

#L-1028

First Supplement to Memorandum 85-71

Subject: Study L-1028 - Estates and Trusts Code (Independent Administration)

Charles A. Collier, Jr., made a careful review of the draft statute attached to Memorandum 85-71. He submitted a number of suggestions for technical or clarifying revisions in the draft statute and official Comments. A copy of his letter is attached as Exhibit 1 to this supplement. His suggestions are discussed below.

At Mr. Collier's suggestion, we are sending you a copy of the latest amended version of Assembly Bill 196 which makes revisions in the independent administration provisions. This will be useful should you wish to compare a provision of the draft statute with the existing law (as it will be when Assembly Bill 196 becomes law).

Many of Mr. Collier's suggestions will be adopted by the staff and do not involve any policy determination. With respect to these suggestions which will be adopted by the staff, we merely state "Adopted" and do not include any further discussion below.

In the discussion below, we number and consider the comments of Mr. Collier in the same order as set out in his letter (attached as Exhibit 1). We have highlighted the portion of this Supplement that we suggest be discussed at the meeting.

1. Adopted.
2. Adopted.
3. Adopted. We will use the word "replaces."
4. No change recommended by Mr. Collier.
5. We would adopt the substance of this comment by substituting in the Comment to Section 8360, second paragraph, lines 6 and 7, for "real property transactions" the words "the real property transactions listed in subdivision (b)(2)."
6. All suggestions for revision of statute text adopted.

In response to Mr. Collier's comment, we would revise the second sentence of the Comment to Section 8361 to read: "The first

sentence of subdivision (c) restates subdivision (e) of former Section 591.1 without substantive change. The last two sentences of subdivision (c) are new."

7. Adopted.
8. Mr. Collier raises the question of the relationship between Section 8367 (specific independent administration powers) and Section 8371 (actions requiring advice of proposed action).

The fact that a particular power is listed in Section 8367 does not mean that the personal representative necessarily can exercise that power without giving advice of proposed action. The powers listed in Section 8367 are subject to the requirement of Section 8371 that advice of proposed action be given with respect to the proposed actions listed in Section 8371. For example, subdivision (m) of Section 8367 gives the power to "continue the operation of the decedent's business to the extent the personal representative determines that to be for the best interest of the estate and those interested therein." Subdivision (f) of Section 8371 requires that advice of proposed action be given for "[c]ontinuing for a period of more than six months from the date of appointment of the personal representative of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death, or the sale or incorporation of such a business." The same overlap between the two sections exists with respect to the matters noted in Mr. Collier's comment as well as with respect to other matters covered by both sections.

The Comment to Section 8367 notes the possibility of overlap of the two sections and the effect of the overlap:

The personal representative must exercise the powers listed in Section 8367 in the manner provided in this chapter. Accordingly, if the action to be taken is one listed in Section 8371, the personal representative can take the action only if the requirements of Article 4 (commencing with Section 8370) (advice of proposed action) are satisfied. See Section 8370.

Mr. Collier also raises a question about the Comment to Section 8367. We propose to make the Comment more understandable

by revising the last sentence of the first paragraph of the Comment to Section 8367 to read:

The words "by compromise," which appeared in the first clause of subdivision (j) of former Section 591.6 are omitted at the end of the first clause of subdivision (k) of Section 8367 because these words are unnecessary and their omission does not make a substantive change in the meaning of the provision.

9. Mr Collier suggests that paragraphs (a) and (b) of Section 8371 should qualified to indicate that the advice of proposed action would be given only if independent power relates to these two items, since the grant of that power is optional.

In response to this comment, the staff suggests that the following sentence be added at the end of subdivision (a) of Section 8370: "Nothing in this subdivision authorizes a personal representative to take an action under this chapter if the personal representative does not have the power under Section 8367 to take the action under this chapter."

If this sentence is added, the staff would revise the first sentence of the Comment to Section 8370 to read:

Subdivision (a) of Section 8370 continues paragraph (1) of subdivision (a) of former Section 591.3 without substantive change. The second sentence of subdivision (a) is new. This new sentence is merely clarifying and makes no substantive change in prior law. The sentence makes clear that if the powers of the personal representative do not include authority with respect to sales or exchanges of real property and grants of options to purchase real property (see subdivision (e) of Section 8366), the mere fact that the power is listed in Section 8371 gives the personal representative no right or authority to exercise the power using the procedure provided in this article. In such a case, the power may be exercised only pursuant to the provisions relating to court supervision of the sale or exchange of the real property or the grant of the option to purchase the real property, as the case may be, and the provisions of this chapter have no application to the transaction.

The staff also would add the following at the end of the Comment to Section 8371:

If the personal representative is not authorized to sell or exchange real property or grant options to purchase real property under this chapter (see subdivision (e) of Section

8366), those powers can be exercised only under the provisions relating to court supervision and the provisions of this chapter have no application to the transaction. See also the Comment to Section 8370.

The Commission should note that subdivision (h) of Section 8371 permits investments without the need to give advice of proposed action "in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of (1) those obligations, or (2) repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest." At the last meeting, the Commission determined that court approval would be required for investment in mutual funds "which are comprised of repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest." Also, the Commission determined that the word "solely" should be inserted, so the language would read "mutual funds which are comprised solely of . . ." Does the Commission wish to make the same change here? If so, what explanation is to be given for making the change in the recommendation and Comment?

10. Adopted.
11. In response to Mr. Collier's comment, the staff would change "shall" to "may" in the second line of Section 8377. This restores language found in the provision of existing law.
12. In response to Mr. Collier's comment, the staff would delete all of the Comment to Section 8378 except the first sentence and add after the first sentence:

With respect to a particular action, the person objecting to the action may do either or both of the following:

(1) Mail or deliver a written objection to the proposed action under Section 8377.

(2) Apply for a restraining order under Section 8378."

13. We will change "Law" to "Act" in paragraph 2 as suggested by Mr. Collier.

Mr. Collier points out the need for a revision in paragraph 5 of the form set out in Section 8391 (page 26 of draft

statute). The change is needed to reflect the fact that the law requires that a form for objecting to a proposed action (prepared by the Judicial Council) accompany the advice of proposed action. The Judicial Council form can be used to make an objection to the proposed action.

The staff proposes to revise paragraph 5 to read:

5. If you object to the proposed action, you may complete the enclosed form and deliver or mail it to the personal representative at the following address: _____

You are not required to use the enclosed form to make an objection. Instead of using the enclosed form, you can make your objection by any writing delivered or mailed to the personal representative at the address set out above. Your objection can be simply stated. All you need to do is state that you object to the proposed action (specifying the action you object to) and sign your name(s). Alternatively, you may also apply to the court for an order preventing the personal representative from taking the proposed action without court supervision.

This revision would add the reference to the Judicial Council form. The revision also would retain the existing portion of the form that informs the person how to make an objection without using the form and of the right to obtain a restraining order if the person so desires. Is this additional information desirable? What if the person giving the advice of proposed action inadvertently fails to include the Judicial Council form? (The staff would suggest to the Judicial Council that the form for objecting be included on the same sheet as the form for giving advice of proposed action, thereby assuring that the form for objecting is sent with the advice of proposed action.)

14. No change suggested by Mr. Collier.

Respectfully submitted,

John H. DeMouly
Executive Secretary

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August 27, 1985

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Re: Memorandum 85-71

Dear John:

Reference is made to our exchange of letters dated August 13 and August 16. The following are my personal comments with reference to Memorandum 85-71. That Memorandum has been sent to one of the teams of the Executive Committee of the Estate Planning, Probate and Trust Law Section for review. Therefore, a report of the team should also be available by the time of the September Commission meeting.

My own comments are as follows:

1. Since the tentative recommendation incorporates many changes included in AB-196, I would suggest that the language of AB-196 be forwarded with the tentative draft. Otherwise, it will be very difficult for people to check certain portions of the tentative recommendation.
2. Section 8350 would change the name of the law from the Independent Administration of Estates Act to the Independent Administration of Estates Law. The Act has been known as such for more than ten years. It is so referred to in various publications, on Judicial Council forms, etc. I see no purpose in changing the word "Act" to "Law".
3. Section 8353: In the Comment, first sentence, the word "supersedes" seems inappropriate since it significantly changes existing law in this area. Perhaps words such as "replaces", "modifies", etc., would be descriptive.

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4. Section 8354: I agree that the changes in the law are minimal at this time and should apply to existing estates whenever the power to proceed under independent administration was granted on or after January 1, 1985.

5. Section 8560: In the Comment, second paragraph, sixth line, the word "specified" might be inserted before the word "real" at the end of the line, since there are a number of transactions involving real property other than sale or exchange of real property or granting of options to purchase real property. Other real property transactions might involve refinancing, long-term leases, granting of easements, condemnation, etc.

I do not believe that a person petitioning for independent administration should have any more options as to which powers apply than provided under the current draft, that is, they either would opt for all independent powers or all independent powers except sale or exchange of real property or the granting of options to purchase real property. Any further options would make the issuance of letters very technical and difficult, would complicate Judicial Council forms, would add to confusion and to some degree defeat the purposes of independent administration.

6. Section 8361: I would suggest in subparagraph (c) after the word "hearing" in the first line that the following language be inserted: "of the petition for authority to administer the estate under this chapter". In the fourth line, I believe insertion of the words "the estate" after the word "administer" would clarify language, and I would also change the word "Law" in the fourth line to "Act".

By way of further comment as to Section 8361(c), the sentence which starts on line 4 may not be too meaningful to laymen when it refers to "judicial authorization, approval, confirmation, or instructions". Perhaps it would be more satisfactory for this sentence simply to read as follows:

"This authority would permit estate transactions without the judicial supervision that would otherwise be required."

The Comment following Section 8361 dealing with subsection (c), I believe, would be more accurate if it states that subdivision (c) restates the substance of subdivision (e) of former Section 591.1 for purposes of clarification, etc. *

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7. Section 8362: Subsection (c) in the third line uses the word "excludes" while AB-196 uses the phrase "does not include". I would think the language should be consistent with AB-196. *

8. Section 8367(d) refers to borrowing. Section 8371(j) also refers to borrowing. Both sections also refer to encumbrances. There is some confusion in reading these sections as to determining whether borrowing requires an advice of proposed action or does not require such an advice. There should be some clarification as between these two provisions. My preference would be to leave the power to borrow in 8367 and delete it from 8371. *

Paragraph (n) of 8367 raises a similar question when compared with paragraph (g) of 8371, both of which deal with a family allowance. Perhaps paragraph (n) should be modified to read "to pay a reasonable family allowance, except as otherwise provided in Section 8371(g)." *

In the Comment following Section 8367, first paragraph, last sentence, I was not able to track the comment about the words "by compromise". *

9. Section 8371: Paragraphs (a) and (b) perhaps should be qualified to indicate that the advice would be given only if independent power relates to those two items, since the grant of that power is optional. It might avoid someone's concern that both a statutory notice and an advice had to be given.

10. Section 8376: In the Comment, the second sentence, I believe, would be more accurate if it stated that subdivisions (b) and (c) restate the substance of the fourth sentence of former Section 591.4 without substantive change.

11. Section 8377: Section 591.5 as stated in AB-196 provides that the objector may "do either or both of the following" and refers to the written objection or the court order. As written, Section 8377 appears to require the written objection in all events and eliminates the option which is provided under Section 591.5 at present. I believe Section 8377 requires some qualification, such as the following: "unless a person proceeds under Section 8378".

12. Section 8378: The second sentence of the Comment, I believe, is inaccurate in the context of Section 8378. Some of the items which are specified in 591.6 are ones which, except for independent administration, would require court approval. Under 8370(b), advice can be given on items which

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are now covered by 591.6. However, if you look at 591.6, there are provisions for court approval, absent independent administration, of a compromise or settlement of a claim.

13. Section 8391: In paragraph 2, this again refers to the Independent Administration of Estates "Law". I would suggest that be changed to "Act".

Section 8391, paragraph 5: It had been my understanding that the Commission wanted a Judicial Council form of objections to be forwarded with the advice of proposed action. Paragraph 5, as worded, does not contemplate that type of form.

14. Since the Independent Administration of Estates Act itself is fairly recent in origin and has been rewritten somewhat through AB-2270 and AB-196, there are relatively few instances involved in Memorandum 85-71 of rewording language, extracting portions of sentences from a number of different locations and reorganizing them, etc. Much of the rewording has been done in AB-2270 and AB-196. Thus, I have made very few comments of the kind referred to in particular in the letter of August 13.

I hope this will be of assistance.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Kenneth M. Klug, Esq.
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