

First Supplement to Memorandum 87-14

Subject: Study L-1037 - Amendments to AB 708 (Supervised Administration-
-Brokers' Commissions)

Lloyd Holmer, who is reviewing the portion of AB 708 relating to compensation of agents and brokers, called me to bring to my attention the fact that AB 708 is silent on the rules for determining the compensation in several situations.

I have prepared amendments to AB 708 to cover these situations. The situations are described in Examples 7 to 10, inclusive, set out in the attached pink pages. These examples would be added to the Comment to Section 10161. The Commission should review the examples to determine that they reflect the rules that the Commission wishes to provide in AB 708. The attached pink sheets also contain Comments to the new sections that would be added to AB 708 to provide the rules described in the Comment.

The amendments that the staff recommends be made to AB 708 to fill in the caps in the provisions covering compensation of agents and brokers are set out in the attached yellow sheets.

The text of the provisions relating to compensation of agents and brokers as proposed to be revised by the staff are set out on the attached green sheets. The Comments to those provisions are set out on the attached white sheets.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

INSERT IN COMMENT TO SECTION 10161

(First insert on page 72 of proofs of Comments)

Example 7. No exclusive listing contract; broker produces bid returned to court; no overbid. The personal representative has not entered into an exclusive contract with a broker. Broker B finds a purchaser whose bid is confirmed by the court. The reasonable compensation allowed by the court on the amount for which the sale is confirmed is paid to Broker B. See Section 10162.3.

Example 8. Exclusive listing contract; bidder not represented by broker; no overbid. The personal representative has entered into an exclusive contract with Broker A. The bid returned to court for confirmation is made by a person who is not represented by a broker. The sale is confirmed to that bidder on that bid. The reasonable compensation allowed by the court on the amount for which the sale is confirmed is paid to Broker A. See Section 10162.5(a)

Example 9. Exclusive listing contract; bidder whose bid is returned to court not represented by broker; overbidder not represented by broker. The personal representative has entered into an exclusive contract with Broker A. The bid returned to court for confirmation is made by a person who is not represented by a broker. At the confirmation hearing the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder. The Commission payable to Broker A is such amount as the court determines is reasonable. See Section 10161. The commission is allowed on the amount of the original bid. See Section 10162.5(b). For example, where the commission is fixed by the court in a percentage amount, the percentage is applied to the amount of the original bid, not the amount of the successful overbid.

Example 10. Exclusive listing contract; bidder whose bid is returned to court represented by another broker; no overbid. The personal representative has entered into an exclusive contract with Broker A. The bid returned to court for confirmation is made by a person represented by Broker B. The sale is confirmed to that bidder

on that bid. The reasonable compensation allowed by the court on the amount for which the sale is confirmed is divided between Broker A and Broker B as provided in any agreement between them, or, if there is no agreement, is divided equally. See Section 10162.7. For example, if the sale is confirmed to the bidder whose bid submitted to the court was \$100,000 and the court determines that a reasonable commission is six percent of that amount (six percent of \$100,000, or \$6,000), the \$6,000 is divided between Broker A and Broker B as provided in their agreement or, absent an agreement, Broker A receives \$3,000 and Broker B receives \$3,000.

COMMENTS TO NEW SECTIONS ADDED BY AMENDMENTS
(Second insert on page 72 of proofs of Comments)

§ 10162.3. Compensation where there is no exclusive contract and the sale is made on bid returned to court by purchaser represented by agent or broker

Comment. Section 1062.3 makes clear the rule that applies where there is no exclusive contract and the sale is made on a bid returned to the court by a purchaser represented by an agent or broker. The reference to Section 10161 in Section 10162.3 makes clear that the court has discretion to determine the total amount of compensation to be paid. For an example of the operation of Section 10162.3, see Example 7 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Property § 62

§ 10162.5. Compensation where there is an exclusive contract and no other broker or agent is involved

Comment Section 10162.5 makes clear the rules that apply where there is an exclusive contract and no other agent or broker is involved in the sale. The references to Section 10161 in Section 10162.5 makes clear that the court has discretion to determine the amount of

compensation to be paid. For examples of the operation of Section 10162.5, see Examples 8 and 9 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Property § 62

§ 10162.7. Compensation where there is an exclusive contract and sale is made on bid returned to court by purchaser represented by another agent or broker

Comment Section 10162.7 makes clear the rule that applies where there is an exclusive contract and the sale is made on a bid returned to court by a purchaser represented by another agent or broker. The reference to Section 10161 in Section 10162.7 makes clear that the court has discretion to determine the total amount of compensation to be paid. For an example of the operation of Section 10162.7, see Example 10 in the Comment to Section 10161. Section 10162.7 does not apply where the sale is confirmed on an overbid at the confirmation hearing. As to the rule in that case, see Section 10165.

CROSS-REFERENCES

Definitions

Property § 62

AMENDMENTS TO ASSEMBLY BILL 708 (SUPERVISED ADMINISTRATION)

AMENDMENT 1

On page 113, between lines 15 and 16, insert:

10162.3. (a) This section applies if all of the following circumstances exist:

(1) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The bid returned to court for confirmation is made by a person represented by an agent or broker.

(3) The court confirms the sale to that purchaser on the bid returned to court for confirmation.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the agent or broker who procured the purchaser to whom the sale is confirmed the compensation determined under Section 10161 on the full amount for which the sale is confirmed.

10162.5. Where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the court shall allow to the agent or broker holding the contract the compensation determined under Section 10161 on:

(a) The full amount for which the sale is confirmed if both of the following circumstances exist:

(1) The bid returned to the court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale to that purchaser on that bid.

(b) The amount of the original bid if both of the following circumstances exist:

(1) The bid returned to court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

10162.7. (a) This section applies if all of the following circumstances exist:

(1) There is an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The bid returned to court for confirmation is made by a purchaser procured by another agent or broker.

(3) The court confirms the sale to that purchaser on the bid returned to court for confirmation.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed. The compensation allowed by the court shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding contract and the other agent or broker.

AMENDMENT 2

On page 125, between lines 16 and 17, insert:

(d) Upon its own motion or upon the request of the personal representative, the agent or broker, or any other interested person, made at the time of the confirmation hearing or at another time, court shall fix the compensation of the agent or broker as provided in Article 3 (commencing with Section 10160).

AMENDMENT 3

On page 131, line 38, strike out "The" and insert:

Upon its own motion or upon the request of the personal representative, the agent or broker, or any other interested person, made at the time of the confirmation hearing or at another time, the

10160. The estate is not liable to an agent, broker, or auctioneer under a contract for the sale of property or for any fee, commission, or other compensation or expenses in connection with a sale of property unless the following requirements are satisfied:

(a) An actual sale is made.

(b) If court confirmation or approval is required, the sale is confirmed or approved by the court as required.

(c) The sale is consummated.

10161. (a) Subject to the provisions of this article, whether or not the agent or broker has a contract with the personal representative, the fee, commission, or other compensation of an agent or broker in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate.

(b) Unless the agent or broker holds a contract granting an exclusive right to sell the property, an agent or broker is not entitled to any fee, compensation, or other compensation for services to the estate in connection with a sale except in the following cases:

(1) Where the agent or broker produces the original bid which is returned to the court for confirmation.

(2) Where the property is sold on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by the agent or broker.

(c) If the agent or broker has a contract with the personal representative, the amount of the compensation of the agent or broker in connection with the sale of property shall not exceed the amount provided for in the contract.

10162. (a) Where the bid returned to the court for confirmation is made by a person who is not represented by an agent or broker and the successful bidder is represented by an agent or broker, the compensation of the agent or broker shall not exceed one-half of the

difference between the amount of the bid in the original return and the amount of the successful bid.

(b) Subdivision (a) does not limit the compensation of the agent or broker who holds a contract under Section 10150 granting him or her the exclusive right to sell the property.

10162.3. (a) This section applies if all of the following circumstances exist:

(1) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The bid returned to court for confirmation is made by a person represented by an agent or broker.

(3) The court confirms the sale to that purchaser on the bid returned to court for confirmation.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the agent or broker who procured the purchaser to whom the sale is confirmed the compensation determined under Section 10161 on the full amount for which the sale is confirmed.

10162.5. Where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the court shall allow to the agent or broker holding the contract the compensation determined under Section 10161 on:

(a) The full amount for which the sale is confirmed if both of the following circumstances exist:

(1) The bid returned to the court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale to that purchaser on that bid.

(b) The amount of the original bid if both of the following circumstances exist:

(1) The bid returned to court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

10162.7. (a) This section applies if all of the following circumstances exist:

(1) There is an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The bid returned to court for confirmation is made by a purchaser procured by another agent or broker.

(3) The court confirms the sale to that purchaser on the bid returned to court for confirmation.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed. The compensation allowed by the court shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding contract and the other agent or broker.

10163. (a) This section applies if all of the following circumstances exist:

(1) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The original bid was made direct to the estate by a purchaser who was not procured by an agent or broker.

(3) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker.

(b) Subject to Section 10162, if all the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed to the agent or broker who procured the purchaser to whom the sale is confirmed.

10164. (a) This section applies only where the court confirms a sale on increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

(b) Except as provided in subdivision (c), the court shall allow the compensation determined under Section 10161 on the amount of the original bid to the agent or broker whose original bid was returned to the court.

(c) If an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the compensation determined under Section 10161 on the amount of the original bid shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding the contract and the other agent or broker.

10165. (a) Where the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed, as provided in this section, if either of the following conditions is satisfied:

(1) The original bid returned to the court for confirmation was made by a purchaser who was procured by another agent or broker.

(2) Another agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(b) Subject to Section 10162, the agent or broker who procured the purchaser to whom the sale is confirmed shall be paid one-half of the compensation on the amount of the original bid and all of the compensation on the amount of the difference between the original bid and the amount for which the sale is confirmed.

(c) The other one-half of the compensation on the amount of the original bid shall be paid as follows:

(1) If the original bid returned to the court is made by a purchaser who was procured by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(2) If the original bid returned to the court is made by a purchaser who was procured by a bona fide agent or broker and there is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(3) If there is an agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the one-half of the compensation on the amount of the original bid shall be divided between the agent or broker holding the contract granting the exclusive right to sell the property and the other agent or broker whose original bid was returned to the court for confirmation as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the one-half of the compensation on the amount of the original bid shall be divided equally between the agent or broker holding the contract and the other agent or broker whose original bid was returned to the court for confirmation.

10166. Notwithstanding that a bid contains a condition that a certain amount of the bid shall be paid to an agent or broker by the personal representative, only such compensation as is proper under this article shall be allowed. Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition.

10167. (a) Subject to subdivision (b), whether or not the auctioneer has a contract with the personal representative, the fees, compensation, and expenses of an auctioneer in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable compensation for the services of the auctioneer to the estate.

(b) If the auctioneer has a contract with the personal representative, the amount of the compensation of the auctioneer in connection with the sale of property shall not exceed the amount provided for in the contract.

law. See *In re Estate of Guglielmi*, 138 Cal. App. 80, 86-88, 31 P.2d 1078 (1934).

See also Sections 920 (duty to account), 9657 (personal representative shall not profit from increase, nor suffer loss from decrease or destruction without fault).

CROSS-REFERENCES

Definitions

Personal representative § 58
 Property § 62

Article 2. Contract With Agent, Broker, or Auctioneer

§ 10150. Contract with agent or broker

Comment. Subdivision (a) of Section 10150 continues a portion of the first sentence of former Section 760 except that:

(1) The former reference to a "bona fide agent or broker" is not continued. Instead, a reference to a "licensed real estate broker" is made in paragraph (1) of subdivision (a) and the second sentence of paragraph (2) of subdivision (a) has been added. For various licensing provisions, see Bus. & Prof. Code §§ 5731 (auctioneer), 10000-10581 (real estate brokers); Fin. Code § 22200 (personal property brokers); Health & Safety Code §§ 18006, 18045 (sale of mobilehomes and manufactured housing).

(2) The former reference to a "multiple group of agents or brokers" is replaced by the second sentence of paragraph (1) of subdivision (a).

The first sentence of subdivision (b) continues the last portion of the first sentence and the fourth sentence of former Section 760 without substantive change. The second sentence of subdivision (b) continues the last portion of the last sentence of former Section 760 with the addition of the phrase "except for the obligations of the estate to the purchaser of personal property as to which title passes pursuant to Section 10259 without court confirmation or approval." This additional phrase is clarifying and is drawn from former Section 760.5, continued as Section 10151. See also Section 10160 (no liability unless actual sale made, confirmed, and consummated). The third sentence of subdivision (b) restates the first portion of the last sentence of former Section 760 without substantive change.

The first two sentences of subdivision (c) continue the third sentence of former Section 760 without substantive change. The

CALIFORNIA LAW REVISION COMMISSION

65

third sentence of subdivision (c) is new and makes clear that the exclusive right to sell contract may be extended for any number of additional periods (each period not to exceed 90 days) if the personal representative obtains permission of the court for each extension.

CROSS-REFERENCES

Contract with auctioneer § 10151

Definitions

Personal representative § 58

Property § 62

Real property § 68

§ 10151. Contract with auctioneer

Comment. Subdivision (a) of Section 10151 restates the first sentence of former Section 760.5 with the following changes:

(1) The reference in former Section 760.5 to a "bona fide" auctioneer "authorized to act as such in the locality" is replaced by the reference to an auctioneer licensed under the Auctioneer and Auction Licensing Act (Bus. & Prof. Code §§ 5700-5791.5) and, where the sale is to be made in another jurisdiction, the reference to a person permitted to sell the property by public auction sale in that jurisdiction.

(2) The provision of former Section 760.5 authorizing auction sale of "tangible" personal property is revised to authorize auction sale of all personal property an auctioneer may auction under the Auctioneer and Auction Licensing Act (see, e.g., Bus. & Prof. Code §§ 5701(j), 5774, 5775-5776).

Subdivision (b) is new.

Subdivisions (c) and (d) restate the remainder of former Section 760.5 without substantive change.

See also Sections 10254 (sales at public auction), 10259 (unless court subsequently approves the sale, personal representative responsible for the value of property title to which passes without court confirmation or approval).

CROSS-REFERENCES

Definitions

Personal representative § 58

Sales at public auction § 10254

Article 3. Compensation of Agent, Broker, or Auctioneer

§ 10160. Limitation on liability of estate

Comment. Section 10160 restates the last portion of the last sentence of former Section 760 and a portion of the third sentence of former Section 760.5 with the addition of subdivision (c) which makes clear that the sale must be consummated before the estate is liable to the agent, broker, or auctioneer. In the case of real property, the requirement that an actual sale be made and be consummated requires that the estate receive the purchase price and that a deed be given to the purchaser and a mortgage or deed of trust be taken for payments due in the future. See *Estate of Rule*, 25 Cal. 2d 1, 16, 152 P.2d 1003 (1944); *Wilson v. Fleming*, 106 Cal. App. 542, 549, 289 P. 658 (1930). As to when court confirmation or approval is not required, see Section 10259 (personal property).

CROSS-REFERENCES

Contract with agent or broker § 10150

Contract with auctioneer § 10151

Definitions

Property § 62

§ 10161. Compensation and fees to be in reasonable amount determined by court

Comment. Subdivision (a) of Section 10161 restates a portion of the fourth sentence of former Section 760 (contract binding "for an amount to be allowed by the court"), a portion of former Section 761.5 (overbidder's agent entitled to "reasonable compensation" fixed by the court), and a portion of the second and third sentences of former Section 785 (overbidder's agent entitled to "reasonable compensation" fixed by the court), without substantive change. Subdivision (a) uses language drawn primarily from the last portion of former Section 761.5. As was the case under former law, a local court rule may, for example, fix reasonable compensation as a commission of six percent of the original bid or sales price (whichever is appropriate under the rules set out in this article), and the court may determine what constitutes reasonable compensation by applying the court rule.

Subdivision (b) is a new provision that makes clear that an agent or broker holding a nonexclusive contract is not entitled to compensation unless the agent or broker produces the original bid returned to the court for confirmation or procures the overbidder to whom the sale is confirmed at the confirmation hearing. For example, the agent or broker holding a nonexclusive

CALIFORNIA LAW REVISION COMMISSION

67

contract is not entitled to compensation in the following cases:

(1) Where the bid returned to the court for confirmation was submitted by a bidder not represented by an agent or broker and the sale is confirmed to that bidder.

(2) Where the bid returned to the court for confirmation was submitted by a bidder represented by another agent or broker and the sale is confirmed to that bidder.

(3) Where the bid returned to the court for confirmation was submitted by a bidder not represented by the agent or broker who holds the nonexclusive contract and the court at the confirmation hearing confirms the sale of the property to an overbidder not procured by the agent or broker holding the nonexclusive contract.

Subdivision (c) is a new provision that makes clear that the amount of the compensation of the agent or broker may not exceed the amount provided for in the contract. For example, if the contract provides for a five percent commission and the applicable court rule would allow a six percent commission, the commission awarded by the court may not exceed the five percent rate provided for in the contract. See also Section 10166 (invalidity of provision in bid that certain amount of bid be paid to agent or broker).

Where an agent or broker holding a nonexclusive contract either produces the original bid returned to the court for confirmation or procures the successful overbidder, the compensation to which the agent or broker is entitled is the amount determined by the court to be a reasonable compensation for the services of the agent or broker to the estate (Section 10161) and is subject to the provisions of this article.

The compensation to an agent or broker may be for the sale of real or personal property. See Section 10150. For a limitation on the amount of compensation that may be allowed to the agent or broker who produces the successful overbidder, see Section 10162. See also Section 10166 (invalidity of provision in bid that certain amount of bid be paid to agent or broker).

The court has considerable flexibility in determining the compensation of the agent or broker or the agents or brokers in connection with a sale of property. Subject to the provisions of this article, compensation may be fixed, for example, as a percentage of the amount of the bid returned to the court for confirmation (see Sections 10164 and 10165) or as a percentage of the amount for which the sale is confirmed (see Section 10165). The court may use one percentage (e.g., six percent) for

improved property and another (e.g., ten percent) for unimproved property. Or the court may use a schedule with the percentage decreasing as the value of the property increases (e.g., six percent for the first \$100,000; five percent for amounts in excess of \$100,000). The percentage or percentages or other method of computing the compensation may be prescribed by court rule, but the court rule must be consistent with the provisions of this article. Nothing in this article precludes the court from fixing the compensation using a different method than a percentage of the amount bid or the amount for which the sale is confirmed. The personal representative and the agent or broker may provide in their contract for the amount or manner of computing the compensation for the sale and, although the court may fix the compensation at less than the amount provided for in the contract, the compensation allowed by the court in such a case may not exceed the contract amount. See Section 10161(c).

The following examples illustrate the effect of Sections 10161-10166. In these examples, Broker A refers to the broker holding the contract with the personal representative. Broker B refers to a cooperating broker whose bid is returned to the court for confirmation. Broker C refers to a broker who does not have a contract with the personal representative and who procures a successful overbidder (this broker is referred to as Broker C whether or not there is a Broker A or a Broker B in the transaction).

Example 1. Broker with contract produces original bid; no overbid. The personal representative enters into a written contract (either exclusive or nonexclusive) with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is confirmed by the court. The court is not bound by the six percent commission provided in the contract, but may fix a commission in such amount as the court determines is reasonable compensation for the services of Broker A to the estate, but not an amount in excess of the amount provided in the contract. See Section 10161.

A court rule may, for example, establish what constitutes reasonable compensation and fix the compensation at six percent of the sales price in this situation (or at a higher or lower percentage), and the court may determine what constitutes reasonable compensation by applying the court

~~Ex~~
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~~The compensation in~~
~~may be fixed by~~
~~the court~~

See also
Sections 10261 (d)
and
10312 (b)
(court to
fix compensa-
tion of agents
or brokers).

CALIFORNIA LAW REVISION COMMISSION

69

rule. If the court rule provides for a commission at six percent of the sales price in this situation but the contract provides for a commission at five percent of the sales price, the court may not award a commission in excess of the five percent provided for in the contract.

Example 2. Broker with contract produces original bid; successful overbidder not represented by broker. The personal representative enters into a written contract (either exclusive or nonexclusive) with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder. The commission payable to Broker A is such amount as the court determines is reasonable. See Section 10161; see also the discussion in Example 1. The commission is allowed on the amount of the original bid. See Section 10164(b). For example, where the commission is fixed by the court in a percentage amount, the percentage is applied to the amount of the original bid, not the amount of the successful overbid.

Example 3. Exclusive listing contract; original bid produced by cooperating broker; successful overbid by purchaser not represented by broker. The personal representative enters into a written exclusive listing contract with Broker A. (An exclusive listing contract must be authorized by a court order. See Section 10150(c) (personal representative must obtain permission of court to enter into an exclusive listing contract; showing of necessity and advantage to estate required; duration of contract limited).) The original bid returned to court for confirmation is procured not by Broker A, but rather by Broker B, a cooperating broker. At the confirmation hearing, the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder. The commission is determined as in Example 2 (reasonable commission on amount of original bid), and is divided between Broker A and Broker B as provided in any agreement between them, or, if there is no agreement, is divided equally. See Section 10164(c). For example, if the original bid returned to the court by Broker B is \$100,000 and the sale is confirmed to the successful overbidder at \$150,000,

and the court determines that a reasonable commission is six percent of the original bid returned to court for confirmation (six percent of \$100,000, or \$6,000), the \$6,000 is divided between Broker A and Broker B as provided in their agreement or, absent an agreement, Broker A receives \$3,000 and Broker B receives \$3,000.

Example 4. Original bidder not represented by broker; successful overbidder represented by broker. The personal representative has not entered into an exclusive sales contract with an agent or broker. The original bid is made by a purchaser who is not represented by a broker. The successful overbidder is procured by Broker C. The reasonable commission allowed by the court is paid entirely to Broker C. See Section 10163. Subject to Section 10162, the commission is allowed on the full amount for which the sale is confirmed. See Section 10163 (b). For example, where the commission is fixed by the court in a percentage amount, the percentage is applied to the full amount for which the sale is confirmed. See *id.* The commission of Broker C is subject to the limitation that it may not exceed one-half of the difference between the amount bid in the original return and the amount of the successful bid. See Section 10162.

Example 5. Broker holding contract produces original bidder; successful overbidder represented by another broker. The personal representative enters into a written nonexclusive contract with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is also represented by a broker (Broker C) who does not hold a contract with the personal representative. The court confirms the sale to the overbidder. Under Section 10165, where a broker returns a bid for confirmation and another broker brings in a successful overbid, the commission is divided as follows: One-half of the commission on the original bid to the original broker (Broker A); the remaining one-half of the commission on the original bid plus all of the commission on the overbid amount to the successful overbidding broker (Broker C). For example, Broker A returns a \$100,000 bid for confirmation, and Broker C brings in an increased bid of \$110,000 on which the sale is confirmed. The court awards six

CALIFORNIA LAW REVISION COMMISSION

71

percent of \$110,000 or \$6,600 in commissions. Broker A receives one-half of the commission on the original bid (\$100,000 at six percent commission equals \$6,000; one-half of \$6,000 equals \$3,000) or \$3,000. Broker C receives the other one-half of the commission on the original bid (\$3,000) plus all of the commission on the amount of the difference between the original bid and the amount for which the sale is confirmed (six percent of the difference between \$110,000 and \$100,000 (\$10,000) or \$600). Broker C thus receives \$3,600.

Example 6. Exclusive listing contract; original bid produced by cooperating broker; successful overbid by purchaser represented by another broker. The personal representative enters into a written exclusive sales contract with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker B, a cooperating broker, finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is represented by Broker C. The court confirms the sale to the overbidder. Under Section 10165, Brokers A and B are entitled to share one-half of the commission on the original bid; Broker C is entitled to the remaining one-half of the commission on the original bid plus all of the commission on the overbid. Under Section 10165, where there are two brokers on the original bid—Broker A (broker holding a contract granting an exclusive right to sell the property) and Broker B (broker who produced the original bid returned to the court for confirmation)—the one-half commission on the original bid is divided equally between the brokers, unless otherwise provided in an agreement between them. See Section 10165.

For example, Broker B returns a \$100,000 bid for confirmation, and Broker C brings in an increased bid of \$110,000 on which the sale is confirmed. The court awards six percent of \$110,000 or \$6,600 in commissions. Broker A (holder of exclusive sales contract) and Broker B (broker producing purchaser whose bid was returned to the court for confirmation) are entitled to share one-half of the commission on the original bid (\$100,000 at six percent commission equals \$6,000; one-half of \$6,000 equals \$3,000) or \$3,000. The one-half commission on the original bid (\$3,000) is divided equally between Brokers A and B (each receiving

\$1,500), unless otherwise provided in an agreement between them. Broker C receives the other one-half of the commission on the original bid (\$3,000) plus all of the commission on the amount of the difference between the original bid and the amount for which the sale is confirmed (six percent of the difference between \$110,000 and \$100,000 (\$10,000) or \$600). Broker C thus receives \$3,600.

CROSS-REFERENCES

- Contract with agent or broker § 10150
- Definitions
 - Personal representative § 58
 - Property § 62

→ (INSERT 1)

§ 10162. Limitation on compensation of agent or broker producing successful overbidder

Comment. Section 10162 restates the fourth sentence of former Section 785 with the following changes:

(1) Section 10162 is limited to the case where the original bid returned to the court for confirmation is made by a person not represented by an agent or broker.

(2) Section 10162 applies to sales of real and personal property. Formerly, the provision applied only to real property sales.

(3) Section 10162 does not limit the compensation of the agent or broker who holds a contract under Section 10150 granting him or her the exclusive right to sell the property. Former Section 785 did not limit the compensation of the agent or broker who held the contract with the personal representative, whether or not the contract granted the exclusive right to sell the property.

For examples of the operation of this section, see the examples in the Comment to Section 10161.

CROSS-REFERENCES

- Definitions
 - Person § 56
 - Personal representative § 58
 - Real property § 68
 - Property § 62

→ (INSERT 2)

§ 10163. Compensation where original bid made by purchaser direct to estate and sale made on increased bid

Comment. Section 10163 restates the substance of former Section 761.5. Section 10163 refers to Section 10161 which continues the last portion of former Section 761.5 without substantive change. The reference to Section 10161 in Section



CALIFORNIA LAW REVISION COMMISSION

10163 makes clear that the court has discretion to determine the total amount of compensation to be paid. Section 10163 applies only where there is no agent or broker holding an exclusive right to sell the property. For an example of the operation of Section 10163, see Example 4 in the Comment to Section 10161. If there is an agent or broker holding an exclusive right to sell contract, and the requirements of subdivisions (b) and (c) of Section 10163 are satisfied, the compensation is determined under Section 10165. For a limitation on the amount of compensation that may be allowed to the agent or broker who produces the successful overbidder, see Section 10162.

Where Section 10163 would apply except for the fact that

CROSS-REFERENCES

Definitions
Property § 62

§ 10164. Compensation where sale made on increased bid by purchaser not procured by agent or broker

Comment. Subdivision (b) of Section 10164 continues the last sentence of former Section 761 without substantive change. Subdivision (c) is a new provision that covers the situation where an agent or broker holds an exclusive right to sell contract and the original bid returned to the court is made by a purchaser who was procured by another agent or broker. Former Section 761 failed to cover this situation. If there is an agreement concerning the sharing of commissions, subdivision (c) requires that the court divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as under the second sentence of former Section 760.

The references to Section 10161 in Section 10164 make clear that the court has discretion to determine the total amount of compensation to be paid and allocated.

For examples of the operation of Section 10164, see Examples 2 and 3 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions
Property § 62

§ 10165. Compensation where sale made on increased bid by purchaser represented by agent or broker and either the original bid returned to court was made by a purchaser procured by another agent or broker or there is another agent or broker who holds exclusive right to

sell contract

Comment. Subdivision (a) of Section 10165 describes the circumstances that must exist before Section 10165 applies. The section applies only where the court confirms a sale on an increased bid made at the time of the hearing on the petition for confirmation. The successful overbidder must be one procured by a bona fide agent or broker. In addition, before the section applies one of the following requirements also must be satisfied:

(1) The original bid returned to court for confirmation was made by a purchaser who was procured by another agent or broker (*i.e.*, an agent or broker other than the one who procured the successful overbidder).

(2) An agent or broker (other than the one who procured the successful overbidder) holds an exclusive sales contract. All that is required to satisfy this requirement is that an exclusive right to sell the property has been granted to the agent or broker; there is no requirement that the agent or broker holding the exclusive sales contract have produced the purchaser whose original bid was returned to the court for confirmation.

The reference in subdivision (a) to Section 10161 makes clear that the court has discretion to determine the total amount of compensation to be allocated under Section 10165. See the Comment to Section 10161.

Subdivision (b) continues a portion of the first sentence of former Section 761 without substantive change.

Paragraphs (1) and (2) of subdivision (c) continue a portion of the first sentence of former Section 761 without substantive change. Paragraph (3) of subdivision (c) is a new provision that covers the situation where an agent or broker holds an exclusive right to sell contract and the original bid returned to the court is made by a purchaser who was procured by another agent or broker. Former Section 761 failed to cover this situation. Paragraph (3) makes clear that the agent or broker holding an exclusive right to sell contract is allowed a commission whether or not he or she returns a bid to the court. In this respect, paragraph (3) is consistent with what appears to have been prior law. See 1 H. Miller & M. Starr, *Current Law of California Real Estate* § 2:50, at 301 (rev. ed. 1975). If there is an agreement concerning the sharing of commissions, subdivision (c) requires that the court divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as was the case under the second sentence of former Section 760. If the agent or broker

CALIFORNIA LAW REVISION COMMISSION

75

who holds the contract under Section 10150 has not been granted an exclusive right to sell the property, the agent or broker is allowed a commission only if he or she returns the original bid to the court or procures the successful overbidder to whom the sale of the property is confirmed at the confirmation hearing. See Section 10161 (b).

For examples showing the operation of Section 10165, see Examples 5 and 6 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Property § 62

§ 10166. Condition of bid that certain amount of bid be paid to agent or broker

Comment. Section 10166 restates the last portion of the sixth sentence of former Section 785 (real property) without substantive change, and generalizes it to apply also to sales of personal property.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 10167. Compensation and expenses of auctioneer

Comment. Section 10167 is a new provision that is consistent with the second sentence of former Section 760.5 (auctioneer's fee "to be determined by the court"). The language of Section 10167 is drawn from the language used in Section 10161 (compensation of agent or broker). The compensation to an auctioneer may be for the sale of personal property only. See Section 10151.

CROSS-REFERENCES

Contract with auctioneer § 10151

Definitions

Personal representative § 58

Article 4. Special Provisions Applicable to Particular Types of Property

§ 10200. Sale or surrender for redemption or conversion of securities

Comment. Section 10200 restates subdivisions (a) and (b) of former Section 771 without substantive change, except that (1)