

#L-1028

May 10, 1985

Fifth Supplement to Memorandum 85-50

Subject: Study L-1028 - Probate Code (Independent Administration)

Attached are four additional letters relating to the requirement of court confirmation for real property sales. Two of the letters are from Mr. Sapiro responding to the letters previously distributed from Mr. Muhs and Mr. Brownscombe. We urge you to read the letters from Mr. Sapiro prior to the meeting so that it will not be necessary for Mr. Sapiro to orally present the information in the letters at the meeting.

Mr. Sapiro sent his letters by certified mail. This resulted several days delay in our receiving the letters; but, although there is little time allowed for you to study the letters before the meeting, we hope you will have an opportunity to do so.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

LAW OFFICES
JEROME SAPIRO
100 BUSH STREET
SAN FRANCISCO 94104
(415) 362-7807

May 6, 1985

CERTIFIED MAIL

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

Through John DeMouilly, Executive Secretary

Re: Restoration of Required Court Supervision
as to Probate Real Property Sales,
Exchanges and Grants of Option

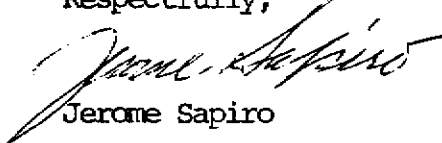
Dear Mr. DeMouilly:

Herewith are two letters to the Commission from me, both dated May 6, 1985, - one being in response to the Peter L. Muhs (of Cooper, White & Cooper) letter dated April 9, 1985, and the other being in response to the Thomas M. Brownscombe letter dated April 29, 1985.

It is intended that my letters assist the Commission and help to expedite its hearing on May 16th, 1985.

Hence, I request that you immediately reproduce my said letters and make copies thereof immediately available to every member of the Commission so that they will have time to read and consider the contents.

Respectfully,


Jerome Sapiro

JS:mes
Encs. 2

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May 6 , 1985

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4000 Middlefield Road, Rm. D-2
Palo Alto, CA, 94303

Re: Restoration of Required Court Supervision
as to Probate Real Property Sales,
Exchanges and Grants of Option

Hon. Commission Members:

I write in response to letter dated April 9, 1985 to the Commission of Peter L. Muhs of Cooper, White & Cooper. At this writing, this is the only letter received by the undersigned opposing the request for reconsideration and restoration of Court supervision as a required procedure in the area of probate sales, exchanges and grants of option. I know of one other letter from source outside of San Francisco.

As against this I do know that the Judges of San Francisco, San Mateo and Humboldt Counties have urged the Commission to require such Court confirmation procedures, based on their experience, observations and specific reasons. Such Judges who preside over their respective Probate Courts know better than any of us concerning the benefits to the estates and all persons interested therein and the protections afforded by Court Supervision.

In addition, 694 attorneys in the State Bar Estate Planning, Trust & Probate Section, of which I am a member, voted in favor of requiring Court Order confirming real property sales (the former law), being a majority of the ballots cast. There were 546 votes disapproving the allowance of sale under independent administration, and substantially less votes disapproving the old requirement of Court supervision.

I do know that many attorneys have written to you supporting the restoration of the requirement of Court supervision, particularly from San Francisco. The San Francisco Lawyers Club has passed a resolution for such restoration to be put before the State Bar Conference of Delegates at its next convention.

I have been licensed to practice law in the State of California for over 45 years and have during that period maintained my office in the City and County of San Francisco. My field of emphasis is probate.

Following Mr. Muhs remarks and using the same paragraph numbering, to assist you, my comments are:

1. In my experience, banks, savings and loan associations and other financial institutions have made prebid commitments for buyers who make bids or offers in probate sales of real property. Realty brokers have been very helpful to buyers in the matter of financing. Of course, there was one period a few years back when skyrocketing interest rates put financing out of reach, but that was an abnormal situation which did not continue.

a. There are some sales made and approved in probate on credit and in some instances estates do take back the paper and security, subject to approval of the Probate Court. An estate may do this to get the tax benefits of an installment sale or to realize the highest price available. This allows not only the tax benefits, but also interest income to the estate and to beneficiaries after distribution. Probate Courts do approve such sales if they appear to be in the best interests of the estate.

b. Obviously, an unqualified buyer or an unqualified property is not going to be approved for loan by financial institutions, whether the sale be subject to Court confirmation or outside probate.

c. Probate sales do not lack for bidders or buyers. If property is over-appraised or if a year has passed, a reappraisal for sale can be requested and obtained. Today Probate Referees perform good appraisal services and assist thereby in realizing a proper price upon sale of the real property appraised. However, Court confirmation is necessary to assure that the sale price is in line with the appraisal, under applicable law.

d. I know that Mr. Muhs and his said firm have represented a certain Bank executor in a case where the sole beneficiary of the estate left that firm and came to me for legal assistance, asserting claims against both the Bank and the firm. This was settled without litigation. This may explain some of his statements. It is known that Banks as compared to other financial institutions have been tighter on some loans. Perhaps this is why Mr. Muhs opposes Court supervision, aspires for free-wheeling and takes the position that he does.

2. Mr. Muhs suggests and inferentially complains that a Probate Court would not approve the making of a sale subject to contingency and delay of waiting for sale of another piece of property to be made. This in and of itself supports the requirement of Court confirmation. The 48 hour escape provision could involve delays far in excess of said period, whether the sale be in probate subject to Court confirmation or be an outside private sale. In a Court confirmation sale an attorney could have a "48 hour" wait adapted to the best interests of the estate in order to obtain Court approval and realize the highest price available by not petitioning the Court immediately and by waiting a reasonable time before so doing; and by providing that the Seller could escape said clause after the lapse of the reasonable time set. After the lapse of said time the Seller estate could sell to the next highest bidder or anyone on terms acceptable to the estate, subject to Court approval.

a. If the "48 hour escape" were only for said period, there would be no problem to the estate as indicated above.

b. If the delay period were indefinite and if the "48 hour escape" clause refers to the time of notice to be given by the Seller, Mr. Muhs would visit potentially great delay and contingencies on estate sales of real property, and delay is one of the things that some supporters of the Independent Administration of Estates Act have complained about.

3. There is no reduction of price in offers made at

probate sales subject to Court confirmation. Certainly some buyers will try to steal property, whether the sale is subject to Court confirmation, under the IAE Act, or outside of probate. But, in probate sales subject to Court confirmation, the estate is protected by the Court and the confirmation procedures. Under the IAE Act or outside of probate, bids can be low and the terms non-protective. I recall one sale attempted by a Bank at \$151,000.00 and when the Bank was removed as fiduciary the sale of the said interest in real property was made for \$265,000.00. I recall another real property sale overseen by Bank and attorneys outside of probate which had a subrogation provision not defining the amount the deed of trust received by the seller was to be subrogated to and not limiting the time within which subrogation could occur. Although noone contends that the Probate Court can catch every error or wrongdoing, it does a very good job in discovering many of same and thereby protecting our estates, their beneficiaries and all other persons interested therein.

a. Mr. Muhs admits that even a negotiated bid can be commenced at a lower level, but in probate confirmation-type sales the 90% of appraised value protects against too low a start. The insertion in sales notices of the reservation of the right by the estate representative to reject any and all bids and offers allows for some negotiations to boost offers or bids in the probate private sales, which are subject to Court confirmation. The sale is noticed for a particular date or at any time within one year after the date of first publication. The listing broker for the estate (usually with a Board multiple listing) has a pretty good idea of what will be acceptable and in that later period can attempt to encourage submission or resubmission of bids within the ball park.

b. The negotiated sale without Court approval is inferior because it takes away the chance to get an increased bid and also deprives the estate of the protections of Court supervision.

4. The advice of proposed action, even if amended as proposed herein, does not adequately inform or protect beneficiaries. It does not inform them that an objection will accomplish the following:

- a. Make the sale subject to Court scrutiny concerning due procedures having been taken;
- b. Assure the estate that the property has been reasonably exposed to the market; and
- c. Assure that the price offered is in line with appraisal of the property as required by law.

The lay beneficiary usually is unknowing, not familiar with the procedures, and is not readily disposed to consult an attorney because of the fees and costs that may be involved.

For the proposed notice to say in effect that this is the telephone number of the estate representative, - if you have any questions call me, is non-protective and a poor substitute for Court supervision. It tends to lull the unwary into a false sense of security. An estate representative would push for the sale that he, she or it is

proposing and give lip service to such caller.

The lay beneficiary and the estate are better by protected by Court confirmation procedures in all cases. The layman is usually disinclined to hire an attorney. From my experience the lay beneficiaries put too much trust in the word of the estate representative and are sometimes led like a lamb to slaughter.

Contrary to what Mr. Muhs states, even with an objection by a beneficiary title can be passed to a bona fide purchaser without knowledge of the objection or restraining order, and, the estate is the loser.

The proposed bonding changes may increase the bond by the amount of the value of the real property at the time of granting of letters, if it appears that the real property may or will be sold in probate. This is an inadequate protection, because:

a. At the time of qualifying an estate representative, in most cases, it is not known whether a sale of real property may become necessary or may be made.

b. At that time there is no appraisal of the property and stating a value for bond is usually an "uneducated guess" - hence, the value statement may be substantially inadequate.

c. There is no provision to take care of the differential between the value stated and the increased value realized on sale, and there is no coordinating provision in this regard (i.e. having bond appropriately increased before close of sale and escrow pursuant to Court order).

5. Being in and subject to probate administration means just that and estates should be protected in the matter of real property sales, exchanges and grants of option in probate by Court supervision as a required procedure. The IAE Act procedures increase the potential for and risk of loss to estates and all persons interested therein.

a. Mr. Muhs suggests preliminary distribution as an alternative to be followed by sale of the real property outside of probate. In so doing he builds a "snow man" and departs from the real issue - that estates and all persons interested therein need the protection of required Court supervision in this area.

b. By Probate Code §650 procedures and joint tenancy terminations property is not subject to probate. Of course, the surviving spouse must make election if any property coming to her or him is to be administered. Such property when cleared would not be subject to Court confirmation. But in probate the protections and benefits that the law affords by Court supervision should be assured and required.

c. The relative very small purported saving in time and costs claimed for IAE Act sales is not worth the protection and benefits lost by the avoidance of Court confirmation procedure.

Ltr. to California Law Revision Commission
dated May 6 , 1985

d. As part of his snowman approach, Mr. Muhs talks about preliminary distribution and then an estate being unable to pay its obligations. If an estate needs money to pay Federal Estate Tax, creditors and obligations of the decedent and the estate, it is better that probate sales be Court supervised and that there be no preliminary distribution of either the property or its proceeds until such obligations are adequately provided for. This is good procedure and law.

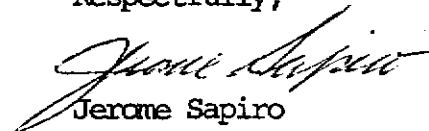
6. Anyone who has practiced in the Courts over the years knows that the protection of estates and all persons interested therein is part of the function of Probate Courts, their Commissioners and Examiners.

a. Unscrupulous, erroneous or improper acts and procedures should not be left to disciplinary or ethical procedures after "the horse is out of the stable" as Mr. Muhs suggests. He refers, apparently, to the misgivings of attorneys, but we are also faced with and need the protection from similar acts of executors and administrators and brokers, which is afforded by Court confirmation. As for attorneys, when the loss is sustained a disciplinary procedure means time and expense and does not assure full recoupment. Who would suggest keeping an estate open for this, when there is a way to protect against some of same by required Court supervision?

b. Mr. Muhs appears to concede that a better form of notice or advice explaining the rights of beneficiaries could be statutorily enacted and included in the initial probate notice or in an expanded advice of proposed action. Even then, Courts knowing and being the best to observe and report what occurs in their respective county Probate Courts should be given the right to deny the right to sell, exchange and grant options as to real property under the IAE Act of their own motion or in accordance with local Superior Court Probate rules and policy, whether objection has been made by beneficiary or not, to assure the protections and benefits of Court supervision.

It is requested that the Commission reconsider and propose and support legislation restoring Court supervision as a requirement in the area of probate real property sales, exchanges and grants of option.

Respectfully,


Jerome Sapiro

JS:mes

cc to Cooper, White & Cooper, Attn: Peter L. Muhs.

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May 6 , 1985

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Palo Alto, CA, 94303

Re: Restoration of Required Court Supervision
as to Probate Real Property Sales,
Exchanges and Grants of Option

Hon. Commission Members:

This letter is written in response to letter dated April 29, 1985 to the California Law Revision Commission by Thomas M. Brownscombe, to assist the Commission and to try to expedite its hearing on this matter.

Mr. Brownscombe's letter contains incorrect comments and attempts to confuse the issue by introducing matters not relevant thereto. He does not specify any incorrectness in statements made by the Probate Judges or this writer.

Because Courts cannot discover every instance of wrong-doing or impropriety, he seems critical of the position taken by the Probate Judges who have written to the Commission supporting the restoration of Court confirmation as a requirement in all probate sales, exchanges and grants of option concerning real property. Probate Courts, their Commissioners and Examiners do protect estates and all persons interested therein not only against the unscrupulous, but also against errors, mistakes and improprieties of executors, administrators and attorneys. Noone suggests that every case of wrongdoing is going to be discovered by any procedures that the Commission, the Legislature or anyone may propose. By the confirmation procedure the Courts do discover and reduce very substantially wrongdoing, improprieties and errors that would otherwise be costly to estates. The Probate Judges are in a better position than those who are not before them on all Court days to observe, correct, report on, and protect against the wrongs, neglects, improprieties and errors of executors, administrators and attorneys. Likewise, their observations and reports concerning substantial increases in prices received by estates in sales coming before them for confirmation must be given very great weight. They also assure that properties sold have been reasonably exposed to the market.

There is no inadequacy of protection afforded by the Probate Court in this area, and Mr. Brownscombe's statement to that effect is not supported by the Estate of Anderson, (Cal. App. 1 Div. 1983), 149 Cal. App. 3rd 336, 196 Cal. Rptr. 782. He deliberately omits reference to the key point in the case, namely, the extrinsic fraud found against the Bank of America, the executor, in concealing material information from both the Court and the beneficiaries of the estate, resulting in very great loss. The State Supreme Court denied hearing in said case and it remains good law. There a surcharge was made by the Probate trial Court, further demonstrating the protection needed and afforded thereby. Obviously,

a Probate Court cannot pass on that which is not reported to it and which is concealed from it.

The procedure for confirmation of sales is not cumbersome or expensive. The cost of publication of notice, where not waived in the will, ranges from about \$100.00 to \$310.00 depending on the length of the notice and the rates of the publisher. Attorneys' fees are and would be awarded for extraordinary sale services, whether rendered in sales subject to Court confirmation or sales under the IAE Act. There is no undue delay in the Court confirmation procedure; - the petition, its notices, and the proposed Order usually can be prepared within one and a half (1½) hours, and the hearing date is usually 14 to 20 days after its filing (with variance between counties). The hearing itself normally takes from 3 to 15 minutes depending upon the amount of competitive bidding. Files and pleadings are examined by the Court prior to the hearing. The opportunity to try to realize a higher price for the estate by in-Court competitive bidding and the protections afforded by Probate Court supervision are well worth any and all of the foregoing. Those findings by the Court of fair price, due procedures, and reasonable exposure to the market are protective to all, - the estate, its beneficiaries, its representatives, their attorneys and brokers, - in absence of extrinsic fraud.

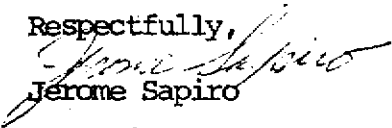
The inability to discover every case of wrongdoing does not justify opening the door further to allow avoidance of Court supervision, thereby taking away from estates both the opportunity to get a better price and the said protections. It is not "overkill", but is preserving for estates and all persons interested therein the benefits and protections of Court supervision. In probate means subject to Court administration.

If Mr. Brownscombe objects to the minimum bid of 90% of appraised value, he does not indicate that he has done anything to have this raised. Most attorneys would not return any such minimum bid to the Court. We do try to protect our estates by including in the notice of sale a provision reserving the right to reject any and all bids. A broker who brings in a minimum bid could do the same whether the sale is subject to Court confirmation or one under the IAE Act; but, Court confirmation and in-Court competitive bidding protect against same.

It is not "paternalism" for Judges and attorneys to urge the restoration of Court supervision as a required protection for the public and our clients. Such protective confirmation procedures should be assured as a requirement for the benefit of all, - the uninformed, the unknowing, those without representation, and, even the sophisticated.

Mr. Brownscombe's reference to the trust situation is readily distinguished. A probate sale of real property occurs while the probate administration continues, before distribution. The trust administration is after probate administration and distribution. The need for protection during administration in probate should be obvious. There are usually many more persons whose interests may be affected in the probate proceeding. Court supervision as a requirement is the best line of defense.

Respectfully,


Jerome Sapiro

JS:mes

**Superior Court of the State of California
County of Sacramento**

May 7, 1985

720 Ninth Street, Room 607
Sacramento, California 95814

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

Re: Reinstatement of Confirmation of Estate
Sales, Granting of Options to Purchase
Real Property and Long-Term Leases

Dear Commission Members:

The Sacramento County Superior Court Probate Bench is deeply concerned about the effect of Probate Code sections 591.2 and 591.3 as presently legislated. Excluding the Probate Court from the confirmation of sales of real property, as well as requiring Court approval for the granting of options to purchase real property and the execution long-term leases substantially erodes the protective measures the Court has historically exercised in probate estates.

The major area of abuse or misfeasance occurs in the sales of real property. Our Probate Courts have, on numerous occasions, been compelled to deny or continue sales for failure to comply with the Probate Code.

Sales of real property which were grossly undersold have frequently been returned to the Court for confirmation. Often there are substantial overbids elicited in open Court. Recently, a sale of real property was returned to the Court for \$200,000. The sale was ultimately confirmed for \$600,000. Another example was a sale for \$600,000 which was sold for \$1,200,000. A third example was property returned for \$40,000, which was subsequently sold for \$80,000. These examples are not isolated incidents, but are offered to illustrate the potential harm that could occur in the absence of requiring approvals by the Probate Court. Had these sales proceeded without Court supervision, the beneficiaries and heirs would have been deprived of a substantial portion of their inheritance.

In our opinion, "advisement of proposed actions," as provided in Probate Code section 591.3, does not afford the beneficiaries or heirs adequate protection. It's language is ambiguous, and there is no specificity as to information which

must be given to interested parties. The Probate Court is frequently contacted with questions about the "advisement" because lay persons are often confused as to the intricacies of the legal process and solicit clarification. Suggesting that they seek legal counsel is sometimes of no assistance in that many are of limited means, and since actions are not subject to Court approval, they are unable to receive the assistance of the Probate Court.

The relinquishment of the Probate Court's protection may ultimately result in litigation for misfeasance, malfeasance or malpractice. Such actions would further deplete the assets to be distributed to the heirs and beneficiaries.

The preemption of the Probate Court from review and approval of sales, options and leases assumes the expertise of the attorney, the veracity of the personal representative and the integrity of the real estate brokers. This may be true in the majority of the probate estates and do not pose any problems. Unfortunately, there are estates whose personal representative may succumb to temptation which would adversely impact the interests of the beneficiaries or heirs of a probate estate. Traditionally, the Probate Court has been the "protector of widows, orphans and little children," and this umbrella of protection should continue to apply to all persons interested in a probate estate.

The Sacramento County Superior Court Probate Bench strongly advocates the reinstatement of review and approval by the Court in probate sales, options and long-term leases.

Respectfully submitted,



CECILY BOND
Judge of the Superior Court



EUGENE T. GUALCO
Judge of the Superior Court



WILLIAM A. WHITE
Judge of the Superior Court, Retired

ETG/lb

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DONALD GEARY (1958-1966)
RICHARD F. PAWSON (1967-1976)

May 7, 1985

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

Re: Reinstitution-Confirmation Estate Sales
Probate Code Section 591.3 and related sections

Dear Commission Members:

As a lawyer whose practice is limited almost entirely to probate and real estate law, I am most concerned about the recent revisions to Probate Code section 591.3 and related sections, removing from court supervision the sale or exchange of real property or the grant of options to purchase such property.

Much has recently been written to you by experienced lawyers and learned probate judges about the benefits of competitive bidding and judicial review under the former procedures and the risks of inept or unscrupulous action under the new. I will not reiterate those arguments here, but I wish to note a point which was not addressed in the letters I reviewed on this subject.

1. When enacted in 1974, the Independent Administration of Estates Act was a sensible and long-needed response to many probate decisions which had theretofore required court supervision. Perhaps one force that lead to reform was an increasing concern that probate was viewed, correctly or not, as an expensive process. By removing some items from automatic judicial review, not only would the courts be relieved of otherwise unnecessary work, but legal fees attendant the preparation of some petitions and court hearings could be reduced. However, concern for the cost of probate administration does not justify adding real estate sales and exchanges to the list of transactions for which no court supervision is required.

2. Even under IAEA, the attorney has a fiduciary obligation to: review with the personal representative the wisdom of any proposed sale; scrutinize all marketing efforts; examine title reports and documents; negotiate with parties regarding price and terms; and either draft or review listing agreements, sales

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contracts, deeds, escrow instructions and other typical documents. These services have often been regarded as extraordinary and thus compensable in addition to the statutory fees otherwise allowed for routine probate matters.

3. By removing real estate sales transactions from court supervision, the Legislature has eliminated none of the foregoing costs, but at most, the expense of handling pre-hearing inquiries from interested bidders (which are often referred on to the listing broker) and the cost of a court appearance--usually representing only a minor portion of the probate attorney's time charges in connection with real estate sales transactions. Accordingly, the savings in administrative fees to the beneficiaries and heirs under the recent amendments is really quite small. In view of the benefits of competitive bidding and court supervision and the risks of the present procedure, one must question whether any projected savings in administrative fees in this instance is sound.

Accordingly, I urge you to reconsider the recent amendments to Probate Code section 591.3 and related sections, and to again restore real estate sales and exchanges to the former procedure of court supervision.

Sincerely,

GEARY, SHEA & O'DONNELL, P/C.



THOMAS C. TAYLOR, JR.

TCT:gs

cc: Honorable R. Bryan Jamar
Sonoma County Superior Court (Probate)