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9/10/86

First Supplement to Memorandum 86-89

Subject: Study L-1037 - Estate and Trust Code (Compelling Personal Representative to Act)

The Commission has considered whether estate beneficiaries should be able to seek an order requiring a personal representative to take or refrain from taking certain action. It has been argued that this would permit too much interference with the personal representative in administering the estate. On the other hand, it has been suggested that there should be some intermediate remedy, such as an order to show cause why the personal representative should not be required to act or not to act. The Commission asked the staff to draft an intermediate remedy for Commission consideration. A staff draft is attached.

Order to Show Cause or Petition?

If there is to be such a remedy, it should be brought to court by petition rather than by order to show cause. An order to show cause is a form of process (jurisdictional notice) and must be personally served on the person to whom the order is directed. 3 B. Witkin, California Procedure Actions § 713, at 727 (3d ed. 1985). However, if jurisdiction has already been obtained over the person, process is not necessary and notice may be given by mail. Id. In pending estate proceedings, jurisdiction has already been obtained over the personal representative. Hence, jurisdictional notice is not necessary, and the matter may be initiated by petition.

Irreparable Harm to the Estate

The attached draft requires a showing that the estate will suffer irreparable harm unless the petition is granted. This should assure that the petition will be granted only in extreme cases, and may alleviate the concern that this procedure will result in excessive interference with the management of the estate by the personal representative.

Limitation of Procedure to Certain Powers and Duties?

The staff has considered whether the petition procedure should be limited to certain specified powers and duties of the personal representative. In the attached draft, the petition procedure is not so limited. Irreparable harm may be caused to the estate by failure of the personal representative to act or not to act without regard to the nature of the power or duty. Hence, the draft permits the court to compel the personal representative to exercise or not to exercise any power or duty granted in the estate management provisions.

Respectfully submitted,

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Exhibit 1

§ 9613. Order compelling personal representative to act or not to act

9613. (a) On petition of any interested person, and upon a showing that if the petition is not granted the estate will suffer irreparable harm, the court may order that the personal representative exercise or refrain from exercising any power given by this part, or perform or refrain from performing any duty imposed by this part.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

Comment. Section 9613 is new and permits the court to direct the personal representative to act or not to act concerning the estate.

CROSS-REFERENCES

Definitions

Interested person § 48