

Memorandum 85-46

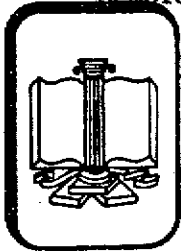
Subject: Study L-811 - Independent Administration of Estates (Waiver
of Advice of Proposed Action)

In 1984, Probate Code Section 591.4 was amended by Commission-recommended legislation to require the advice of proposed action to "state the material terms" when real property is to be sold, and to give at least 20 days' notice when notice is mailed. Exhibit 1 to this Memorandum is a letter from Professor Benjamin D. Frantz of the McGeorge School of Law pointing out that the 20-day delay after mailing before the sale may be consummated may deter a potential buyer.

The staff thinks the notice period should not be shortened, but instead recommends that the Commission add an express provision to the independent administration statute to make clear that those entitled to the advice of proposed action may waive it in writing or may consent in writing to the proposed action. This would codify existing practice (see McCarroll, 1 California Decedent Estate Administration Supplement § 7.130, at 202 (Cal. Cont. Ed. Bar 1984)). Also it would address the delay problem without shortening the notice period generally. This clarification would be accomplished by making amendments to Probate Code Sections 591.3 and 591.5 (set out in Exhibit 2 to this Memorandum) in Assembly Bill 196.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

March 22, 1985

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Attention: Mr. John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

For those that like independent administration, I think that it is a step in the right direction to permit the personal representative to sell real property under Probate Code Section 591.4. My criticism goes to the 20-day mailing time for the advice of proposed action requiring the statement of all material terms including "if applicable" the sale price.

Until the personal representative receives an offer, it is really impossible for him to state "the material terms of the transaction," which means that he cannot accept the offer until after 20 days ^{after} he has mailed the advice of proposed action -- in which event the "bird has probably flown."

With best regards, I am

Very truly yours,

Benjamin D. Frantz
BENJAMIN D. FRANTZ
Professor of Law

BDF:bk

cc: Mr. James A. Willett

EXHIBIT 2

Amendment to Probate Code Section 591.3591.3. (a) Except as provided in subdivisions (c) and (d):

(1) Prior to the consummation of any of the actions described in subdivision (b) without court supervision, the executor or administrator to whom authority has been granted to act without court supervision shall advise the persons affected by the proposed action of his or her intention to take such action.

(2) The advice, known and referred to in this article as "advice of proposed action," shall be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and to persons who have filed a request for special notice pursuant to Section 1202.

(b) The actions requiring such advice are all of the following:

- (1) Selling or exchanging real property.
- (2) Granting options to purchase real property.
- (3) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in Sections 770 and 771.5 when sold for cash.
- (4) Leasing real property for a term in excess of one year.
- (5) Entering into any contract, other than a lease of real property, not to be performed within two years.
- (6) Continuing for a period of more than six months from the date of appointment of the executor or administrator of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death, or the sale or incorporation of such business.
- (7) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(8) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan association accounts, in units of a common trust fund described in Section 585.1, in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of (A) those obligations, or (B) repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest.

(9) Completing a contract entered into by the decedent to convey real or personal property.

(10) Borrowing money or executing a mortgage or deed of trust or giving other security.

(11) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, such property, or determining decedent's claim to real or personal property title to or possession of which is held by another.

(c) The advice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(d) The advice of proposed action need not be given to any person who waives it in writing. The waiver may be executed at any time before or after the proposed action is taken. The waiver may waive particular aspects of the advice, such as the service, mailing, or time requirements of Section 591.4, or the giving of the advice in its entirety for a particular proposed action, for a class of proposed actions, or for all proposed actions generally.

Amendment to Probate Code Section 591.5

591.5. (a) 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.

Note: This)
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(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 unless the person was not required to be given advice of proposed action because the person consented to the proposed action or waived advice of proposed action as provided in subdivision (c) or (d) of Section 591.3.