

3/12/85

Memorandum 85-43

Subject: Comments of State Bar Section on Various Meeting Materials

Attached are the comments of the State Bar Section on Estate Planning, Trust and Probate Law on various probate materials to be considered at the March meeting. We will refer to these comments in various meeting materials.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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March 12, 1985

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Mr. John H. DeMouilly
California Law Revision Commission
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Re: Memos 85-31, 85-34, 85-35, 85-36

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar, has considered the following memoranda. Our comments are set forth as follows:

1. Memorandum 85-31 - Sales.

A. Sale of Mining Property. We agree with the staff proposal not to continue the existing provisions concerning sales of mining property (Sections 810 to 814). Sales of mining property should be treated as regular estate sales generally.

B. Public Auction of Intangible Personal Property. Our section agrees with the staff proposal to make clear that intangible personal property may be sold at public auction but to require only the tangible personal property be present at the auction and to expand the authority of an auctioneer to include the sale of intangible personal property.

C. Notice of Sales and Subscription Rights. The Executive Committee agrees with the staff proposal to amend Section 8270 to dispense with posted or published notice of sale of subscription rights.

D. Real Estate Property Sale Without Notice When Authorized by Will. The Executive Committee disagrees that it would be a better policy to require a notice of sale of real property unless the Will specifically grants the executor authority to sell without notice. It is disputed that the Los Angeles County Probate Policy Memorandum, Section 12.02 makes such a rule. The better rule is when the decedent's will authorizes or directs estate property be sold, the executor may sell with or without notices as he may determine.

E. Minimum Overbid for Real Property. The Executive Committee spent a good deal of time discussing this Section and various alternatives to it. It was decided that the current system works quite well, the public and brokers are familiar with it. We could see no reason to change it.

F. Personal Representatives to Refuse Overbid for Real Property. Our Executive Committee does not feel that current Section 785.1 should be amended; it is very important for the personal representative of the estate to have these kinds of powers. The sale could be made for tax purposes, it could be structured for various tax planning and/or other purposes. The personal representative has personal knowledge of the sale and the needs of the estate. All of these factors make it important that the personal representative have discretion in this area. The sale also might be for a fractional interest in property to another family member and this may be an important matter of consideration rather than price alone.

G. Special Notice and Estate Sales. The Executive Committee agrees that special notice be required on resale of real property. The Executive Committee does not feel that Sections 772 and 780 be amended so that special notice be given at the first step in the sale of stocks or bonds or real property. We may end up in a situation where real estate brokers file requests for special notice in all probates. Title may be brought into question when special notice was not properly given. Requiring Special Notice at this stage would increase Court involvement in a procedure that already works very well.

H. Procedural Differences in Real and Personal Property Sales that Might be Eliminated. The Executive Committee opposes any requirement for written bids in private sales of personal property. This is not a problem as currently found in probate practice. To require written bids for garage sales and other informal sales of low-value personal property is burdensome.

I. Exposing Property to Market; Price Not Disproportionate to Value. The Executive Committee opposes any requirement to show market exposure or value in the return of sale of personal property. The current provisions for sales of personal property work just fine. It is not necessary to have the Court to examine exposure of the property to market or value. Garage sales and other expedient methods of disposing the personal property would require additional Court involvement and additional unnecessary work.

2. Independent Administration of the Estates Act. As a separate matter, not on the Law Revision Commission's current agenda, the Executive Committee reviewed the current situation with the Independent Administration of the Estates Act regarding sales of real property. The Executive Committee endorses the Law Revision Commission's effort to have the Independent Administration of the Estates Act amended to make it absolutely clear that in sales of real property, there is to be no Court involvement in determining brokerage commissions, requiring publication of notice, and/or determining that the return of sale is 90% of the appraised value. For the Independent Administration of the Estates Act to be effective, these sales must be independent.

3. Memorandum 85-34 - Presentation of Claims.

A. Section 7901 - Notice to Creditors. The Executive Committee is very concerned about the Mennonite Board of Missions vs. Adams case and the Continental Insurance Company vs. Mosley case. We have appointed a special Subcommittee to look into the due process issue. The Executive Committee currently is very strongly opposed to adding Subdivision (b) to the 7901 to require actual notice to known creditors. We feel this would jeopardize the In Rem nature of probate proceedings and would cause undue problems. We will have more thought and input on this matter at such time as our Subcommittee reports.

B. Section 7911 - Documentary Support of Claim. The Executive Committee supports the requirement of an affidavit to support a creditor's claim. This procedure has been in place for many years and works fine. To allow otherwise may result in fraudulent claims.

C. Section 7923 - Late Claims. The Executive Committee supports the retention of the out-of-state creditors late claim procedures but would have the section amended to exclude such late claims if the out-of-state creditor is doing business in the State of California.

D. Section 7934 - Claim Covered by Insurance. The Executive Committee does not approve the change to no longer require prior Court approval to commence an action within the policy limits by serving the insurer. The reason for this is that there may be deductibles in the insurance policy, the cost of defense may not be covered and other matters should be looked into before the plaintiff is allowed to proceed directly against the insurance carrier. The personal representative of the estate may have a duty to defend even though there is insurance coverage and if he fails to respond relying on insurance coverage and finds out later that there is none, there could be real liability for the personal representative.

E. Section 7962 - Effect of Statute of Limitations. The Executive Committee approves new Section 7962.

F. Section 79.65 - Failure of Personal Representative to Report Act. The change in the time period from 10 to 30 days is approved by the Executive Committee.

G. Section 7967 - Action on Rejected Claim. The Executive Committee supports the ability of the Probate Court to hear and determine claims so long as no other action is pending between or among the parties. The concept of a statutory priority may also provide relief in this area.

H. Section 7968 - Reference to Determine Disputed Claim. The Executive Committee reviewed this area extensively and is of the same opinion as Commissioner Stodden that Section 7968(a) should be deleted. We support the inclusion of Section 7969, so long as it is binding arbitration.

4. Memorandum 85-35 - Payment of Demands.

A. Section 8620 to 8625. Allocation of Claims Between State and Surviving Spouse. The Executive Committee approves this Section as continuing existing law.

b. Section 8635 and 8636. Property Not Possessed by Personal Representative. The Executive Committee approves this Section as continuing existing law with the inclusion of some long-arm jurisdiction language to hopefully assist the Court in having these types of orders obeyed. [Please note that the Memorandum has incorrect Section numbers 9245 and 9246.]

C. Section 8603(b) may not give the beneficiaries ample opportunity to review the Executor's account if the account constitutes the final account after payment has been ordered by the Court. The personal representative should be required to state in the petition that it is a final account because the estate will be exhausted or in the alternative to have the petition indicate that it is the final account because the personal representative believes the estate will be exhausted.

D. Section 8604(a). It may be helpful to have a cross reference to the Section on judgments in the comments.

E. Sections 8630 to 8636 - Proration of a Estate Tax. There is a serious problem with these Sections as they relate to Internal Revenue Code Section 2207a. IRC Section 2207a requires that the QTIP Trust pay the tax to the surviving spouse highest marginal tax bracket, the proration statute could require, in some instances, the beneficiaries of the surviving spouse's residuary estate deliver property to the QTIP beneficiaries since the QTIP beneficiaries will have paid more than their pro-rata share of the Federal Estate Tax. We have not seen this problem yet as the surviving spouses have not yet died. It is suggested that in 8633(a) after the word "exemptions" the following language be inserted - "credits, deductions, and charges".

F. Section 8631(b)(2). This Section is rather poorly written. It is desirable to clean up the language.

G. Section 8607 - Trust for Contingent Claim. In Subsection (b), the Court may authorize investment in assets that are "legal investments for saving banks". This language seems to be a little out of place in current context and should be changed to provide investments authorized for personal representatives or trustees.

H. Section 8600. The definition of "established claims" would appear to exclude debts which were paid by the personal representative within the time during which claims could have been filed but for which no formal creditor's claim were presented, claims which were "allowed" by the personal representative under IEAA but not submitted to the court for approval, claims which were rejected by the personal representative and thereafter reduced to judgement by suit against the estate and claims payable following administration by a trustee pursuant to 8607. All such claims should be considered "demands against the estate" for the purposes of making an order of payment. There is no definition for a "charge against the estate". The \$900 limitation on wage claims may be antiquated. The Federal Bankruptcy Code allows a \$2000.00 priority to wage claims. This \$2000.00 is suggested as a better amount.

I. Section 8602. Subparagraph (b) should require a reserve sufficient to pay federal and state claims having priority to reflect the priorities in 8601.

J. Section 8606. The LRC may wish to consider the advisability of permitting a decedent's estate to prepay debts without the incurrence of a prepayment penalty. This is somewhat analogous to successors in interests of time certificates of deposit.

K. Section 8609(b). This section is no longer needed as the Notice of Creditors must be now given for letters to issue.

L. Section 8623. The words "to show cause" need to added after the word "order" in line 3.

M. Section 8635. Concedeing the difficulty in this area, should the personal representaive have the "duty" to recover under this section?

5. Memorandum 85-36 - Accountings.

A. Section 8502. The Executive Committee reviewed extensively Sections 8501 & 8502. After first rejecting 8502, if Section F2 was removed, the Executive Committee reconsidered the situation and realized the difference between 8501 and 8502 is that 8501 calls for a chronological accounting and the new proposed Section 8502 allows for a categorical accounting. With this understanding the Executive Committee approves the new concept contained a new Section 8502.

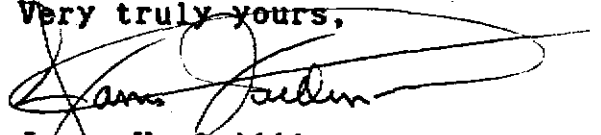
B. Section 8522. The Executive Committee approves the removal of the right to a jury trial in the area of contest of account.

C. Section 8524 - Settlement of Claim on Property Made or Allowed. The Executive Committee suggests that the following language be inserted after the word "due" in Subsection (a) "without regard to when the payment was made". The reason for this is that Courts have routinely construed the meaning of the phrase "the debt was justly due", to mean that the personal representative actually paid the amount for which no claim was filed during the 4-month claim period. This is frequently not the case. As a result, the personal representative is surcharged with the payment and the Internal Revenue Service will not allow the payment as a deduction against the Federal Estate taxes. In order to conform this Section to frequent practice and to make such payments deductible, it is suggested that the language described above be added.

Mr. John H. DeMouilly
March 12, 1985
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Looking forward in seeing you in Sacramento on the 21st and 22nd of March.

Very truly yours,



James V. Quillinan
Attorney at Law

JVQ/agc

cc: Ken Klug
Chuck Collier
Ted Cranston