

## First Supplement to Memorandum 87-86

Subject: Study L-1029 - Distribution and Discharge (Comments of  
State Bar Study Team 1)

Attached is a letter from State Bar Study Team 1 with the following comments on the distribution and discharge draft.

§ 11640. Petition and order

This section provides for final distribution of the estate when debts have been paid or adequately provided for. The study team points out that this does not cover the situation where the debts may be neither paid nor provided for because the estate is insolvent. The staff would cover this situation by revising the provision to read:

When debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, a petition shall be made for, and the court shall make, an order for final distribution of the estate.

§ 11702. Responsive pleading

This section specifies details of the responsive pleading to a petition for determination of persons entitled to distribution. It includes provisions to the effect that failure to make a responsive pleading does not affect a person's interest, and that no entry of default is necessary. The study team objects to these provisions on the ground that they are unnecessary and could create an implication that entry of default is necessary in case of a failure to respond to other probate petitions.

The staff has no problem with deleting the provisions; they were added by the Commission to address concerns expressed by the State Bar previously that the rules governing failure to respond are not clear. The problem of the negative implication could be addressed by general procedural provisions governing such matters. However, the Commission has rejected this approach.

§ 11801. Distribution despite death of distributee

Section 11800 defines "deceased distributee" to include a person who fails to survive the decedent by a period specified in the will, and Section 11801 deals with a situation where the will requires survival of the date of distribution. The study team points out that there is some overlap between these two provisions. The staff would cure this situation by deleting from Section 11800 the reference to a survival period specified in the will and inserting it in Section 11801, thus:

Distribution of the share of a deceased distributee may not be made under this chapter if the decedent's will provides that a person is entitled to take under the will only if the person survives the date of distribution or other period stated in the will and the decedent fails to survive the date or other period.

§ 11850. When deposit with county treasurer authorized

Subdivision (c) authorizes a distribution to a minor to be made to the county treasurer where the minor has no guardian. The Commission has discussed but rejected the possibility of providing for distribution to a custodian account instead. The study team raises this issue again.

§ 11852. Receipt by county treasurer

The study team would add to the Comment that, "Money deposited with the County Treasurer shall not bear interest." This is the law, and the staff has no problem with adding the comment.

§ 11953. Disposition of property

This section used to include a reference to the court "taking evidence." The study team questions whether that reference should have been deleted. The Commission decided to delete it in reliance on a general reference to the court taking evidence so that the concept will be applied consistently throughout the statute.

§ 11954. Referees

An earlier draft of this section referred to referees "in civil actions for partition." This draft replaces the reference with a reference to "partition actions", on the theory that all partition actions are civil in nature. The study team suggests that the word "civil" be restored. A more useful reference, in the staff's opinion, would be to partition actions under "Title 10.5 (commencing with Section 872.010) of Part 2 of the Code of Civil Procedure."

Respectfully submitted,

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R E P O R T

TO: JAMES V. QUILLINAN  
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THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: OCTOBER 13, 1987

SUBJECT: LRC MEMORANDUM 87-86 (Distribution and  
Discharge); New Probate Code §§  
11600-12253

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Study Team No. 1 relied on a telephone conversation between Charles A. Collier, Jr. and William V. Schmidt on October 12, 1987, for the preparation of this Report. This Report is a follow-up on our Report to LRC Memorandum 86-203, which was dated June 19, 1987.

We have the following comments:

Section 11640(a): We understand that when this Section was discussed at the last Law Revision Commission Meeting, the question of an insolvent estate was raised. This Section, as it was presented in LRC Memorandum 86-203, stated that a petition for an order for final distribution shall be made when debts have been paid and the estate is in a condition to be closed. In an insolvent estate, debts obviously are not paid.

The words "or adequately provided for" have been inserted in the new proposed Section, but we wonder whether or not they adequately cover a situation involving an insolvent estate. Are creditors of an insolvent estate adequately provided for?

Section 11702(b): We suggest that the words "and no entry of default is necessary" at the end of the first sentence of subsection (1) are not necessary and should be deleted. In our opinion, their presence adds nothing, but suggests that an entry of default might sometimes be appropriate in probate proceedings. To our knowledge, there is no such thing as an entry of default in probate proceedings.

We suggest that the words "but the person's interest in the proceeding of an estate is not otherwise affected." at the end of subsection (2) be deleted. We feel that it is unnecessary.

Sections 11800 and 11801: We wonder whether subsection (b) of Section 11801 is necessary in view of the language of Section 11800. Section 11800 talks about survival of the decedent for a stated period. Does this language not cover the requirement that a person survive until the date of distribution of the estate? If it does not, might it be better to make a slight revision to the language of Section 11800 to cover that situation rather than try to cover it in a separate section?

Section 11850: We understand that at the last Law Revision Commission Meeting the removal of the word "minor" in subsection (c) was discussed. Should the word "minor" be removed from this Section?

Section 11852: We feel that the comment should state that money deposited with the County Treasurer shall not bear interest.

Section 119~~0~~<sup>5</sup>3(a): This Section, as it appeared in LRC Memorandum 86-203, read "The court shall take evidence and shall petition, allot and divide ..." The words "take evidence and shall" have been deleted from the new proposed Section. Is this deletion desirable?

Section 11954(b): The word "civil" appeared before the word "partition" in the second line of the Section as it appeared in LRC Memorandum 86-203. Is its deletion desirable here?

We have no further comments.

Respectfully submitted,

STUDY TEAM NO. 1

By:

  
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