

5/3/85

Third Supplement to Memorandum 85-50

Subject: Study L-1028 - Probate Code (Independent Administration--
communications concerning real property sales)

Attached to this memorandum are additional letters we have received concerning inclusion of real property sales under independent administration. The letters may be summarized as follows:

Exhibit 1 (Stephen G. Gould)--court confirmation should be required

Exhibit 2 (Executive Committee, State Bar Estate Planning, Trust
and Probate Law Section)--independent administration proper

Exhibit 3 (Thomas M. Brownscombe)--independent administration
proper

Exhibit 4 (Luther J. Avery)--independent administration proper

Exhibit 5 (Judge Gerald F. Schulte)--court confirmation should be
required

You should read these letters with care.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1
LAW OFFICES OF

TITCHELL, MALTZMAN, MARK, BASS, OHLEYER & MISHEL

HASKELL TITCHELL
OF COUNSELRICHARD D. MALTZMAN
MELVYN I. MARK
PHILIP B. BASS
MICHAEL L. OHLEYER
R. DAVID MISHEL
STEVEN L. SWIG
STEPHEN G. GOULD
THOMAS M. BRUEN
ROBERT TED PARKER
PHILIP H. WELCH IV
CHARLES E. STEIDTMANN
THOMAS A. ACKLEY
KAY ELAINE RUSTAND
GEOFFREY M. FAUST
STEVEN B. SACKS
LEMOINE SKINNER III
JANET RAE MONTGOMERY
JAMES S. MADOW
EDWARD G. LIEBERMAN
PETER M. RADIN, JR.

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278951 TMNB UR

April 25, 1985

California Law Revision Commission
4000 Middlefield Road, Room D2
Palo Alto, California 94306Re: Reinstitution of Court Confirmation
Proceedings for Probate Real Property
Sales, Exchanges, and Grants of Option
(Prob. Sec. 521.2, et seq.)

Dear Commission Members:

I am writing to urge your support for restoration of mandatory court confirmation of all sales, exchanges, and grants of options relating to real property of probate estates.

In my experience, overbids at court confirmation hearings frequently increase the amount realized in sales by probate estates.

Equally important, the mere requirement that sales be returned to the court for confirmation results, in my opinion, in estates receiving higher bids in the first instance regardless of whether there is a subsequent overbid. In the confirmation proceedings I have handled and observed, probate judges have carefully adhered to the requirements that the court examine into the necessity of the sale, that it find the sale to have been legally made and fairly conducted, and in particular that it find the property to have been adequately exposed to the market. This

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inquiry is not an idle exercise. Judges routinely refuse to confirm sales because the property was never listed in the multiple listings or otherwise exposed to the market, or because prospective purchasers were denied access to inspect the property (and have appeared in court to complain about it) or because the property was never appraised, or because a published bidding procedure was not followed, to the prejudice of a bidder and the detriment of the estate.

In the past, these and similar problems have occurred routinely even though the parties have presumably known that the probate court would be reviewing the sale. One can only speculate what abuses will occur when that safeguard is removed. Perhaps one indication is this: In the 120 odd days that personal representatives have been authorized to sell real property without court confirmation, I have received two form letters (sample enclosed) from a real estate broker offering "a minimum \$500 referral fee" for probate listings referred to the broker which are sold and close escrow. I am cynical enough to suspect that the elimination of mandatory court confirmation will affect the attitude of a good many executors and/or attorneys toward the propriety of receiving a "referral fee," or selling on preferential

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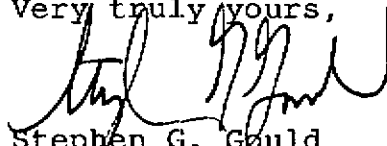
terms to a friend or relative, or selling "without advertisement," or a myriad of other questionable practices.

One final consideration deserves particular attention. The court confirmation procedure is often the only direct contact that parties interested in the estate, including both personal representatives and beneficiaries, have with the probate court. In my experience their reaction to the confirmation procedure has been uniformly positive. The representatives, the beneficiaries, and the prospective purchasers all have an opportunity to watch an impartial judge conduct a fair, understandable proceeding in open court. In every confirmed sale with which I have been associated, the representatives and beneficiaries have emerged from the hearing satisfied that they received the best price they could for the property. The bidders, both successful and unsuccessful, all understood that they had a fair opportunity to purchase the property. In short, the safeguards of the confirmation proceeding not only have produced a fair result, but they have given the appearance of a fair result under a prompt, simple, inexpensive procedure which is readily understood by sellers and purchasers alike. The only complaints I have heard about the confirmation procedure have been from real estate brokers.

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I wonder whether the situation won't change under the
new law.

Very truly yours,



Stephen G. Gould

SGG:cms

Enclosure

cc: The Honorable Raymond J. Arata, Jr.
Jerome B. Sapiro, Esq.

HOMESTEAD



REAL ESTATE CO.

6371 MISSION STREET
DALY CITY, CA 94014

6371 MISSION STREET • DALY CITY, CA 94014

Telephone
992-0233

February 7, 1985

Stephen G. Gould
Titchell, Maltzman, Mark,
Bass, Ohleyer & Mishel, APC
650 California Street, 29th Floor
San Francisco, Ca.
94108

Dear Mr Gould:

In the event that the estate of _____ has real property in the Bay Area which must be sold, Homestead Real Estate Co will pay you a \$500.00 referral fee for any listings which are sold and close escrow.

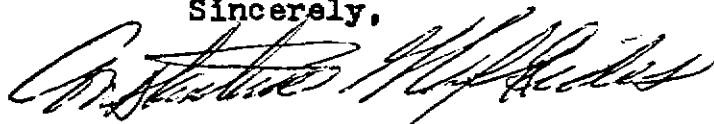
AB 3085, recently enacted by the State Legislature, permits executors and administrators, without court supervision, to grant exclusive rights to sell real property for a period not to exceed 90 days, where necessary and advantageous to the estate. This permits either executors or administrators to step in the decedants shoes and sell the properties without advertisement and subject only to court confirmation.

Homestead Real Estate Co offers first-class professional services and is well informed on probate matters. Should you retain Homestead Real Estate Co as the estate's agent, I will instruct the title company to pay you a \$500.00 referral fee.

Please feel free to contact me for a professional market analysis of the subject property, which I will be happy to furnish at no cost or obligation to you.

P.S. A minimum \$500.00 referral fee is paid.

Sincerely,



Mr Constantine Glafkides

Exhibit 2

**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. PLAGEMAN, JR., Oakland
JAMES F. ROGERS, Los Angeles
HARLEY J. SPITLER, San Francisco
ANN E. STODDEN, Los Angeles



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Executive Committee
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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

April 26, 1985

John H. DeMouilly, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Real Property Sales, Exchanges and
Options - Independent Administration

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, is strongly opposed to the proposal of Jerome Sapiro and others to eliminate sales or exchanges of real property or the granting of options relating to real property from independent administration.

The basis for our opposition is as follows:

1. The Independent Administration of Estates Act is itself optional. It applies only if the personal representative petitions the court for authority to administer the estate under independent administration.

2. A will can by its terms preclude administration pursuant to the Independent Administration of Estates Act.

3. Probate Code Section 591.1 provides that utilization of the powers granted a personal representative under the Independent Administration of Estates Act is optional. The procedure is an in-and-out procedure. That is, the personal representative can elect to handle certain matters under independent administration and other matters under court supervision. Consequently, any one who is granted powers under the Independent Administration of Estates Act can, if he or she wishes, handle all real property transactions under court supervision, that is, with confirmation of sale.

4. All provisions in the Probate Code dealing with sales in general, Sections 750-764, and sales of real property, Sections 780-794, remain in the Code and are available in the administration of any estate, even though authority has been granted to administer the estate under independent administration.

5. There at no time has been any provision for court confirmation of sales made by testamentary trustees. The trustees can sell real property to third parties without court involvement. Court review arises in connection with the report of a sale in an account.

6. In connection with inter vivos trusts, the probate court has long had jurisdiction over various aspects of an inter vivos trust, pursuant to Probate Code Section 1138. That section contains no provisions for court confirmation of sale of real property by a trustee of an inter vivos trust.

7. Under the guardianship and conservatorship law, the court is authorized to grant independent powers to the guardian or conservator, pursuant to Probate Code Section 2590. Among the powers which can be granted are the powers to grant and take options and to sell at public or private sale real or personal property. These powers can be exercised without court confirmation. They are also optional powers and do not preclude court confirmation of a sale in a guardianship or a conservatorship, if it is deemed appropriate.

8. The Independent Administration of Estates Act as originally introduced in 1974, as AB 517, provided for sale or exchange of real property and granting of options to real property under independent administration. That bill was sponsored by the State Bar. During the course of the legislative hearings, those provisions relating to sale or exchange of real property and the granting of options under independent administration were deleted because of opposition particularly from the newspapers. The State Bar thus has supported sale or exchange of real property or the granting of options under independent administration for a period of more than ten years.

9. The poll of members of the Estate Planning, Trust and Probate Law Section in 1983 showed that in connection with sales of real property 694 approved requiring the court to confirm the sale while 426 disapproved. However, 660 people also approved allowing sale without court confirmation under independent administration. Certainly the two answers were not mutually exclusive and most persons answered both questions. The majority of the persons answering both questions approved both court confirmation procedures and the alternate procedures of sale under independent administration.

10. In an as yet unpublished survey of probate practices in the 50 states and the District of Columbia undertaken by the American College of Probate Counsel, one of the questions was whether sales of real property required court confirmation. Some 22 states require no court order in connection with sales of real property. Another 15 states do not require a court order in connection with sale of real property if there is a power of sale in the will. Several other states do not require a court order if all parties involved consent to the sale of real property without order of court. Those states which mandate that real estate sales must be handled through the court are a very distinct minority.

11. The Uniform Probate Code does not require court confirmation of sales of real property (UPC Section 3-715), except in certain self-dealing situations (UPC Section 3-713).

12. A trustee in bankruptcy can be granted power to sell real property without a court hearing (11 USC Section 363(c)(1)).

13. A letter written on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section in 1983 to the Law Revision Commission suggesting various improvements in probate practice in California (many of which were incorporated in AB 2270 in 1984) included the proposal that sales or exchanges of real property or the granting of options be added to the independent powers exercisable by a personal representative pursuant to the Independent Administration of Estates Act.

14. Sale of real property under independent administration does not lessen the personal representative's fiduciary obligations to the estate and those interested therein.

15. Under proposed administration, if any person objects to a proposed sale of real property either in writing or by obtaining a temporary restraining order, the personal representative will proceed with the sale through the court, not independently. Thus, anyone interested in the estate who feels that court confirmation is appropriate always has the means of assuring that the matter will be presented to the court for consideration.

16. While there is undoubtedly overbidding on many sales brought before the court, there is a feeling, which unfortunately cannot be documented, that persons do not make their best offer to an estate because that offer may have to be raised as a result of the overbid procedures. Certainly there is no proof that the estate always maximizes its sales proceeds as a result of possible overbidding.

17. Certain provisions now contained in AB 196 allow the grant of independent powers except in connection with the sale or exchange of real property and the granting of options. This, if enacted, would solve a problem which has developed in some counties wherein the court requires a bond for the value of real property if there is an ability to sell it under independent administration without court confirmation. In short, it would allow all other independent powers but preserve court confirmation as to real property.

18. In many cases where there is hostility among the beneficiaries, the personal representative would want to have the protection of the court order confirming sale and it is anticipated that in such situations independent powers, even if existent, would not be utilized.

19. There are other situations where the personal representative may wish to seek court confirmation of a sale so that the court will set the broker's commission.

20. There are many situations, however, where all of the parties interested in the estate agree to the terms of the sale by consenting in writing to the terms, waiving advice of proposed action or not objecting to the advice of proposed action. In those situations the personal representative should have the option to proceed without court confirmation to expedite the proceedings and perhaps maximize the price through more intensive bargaining with the proposed purchaser on the sale price.

21. It is believed that overbidding on real property occurs on fewer than one-half of all probate sales. Mr. Sapiro mentions overbids on 22% to 25% of sales in San Francisco. To mandate court confirmation on all sales is not justified by the possibility of overbidding.

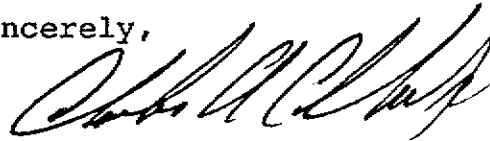
22. As the letter from Peter Muhs of April 9, addressed to the Commission points out, contingencies on a sale often make it difficult to sell property through the court.

23. In summary, the ability to sell real property, to exchange real property or to grant options relating to real property under independent administration should be retained in the Code. That is the law as of January 1, 1985. Those persons who object to its usage can continue to sell property exclusively through court confirmation. To mandate that all real property must be sold only through court confirmation in a probate is unduly restrictive, contrary to the general trend of simplifying probate administration and certainly inconsistent with the handling of sales of real property through inter vivos trusts, testamentary trusts and frequently through guardianships and conservatorships.

John H. DeMouilly, Esq.
April 26, 1985
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For the various reasons set forth above, the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, urges the California Law Revision Commission to retain the existing provisions on sales or exchanges of real property and the granting of options under independent administration.

Sincerely,



Charles A. Collier, Jr.
for the Executive Committee,
Estate Planning, Trust and
Probate Law Section, State
Bar of California

CAC:vjd

cc: Kenneth Klug, Esq.
Theodore Cranston, Esq.
James Quillinan, Esq.
Matthew S. Rae, Jr., Esq.

Exhibit 3

THOMAS M. BROWNSCOMBE
DENNIS P. KEEGAN

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GEORGE W. MURPHY
(1892-1983)

April 29, 1985

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, California 94306

Dear Commission Members:

Re: Restoration of court confirmation
of all probate sales

My views on the I.A.E.A. in general are expressed in a letter to the Commission dated August 11, 1983. However, I feel that the amendments which took effect on January 1 are a small step in the right direction and should not be reversed as requested by Jerome Sapiro, Esq., and others.

In my estimation, Mr. Sapiro "strains at a gnat but swallows a camel." If he feels that the public needs the "safeguards" provided by probate proceedings, he could better devote his energies to abolition of joint tenancies, inter-vivos trusts, contracts to pay on death and all the other popular will substitutes through which a majority of wealth passes at death.

The probate judges who have written to the Commission surely do not wish to convey the impression that their "monitoring probate of decedents' estates" furnishes comprehensive protection to the beneficiaries, or diminishes the need for them to look out for their own interests. This need is not due to any lack of good will or diligence on the part of the judges, but rather to their lack of time, information and facilities for such a Herculean task. A vast amount of information not available to them would be required to determine whether any particular estate is being properly and prudently administered.

As an example, consider the notorious Estate of Anderson, 149 CA3d 336, 196 C.R. 782, where after a 12 day trial a corporate executor was found to have mismanaged the estate to the extent of over \$1,500,000, although an imprudent sale which had been confirmed by the court was the cause of most of the damage. This is not a reflection on the probate judge, only an illustration of the inadequacy of the protection afforded beneficiaries by the system of court confirmation.

The views expressed by the judges do not give the complete picture. First, to force all estates to following the "cumbersome, expensive and time consuming court supervised procedures required by the Probate Code" in order to head off a very small proportion of unscrupulous brokers and personal representatives is an over-kill. Also, the representative commonly is the only or one of the beneficiaries who would suffer any loss, and there are remedies for fraudulent conduct. Second, while bids are sometimes raised in court, this may be due to the unusual nature of the procedure. Often the listing broker submits a bid of 90% of the appraised value even though the prospect is willing to pay considerably more, but holds back because he knows he will have a second chance to bid in court. It is by no means certain that the common practice of individuals in selling their own property by dickering through offers and counter-offers would not secure a fair price.

In recent years a substantial number of states have enacted legislation reducing or eliminating mandatory court supervision over probate proceedings. In California, the 1976 and subsequent amendments to Probate Code §§1120, et seq. have done away with such supervision over testamentary trusts, indicating a public policy that probate courts are available to help those who ask for assistance, rather than being general overseers of probate administration. It is indeed ironic to find probate lawyers and judges, normally conservative people, espousing governmental paternalism.

Very truly yours,

Thomas M. Brownscombe

THOMAS M. BROWNSCOMBE

TMB:bl



Exhibit 4

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JAMES WISNER
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JOHN S. McCLINTIC
RICHARD HANDEL
REBECCA A. THOMPSON
KENDALL A. LAYNE
LEWIS WARREN

May 1, 1985

OUR FILE NUMBER

9911.81-35

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

SALE OF REAL PROPERTY UNDER
INDEPENDENT ADMINISTRATION AUTHORITY

Gentlemen:

I am a partner in a San Francisco law firm. I have specialized in probate, trust and estate planning matters for over 25 years. The proposal of the California Law Revision Commission ("CLRC") adopted in 1984 by the legislation as Probate Code Section 591.2-591.4 to authorize, among other things, the sale of real property of an estate under independent administration authority is an important improvement in the law.

I understand your May 16-17, 1985 meeting is considering a proposal to rescind that authority and perpetuate the cumbersome and expensive formal probate procedures previously in use. I oppose the rescission of your policy favoring independent administration for sale of real estate at the time of death.

In designing the approach to transfer of property at death, a key issue, if not the key issue, is whether the family of the decedent is going to be able to inexpensively and expeditiously pay the debts and taxes, and distribute the property of the decedent with a maximum concern for the needs of the family. I have for years been counselling clients to use inter vivos trusts as will substitutes to avoid the publicity, the delay and the expense of probate proceedings. The ability to use independent administration authority when clients have not planned in advance to avoid probate is a valuable tool for the benefit of the family. I strongly support the authority to sell real property at the time of death with the actor to act under independent administration authority.

It would be a mistake to retain an invariable rule that all transfers of real property at death must be through a court proceeding. First, such a policy confirms the belief of the public that such proceedings are simply to fatten the purse of a lawyer. Second, the requirement that a sale of real estate go through court proceedings causes substantial additional time and paperwork. In addition, in my experience, probate sales tend to maximize real estate brokers' commissions and to reduce the ability of estate representatives to negotiate less expensive methods of selling real estate and tend to drive down real estate prices paid to estates.

The principal justification for a formal probate procedure, including the confirmation of all real estate sales, leases, options or exchanges in court, is that no one can be trusted, and all conduct must be reviewed publicly and approved by a probate court. The fact is that most people are honest and that there are adequate legal remedies available without need for probate court intervention, particularly at the time the family is trying to sell a piece of real estate after death. The fact is that the public is continuously upset by the delays of probate and the expense of probate. The legal system is in disrepute in large, part because of the probate systems because at death that is the one place where one time or another all people get involved in the courts.

The summary probate procedures have been helpful in expediting smaller estates. The use of independent administration authority and related procedures for reducing delay and expense is needed to give to the not-so-small estate the ability to have somewhat the same benefit as the law provides in a summary probate procedure.

If the estate or its advisers want to use the court supervised probate sale of real estate, they can do so under the 1984 Probate Code amendments. Thus, if the executor believes there is some benefit in the probate sale of real estate, that avenue is open under the present law. It seems to me to be most inadvisable policy to deny to others the right to proceed under independent administration authority and avoid a court supervised sale. Reversion back to the old policy appears to me to be an attempt to complicate the law for the benefit of lawyers.

California Law Revision Commission
May 1, 1985
Page 3.

In fact, while I realize the CLRC has been engaged in a tremendous effort to modernize the California Probate Law, I wonder if you realize that formal probate, as utilized in California, is the exception in the world. Most countries have civil law and utilize systems much less restricted than those of California. Even England has less restrictive procedures than California. See e.g., Fratcher, "The English System: Simplified Probate in a Similar Context", from Halbach, Death, Taxes, and Family Property (West, 1977).

To withdraw from the Probate Code amendments adopted in 1984 even before there is experience under the new procedures is not desirable social policy. There is ample experience the old procedures were undesirable. There is no evidence the new procedures under Probate Code Section 591.2 et seq. cause problems. I recommend you give law reform a chance and not recommend repeal of the 1984 reform.

Yours sincerely,



Luther J. Avery

LJA:bal
841.1.clrc

cc: John H. DeMouilly, Esq.

Exhibit 5
SUPERIOR COURT OF CALIFORNIA
FOR THE
COUNTY OF RIVERSIDE

CHAMBERS OF
GERALD F. SCHULTE
JUDGE OF THE SUPERIOR COURT

May 1, 1985

COURT HOUSE
4050 MAIN STREET
RIVERSIDE, CALIFORNIA 92501
(714) 787-6637

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Restoration of Court Supervision over
Real Property Sales in Probate
Probate Code §591.2, et seq.

Dear Commission Members:

I am informed that later this month you will be considering the above matter as part of your agenda.

I have been the Probate Court Judge of the Superior Court for the County of Riverside for approximately the last ten years.

Based upon my experience, I support the restoration of court control and supervision over real estate sales, exchanges and grants of options under the Probate Code.

Court supervision is necessary to assure that a fair price is received for estate property, and to assure that sale proceeds are protected for the heirs and beneficiaries of estates.

The present system allows an opportunity for the unscrupulous.

The mere giving of an advice of proposed action puts an unrealistic burden on those who have an interest in the estate.

Presently, there is the problem of adequate bonding under independent administration.

It regularly happens, particularly in the case of business property, that the Court receives overbids. Some of these overbids are substantial.

May 1, 1985

I am familiar with the amendments to Probate Code Sections 591.2, 591.3 and 591.4 recommended by the State Bar Committee on Estate Planning, Trust and Probate Law. I urge that they be adopted.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Gerald F. Schulte".

GERALD F. SCHULTE
Judge of the Superior Court

GFS/mg