

#L-1020

3/13/85

0006L

Second Supplement to Memorandum 85-13

Subject: Study L-1020 - Probate Code (Powers and Duties of Executors
and Administrators)

Attached to this supplement are individual and collective comments on the basic Memorandum (Memo 85-13) from members of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. We are sending these without analysis because of the short time until the meeting. The staff will raise these points orally as we consider the basic Memorandum at the meeting.

Respectfully submitted,

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Exhibit 3

Memorandum 85-13

§ 7158:

It has been the practice in probate to give ten days' notice, for example, by mailing the notice ten days in advance of the hearing without additional time for mailing. This is provided in the CCP. This requires clarification for consistency.

§ 7511:

Subparagraph (b) obviously refers to court orders in connection with sale. If the property is sold pursuant to independent administration, there would be no court order. In this situation perhaps what should be recorded would be the conveyance from the personal representative and a certified copy of letters testamentary showing the authority to sell the property under independent administration.

§ 7550:

This language should be consistent with the language relating to the duties of a trustee. Both are fiduciaries and their standards that are submitted are the same. Perhaps paraphrasing the language from the Estate of Beach is a most accurate way of setting forth the duties.

§ 7551:

Subparagraphs (c) and (d) raise interesting questions in the estate. The inventory seemed to cover items both in the possession of the personal representative and items

of which the personal representative has knowledge. It also raises the question of what items should be included in the account (possession only) and the basis for statutory fees and commissions. Although many of these provisions are found in existing law, there is some ambiguity in this area. The second sentence of (c) could simply state that the heir or devisee shall turn over estate property upon the request of the personal representative to the personal representative. Subparagraph (d) should perhaps refer to taxes as well as debts and should not be limited to those "already accrued."

§ 7553:

Subparagraph (a)(3) refers to a gift in view of death. Query whether there should be any right to recover such gifts which are often made for tax purposes unless there was an attempt to defraud creditors. The concept of contemplation of death involved transfers up to three years from date of death. That concept generally has been eliminated from tax law because of the integration of the gift and estate taxes into a unified system. Query whether subparagraph (3) therefore should remain in the law.

§ 7554:

The costs and expenses referred to in subpart (a) should, we believe, include attorney's fees, at least in the discretion of the court. Subparagraph (b) requires that the property recovered be sold for the payment of debts. This may not be necessary in all situations if, for example, the property recovered is stock which can obviously be assigned to a creditor for the value of the claim without a forced sale.

§ 7556:

The provisions of this section should be subject to the provisions of the decedent's Will as to any partnership interests and also subject to the terms of the written partnership agreement. Also, is it necessary to wind up the partnership business where the decedent's interest was that of a limited partner rather than a general partner?

§ 7557:

This delivery is apparently without court order. It does not itself constitute a distribution of the real property. This should include taxes of the estate, not just debts.

§ 7559:

Subparagraph (a)(3) does not seem necessary and could be deleted. The six months' limitation on filing a petition to exercise an option does not seem necessary.

§ 7560:

Subparagraph (b) perhaps requires clarification. If, for example, there are three personal representatives and one is a nonresident, does this mean that the two personal representatives who are residents of California have complete control of the estate? Does this disqualify the the nonresident personal representative? We believe this refers generally to a person's temporary inability. This phrase probably got into California law many years ago when the telephone and other means of rapid communication were not available.

§ 7561:

We believe that this section, dealing with the petition for instructions, should not be expanded beyond its present scope except to allow the filing of such a petition by any interested person in addition to the personal representative. As now worded, it is limited to situations where no other remedy is available. We believe it should continue to be so limited.

§ 7570:

This refers in subpart (a) to "a trust company authorized to conduct a trust business in this state." We believe other references to a trust company are not so limited. See, for example, the references to a trust company in §§ 7571, 7572 and 7573.

§ 7580:

Query whether subpart (e) is necessary.

§ 7620:

The word "claim" in paragraph (b) should perhaps be replaced with the word "contract" or other right, since claim seems too restrictive.

§ 7621:

Subparagraph (b) should require that a copy of the petition also be included with the notice.

§ 7625:

The phrase "jurisdiction has been obtained in the court": does it refer to service of the summons and complaint on all the parties, appearance by all the parties in the action, etc.? This section also provides an automatic abatement

of the probate proceeding if there is a civil action pending. Should not the civil court and probate court have the discretion between them to determine which action should be abated?

§ 7628:

Subparagraph (b) refers to the right of possession after the order is made that the personal representative execute a conveyance or transfer rather than when that conveyance or transfer is actually made. Is this correct? Similarly, there is no provision that the right of possession is stayed pending appeal from the order.

With reference to the Note following the Comment, perhaps the Evidence Code provisions are sufficient.

§ 7640:

We believe subparagraph (a) should also include the borrowing of money to preserve and improve property and to pay taxes.

§ 7644:

The last sentence of subparagraph (c) presumably relates to the third party and would not limit the right of a beneficiary to complain about the transaction if that beneficiary did not have notice thereof previously.

Subparagraph (d), at the end of the second line, appears to have some words missing.

§ 7651:

This section provides for 20 days' notice for a long term lease. Should not this notice provision be consistent with other notices which normally are ten days?

§ 7664:

The reference in the second line to "his or her hands" should probably be changed to "possession of the personal representative."