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Memorandum 86-52

Subject: Study L-1037 - Estate and Trust Code (Brokers' Commissions
in Estate Sales of Real Property)

At the March 1985 meeting, the Commission considered a staff draft concerning brokers' commissions in estate sales of real property. The Commission asked the staff to work with the California Association of Realtors to revise the draft. The staff has received the CAR's suggestions, and a revised draft is attached to this Memorandum. The revised draft replaces Sections 10150-10166 attached to Memorandum 86-38 (estate management). Policy questions are discussed below.

Commission Where Broker Has Exclusive Listing

Under existing law, the personal representative may, with court approval, give a broker an exclusive right to sell estate property for a period not in excess of 90 days. Prob. Code § 760. Unlike a nonprobate listing, an exclusive listing in probate is not binding until a sale is confirmed, and the probate court is not bound by the agreed commission, but makes its own determination of the amount of commission. 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:50, at 301 (rev. ed. 1975). However, like a nonprobate listing, the broker having the exclusive listing is entitled to a commission on a probate sale, even if he or she does not produce the offer which results in the sale. Id.

The CAR is concerned that, if not revised, Section 10163 (continuing existing law) might be read to mean that a broker with an exclusive listing is entitled to a commission only if he or she returns a bid to the court. Existing law apparently has not been construed to impose such a requirement. As a matter of policy, the broker having an exclusive listing should be entitled to a commission whether or not he or she returns a bid to the court. Otherwise the personal representative may freely disregard the exclusive listing agreement.

To deal with the CAR's concern, the staff has added a new subdivision (d) to Section 10163 to make clear that a broker having an

exclusive listing is entitled to a commission on any court-approved sale, whether or not he or she returns a bid to the court. Is this provision satisfactory?

Requiring Court to Give Effect to Agreement to Share Commissions

Under existing law, the court must "give consideration" to an agreement between brokers to share commissions. Prob. Code § 760. At the March 1985 meeting, the Commission wanted an agreement between brokers to be binding on the court. The CRA has suggested language to do this, included in Section 10164. Does the Commission approve Section 10164?

Allocation of Commission Among Three Brokers

When estate property is sold through a broker, the court allows a "reasonable" commission to the broker, regardless of the commission specified in the listing agreement. Section 10161. When there is more than one broker involved in the transaction, the court allocates the commission according to a statutory formula. See Section 10163.

If there are two brokers involved -- the listing broker (A) whose bid is returned to the court for confirmation, and the broker (C) who represents the successful overbidder -- half the commission on the original bid is allocated to A, and the balance is allocated to C (subject to the limitation that C's commission may not exceed half the difference between the original bid and the successful overbid). Section 10163. Thus A will get slightly less than half the total commission and C will get slightly more than half.

When there are three brokers involved -- the listing broker (A), a cooperating broker (B) whose bid is returned to the court for confirmation, and the broker (C) representing the successful overbidder -- B gets half the commission on the original bid, and C gets the balance (subject to the limitation that C's commission may not exceed half the difference between the original bid and the successful overbid). Section 10163. If there is an agreement between A and B to share the commission, the court divides B's half share between A and B according to the agreement. Section 10164. If there is no agreement, the court may divide B's commission between A and B in such manner as the court determines is reasonable. Thus A and B will each get slightly less than one-quarter of the total commission,

and C will get slightly more than half.

Charles Collier has written to say that, where there are three brokers involved, it may be fairer to give half of the commission on the original bid to A, to split the other half of the commission on the original bid between B and C, and to give C a commission on the difference between the original bid and the overbid. The result of this suggestion would be to give a larger share to A and a smaller share to B and C than does existing law. The staff prefers existing law because it rewards the broker (C) who produces the successful bidder -- the ultimate object of the transaction.

Limitation on Commission Payable on Overbid

Mr. Collier writes that the limitation on the commission payable to the broker (C) representing the successful overbidder (one-half the difference between the original bid and the overbid)

has been in the law for some time but has limited applicability. We recently had a sale in the office where we did have three brokers involved and this limitation cut the commission of broker C by about \$32 (on a sale of \$108,000). Is this limitation necessary?

The staff thinks this limitation is sound. The estate should benefit from the overbid; it should not be consumed by brokers' commissions. The half-the-difference limit seems like a reasonable way to accomplish this objective.

Respectfully submitted,

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Staff Draft

REVISED PROVISIONS CONCERNING BROKERS'
COMMISSIONS IN ESTATE SALES

Article 2. Contract With Agent, Broker, or Auctioneer

§ 10150. Contract with agent or broker

10150. The personal representative may enter into a written contract with either or both of the following:

(a) A licensed real estate broker, or multiple group of licensed real estate brokers, to secure a purchaser for any real property of the estate.

(b) One or more agents or brokers to secure a purchaser for any personal property of the estate. If the particular property to be sold or the particular manner of sale requires that the agent or broker be licensed, the contract may be made only with an agent or broker that is so licensed.

Comment. Section 10150 continues a portion of the first sentence of former Probate Code Section 760 without substantive change. The former reference to a "bona fide agent or broker" is replaced by the reference in subdivision (a) to a "licensed real estate broker" and by the second sentence of subdivision (b). For various licensing provisions, see Bus. & Prof. Code §§ 5731 (auctioneer), 10000-10602 (real estate brokers); Fin. Code § 22200 (personal property brokers); Health & Safety Code §§ 18006, 18045 (sale of mobilehomes and manufactured housing).

CROSS-REFERENCES

Contract with auctioneer § 10152

Definitions

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Rights of purchaser of personal property § 10153

§ 10151. Commission; exclusive right to sell; limitation of liability

10151. With respect to a contract described in Section 10150:

(a) The contract may provide for payment of a commission out of the proceeds of sale.

(b) The contract may grant an exclusive right to sell property for a period not in excess of 90 days if prior to execution of the

contract granting an exclusive right to sell the personal representative obtains permission of the court to enter into the contract upon a showing of necessity and advantage to the estate. The court may grant the permission when the personal representative is appointed or at any subsequent time upon ex parte application.

(c) No liability of any kind is incurred by the estate under the contract unless an actual sale is made and is confirmed by the court. When a sale is confirmed by the court to a purchaser procured by the agent or broker making the contract, the contract is binding and valid as against the estate for such amount as the court allows pursuant to Article 3 (commencing with Section 10160).

(d) The personal representative is not personally liable on the contract by reason of execution of the contract.

Comment. Subdivision (a) of Section 10151 continues the last portion of the first sentence of former Probate Code Section 760 without substantive change. Subdivision (b) of Section 10151 continues the third sentence of former Probate Code Section 760 without substantive change. Subdivisions (c) and (d) of Section 10151 restate the fourth and fifth sentences of former Probate Code Section 760 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Property § 62

Note. At the March 1985 meeting, the Commission asked whether the nonliability provision protecting the personal representative (now subdivision (d) of Section 10151 and subdivision (d) of Section 10152) should be limited to contracts which show the representative capacity of the personal representative. The staff would retain existing law; we would not limit the provisions to contracts which show the representative capacity of the personal representative. It seems impossible that the agent, broker, or auctioneer could be unaware that the sale is an estate sale. If so, to require the contract to show the representative capacity would add no real protection and might be a trap for the unwary.

§ 10152. Contract with auctioneer

10152. (a) The personal representative may enter into a written contract with any auctioneer who holds a valid license under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code to conduct a public auction sale and to secure

purchasers by such method for any personal property of the estate to the extent authorized under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code. A sale pursuant to the contract shall be with reserve.

(b) The contract may provide for payment to the auctioneer of a fee or commission out of the proceeds of sale and for reimbursement of expenses, in amounts to be determined by the court if the sale is confirmed by the court. The contract may provide that personal property of two or more estates being administered by the same personal representative may be sold at the same public auction sale. Items of personal property may be sold separately or in a lot with other items from the same estate. The auctioneer shall comply with the instructions of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters.

(c) No liability of any kind is incurred by the estate under the contract or a sale unless the sale is confirmed by the court. When a sale is confirmed by the court, the contract is binding and valid as against the estate for such amount as the court allows under Section 10166.

(d) The personal representative is not personally liable on the contract by reason of execution of the contract.

Comment. Subdivision (a) of Section 10152 restates the first and sixth sentences of former Probate Code Section 760.5 with the following changes:

(1) The reference in former Section 760.5 to a "bona fide" auctioneer "authorized to act as such in the locality" is replaced by the reference to an auctioneer licensed under the Auctioneer and Auction Licensing Act (Bus. & Prof. Code §§ 5700-5791.5).

(2) The provision of former Section 760.5 authorizing auction sale of "tangible" personal property is revised to authorize auction sale of all personal property an auctioneer may auction under the Auctioneer and Auction Licensing Act (see, e.g., Bus. & Prof. Code §§ 5701(j), 5774, 5775-5776).

Subdivisions (b)-(d) of Section 10152 restate the remainder of former Probate Code Section 760.5 without substantive change except for the last portion of the third sentence which is replaced by Section 10153.

See also Section 10259 (personal representative responsible for the value of property title to which passes without court confirmation unless the court subsequently confirms the sale).

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Rights of purchaser of personal property § 10153

Sales at public auction § 10254

Note. Should there be a provision authorizing a contract with an auctioneer to sell personal property that may be sold without court confirmation under Section 10087 (perishable and depreciating property)? Section 10152, in its present form, requires court confirmation of a sale before the contract is binding on the estate.

§ 10153. Rights of purchaser of personal property not limited

10153. Nothing in this article limits the rights of a purchaser of personal property to whom title passes pursuant to Section 10259 without court confirmation.

Comment. Section 10153 continues without substantive change the last portion of the third sentence of former Probate Code Section 760.5 (contract with auctioneer) and extends the provision to apply also to the rights of the purchaser of personal property when the contract is with a broker or agent.

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Article 3. Compensation of Agent, Broker, or Auctioneer

§ 10160. Limitation on liability of estate

10160. The estate is not liable to an agent, broker, or auctioneer under a contract for the sale of property or in connection with a sale of property for any fee, commission, or other compensation or expenses unless the following requirements are satisfied:

(a) An actual sale is made.

(b) If court confirmation is required, the sale is confirmed by the court.

Comment. Section 10160 restates the last portion of the last sentence of former Probate Code Section 760 and a portion of the third sentence of former Probate Code Section 760.5 without substantive change. The requirement that an "actual" sale be made means in the case of real property that a deed has been given to the purchaser and a mortgage or deed of trust has been taken for payments due in the future. See Estate of Rule, 25 Cal.2d 1, 16, 152 P.2d 1003 (1944);

Wilson v. Fleming, 106 Cal. App. 542, 549, 289 P. 658 (1930). As to when court confirmation is not required, see Section 10259 (personal property).

CROSS-REFERENCES

Contract with agent or broker § 10150

Contract with auctioneer § 10152

Definitions

Court § 29

Property § 62

§ 10161. Compensation of agent or broker

10161. Subject to the provisions of this article, whether or not the agent or broker has a contract with the personal representative, the fee, commission, or other compensation of an agent or broker in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate.

Comment. Section 10161 restates a portion of the fourth sentence of former Probate Code Section 760 (contract binding "for an amount to be allowed by the court"), a portion of former Probate Code Section 761.5 (overbidder's agent entitled to "reasonable compensation" fixed by the court), and a portion of the second and third sentences of former Probate Code Section 785 (overbidder's agent entitled to "reasonable compensation" fixed by the court), without substantive change. Section 10161 uses language drawn primarily from the last portion of former Probate Code Section 761.5.

The compensation to an agent or broker may be for the sale of real or personal property of the estate. See Section 10150.

CROSS-REFERENCES

Contract with agent or broker § 10150

Definitions

Court § 29

Personal representative § 58

Property § 62

§ 10162. Sale on increased bid where original bid made by purchaser direct to estate

10162. If the original bid is made direct to the estate by a purchaser who is not represented or procured by an agent or broker and thereafter an agent or broker described in Section 10150 procures a bidder who makes an increased bid at the time of the hearing on the petition for confirmation of the sale on the original bid and the property is sold on the increased bid, the court shall allow the

compensation determined under Section 10161 to the agent or broker who procured the purchaser to whom the sale is confirmed.

Comment. Section 10162 restates the substance of former Probate Code Section 761.5. Section 10162 refers to Section 10161 which continues the last portion of former Section 761.5 without substantive change.

CROSS-REFERENCES

Definitions
Court § 29

§ 10163. Allocation of commission among competing agents or brokers

10163. (a) If the court confirms a sale on an increased bid made at the time of the hearing on the petition for confirmation to a purchaser not procured by the agent or broker holding the contract with the personal representative, the court shall allow a commission determined under Section 10161 on the full amount for which the sale is confirmed, to be allocated as provided in this section.

(b) Except as provided in subdivisions (c) and (d), if the successful bidder is produced by an agent or broker described in Section 10150, the commission determined under Section 10161 on the full amount for which the sale is confirmed shall be allocated as follows:

(1) One-half of the commission on the original bid to be paid to the agent or broker whose bid was returned to the court for confirmation.

(2) The balance to be paid to the agent or broker who procured the purchaser to whom the sale is confirmed.

(c) In the case of a sale of real property, the compensation of the agent or broker who produces the successful bidder shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid. This limitation does not apply to the compensation of the agent or broker who holds the contract with the personal representative.

(d) If the contract grants an exclusive right to sell the property as provided in Section 10151, the agent or broker having the exclusive right to sell the property is entitled to a commission on the amount of the sale to the successful bidder, determined as provided in Section 10161, whether or not the agent or broker having

the exclusive right to sell the property has returned a bid to the court.

(e) Subject to subdivision (d), if the successful bidder is not produced by an agent or broker described in Section 10150, the agent or broker holding the contract with the personal representative shall be allowed a full commission on the amount of the original bid returned by him or her, determined as provided in Section 10161.

Comment. Subdivisions (a), (b), and (e) of Section 10163 restate former Probate Code Section 761 without substantive change.

Subdivision (c) restates the fourth sentence of former Probate Code Section 785 without substantive change. See Review of Selected 1955 Code Legislation, at 160 (Cal. Cont. Ed. Bar 1955) (50-50 split of former Section 761 subject to one-half of the difference limit of former Section 785).

Subdivision (d) is new and makes clear that, if the agent or broker holding the contract with the personal representative has an exclusive right to sell the property, the agent or broker is allowed a commission whether or not he or she returns a bid to the court. Subdivision (d) is consistent with what appears to have been prior law. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:50, at 301 (rev. ed. 1975).

The references to Section 10161 in Section 10163 make clear that the court has discretion to determine the total amount of compensation to be allocated under Section 10163.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

Note. What is the meaning of "one-half of the commission on the original bid" used in subdivision (b)(1)?

§ 10164. Allocation of commission among cooperating agents or brokers

10164. Subject to subdivision (c) of Section 10163, without limiting the court's discretion under Section 10161, if the bid returned to the court for confirmation is procured by an agent or broker other than the agent or broker holding the contract with the personal representative, the court shall order the commission divided as provided in any agreement between the agent or broker holding the contract and the agent or broker procuring the bid. If there is no such agreement, the court may order that the commission or compensation determined under Section 10161 be shared among the agents or brokers in such manner as the court determines is reasonable.

Comment. Section 10164 supersedes the second sentence of former Probate Code Section 760. If there is an agreement concerning the sharing of commissions, Section 10164 requires the court to divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as under former Probate Code Section 760.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

§ 10165. Condition of bid that certain amount of bid be paid to agent or broker

10165. Notwithstanding that a bid contains a condition that a certain amount of the bid shall be paid to an agent or broker by the personal representative, only such compensation as is proper under this article shall be allowed. Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition.

Comment. Section 10165 restates the last portion of the sixth sentence of former Probate Code Section 785 (real property) without substantive change, and generalizes it to apply also to sales of personal property.

CROSS-REFERENCES

Definitions

Court § 29

§ 10166. Compensation and expenses of auctioneer

10166. Whether or not the auctioneer has a contract with the personal representative, the fees, compensation, and expenses of an auctioneer in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable amount for the services of the auctioneer to the estate.

Comment. Section 10166 is a new provision that is consistent with the second sentence of former Probate Code Section 760.5 (auctioneer's fee "to be determined by the court"). The language of Section 10166 is drawn from the language used in Section 10161 (compensation of agent or broker). The compensation to an auctioneer may be for the sale of personal property only. See Section 10152.

CROSS-REFERENCES

Contract with auctioneer § 10152

Definitions

Court § 29

Personal representative § 58

DISPOSITION OF EXISTING SECTIONS

Probate Code § 760 (repealed). Contract with agent or broker

Comment. The first portion of the first sentence of former Probate Code Section 760 is restated in Estate and Trust Code Section 10150 without substantive change. The last portion of the first sentence of former Probate Code Section 760 is continued in subdivision (a) of Estate and Trust Code Section 10151 without substantive change.

The second sentence of former Probate Code Section 760 is superseded by Estate and Trust Code Section 10164.

The third sentence of former Probate Code Section 760 is continued in subdivision (b) of Estate and Trust Code Section 10151 without substantive change.

The fourth sentence of former Probate Code Section 760 is continued in the second sentence of subdivision (c) of Estate and Trust Code Section 10151, and in Estate and Trust Code Section 10161, without substantive change.

The fifth sentence of former Probate Code Section 760 is continued in the first sentence of subdivision (c) and in subdivision (d) of Estate and Trust Code Section 10151, and in Estate and Trust Code Section 10160, without substantive change.

Probate Code § 760.5 (repealed). Contract with auctioneer

Comment. The first sentence of former Probate Code Section 760.5 is superseded by subdivision (a) of Estate and Trust Code Section 10152.

The second sentence of former Probate Code Section 760.5 is continued in the first sentence of subdivision (b) of Estate and Trust Code Section 10152 without substantive change.

The first portion of the third sentence of former Probate Code Section 760.5 (no personal liability) is restated in subdivision (d) of Estate and Trust Code Section 10152 without substantive change. The last portion of the third sentence of former Probate Code Section 760.5 (no liability of estate) is restated in subdivision (c) of Estate and Trust Code Section 10152, and in Estate and Trust Code Section 10153 and 10160, without substantive change.

The fourth sentence of former Probate Code Section 760.5 is restated in the second sentence of subdivision (b) of Estate and Trust Code Section 10152 with the deletion of the former reference to "tangible" personal property.

The fifth sentence of former Probate Code Section 760.5 is continued in the third sentence of subdivision (b) of Estate and Trust Code Section 10152 with the deletion of the former reference to "tangible" personal property.

The sixth sentence of former Probate Code Section 760.5 is continued in the second sentence of subdivision (a) of Estate and Trust Code Section 10152 without substantive change.

The seventh sentence of former Probate Code Section 760.5 is continued in the fourth sentence of subdivision (b) of Estate and Trust Code Section 10152 without substantive change.

Probate Code § 761 (repealed). Allocation of commissions among competing agents

Comment. Former Probate Code Section 761 is restated in Estate and Trust Code Section 10163 without substantive change.

Probate Code § 761.5 (repealed). Compensation of agent who procures increased bid

Comment. Former Probate Code Section 761.5 is restated in Estate and Trust Code Sections 10161 and 10162 without substantive change.

Probate Code § 785 (repealed). Court confirmation; overbid; order confirming or vacating sale

Comment. The first sentence of former Probate Code Section 785 is restated in subdivisions (a) and (b) of Estate and Trust Code Section 10310, and in subdivisions (a), (c), and (d) of Estate and Trust Code Section 10313, without substantive change. The provision in the first sentence of former Probate Code Section 785 that the court "must examine the return and witnesses in relation to the sale" is comprehended within the more general language of subdivision (a) of Estate and Trust Code Section 10310. The second and third sentences of former Probate Code Section 785 are restated in Estate and Trust Code Section 10161, in subdivisions (a) and (b) of Estate and Trust Code Section 10311, and in subdivisions (a) and (b) of Estate and Trust Code Section 10313, without substantive change. The fourth sentence of former Probate Code Section 785 is restated in subdivision (c) of Estate and Trust Code Section 10163 without substantive change. The fifth sentence of former Probate Code Section 785 is restated in subdivision (e) of Estate and Trust Code Section 10311 without substantive change. The sixth sentence of former Probate Code Section 785 is restated in Estate and Trust Code Section 10165 and in subdivision (e) of Estate and Trust Code Section 10311 without substantive change. The seventh sentence of former Probate Code Section 785 is restated in the introductory clause of subdivision (a) and in subdivision (d) of Estate and Trust Code Section 10311 without substantive change.