

First Supplement to Memorandum 85-38

Subject: Study L-811 - Probate Code (Form for Advice of Proposed Action)

The form of Advice of Proposed Action attached to the basic Memorandum (Memo 85-38) states that if the recipient of the form objects to the proposed action, "the executor or administrator may take the proposed action only under court supervision." Exhibit 1 is a letter from Kenneth Klug on behalf of the State Bar Estate Planning, Trust and Probate Law Section, stating that the quoted language in the form is incorrect, since the executor or administrator may proceed despite the objection, taking the risk that the court will later find the action to have been improper.

The statute provides that if there is an objection, "the executor or administrator shall, if he or she desires to consummate such action, submit it to the court for approval following the provisions of this code dealing with the court supervision of such action and may consummate such action under such order as may be entered by the court." Prob. Code § 591.5(b). The staff thinks this provision makes it reasonably clear that an executor or administrator who proceeds without court approval despite an objection has violated a statutory duty and is liable to be surcharged, but perhaps this language could be tightened up by adding an express statement that this is a violation of the fiduciary duty of the executor or administrator and is grounds for his or her removal, as set out in Exhibit 2.

The staff thinks it is better to revise the statute as indicated than to revise the form to say that, if there is an objection, "the executor or administrator may still take the proposed action" as Mr. Klug suggests (Exhibit 1). Such a statement is not entirely accurate, since the executor or administrator does not have the right to take the action without court approval (although he or she does have the power to do so).

The staff thinks that Mr. Klug has made a good suggestion in saying that the form should refer to the objector's option to seek a court restraining order. This suggestion may be implemented by adding the following sentence to paragraph 5 of the proposed form:

You may also apply for a court order preventing the executor or administrator from taking the proposed action without court supervision.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

Chair
KENNETH M. KLUG, Fresno
Vice-Chair
JAMES A. WILLETT, Sacramento

Advisors
COLLEEN M. CLAIRE, Newport Beach
CHARLES A. COLLIER, JR., Los Angeles
JAMES D. DEVINE, Monterey
K. BRUCE FRIEDMAN, San Francisco
JAMES R. GOODWIN, San Diego
JOHN L. McDONNELL, JR., Oakland
WILLIAM H. FLAGEMAN, JR., Oakland
JAMES F. ROGERS, Los Angeles
HARLEY J. SPITLER, San Francisco
ANN E. STODDEN, Los Angeles



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

Executive Committee
KATHRYN A. BALLSUN, Los Angeles
D. KEITH BILTER, San Francisco
HERMIONE K. BROWN, Los Angeles
THEODORE J. CRANSTON, La Jolla
JOHN S. HARTWELL, Livermore
LLOYD W. HOMER, Campbell
KENNETH M. KLUG, Fresno
JAMES C. OPEL, Los Angeles
LEONARD W. POLLARD, II, San Diego
JAMES V. QUILLINAN, Mountain View
ROBERT A. SCHLESINGER, Palm Springs
WILLIAM V. SCHMIDT, Costa Mesa
CLARE H. SPRINGS, San Francisco
H. NEAL WELLS, III, Costa Mesa
JAMES A. WILLETT, Sacramento

March 4, 1985

Mr. John H. DeMouilly
Executive Secretary of the
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Memorandum 85-38

Dear John:

The form of Advice of Proposed Action contained in Memorandum 85-38 misstates the law. Paragraph 6 of the form contains the following statement:

If you object, the executor or administrator may take the proposed action only under court supervision.

Of course, that statement is wrong, and the personal representative can proceed with the action. The objection by a beneficiary merely preserves the right to have the court review the action at a later time. It does not prevent the personal representative from taking the action.

The two means of curing the problem are either to change the law to conform to the proposed form of advice, or to change the proposed form of advice. It is my opinion that the law should not be changed.

Present law allows the beneficiary to apply to the probate court to obtain an order restraining the action. A restraining order prohibits the transaction, and is enforceable under the general contempt powers of the court, as well as by surcharge and/or removal. It would be a mistake to give an objection the same weight as a restraining order. I can think of no other area where individuals are granted judicial powers and this area ought not be the first. As a

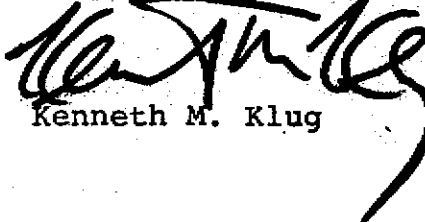
Mr. John H. DeMouilly
March 4, 1985
Page Two

practical matter, what happens if the executor undertakes the action over the objection? The beneficiary has no power to find the executor in contempt. The only remedy available (and the only remedy which should be available) if the executor undertakes the action over an objection is to have the court review the action and determine whether or not it was proper. If the court determines the action was proper, it will over-rule the beneficiary's objection. If the court determines that the action was improper, it will sustain the objection, and assess damages.

Since the law should not be changed, the form of Advice of Proposed Action should be. I suggest the following language for paragraph 6:

6. Your objection must be received before the date specified above, or before the proposed action is taken, whichever is later. If you object, the executor or administrator may still take the proposed action, but you will preserve your right to object at a later date. If you wish to prevent the proposed action from being taken, you must apply to the above-named court for an order restraining the executor or administrator from taking the proposed action.

Very truly yours,



Kenneth M. Klug

EXHIBIT 2

Probate Code § 591.5 (amended). Objection to proposed action

591.5. (2) Any person described in Section 591.3 who objects to the taking of any proposed action described in Section 591.3 without court supervision, may do either or both of the following:

(1) The person may apply to the court having jurisdiction over the proceeding for an order restraining the executor or administrator from taking the proposed action without court supervision under the provisions of this code dealing with the court supervision of such action, which order the court shall grant without requiring notice to the executor or administrator and without cause being shown therefor. Such order may be served by the person so objecting upon the executor or administrator in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

(2) The person may deliver or mail a written objection to the executor or administrator at the address stated in the advice of proposed action, so that the objection is received before the date specified on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is later.

(b) If the executor or administrator has notice of the issuance of the restraining order or of the written objection of a person described in Section 591.3, the executor or administrator shall, if he or she desires to consummate such action, submit it to the court for approval following the provisions of this code dealing with the court supervision of such action and may consummate such action under such order as may be entered by the court. Failure to comply with this subdivision is a violation of the fiduciary duty of the executor or administrator and is grounds for his or her removal.

(c) The failure of the executor or administrator to comply with subdivision (b) and the consummation of the action by the executor or administrator without complying with subdivision (b) shall not affect the validity of the action so taken or the title to any

property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with the executor or administrator who changed their position in reliance on the action, conveyance, or transfer without actual notice of the failure of the executor or administrator to comply with subdivision (b). No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not the executor or administrator has complied with subdivision (b).

(d) All persons described in Section 591.3 who have been given an advice of proposed action as provided in Section 591.4 may object only in the manner provided in this section. The failure to object is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired. The court may, however, review actions of the executor or administrator on its own motion or on motion of an interested person who did not receive an advice of proposed action before the time to object expired.

Comment. Section 591.5 is amended to add the last sentence to subdivision (b) to make clear that an executor or administrator who takes the proposed action without court supervision after notice of a restraining order or written objection has violated his or her fiduciary duty. Such a violation would be grounds for removal of the executor or administrator and may result in the executor or administrator being surcharged by the court on the final accounting.