

First Supplement to Memorandum 89-101

Subject: Study L - New Probate Code (Proposed Amendments to Bill)

Attached to this memorandum as Exhibit 1 are additional amendments of a technical nature the staff proposes be added to the new Probate Code. In addition, this memorandum discusses a few small substantive matters the staff believes have some urgency for addition to the new code. Other more substantial suggestions for change that have been sent to the Commission will be scheduled for review at a future meeting.

§ 2631. Disposition of small estate on death of ward or conservatee

Among the proposals in the Commission's tentative recommendation on miscellaneous probate revisions was to increase from \$10,000 to \$60,000 the amount for summary liquidation of the estate of a deceased ward or conservatee, consistent with the general affidavit procedure limitation. This proposal was unanimously approved by the commentators and is included in AB 759. One commentator, Howard Serbin of Santa Ana, suggests an expansion of Section 2631 that the staff believes is appropriate.

Mr. Serbin notes that the section supersedes former Welfare and Institutions Code Section 8012 (limited to public guardians), which provided for summary liquidation on court order, whereas Section 2631 provides for a court order only if assets are insufficient to pay guardianship or conservatorship expenses in full. Mr. Serbin remarks that under the old law a public guardian could get an order to sell personal property, withdraw money, collect debts, etc., whether or not this was necessary to pay expenses. "This was very helpful in small but solvent estates where, for example, the heirs lived far away and did not want to pick up personal property, but wanted the Public Guardian to sell it. To expedite resolution of these types of cases, I would strongly urge that the Commission reinstate the language of former Welfare and Institutions Code Section 8012 for Public Guardian cases where the ward or conservatee has died."

The staff believes this is a good point, and would make available a court order for any guardian or conservator, not just the public guardian. We would amend subdivision (b) of Section 2631 to read:

If after payment of expenses under subdivision (a) ~~cannot be made in full and~~ the total market value of the remaining estate of the decedent does not exceed the amount determined under Section 13100, the guardian or conservator may petition the court for an order permitting the guardian or conservator to liquidate the decedent's estate. The guardian or conservator may petition even though there is a will of the decedent in existence if the will does not appoint an executor or if the named executor refuses to act. No notice of the petition need be given. If the order is granted, the guardian or conservator may sell personal property of the decedent, withdraw money of the decedent in an account in a financial institution, and collect a debt, claim, or insurance proceeds owed to the decedent or the decedent's estate, and a person having possession or control shall pay or deliver the money or property to the guardian or conservator.

Comment. Subdivision (b) of Section 2631 is amended to authorize a court order for liquidation of the decedent ward's or conservatee's estate, whether or not required for payment of expenses. This generalizes a provision formerly found in Welfare and Institutions Code Section 8012 (public guardian).

§ 8250. Contest of will

Jeff Strathmeyer has written that the will contest provisions refer in places to "objections" that initiate a will contest, but nowhere does the statute expressly require the filing of objections. This gap could easily be cured by a revision along the following lines:

8250. (a) ~~When an objection is made~~ a will is contested under Section 8004, the contestant shall file an objection to probate of the will and the court clerk shall issue a summons and a copy of the objection directed to the persons required by Section 8110 to be served with notice of hearing of a petition for administration of the decedent's estate. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons.

Comment. Section 8250 is amended to make clear that a will contest is initiated by filing an objection to probate of the will.

§ 8251. Responsive pleading

If there is a will contest, a summons must be served on the proponents of the will and on other interested persons, who have 30 days within which to respond to the objections. Failure of any person to respond renders that person ineligible to participate further in the contest proceedings. Jeff Strathmeyer has observed that, while other persons might be ineligible, the original proponents of the will being objected to should not be made to file a responsive pleading in order to participate.

The staff agrees, and would amend Section 8251(c) to read:

(c) If a person fails timely to respond to the summons:

(1) The case is at issue notwithstanding the failure and the case may proceed on the petition and other documents filed by the time of the hearing, and no further pleadings by other persons are necessary.

(2) The person may not participate further in the contest, but the person's interest in the estate is not otherwise affected. Nothing in this paragraph precludes further participation by the petitioner.

(3) The person is bound by the decision in the proceeding.

§ 21305. Declaratory relief

The no contest clause legislation enacted on Commission recommendation during the past session includes a provision for court determination, on application of a beneficiary, whether a particular act by the beneficiary would be a "contest" within the terms of the no contest clause. Under the new statute, this procedure is a preferred alternative to the standard declaratory relief action of Code of Civil Procedure Section 1060.

The new provision contemplates a pending estate administration proceeding in which the beneficiary's application may be made. The statute includes no procedures to deal with the situation where the issue arises and there is no pending estate proceeding.

The staff does not know how frequently a problem will arise, but some procedural guidance may be useful. The staff would move the declaratory relief provision into a separate chapter that includes procedures, thus:

PART 3. NO CONTEST CLAUSE

Chapter 1. General Provisions

[Consisting of Sections 21300-21307, except Section 21305]

Chapter 2. Declaratory Relief

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause.

(b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) by the beneficiary is limited to the procedure and purpose described in subdivision (a) and does not require a determination of the merits of the motion, petition, or other act by the beneficiary.

(c) A determination of whether Section 21306 or 21307 would apply in a particular case may not be made under this section.

21321. (a) If a proceeding is pending for administration of the transferor's estate, the application under Section 21305 shall be filed in the court in which the proceeding is pending.

(b) If there is no proceeding pending for administration of the transferor's estate and the transferor is deceased, the application under Section 21305 shall be filed in the superior court in any county in which administration of the transferor's estate would be proper or, if none, in any county in which property affected by the transfer is located or, if none, in any county in this state.

(c) If there is no proceeding pending for administration of the transferor's estate and the transferor is living and resides in this state, the application under Section 21305 shall be filed in the superior court in the county in which the transferor resides.

(c) If there is no proceeding pending for administration of the transferor's estate and the transferor is living but does not reside in this state, the application under Section 21305 shall be filed in the superior court in any county in which property affected by the transfer is located or, if none, in any county in this state.

21322. (a) If a proceeding is pending for administration of the transferor's estate, notice of the hearing on the application under Section 21305 shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each beneficiary named in the instrument whose interest could be adversely affected by the application.

(3) If the instrument involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, to the Attorney General.

(b) If no proceeding is pending for administration of the transferor's estate, at least 30 days before the hearing on an application under Section 21305, the applicant shall serve notice of the hearing in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure on all of the following persons:

(1) Each beneficiary named in the instrument whose interest could be affected by the application.

(2) Each executor, trustee, or other fiduciary named in the instrument.

(3) If the instrument involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, to the Attorney General.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

AB 759 AMENDMENTS (Additions to 2d round)

The following amendments are directed toward the bill as amended on May 20

Amendment

On page 3, line 11, strike out "in the new law" and insert:
by statute

Amendment

On page 37, lines 13 and 14, strike out "or trust" and insert:
, trust, or other instrument

Amendment

On page 61, line 38, should read "written receipt" (not "receipt"
as proposed in amendments sent to legislative counsel)

Amendment 58, p. 121, lines 35-36, needs a comma following "1880"

Amendment 101, p. 211, line 26, should refer to the first "of"

Amendment

On page 305, line 10, strike out "or profit-sharing"

Amendment

On page 413, line 14, after "in" insert:
Section 7623 and in

Amendment

On page 504, line 33, after "the" insert:
community

Amendment

On page 506, line 23, after the first "the" insert:
community

Amendment

On page 507, line 2, strike out "both" and insert:
all

Amendment

On page 507, between lines 8 and 9, insert:
(3) Any right, title, or interest in the community real property belonging to the decedent's surviving spouse whose written consent has been filed with the court and which is referred to in the court order obtained under this chapter.

Amendment

On page 507, line 40, strike out "mortgage, security interest" and insert:
security interest, mortgage

Amendment

On page 508, line 6, strike out "and paid"

Amendment on page 517, lines 15 and 16, should be EASEMENTS

Amendment on page 716, lines 32 to 34, the comma should be deleted

Amendment

On page 753, SECTION 21305 - add language to specify manner of giving notice of hearing on application to determine whether a particular act by the beneficiary would be a contest.