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May 9, 1985
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Memorandum 85-57

Subject: Comments of Executive Committee of the Probate and Trust
Law Section of the Los Angeles County Bar Association on
various matters to be considered at May meeting.

We have just received the attached comments from the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association. The comments relate to the following matters:

(1) Independent Administration - Memorandum 85-50 and Supplements.

(2) Passage of Property to Surviving Spouse Without Administration - Memorandum 85-47.

(3) Small Estate Set-Aside - Memorandum 85-49.

(4) Payment of Demands - Memorandum 85-35

Time does not permit us to make a staff analysis of these comments prior to the meeting. We will raise each point in the attached comments at the time we consider the particular statutory provision at the meeting. We hope that you will consider the comments as you read the meeting materials to which they relate in preparing for the meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Probate and Trust Law Section

Mailing address:
P.O. Box 55020
Los Angeles, California 90055

May 7, 1985



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

Re: May Meeting

Dear Commissioners:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submits the following comments on various studies which are scheduled for discussion at your meeting, May 16-17.

Study L-1028 - Probate Code (Independent Administration)
(Memorandum 85-50, First And Second Supplements)

Section 8353:

This section would allow a special administrator with general powers to have authority for independent administration of the estate. As noted in the comment, the authority will be useful where almost all of the administration will be done by the special administrator. As discussed below, perhaps this authority should not be granted to a special administrator unless all of the persons who would be entitled to notice of the petition for appointment of the personal representative are notified, as set forth in section 8361(a).

Section 8354:

This section presents a policy issue of whether the new code provisions relating to independent administration should apply to all cases after the operative date of the new code. We are in agreement with the draftsman's comment that confusion will be avoided if the chapters are made applicable to pending proceedings on the operative date of the new code.

Section 8360(b):

As proposed, the personal representative may petition for authority to administer the estate under

independent administration authority, including the authority to sell, exchange or grant options to purchase real property, or may seek authority to independently administer the estate, but require court supervision for sales, exchanges or grants of options to purchase real property. We agree with the proposed section. The proposed section adequately addresses the concern raised by critics concerned with the recent change in the law permitting sales of real property under independent administration. It also would be useful in avoiding the added expense where a bond would otherwise be required based on the value of the real property. We also agree with the staff's reasoning that singling out other powers for inclusion or exclusion from the authority of the representative would add unnecessary complexity and confusion to the system.

Section 8361:

This section is divided into two subparts, depending upon whether authority to independently administer the estate is sought in the petition for appointment or at a later date. If authority is sought in the initial petition for appointment, notice must be given to all potentially interested beneficiaries. If a policy decision has been made that all of those individuals receive notice, then a similar notice should be given if a special administrator seeks general powers and further seeks to exercise those powers under the independent administration provisions.

The authority under the independent administration provisions is broad, and may have a substantial impact on an estate. Limiting notice of petitions for independent authority where such petition is filed after the initial petition for appointment to persons who have requested special notice or who have actually appeared may not be appropriate. As drafted, this section would authorize a petition for appointment without seeking independent powers, and then filing a petition to have that authority granted while not being required to notify any beneficiary unless they had requested special notice or actually appeared.

Section 8361(c) sets forth a statement which must be included in the notice of hearing. If authority is

requested under section 8360(b)(2), the notice should advise that the personal representative must obtain court authority to sell or exchange real property, or to grant an option to purchase real property.

Section 8363:

This section allows the court in its discretion to require a bond for the property which will be sold without court supervision. However, the section does not provide how the court is to determine whether the property will be sold, nor at what time that determination is to be made. Perhaps the wording "will be sold" should be changed to read "may be sold."

Section 8367:

This section conforms with prior law in listing the powers which may be exercised under the independent administration act. Reference to the mutual funds referred to in subdivision (h) of section 8371 should be added to subdivision b of section of 8367, as suggested in the Draftsman Note to Section 8367.

Section 8370(b):

The proposed section authorizes a personal representative to give advice of proposed action even though such advice is not required under section 8371. This procedure will save significant time and court congestion by avoiding the use of petitions for instructions for matters which are not described in section 8371.

Section 8377, 8378 and 8379:

Proposed section 8377 requires all objecting parties to give written objections to the personal representative. In addition, if the proposed action would require court supervision, section 8378 allows an objecting party to obtain a restraining order. Section 8379 states that if the proposed action would require court supervision or if the restraining order had issued, the proposed action may be

taken only if submitted to the court for approval. The procedure for obtaining a restraining order appears helpful if the order is to be delivered to third parties, such as blocking an escrow or proposed sale. The statute might authorize delivery of the order to third parties in addition to the personal representative.

Study L-1031 - Probate Code (Passage of Propety to Surviving Spouse Without Administration) (Memorandum 85-47)

In 1983 the substantive provisions were moved from sections 202-206 to sections 649.1-649.6, and they are moved once again to sections 9500-9506 under the Law Revision Commission Proposal. Although section 9506 provides (as does section 649.6 now) that references to repealed sections will apply to the new sections, it will undoubtedly take attorneys several years to adjust to the double change in the numbering of sections. We find it unfortunate that it is necessary to renumber sections, however, the new arrangement numbering system is well laid out.

Section 9502:

This section, at subpart (b), continues the present requirement that the election to administer assets must be made in writing and filed in the proceedings within 4 months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon showing of good cause. Although we recognize the need of a written election filed with the court, we believe it would be sufficient to have the election filed with the court at any time prior to the hearing of a petition for distribution.

Sections 9520 and 9521:

These sections embody the present section 649.2 and former section 203 which provide that a surviving spouse has the full power to sell, mortgage or otherwise convey the deceased spouse's interest in community property after 40 days have elapsed from the death of the spouse, unless a beneficiary and a deceased spouse's Will records a notice in the county where the real property is located. We question the desirability of retaining these provisions. It is hard to see why such procedures are required in

view of the ease by which the surviving spouse may confirm title to himself or herself. One may at least question why the burden is placed on the beneficiary to record a notice in order to protect his or her rights against an illegal conveyance or hypothecation by the surviving spouse.

Sections 9550-9554:

These sections set forth a comprehensive procedure allowing the surviving spouse to collect via affidavit up to \$5,000 in salary and other compensation due from an employer to a deceased spouse. These sections apply to estates of all sizes. This procedure seems appropriate where the property of the deceased spouse passes to the surviving spouse, however, we question the need or appropriateness of having the surviving spouse collect assets a portion of which pass to someone other than the surviving spouse.

Section 9571:

This section will eliminate the requirement that attorneys' fees in "set aside" proceedings be approved by the Probate Court. As noted in the Comment, there is no comparable provision when the attorney for the surviving spouse declares title to joint tenancy property, collects qualified plan proceeds or collects insurance benefits. There is no reason why the surviving spouse should be treated differently from any other individual who retains an attorney and determines the fee to be paid to the attorney by the normal process of negotiation. Moreover, the requirement of present law that the attorney substantiate his or her fees, merely adds an unnecessary additional task to the "set aside" process and likely increases the fees involved.

Study L-1032 - Probate Code (Small Estate Set-Aside)
(Memorandum 85-49)

Section 6607(a):

This section requires notice to be given to "each heir" at least ten days prior to the hearing. If

"heir" is limited to intestate heirs, we agree with the draftman's suggestion that notice be given to devisees under the decedent's Will. However, such a requirement must be limited to those situations in which the petitioner has possession of or reasonable access to the Will. We see no problem with incorporating the notice of provisions of Section 1200.5.

Section 6608:

We believe that the court should have the discretion to dispense with the filing of an inventory and appraisal where the petitioner's declaration clearly establishes that the estate is under \$20,000.

Section 6609:

We concur in the draftman's proposal that the court be permitted to assign the estate to the decedent's minor children even if there is a surviving spouse. Particularly with the ever-increasing number of second marriages, the decedent's minor children may not be living with the surviving spouse/stepparent and may well be in greater need of the estate than the surviving spouse, who may have significant assets of his or her own.

Section 6611:

We agree that the personal liability for the decedent's debts imposed upon a person acquiring a portion of the decedent's estate pursuant to this chapter should be limited to the value of the portion received.

Section 6613:

We do not believe that the applicability of this chapter should be controlled by the date of the decedent's death. As the draftsman indicates, that approach would require the application of different law to virtually identical petitions heard the same day by the same judge where one decedent died before the operative date of the

statute and the other after. While we generally oppose retroactivity on the ground that the decedent placed certain provisions in his or her Will with the expectation that they would be interpreted in accordance with the law then in existence, it is unlikely that any decedent would deliberately reduce his or her estate below \$20,000 so that it would be set aside to the surviving spouse pursuant to this chapter. Thus, we would make this chapter apply in both of the following situations:

1. Where the decedent dies before the operative date of the statute but the petition is filed after the operative date;
2. Where the petition was filed before the operative date but not determined until after the operative date.

Study L-1026 - Probate Code (Payment of Demands)
(Memorandum 85-35)

Section 8602:

Under subpart(b) the person or representative should pay the claims listed therein as soon as there are sufficient funds on hand after retaining amounts sufficient to pay anticipated expenses of administration as well as federal and state priority claims.

Section 8606:

Under subpart (b) of this section, a creditor whose claim is established but is not due is entitled to payment if he assents to a deduction from the claim of the legal interest for the time the claim has yet to run. This section should be expanded to include a required waiver of prepayment penalties as well as interest.

Section 8609:

Subpart (b) of this section permits a creditor to recover on the bond of the personal representative if he has failed to give notice to creditors as prescribed by law. Presently, Letters will not issue unless proof has been made that notice to creditors has been given. This subpart should be removed.

Section 8632:

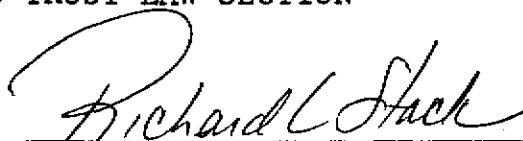
This section continues the substance of former section 971 requiring the proration of death taxes in proportion to the value of the property received. Internal Revenue Code section 2207A(a) gives the personal representative the right to recover from a QTIP Trust (a non-probate asset) the amount of the federal estate tax at the highest marginal rate. This is contrary to the requirement of the proposed code section.

We trust that these comments will be useful in your work. If you require clarification on any points, please contact Richard L. Stack, Darling, Hall & Rae, 606 South Olive Street, Suite 1900, Los Angeles, California 90014; telephone (213) 627-8104.

Sincerely,

EXECUTIVE COMMITTEE, PROBATE
AND TRUST LAW SECTION

By:


Richard L. Stack