

#L-1020

0011d
9/10/85

Memorandum 85-92

Subject: Study L-1020 - Estates & Trusts Code (Probate Code Section 854)

Valerie Merritt has written to the Commission (see Exhibit 1 attached) to suggest improvements in Probate Code Section 854 (option to purchase estate property given in will). The main question is whether we should do this now, or wait until we have our comprehensive probate bill. Valerie Merritt thinks we should act now. The policy questions are discussed below.

Obsolete Inheritance Tax Provision

At the June 1985 meeting, the Commission considered the section permitting a person having an option to purchase estate property given under the decedent's will to obtain a court order for conveyance of the property to the optionee (existing Section 854). The Commission decided to omit from the new statute the obsolete requirement that the court shall find that all inheritance taxes have been paid or that the State Controller must consent to the order.

Valerie Merritt thinks that this revision should be made now. We can implement this suggestion by amending Section 854 as set out in Exhibit 2. This amendment can be introduced in bill form in 1986, and later probate cleanup revisions can be added to the bill as needed.

Obsolete Notice Provision

Valerie Merritt points out that the notice provision in Section 854 is obsolete, and that we should rectify this now. Section 854 requires that notice of the petition be given as provided in Section 1200 (posting at the county courthouse). No notice by mail or other notice is required. This is apparently a drafting oversight, because when Section 854 was enacted in 1963, Section 1200 provided for notice both by posting and by mail. In 1980, the provisions of Section 1200 for notice by mail were split out and relocated in Section 1200.5, but

a conforming revision was not made to Section 854. Thus the original requirement of Section 854 for notice by mail has been inadvertently lost. This oversight may be corrected by adding a reference to Section 1200.5 in Section 854 as set out in Exhibit 2 and by amending Section 1200.5 as indicated in Exhibit 3.

A contrary consideration is that there are other sections with the same problem. See, e.g., Section 851.5. It may not be desirable to deal with Section 854 but not the other defective sections.

Time Limit for Filing Petition

Section 854 requires that the optionee's petition be filed within six months after issuance of letters. At the June 1985 meeting, the Commission decided to relax this requirement by allowing the petition to be filed at any time up to the filing of a petition for distribution of the optioned property (subject to any time limitation stated in the decedent's will). This revision has been made in the staff draft of the new code provisions, but is not included in the amendments to Section 854 proposed in Exhibit 2. The amendments proposed in Exhibit 2 are corrective in nature, and do not present any new policy issue. To include an amendment extending the time for filing the petition would present a substantive policy issue, and for that reason should probably be omitted from the proposed 1986 cleanup legislation.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1**DREISEN, KASSOY & FREIBERG**

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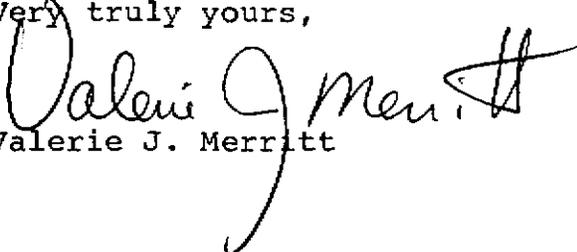
Re: Proposed Changes to the Probate Code:

Dear Sirs:

The current Section 854 of the Probate Code needs changes made to it immediately, because it contains two provisions which relate to obsolete law. One problem with current Section 854 is that it has a reference to obtaining consent of the State Controller's office, a reference to the prior inheritance tax law. I have been informed by the State Controller's office in Los Angeles that they will not give such consents. It would be nice if this provision was removed from the law.

The other problem with Section 854 as currently worded is that it requires posting, by reference to old Probate Code Section 1200. The current provisions regarding posting have removed the requirement for posting these petitions. Since these two provisions are in the current law and are already obsolete, these may be provisions to keep in mind for insertion in any future cleanup legislation rather than waiting for complete revision of the Probate Code.

Very truly yours,


Valerie J. Merritt

VJM:la

cc: Charles A. Collier, Jr.
Kenneth M. Klug
Sandra Kass
Michael Harrington

Exhibit 2

Probate Code § 854 (amended). Option to purchase given in will

SEC. _____. Section 854 of the Probate Code is amended to read:

854. When any option to purchase real or personal property is given in a will duly admitted to probate, the optionee may petition the court for an order authorizing the executor or the administrator with the will annexed to transfer or convey such property upon compliance with the terms and conditions stated in the will.

The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by ~~Section~~ Sections 1200 and 1200.5 of this code.

Such order shall not be made unless the court shall find that the rights of creditors will not be impaired or shall require bond in an amount and with such surety as the court shall direct or approve. ~~The order shall not be entered unless the court shall find that all inheritance taxes payable in said proceedings have been paid or the State Controller, an inheritance tax attorney or a subordinate inheritance tax attorney has, in writing, consented to the entry of the order by the court.~~

The petition must be filed within any time limitations stated in the will, or, in any event, within six months after the issuance of letters testamentary or letters of administration with the will annexed; provided, however, that if any time limitation in the will is measured from the death of the testator such time shall be extended by the period between such death and the issuance of such letters but in no event to more than six months after such issuance.

Comment. Section 854 is amended to make two changes:

(1) To delete the fourth sentence which required either a court finding that all inheritance taxes had been paid or consent by the State Controller. Inheritance taxes have been eliminated in California. See Rev. & Tax. Code § 13301.

(2) To add to the notice requirements a reference to Section 1200.5 (notice by mail). When Section 854 was enacted in 1963, the section required notice as provided in Section 1200. At that time, Section 1200 required notice by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in Section 1200.5, but a conforming revision was not made to Section 854. Thus this amendment accomplishes the original purpose of Section 854 as enacted.

Exhibit 3

Probate Code § 1200.5 (amended). Notice by mail or personal service

SEC. _____. Section 1200.5 of the Probate Code is amended to read:

1200.5. (a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such.

(5) A petition for the sale of stocks or bonds.

(6) A petition for confirmation of a sale ~~of~~ , a petition to grant an option to purchase real property, or a petition to authorize a transfer or conveyance to one given an option to purchase property of the decedent given in a will duly admitted to probate.

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine.

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security.

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property.

(10) A petition for an order authorizing or directing the investment of money.

(11) An account of an executor or administrator or trustee.

(12) A petition for partial or ratable or preliminary or final distribution.

(13) A petition for the delivery of the estate of a nonresident.

(14) A petition for determination of heirship or interests in an estate.

(15) A petition of a trustee for instructions.

(16) A petition for the appointment of a trustee.

(17) Any petition for letters of administration or for probate of a will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued.

(18) A report of status of administration.

(19) A petition for family allowance.

(20) An objection to the appraisal made by the executor, administrator, or probate referee.

(21) A petition under Section 709 for leave to file a claim against the estate after the expiration of the prescribed period.

(22) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

(c) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(d) This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4

applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(e) The notice required by this section shall be in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Comment. Section 1200.5 is amended to add a reference in paragraph (6) of subdivision (a) to a petition to authorize a transfer or conveyance to one given an option to purchase the decedent's property given in a will duly admitted to probate. See Section 854.