

Memorandum 88-68

Subject: Study L-2010 - Probate Code (1989 Probate Cleanup Bill)

Attached to this memorandum as Exhibit 1 are provisions we have collected for possible inclusion in the 1989 cleanup/urgency probate legislation. The changes should either be self-explanatory or clear from the Comment to the affected section.

We will add other provisions to the bill as the need for them becomes apparent.

Time for Filing Inventory and Appraisal

One matter left over from the legislative process on AB 2841 is the issue of the time within which an inventory and appraisal must be filed. Existing law requires the inventory and appraisal to be filed within three months after appointment of the personal representative. Prob. Code § 600. The Commission's recommendation to the Legislature was that the inventory should be required within three months, but an additional three months should be allowed for completing and filing the appraisal.

During the legislative process the probate referees objected to this provision because for some reason they did not want the inventory to be a separate document from the appraisal, and the bill ended up with a compromise straight four months for filing the inventory and appraisal. The Commission was unhappy with this solution, since it took some of the pressure off for a prompt filing of the inventory, and it failed to recognize the fact that in many estates three or four months is simply not adequate to complete the appraisal, and moreover, even if the appraisal can be completed within that time, it may be inadvisable due to unresolved estate tax issues.

The Commission decided to allow the bill to go with the four month provision in it, with the understanding that this issue had not been finally resolved. The probate referees felt some more satisfactory

solution could be worked out on this matter. We have not received a proposal from the probate referees, so the Commission needs to consider whether to let the matter stand as enacted, or restore the original concept of a 3/3 scheme for the inventory and appraisal, or take some other approach.

To restore the 3/3 scheme, we would revise Section 8800, as enacted by AB 2841, as follows:

8800. (a) The personal representative shall file with the court clerk an inventory of property to be administered in the decedent's estate ~~together with~~ and an appraisal of property in the inventory. An inventory and appraisal ~~shall~~ may be combined in a single document.

(b) ~~The inventory and appraisal shall be filed within four months~~ shall be filed within three months, and the appraisal shall be filed within six months, after letters are first issued to a general personal representative. The court may allow such further time for filing an inventory ~~and~~ or an appraisal as is reasonable under the circumstances of the particular case.

(c) The personal representative may file partial inventories ~~and~~ or partial appraisals where appropriate under the circumstances of the particular case, but all inventories and appraisals shall be filed before expiration of the time allowed under subdivision (b).

A handful of conforming changes would be made in related sections.

Bill Schmidt's Suggestions

Attached as Exhibit 2 is a letter from Bill Schmidt suggesting two minor revisions in provisions enacted in 1988. The staff has not incorporated these suggestions for the following reasons.

(1) Mr. Schmidt notes that Section 8803 refers to Section 1252 (giving of special notice), and that a more precise reference would be to Section 1252(b). However, as a matter of drafting technique, we try to avoid referring to specific subdivisions since subdivisions are frequently renumbered when new material is later added to a section, thereby rendering cross-references to that subdivision incorrect.

(2) Mr. Schmidt notes that Section 8851 deals with a number of different aspects of the discharge or devise in a will of a claim of the testator against another person, and that locating the section among the inventory provisions is only proper as to one aspect of the section. "I am concerned, for example, that a person who is in the

process of distributing an estate which contains a devise in a will of a debt of the testator against the executor may not be aware of the provisions of this Section 8851 unless those Sections dealing with distribution of an estate contain similar language or contain a cross-reference." The staff is sympathetic to this point, but believes the location among the inventory provisions is as good as any, and perhaps a little better: It is the earliest logical place in the statute to place it, and that is also where it is located in existing law (and has been since the section was first enacted in 1851).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

An Act to amend Sections 3, 254, 2105.5, 2557, 7622, 8547, and 9103 of the Probate Code, and to repeal Section 2 of Chapter 280 of the Statutes of 1988, relating to probate law and procedure, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Prob. Code § 3 (amended). Transitional provision for changes in
Probate Code

SECTION 1. Section 3 of the Probate Code, as added by Chapter *** of the Statutes of 1988, is amended to read:

3. (a) As used in this section:

(1) "New law" means a change in this code, whether effectuated by amendment, addition, or repeal of any provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date" means the operative date of the new law.

(b) This section governs the application of the new law except to the extent otherwise expressly provided in the new law.

(c) Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action.

(d) If a petition, account, report, inventory, appraisal, or other document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law; but any subsequent proceedings taken after the operative date concerning the petition, account, report, inventory, appraisal, or other document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the old law and not by the new law.

(e) If an order is made before the operative date, including an order appointing a personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary or officer, or any action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made or alter a course of action commenced before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.

(f) No personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary, officer, or person is liable for any action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and such a person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.

(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

Comment. Subdivision (g) of Section 3 is amended for completeness.

Note. This amendment implements a Commission decision made at the March 1988 meeting.

Probate Code § 254 (technical amendment), Determination of whether killing was felonious and intentional

SEC. 2. Section 254 of the Probate Code is amended to read:

254. (a) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this part.

(b) In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this part. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part.

Comment. Section 254 is amended to add the words "a final judgment of" in subdivision (b). This makes clear that the civil court may determine the issue by the civil standard of proof during the pendency of an appeal from a criminal conviction of felonious and intentional killing.

Since the civil court may determine whether the killing was felonious and intentional notwithstanding the absence of a criminal conviction, a juvenile may be disqualified under this part from receiving property of the decedent. See *In re Estates of Josephsons*, 297 N.W.2d 444, 448 (N.D. 1980).

Note. This amendment implements a Commission decision made at the September 1988 meeting.

Prob. Code § 2105.5 (amended), Liability of joint guardian or conservator for breach of duty by another guardian or conservator

SEC. 3. Section 2105.5 of the Probate Code is amended to read:

2105.5. (a) Except as provided in subdivision (b), where there is more than one guardian or conservator of the estate, one guardian or conservator is not liable for a breach of fiduciary duty committed by another guardian or conservator.

(b) Where there is more than one guardian or conservator of the estate, one guardian or conservator is liable for a breach of fiduciary duty committed by another guardian or conservator of the same estate under any of the following circumstances:

(1) Where the guardian or conservator participates in a breach of fiduciary duty committed by the other guardian or conservator.

(2) Where the guardian or conservator improperly delegates the administration of the estate to the other guardian or conservator.

(3) Where the guardian or conservator approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other guardian or conservator.

(4) Where the guardian or conservator negligently enables the other guardian or conservator to commit a breach of fiduciary duty.

(5) Where the guardian or conservator knows or has information from which the guardian or conservator reasonably should have known of the breach of fiduciary duty by the other guardian or conservator and fails to take reasonable steps to compel the other guardian or conservator to redress the breach.

(c) The liability of a guardian or conservator for a breach of fiduciary duty committed by another guardian or conservator that occurred before July 1, 1988, is governed by prior law and not by this section.

Comment. Section 2105.5 is amended to add subdivision (c) to make the section apply prospectively only. This has the same effect as subdivision (c) of Section 9631, the comparable section in estate management.

Prob. Code § 2557 (amended). Exchange of property

SEC. 4. Section 2557 of the Probate Code is amended to read:

2557. (a) Whenever it is for the advantage, benefit, and best interests of the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee, the guardian or conservator, after authorization by order of the court, may exchange any property of the estate for other property upon such terms and conditions as the court may prescribe. Such conditions may include the payment or receipt of part cash by the guardian or conservator.

(b) To obtain an order under this section, the guardian or conservator or any interested person may file a petition with the court. Except as provided in subdivision (c), notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) If the petition is for authorization to exchange stocks, bonds, or other securities as defined in Section ~~771~~ 10200 for different stocks, bonds, or other securities, the court, upon a showing of good cause, may order that the notice be given for a shorter period or dispensed with.

(d) After authorization by order of the court, the guardian or conservator may execute the conveyance or transfer to the person with whom the exchange is made to effectuate the exchange.

Comment. Section 2557 is amended to correct the cross-reference in subdivision (c), and to conform that subdivision to subdivision (d) of Section 10200.

Prob. Code § 7622 (amended). General rules governing administration of estates apply

SEC. 5. Section 7622 of the Probate Code, as added by Chapter *** of the Statutes of 1988, is amended to read:

7622. Except as otherwise provided in this chapter:

(a) The public administrator shall administer the estate in the same manner as a personal representative generally, and the provisions of this division apply to administration by the public administrator.

(b) The public administrator ~~is~~ and the public administrator's attorney are entitled to receive the same compensation and allowances granted by this division to a personal representative and the personal representative's attorney generally. However, the compensation of the public administrator and the public administrator's attorney shall not be less than the compensation and allowances in effect at the time of appointment of the public administrator, regardless of whether the public administrator was appointed before, on, or after the operative date of this section.

Comment. Section 7622 is amended to incorporate provisions added by Chapter 280 of the Statutes of 1988.

Prob. Code § 8547 (amended). Fees and commissions

SEC. 6. Section 8547 of the Probate Code, as added by Chapter *** of the Statutes of 1988, is amended to read:

8547. (a) Subject to the limitations of this section, the court shall fix the commission and allowances of the special administrator and the fees of the attorney of the special administrator.

(b) The commission and allowances of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's commission and allowances or the court in

its discretion so allows. The total commission paid and extra allowances made to the special administrator and general personal representative shall not, together, exceed the sums provided in this division for commission and extra allowances for the services of a personal representative. If the same person does not act as both special administrator and general personal representative, the commission and allowances shall be divided in such proportions as the court deems just or as may be agreed to by the special administrator and general personal representative.

(c) The total fees paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in this division as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the fees shall be divided between the attorneys in such proportions as the court deems just or as agreed to by the attorneys.

(d) Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of fees to the attorney may be made on settlement of the final account of the special administrator. Extraordinary services for which the attorney may apply to the court for compensation under this subdivision include those services rendered by any paralegal performing the extraordinary services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

Comment. Section 8547 is amended to incorporate material omitted in the recodification of former Section 469.

Note. This amendment may be unnecessary if the general provisions on compensation of the attorney cover this point.

Prob. Code § 9103 (amended). Late claims

SEC. 7. Section 9103 of the Probate Code, as amended by Chapter *** of the Statutes of 1988, is amended to read:

9103. (a) Upon petition by a creditor and notice of hearing given as provided in Section 1220, the court may allow a claim to be filed after expiration of the time for filing a claim if the creditor establishes that either of the following conditions are is satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate within 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

(2) Neither the creditor nor the attorney representing the creditor in the matter had knowledge of the existence of the claim within 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days after either the creditor or the creditor's attorney had knowledge of the existence of the claim whichever occurred first.

(b) This section applies only to a claim that relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business, or profession in this state.

(c) The court shall not allow a claim to be filed under this section after the earlier of the following times:

(1) The time the court makes an order for final distribution of the estate.

(2) One year after the time letters are first issued to a general personal representative.

(d) The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative if necessary. The court may deny the petition if a preliminary distribution to beneficiaries or a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors.

(e) Regardless of whether the claim is later established in whole or in part, property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim. The personal representative, designee distributee, or payee is not liable on account of the prior distribution or payment.

Comment. Section 9103 is amended to correct erroneous language.

Note. If Section 9103 is amended by the actual notice to known creditors bill, we would put these corrections in that bill instead of here.

Prob. Code § 11004 (amended). Expenses of personal representative

SEC. 8. Section 11004 of the Probate Code, as added by Chapter *** of the Statutes of 1988 is amended to read:

11004. The personal representative shall be allowed all necessary expenses in the administration of the estate, including but not limited to necessary expenses in the care, management, preservation, and settlement of the estate.

Comment. Section 11004 is amended to make clear that the phrase "necessary expenses in the administration of the estate" includes the necessary expenses in the care, management, preservation, and settlement of the estate. This amendment did not make a substantive change in the section. See the Comment to Section 11004 as enacted (Section 11004 "generalizes the former language that provided for allowance of expenses in the care, management, and settlement of the estate"). Section 11004 permits expenses such as insurance, gardening, pool maintenance, and maintenance of property pending sale or distribution to be paid from the estate.

1988 Cal. Stats. ch. 280, § 2 (repealed). Compensation and allowances of public administrator and attorney

SEC. 9. Section 2 of Chapter 280 of the Statutes of 1988, as amended by Chapter *** of the Statutes of 1988, is repealed.

~~SEC. 2. The public administrator and the public administrator's attorney are entitled to receive the same compensation and allowances granted to a personal representative and the personal representative's attorney generally. It is the intent of the Legislature that the compensation received pursuant to Section 1142 of the Probate Code or this section by the public administrator and his or her attorneys net~~

~~be less than the compensation and allowances in effect at the time of appointment of the public administrator notwithstanding the operative date of this act.~~

Comment. Section 2 of Chapter 280 of the Statutes of 1988, as amended by Chapter *** of the Statutes of 1988, is restated without substantive change in Probate Code Section 7622 (general rules governing administration of estates apply).

Operative Date

SEC. 10. This act shall become operative on July 1, 1989.

Urgency Clause

SEC. 11. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to facilitate and coordinate the implementation of Chapter *** of the Statutes of 1988, relating to probate law and procedure, which will become operative July 1, 1989, and other previously enacted statutes relating to probate law and procedure, it is necessary that this act go into immediate effect.

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June 21, 1988

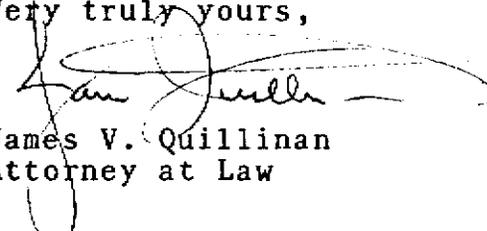
Mr. John H. DeMouly
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Re: AB 2841 (Partial)

Dear John:

I have enclosed a copy of Bill Schmidt's, a member of Team 1, technical report on AB 2841. The report represents the opinions of the author only. The Executive Committee has not reviewed the report. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/h1
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
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JUN 22 1988

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THE EXECUTIVE COMMITTEE IN GENERAL

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

DATE: JUNE 16, 1988

SUBJECT: AB 2841 as Amended on May 25, 1988;
Pages 120 through 136

This report is prepared pursuant to the letter from James V. Quillinan dated June 6, 1988 re AB 2841. The members of Study Team No. 1 have been asked to review the same sections that each of them reviewed when the bill was introduced. You should expect a report on pages 1 through 15 and 26 through 42 from Charles Collier, on pages 44 through 61 from Sterling Ross, on pages 65 through 78 from Michael Vollmer, on pages 148 through 161 from Richard Kinyon and on pages 163 through 168 from Lynn Hart. This report covers pages 120 through 136.

I have read these materials twice and see no errors.

I feel that the reference to Section 1252 in Section 6803 on page 121 would be more accurate if it referred to Subdivision (b), but the reference to Section 1252 in general is correct.

I observed that Section 8851 on page 122 deals with the discharge or devise in a will of any debt or demand of the testator against the executor. It deals with this subject matter in four particulars. The first particular is its validity against creditors of the estate; the second particular refers to its inclusion in the inventory; the third particular deals with its application in the payment of the debts of the testator; and, the fourth particular deals with the manner of its distribution. Clearly three out of four of these particulars have nothing to do with the inventory which is the subject matter of the Article. I am concerned, for example, that a person who is in the process of distributing an estate which contains a devise in a will of a debt of the testator against the executor may not be

aware of the provisions of this Section 8851 unless those Sections dealing with distribution of an estate contains similar language or contain a cross-reference.

Respectfully submitted,

STUDY TEAM #1

By: William V. Schmidt

WVS/ph