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Second Supplement to Memorandum 86-38

Subject: Study L--1037 - Estate and Trust Code (Estate Management)

We have just received the attached letter containing the comments of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association on the draft statute relating to estate management.

We are sending you the letter now without staff analysis so that you will have an opportunity to review it prior to the meeting. At the meeting, we will consider the each of the comments in the letter at the time we consider the relevant section of the draft statute attached to Memorandum 86-38.

Respectfully submitted,

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Executive Secretary

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May 6, 1986

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

Re: Memorandum 86-38  
Study L-1037-Estate and Trust Code  
(Estate Management)

Dear Commissioners:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submits the following comment on Memorandum 86-38 which is scheduled for discussion at your May 15-16 meeting.

Section 9612. The Effect of Court Authorization or Approval.

We agree with the substance of this proposed section which states in essence that a judgment, order or decree is final and releases the personal representative from claims of interested persons. We suggest that the initial phrase of the section read "Subject only to reversal or modification on appeal," rather than "Unless reversed on appeal".

Section 9620. Submission of Dispute to Commissioner, Judge Pro Tempore, or Probate Judge.

This proposed section is a reworking of present Probate Code §718. Under proposed subpart (a) the matter in controversy may be referred to a "referee who is regularly attached to the court ...". Although this language is currently found in §718(2), we do not believe it is consistent with the structure of the current judicial system. We suggest that the language in subpart (1) of §718 be adopted which permits the controversy to be submitted to "some disinterested person, to be approved by the Court". This may be expanded to include specifically a commissioner or a judge pro tempore designated in the agreement.

Section 9631. Liability of Joint Personal Representative for Breach of Duty by Another Personal Representative.

At subpart (b)(4) of this section, where there is more than one personal representative, one personal representative is liable for a breach of fiduciary duty committed by another where the personal representative "negligently enables the other personal representative to commit a breach of fiduciary duty". We feel this language is indefinite, it should be clarified.

Section 9656. Abandonment of Valueless Property.

As proposed, this section would permit a personal representative to dispose of or abandon worthless property. Possibly this section should be expanded to include assets of marginal value where the cost of collecting, maintaining and safeguarding the asset would exceed its value, and where the asset is not subject to a specific devise (e.g., clothing, miscellaneous furniture and furnishings or an old car).

Section 9734. Exercise of Restricted Stock Options.

Subpart (b) appears to be redundant and should be deleted.

Subpart (c) should be changed to read "Notice of hearing shall be given for the period and in the manner provided by [Section 1200.5], [but the court may order the notice to be given for a shorter period or dispersed with]."

Section 9735. Purchase of Securities or Commodities Sold Short.

The comment above for §9734 applies generally to this section as well.

Section 9760. Operation of Decedent's Business Other than Partnership.

This proposed section makes it clear that the continued operation of the decedent's nonpartnership business may take place with or without prior court authorization. Staff accurately points out that in the case of independent administration under §591.3, an Advice

of Proposed Action must be given for continuing for a period of more than six months from the date of appointment of the personal representative an unincorporated business in which the decedent was engaged. We believe it would be appropriate for the section to provide that, absent authority provided in the Will, the personal representative must obtain court authority to continue the business of the deceased beyond six months from the appointment of the personal representative.

Section 9761. Settlement of Affairs of Decedent's Partnership.

Staff accurately points out that the application of this section and the preceding one to a limited partnership interest is not addressed. Consideration should also be given to the effect of this section on the death of a general partner of a limited partnership. We believe that any interested person should have the same right as the personal representative to make application of the Court to compel the surviving partner to render an account or to have the Court compel an accounting in the event of neglect or refusal. This would be particularly useful where the personal representative is the sole surviving general partner. We question the need for Court approval for a personal representative to act as a limited partner, since, by definition, a limited partner does not have authority to act with regard to the management or control of the limited partnership.

Section 9808. Repeat Authorizations.

We agree with the Staff's recommendation that this section be deleted. The proposed section authorizes the Court to make an order under this chapter as often as the occasion therefore may arise in the administration of the estate. It is generally understood that Probate Code procedures may be used more than once where the facts so warrant it.

Section 9823. Partition Actions.

Under this proposed section, a civil action may be brought by or against the personal representative for partition of property in which the decedent held an undivided interest. This section simply restates Probate Code §575 without substantive change. Under present Probate Code §§1100 to 1106, heirs and devisees receiving undivided interests may petition for partition in the probate court. We suggest that consideration be given to including the same partition procedures within the probate

court where third party interests are involved. This would be most beneficial to the efficient administration of probate estates.

Section 9865. Abatement of Petition if Civil Action Pending.

This proposed section would require that if a civil action is pending with respect to the subject matter of a petition filed pursuant to this chapter, and jurisdiction has been obtained in the Court where the civil action is pending prior to the filing of the petition, the Court shall abate the petition until the conclusion of the civil action upon request of any party to the civil action. We agree with the Staff's recommendation that this section conform with §2525 of the Code, which is the comparable provision in the Guardianship-Conservatorship Law, by striking the phrase "prior to the filing of the petition". As proposed, this section makes mandatory the abatement of the petition, except that the Court need not abate the petition if the Court determines that the civil action was filed with the purpose of delay. We support this statement of the law.

Section 9946. Terms and Conditions of Leases.

The proposed section provides that no lease may be authorized by the Court for a term longer than ten years if any heir or devisee who has an interest in the property to be leased objects at the hearing. Staff acknowledges that under current law there is some confusion as to whether this limitation presently applies to leases for production of minerals, oil, gas and other hydrocarbon substances. We agree that an heir or devisee should have the right to prevent a mineral lease for greater than ten (10) years.

Section 9948. Repeat Authorizations.

This section is unnecessary; it should be deleted. Please see our comments to proposed §9808.

Section 9962. Minimum Purchase Price.

The proposed section restates subdivision (b) of present Probate Code §584.3 without substantive change. In each instance, the purchase price under the proposed option must be at least ninety percent (90%) of appraised value as established by an appraisal by a probate referee within ninety (90) days prior to the filing of the

petition. The ninety (90) day appraisal requirement is at variance with the usual standard applied to sales of real property that the sale price be equal to ninety (90) percent of the appraised value providing the appraisal is not more than one (1) year old. It should be noted that present §584.3 was adopted in 1977 during a period of rapid inflation. The section no doubt reflected then current concerns. Possibly, it would be better to have proposed §9962 mandate an appraisal within one (1) year prior to the filing of the petition for approval of the option subject to reasonable court requirements of a more current appraisal. This would permit the local courts to require updated appraisals in a rapidly rising or falling market.

Section 9981. Filing of Petition; Persons who May File; Time for Filing.

Present Probate Code §854 requires the filing of a petition not later than six (6) months after issuance of letters to confirm an option to purchase under a Will. The proposed code section extends the right to file a petition to any time prior to the filing of the petition for distribution of the affected asset. Also, the right to file the petition is extended to the optionee as well as the personal representative. We are in agreement with both of these changes.

Section 10012. Directions in Will as to Mode of Selling or Property to be Sold.

The proposed section provides that if directions are given in the Will as to the mode of selling or the particular property to be sold, the personal representative shall comply with those directions. We suggest that after the last word of the proposed section there be added "unless relieved of this responsibility by court order on showing of good cause therefor". This language would relieve the personal representative from requirements which are unreasonable due to changed circumstances or perversity of the testator in drawing his or her Will.

Section 10013. Discretion of Personal Representative as to Property to be Sold and Mode of Selling.

We agree with the Staff's comment that where in consecutive sentences it is stated that the personal representative has discretion as to which property to sell first and that there is no priority as between real and

personal property, the second sentence is redundant and should be dropped.

Section 10016. Independent Administration Authority not Limited.

The proposed section provides that nothing in the Chapter dealing with the sales of assets limits or restricts the authority given the personal representative under the Independent Administration of Estates Act. This statement is true of applications in a number of chapters and a similar statement should either be included in other areas of estate administration or this section should be deleted.

Section 10150. Contract with Agent or Broker.

Commonly, well drafted agreements provide that the broker is entitled to compensation, as awarded by the Court, from proceeds of the sale. To protect the estate this should be made a statutory standard.

Section 10151. Contract with Auctioneer.

Subpart (c) should be rewritten or deleted as it refers to court confirmation of an auction sale. No court confirmation is necessary.

Section 10200. Sale or Surrender for Redemption or Conversion of Securities.

Under current Probate Code §771, no notice of sale or of the redemption or conversion of securities need be given where the securities are to be sold on an established stock or bond exchange. We are in agreement with the suggestion of Staff that this provision should be expanded to cover a sale of any security that has a price quoted in the Wall Street Journal, or over the counter securities designated as national market securities, or stocks and bonds sold by a registered broker-dealer during the regular course of business. So long as the value of the securities, be known, by virtue of an established market, the interests of an estate are protected.

Section 10301. Notice of Sale Where Property Appraised at Not More Than \$1,000.00.

This proposed section restates the second sentence of present Probate Code §780 without substantive

change. If real property to be sold has an inventory value not exceeding \$1,000.00, the personal representative may dispense with publication of notice of sale and, in lieu of publication, post the notice of sale at the courthouse. Staff raises a question of whether the \$1,000.00 threshold should be increased. We believe it would be appropriate to increase the limit to \$2,500.00.

Section 10308. Report of Sale at Petition for Confirmation of Sale of Real Property.

The proposed section restates present Probate Code §755 without substantive change. It requires the filing of a petition for confirmation of sale within thirty (30) days after a sale. Neither the proposed section nor existing law specifies what procedures are to be taken in the event the personal representative fails to petition the court within the designated thirty (30) day period. We believe it would be appropriate to permit the prospective purchaser to petition the court for confirmation of the sale or, alternately, to petition the court to require the personal representative to prepare such a petition for confirmation.

Section 10310. Hearing on Petition for Confirmation of Sale.

The proposed section is largely a reworking of portions of present Probate Code §§756, 757 and 785. Subpart (b) restates the present standard that the court "shall examine into the efforts of the personal representative to expose the property to the market" and then adds "and shall examine the return and the witnesses in relation to the sale". This latter statement is indefinite at best and should be deleted. We believe that the intention of this subpart is to elicit facts evidencing that reasonable efforts were made to obtain a fair sale price for the property. Possibly a better approach would be to simply state that "The court shall examine into the efforts of the personal representative to obtain the highest and best price for the property reasonably obtainable."

Section 10350. Order Vacating Sale and Directing Resale.

At the March, 1985 meeting, we recommended certain changes in present Probate Code §775 which would expand the measure of damage the estate would be entitled to on resale of real property after default by the initial purchaser. These suggestions were approved in principal



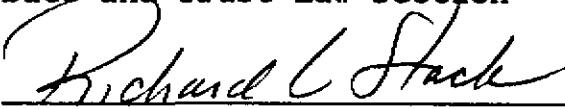
by the Commission and are set forth in this proposed section.

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