

## Fifth Supplement to Memorandum 85-12

Subject: Study L-1010 - Probate Code (Personal Representative--grounds for refusal to appoint named executor--further comments)

The First Supplement to Memorandum 85-12 contains a copy of the recent case of Estate of Baxter which holds that the court must appoint a person named in the will as executor even if the person has such a substantial conflict of interest that the person would thereafter have to be removed from office. The First Supplement suggests that the statute governing appointment of an executor should be revised to include as a ground for denying appointment that the person appointed "would be removed from office" pursuant to statute.

We have now received a letter from William M. Poindexter, Chairman of the State and Local Tax Committee of the Los Angeles County Bar Association, stating that Estate of Baxter denies the court discretion that it traditionally has had, speculating that there must be a number of similar cases now pending where the Baxter rule would cause injustice, and requesting that the Commission sponsor legislation in the current session to provide that a judge can deny appointment of a named executor if the judge finds appointment would not be in the best interests of the estate. A copy of Mr. Poindexter's letter is attached as Exhibit 1. Presumably, such immediate legislation would be along the following lines:

Probate Code § 401 (amended)

401. No person is competent to serve as an executor or executrix who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity, or whose appointment the court believes would be contrary to the best interests of the estate because of conflict of interest or otherwise.

The staff has a number of problems with this suggestion. First, we do not believe Baxter represents a novel principle or application of the law. The staff believes the Court of Appeal decision in Baxter correctly states that California courts have consistently adhered to the rule that the court has no discretion to deny appointment except for the grounds

expressly stated in the statute. The reason the case is significant, in our opinion, is not because of the principle stated or because anyone is surprised by the decision, but because the case highlights the need for reform of the law in this area.

Second, we do not believe the rule will result in substantial injustice. It is not as if an appointed executor with a conflict of interest cannot be removed before the executor harms the estate; such a person can be removed. It simply adds expense and delay and an element of inefficiency. But the law does provide a remedy.

Finally, we do not believe it is appropriate to simply give the court discretion to deny appointment of a named executor on grounds as nebulous as "best interests of the estate." We believe it is better to tie denial of appointment to concrete statutory grounds, such as we suggest in the First Supplement--the person appointed would have to be removed from office anyway.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Exhibit 1  
LAW OFFICES OF  
**POINDEXTER & DOUTRE**  
INCORPORATED

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March 27, 1985

John DeMouilly  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, California 94303

Re: Estate of Philip H. Backer

Dear Mr. DeMouilly:

I understand that the Backer Estate has been called to the attention of the Commission which is in the process of revising Division 3 of the California Probate Code. The Backer decision held that regardless of the adversity of his claim and potential detriment to the estate the court has no jurisdiction in denying the appointment of an executor named by decedent in his will. My understanding is that the Commission's staff has recommended to the Commission that the proposed appointment section be changed to give the court discretion to not appoint a named executor if the court determines it would not be in the best interests of the estate to do so.

Up until Backer it was our understanding that the court always had this discretion. In fact, in a case we were recently involved in, the court ruled as the trial court did in Backer. In our case the court found that it was not in the best interests of the estate to appoint a named executor who had a claim in litigation against the estate in excess of \$2,000,000. His only evidence and support of the claim is his own testimony as to what he heard the decedent say. All other record evidence established the invalidity of his claim.

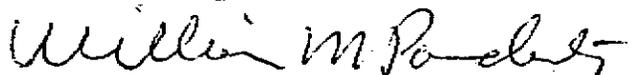
The named executor has appealed the appointment of a corporate administrator with-will-annexed. It occurs to me that there must be a number of other cases now pending in the courts in which the application of Backer would result in wholesale injustice.

John DeMouilly  
March 27, 1985  
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It is my understanding in the normal course of business this proposed revision would not become law until 1986 and not be effective until January 1987.

Consequently, we request that the Commission consider submitting to the Legislature for passage this year a proposed amendment to provide that a judge can deny appointment of a named executor if he finds that it would not be in the best interests of the estate.

Yours sincerely,



William M. Poindexter, Chairman  
State and Local Tax Committee  
Los Angeles County Bar Association

WMP:JY