

Memorandum 89-47

Subject: Study L - 1989 Legislative Program (General Comments)

AB 158 includes (or included) many of the Commission's major substantive probate recommendations for the 1989 legislative session. These are:

- (1) No Contest Clauses
- (2) 120-Hour Survival Requirement
- (3) Hiring and Paying Attorneys, Advisors and Others
- (4) Compensation of Personal Representative

The Commission's Assembly Member, Harris, introduced the bill for the Commission at the beginning of the session, in December. However, he has since then decided to run for Mayor of Oakland, and has had to divest himself of a number of legislative burdens, including authorship of AB 158. As a courtesy to Assembly Member Harris and to the Commission, and at the urging of Assembly Judiciary Committee Chairman Isenberg, Assembly Member Friedman (who is also a member of the Judiciary Committee) agreed carry the bill for the Commission. His understanding was that the Commission had gone through its usual process of involving interested parties, extensive study and deliberation, circulation of tentative drafts for comment, and revision and fine-tuning, and that the bill would be relatively free of problems.

Assembly Member Friedman has moved the bill through the Assembly and to the Senate. However, he has become concerned about the attorney's fee portion of the bill, and would rather not be the author of those provisions, at least until he has had an opportunity to study the matter carefully and be persuaded that the Commission's recommendation is the best way to deal with the attorney's fee matter. To cover this problem, Assembly Member Harris plans to add the attorney's fee provisions to the trustee's fee bill (AB 831) by amendment offered at the Senate Judiciary Committee hearing, if the

committee is willing and the provisions will not cause major problems for the bill. Accordingly, the attorney's fee provisions have been amended out of AB 158 and have been redrafted as an amendment to AB 831.

Meanwhile, Assembly Member Friedman has now received a letter of opposition to the remaining substantive provisions of AB 158 from the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association. See Exhibit 1, attached to this memorandum. The LA Bar now opposes both the 120-hour survival recommendation and the no-contest clause recommendation.

Assembly Member Friedman is understandably upset that this further problem should surface concerning AB 158, a bill he had been led to believe was basically sound. The bill had been pending in the legislature for months, had already passed out of the Assembly Judiciary Committee and the Assembly floor without opposition, and was ready for hearing in the Senate when the LA Bar letter suddenly arrived.

It has been somewhat difficult for us to explain to Mr. Friedman and his staff how this situation could possibly arise. After all, the Commission has worked on the matters at issue for months and even years, has circulated drafts and held public meetings, has distributed tentative recommendations for comment and made revisions in light of the comments received, has published final recommendations on these matters, and has even further fine-tuned them during the legislative process to take care of additional concerns that have surfaced. During all of this time the LA Bar not only has received all materials but has had representatives present at Commission meetings, without a hint that they perceived any problems with the recommendations that were being developed. Copies of the LA Bar opposition letter were sent to legislative personnel but not the the Commission, so neither the Commission nor staff had an advance opportunity to react to it.

The staff has orally contacted the LA Bar to find out what's going on here, and has received the expected response of a failure of communication within the group. This is similar to the situation we had with the California Bankers Association at the last Commission meeting. The process the Commission follows has worked with quite a bit of success in the past, but for some reason appears to be breaking down now. Our experience this session certainly raises doubts about the value of our elaborate process.

In any event, the objections of the LA Bar on the two matters are analyzed in supplements to this memorandum. It is our hope that after discussion of the objections at the meeting we can either resolve the objections satisfactorily (if they have merit) or persuade the LA Bar to withdraw its opposition (if the objections appear to be without merit), so that Assembly Member Friedman can be satisfied that the bill he is carrying is sound.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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June 14, 1989

Honorable Terry Friedman,
Assemblyman
State Capital Assemble Mail Room
Sacramento, CA 95814

Re: Assembly Bill 158

Dear Assembly Member Friedman:

The Executive Committee of the Probate Section of the Los Angeles County Bar Association has reviewed Assembly Bill 158 as last amended on May 8, 1989 and has voted unanimously to oppose said bill on the following grounds:

1. Section 6 of the bill amends Section 6403 to require one-hundred twenty (120) hours survival for all persons dying on or after January 1, 1990;
2. Section 38 of the bill adding Part 3 commencing with Section 21300 substantially restricts the effectiveness of no contest clauses in probate.

The Section is concerned about the proposed amendment of Section 6403 of the Probate Code requiring one-hundred twenty (120) hours survival requirement because of the following reasons:

- a. The Section is concerned that many deaths that do occur are completely unwitnessed. Autopsies will be required to determine times of death in order to try to determine if two decedents died more or less than one-hundred twenty (120) hours apart. Because of varying conditions and rates of decomposition, exact moments of death cannot be determined with such scientific certainty that substantial litigation may not develop in numerous estates in order to determine the period of survival.

Under the present system, the only area of doubt is in estates where the deaths appear to be simultaneous. Although litigation can be expensive in this area, this happens far less

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frequently than unwitnessed deaths and carries with it a much lower cost of litigation when spread over the population of decedents.

b. The Section believes that the one-hundred twenty (120) hour requirement will cause persons to manipulate the time of death of a second decedent in order to qualify to or disqualify that person as an heir. If a second decedent who is the heir of the first decedent is comatose or terminal, steps may be taken to lengthen or shorten that person's life solely to qualify or disqualify that person as an heir so as to affect the devolution of an estate. The Section believes that this may lead to serious consequences on numerous occasions and is generally bad for the health and safety of the people of California.

c. The Section is also concerned that unscrupulous persons may use the one-hundred twenty (120) hour requirement to dispose of potential heirs who are not at that moment terminal. Under present law, heirship is a matter of surviving the moment of death. This removes the temptation for unscrupulous people to try and cause further deaths during an artificially created survival time period.

The Section is greatly concerned by the new Sections 21300 through 307 of the Probate Code. These sections open wide exceptions to the effectiveness of no contest clauses in aborting litigation.

The most serious problem is represented by Section 21307(b). As understood by this Section, a person can ask for a continuance for the purpose of filing a petition to construe a no contest clause without actually violating it. As part of that petition, the person can allege that a beneficiary gave directions to the drafter concerning dispositive or other substantive provisions of the will. The Section believes that the provision as written is broad enough to allow a complete trial on undue influence in the guise of interpreting the no contest clause to determine if a contest is actually being filed. Accordingly, full fledged trials can result without ever reaching the question of whether a contest will be filed. Effectively, this may vitiate the effectiveness of no contest clauses since many of the most important issues may be fought under the guise of construing the no contest clause by means of artful pleading.

It is the Section's belief that no contest clauses should either be strongly effective or entirely made illegal. The proposed half-

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way solution will merely increase litigation and uncertainty without resolving the basic policy question of whether a no contest clause should be given full force and effect or ignored.

In view of the Section's objections, the Section urges that these two sections be removed from AB158. If the objected provisions are removed, the Probate Section will withdraw its objections to the bill.

Respectfully submitted,



MARSHAL A. OLDMAN,
Immediate Past Chair of the
Los Angeles County Bar Probate
Section and Member Legislative
Monitoring Committee

cc: Teresa Taylor, State Senate Judiciary Committee
Debra Debow, State Assembly Judiciary Committee
Philip Isenberg, State Assemblyman
Bill Lockyer, State Senator
Richard Stack
James Birnberg

AB158.612