute [Probate Code §10520] which is set out in full on Page 1 of Memorandum 91-33. Team 1 generally concurred that all of these staff changes were responsive to the previous suggestions of the Executive Committee. In our conference call, however, we developed further modifications which address the following concerns:

(a) The statute should clarify that the \$50,000 cap on distributions of tangible personal property applies to all devisees and is computed cumulatively through the date of any given distribution, i.e., multiple or successive distributions must in the aggregate remain below the \$50,000 maximum.

(b) The provision should be equally applicable in intestate as well as testate situations, thereby requiring the deletion of the reference to "under the decedent's Will".

In response to the staff's question concerning the determination of value, it was our unanimous consensus that fair market value should be determined on the basis of the Inventory and Appraisal.

Accordingly, we recommend that the statute be further modified to read as follows:

Prob. Code § 10520 (added). Preliminary distribution of specified personal property

10520. (a) ~~If the time for filing claims has expired and it appears that the distribution may be made without there will be no~~ loss to creditors or injury to the estate or any interested person, the personal representative has the power to ~~do the following~~ make preliminary distributions of:

(1) ~~To make preliminary distribution of interest and income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10;~~

(2) ~~To make preliminary distribution to specific devisees of household furniture and furnishings, automobiles, motor vehicles, clothing, jewelry, and personal effects~~ other tangible articles of a personal nature to the devisees

entitled to the property under the decedent's will, not to exceed an aggregate fair market value to all devisees of fifty thousand dollars (\$50,000) computed cumulatively through the date of distribution to all devisees in the aggregate; and

(3) To make preliminary distribution of cash to the general pecuniary devisees entitled to it under the decedent's will, not to exceed ten thousand dollars (\$10,000) to any one devisee.

(b) Notwithstanding subdivision (a), distribution may not be made under this section to the personal representative.

(b) For purposes of this section, fair market value shall be determined on the basis of the Inventory and Appraisal.

91-36 - Transfer of Unintentionally Omitted Property by Conservator

This memorandum proposes an addition to Probate Code §2580(b) in order to authorize the conservator to transfer to a trust any property which is discovered to have been unintentionally omitted from the trust at the time of its original formation and funding. While Team 1 was in general agreement with this concept, we felt that the statutory modification as drafted by the staff was too narrow in that it allowed for transfers of after-discovered property only to trusts created by the conservator. We felt that this provision should likewise be operative with respect to trusts created by the conservatee prior to the establishment of the conservatorship.

Accordingly, Team 1 recommends that the addition proposed to §2580(b)(5) be deleted and that a new §2580(b)(6) be added to read as follows:

"(6) Transferring to a trust created by the conservator or the conservatee any property unintentionally omitted therefrom."

The above modification will require renumbering old Subsections (6)-(11) as Subsections (7)-(12).

It should also be pointed out that Team 1 has a concern with respect to the overall operation of the statute as amended above. The Executive Committee previously opposed a suggested provision which would authorize the conservator to make a will for the conservatee. Our concern is that this provision would allow the court to authorize a conservator to accomplish this very result in effect "through the back door". In other words, property held in a conservatorship would, at the conservatee's death, be transmitted pursuant to the provisions of the decedent's will. If, however, the conservator is able to transfer the property out of the conservatorship into a trust, and the trust has dispositive provisions which are different from the will, the conservatee, by making the transfer, can indirectly change the dispositive provisions of the decedent's will. On the other hand, our concerns were somewhat tempered by the fact that courts typically tend to proceed with great caution in exercising the substituted judgment provisions.

91-37 - Trustees Fees
(California Bankers Association Proposal)

This memorandum involves two subjects:

(a) The notice required to be given to beneficiaries when a trustee increases its fees; and

(b) A technical revision to Probate Code §15804(a) which limits the classes of beneficiaries who are required to receive notice of an accounting.

(a) ~~§15686~~ Probate Code §15686 provides that before increasing its fee a trustee must give notice of the proposed increase to each beneficiary "whose interest may be affected by the increased fee". The California Bankers Association proposal is to modify this requirement to provide that notice must be given only to those beneficiaries who are entitled to receive notice of an accounting.

Team 1 has two problems with this proposal:

(1) The proposal would modify the current notice requirements so that the only beneficiaries entitled to notice of an increased fee would be those who are entitled to current distributions of income or principal. Under the principal and income law, however, trustee's fees are generally chargeable one-half to income and one-half to principal. Accordingly, the portion of the fee chargeable to principal could have a substantial impact upon the interests of remainder beneficiaries who are not receiving current distributions of principal. Team 1 feels that these beneficiaries should still be entitled to notice and that, therefore, the amendment proposed by the California Bankers Association should not be approved.

(2) Even if the amendment proposed by the California Bankers Association were acceptable from a conceptual standpoint, there remains a mechanical problem. Under the proposed amendment, notice of a proposed fee increase is required to be given only to those beneficiaries who are entitled to an account, thereby implying that notice of a fee increase would be required only in cases where an account is required. However, even in cases where an account is not required (i.e., living trusts and testamentary trusts created before July 1, 1987), the beneficiaries entitled to current distributions of income or principal should at a minimum be given notice of the proposed fee increase. The proposed amendment does not make it clear that these beneficiaries would be entitled to a notice of proposed fee increase in situations where an accounting is not required.

(b) ~~§15804(a)~~. Team 1 supports the proposed technical amendment to Probate Code §15804(a). In its present form, the statute limits the classes of beneficiaries entitled to notice only in the case of "proceedings". These limitations should apply with equal force even in cases where judicial proceedings are not pending. The proposal also has the effect of expanding the limitations of §15804 so that they apply not only to notices, but to accounts and reports as well.

**91-39 - Nonprobate Transfer
to a Trustee Named in Decedent's Will**

This memorandum proposes amendments to Probate Code §6320 which would have the effect of expanding the categories of assets which may be transferred to a testamentary trust without being subject to probate administration. As expanded, the section would be operative with reference to multiple party accounts and to all other forms of "instrument" described in §5000. Team 1 supports the proposed amendment.

cc: Bruce S. Ross
William V. Schmidt
Sterling L. Ross, Jr.
Robert E. Temmerman, Jr.
Don E. Green