#L-1046 ns32e
07/07/87

First Supplement to Memorandum 86-204

Subject: Study L-1046 - Nonresident Decedent (More Comments on Tentative Recommendation)

Attached to this supplementary memorandum are letters from State Bar Study Team 2 (Exhibit 1) and the San Francisco County Public Administrator (Exhibit 2) concerned about the tentative recommendation relating to nonresident decedents. Their general concerns are similar--the need for greater protection of California residents interested in the estate of a nonresident decedent, particularly a nonresident decedent domiciled in a foreign country. Specific concerns stated in the letters are noted below.

§ 12522. Admission of will to probate

This section allows a will admission to probate in California if the will has been admitted to probate in the jurisdiction of the decedent's domicile, provided that all interested persons were given notice and an opportunity for contest in the foreign jurisdiction. The Bar Team believes that in the case of a foreign country, the California probate court should be the judge of whether due process is satisfied by the foreign country's probate procedure. The staff believes that is the intent of the law, and would reinforce it by revising subdivision (a) to require admission of the foreign will in California "if it appears to the court from the order admitting the will to probate in the foreign jurisdiction or otherwise" that due process is satisfied.

§ 12550. Informal collection authorized

The informal collection procedure enables a personal representative from another state to remove the decedent's property located in California if no one in California objects after publication of a notice. The Bar Team is concerned that large amounts of money and property may be removed under this procedure without adequate protection of California beneficiaries. They believe that published notice is inadequate. They also believe that probate court protection

is necessary even it actual notice is given to California beneficiaries, since some of them may be non-English-speaking. In effect, they would remove the informal collection procedure from the law and require ancillary administration of the California property of a nonresident decedent in every case.

The San Francisco County Public Administrator also opposes the removal procedure. Their concern is the rights of creditors. Specifically, they are worried that removal of assets from California by a nonresident personal representative will jeopardize the rights of out of state creditors, the federal government, state agencies, and other known creditors. They believe that "the proposed change could be harmful to our local agencies, creditors and business people. Also, it creates a temptation to wrongfully remove property from this State."

Once again, this is not a proposed change. It is existing California law that has been the law for 30 years. We have seen no published case or comment that illustrates any defect in the law; indeed, the one article concerning existing law that we have seen argues for expanding the scope of the section to include out-of-country personal representatives as well as out-of-state personal representatives.

The original legislation was sponsored by the California Bankers Association. It was needed, according to the published report of the Senate Judiciary Committee, because the law was not clear as to the rights and duties of persons in this state who hold property of a nonresident decedent. "This proposal would provide a procedure for delivery of such property to a nonresident decedent's executor or administrator with a minimum of expense and delay, at the same time protecting local creditors." Report of Senate Interim Judiciary Committee, 1 App. J. of Senate, Reg. Sess. 1957, at 527 (1957).

The California Bankers Association explanation notes that, "While many states allow removal of personal property by a foreign executor or administrator on a simple affidavit of nonresidency, this proposal provides possible California creditors with the same notice as they presently enjoy where regular probate or administration occurs by requiring publication of notice for the usual period." Ibid. The Bar Team points out that published notice is no longer considered adequate

notice to creditors. The staff agrees that actual notice to known creditors whould be cheaper, quicker, and more effective than published notice, and recommends that publication be supplemented by actual notice.

§ 12552. Payment or delivery to foreign personal representative

The Bar Team would expand the informal collection affidavit given by the foreign personal representative to include:

(1) The names and addresses of all persons interested in the estate.

(2) The names and addresses of the decedent's spouse and children.

(3) The names and addresses of all of the decedent's heirs at law.

(4) The names and addresses of all California creditors.

A copy of the affidavit would be served on all the listed persons, unless waived. The holder of the decedent's property would notify the foreign court, specifying the property being transferred to the foreign personal representative.

These requirements would certainly give greater protection than now exists for beneficiaries and creditors against potential fraud by a foreign personal representative. The question we need to address is whether there is a real fraud problem, or whether these "protections", at least with respect to beneficiaries, would simply increase the time and expense of administering the decedent's estate without any real benefit to anyone. It must be remembered that the property is not being distributed to anyone; it is simply being taken for administration in the domiciliary state, including payment of debts and satisfaction of expenses of administration, before it is distributed to beneficiaries.

§ 12570. Filing proof of authority

This section allows a foreign personal representative to maintain actions and proceedings in California upon filing with the court authenticated copies of the order of appointment of the personal representative, any bond, and any will. The Bar Team takes the position that mere filing is not enough to give the personal representative standing. They believe that the determination must be

made by the trial court, much in the same manner that it appoints guardians ad litem. "Without a procedure to judicially determine who represents the interests of the decedent's estate, we are concerned that finality may not be achieved."

The staff agrees that if a party contests the authority of a foreign personal representative, the court will have to determine whether the foreign personal representative is a proper party. Therefor the filing provided by this section is only marginally useful. Given this fact, the staff would follow the Bar Team advice to delete this section. We would, however, preserve in the law the ability of a foreign personal representative to sue, subject to challenge, without being also appointed as a local personal representative.

§ 12590. Jurisdiction by act of foreign personal representative

Although not directed to any provision in particular, the Bar Team expresses concern over possible violation of federal laws and treaties in cases involving foreign country personal representatives. They suggest that the Commission retain an international law expert to analyze treaties and determine the parameters within which California may deal with foreign country personal representatives.

The staff does not believe this would be a profitable endeavor. The federal government is perfectly capable of making and communicating rules to enforce laws and treaties, and it would be fruitless for us to try to track and duplicate them here. Any law we make is always subject to supervening federal law.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

P.O. Box 1461
Fresno, CA 93716
(209) 442-0600

June 16, 1987

Mr. James V. Quillinan
Diemer, Schneider, Jeffers,
Luce & Quillinan
444 Castro Street, Suite 900
Mountain View, California 94041

Re: LRC Memo 86-204

Dear Jim:

Four members of Team 2 (Jim Rogers, Ted Cranston, Bill Plageman, and me) participated in a conference call on June 12 and discussed LRC Memo 86-204. In general, we observed that the staff, with minor exceptions, did not respond to our concerns regarding the original Tentative Recommendation concerning non-resident decedents.

We remain very much concerned by the attempts to equalize the treatment of personal representatives from other states and personal representatives from other countries. By allowing foreign representatives from other countries to remove personal property from California, the proposal would strip away all of the protection afforded by the present system requiring probate. The only cloak of protection available for those interested in personal property to be withdrawn from California would be a published notice; the staff does not even propose that actual notice be given to heirs and beneficiaries.

As but one example of the many ills which will follow from the proposal, we submit the following: Suppose the decedent was a resident of China, and had a spouse and minor child living in California. A foreign personal representative could remove from California all of the decedent's personal property, thereby effectively denying the spouse

and minor child the protection of a family allowance. The only notice the spouse and minor child would receive is the notice published in a legal newspaper. They may or may not even know of the existence of bank accounts or other personal property, let alone that the assets were being removed to China. At the very minimum, we believe that actual notice to all heirs, beneficiaries, family members, creditors, etc., is required. We do not believe that published notice is sufficient.

Furthermore, we do not believe that mere notice is sufficient protection. It is quite likely that widows and minor children will either be unaware of their rights, or not be in a position to assert those rights to prevent assets from being removed from California. It is not uncommon for non-residents to leave families in California. The families may not even speak English, let alone understand a legal notice. We believe that it is essential that the probate courts be involved to protect the interests of those persons prior to removal of personal property from California.

Specifically, I would like to address the issues raised by the Staff notes following several code sections:

Section 12522. The Staff defends this section by pointing out that existing law expressly authorizes admission of a Will that has been admitted to probate in another state or country where all interested persons were given notice in an opportunity for contest. We are not convinced that the concept should be retained merely because it is in existing law. Both the Commission and the Estate Planning, Trust and Probate Law Section have identified concepts in existing law which should be and have been corrected. We believe this is one of those concepts. While we are not encouraging multiplicity of trials, we do believe that any person interested in an estate should have the opportunity to contest a Will in accordance with rights afforded under the United States Constitution. If the notice and the opportunity to contest in the foreign jurisdiction meet minimum constitutional requirements for due process, we would have no objection to establishing a collateral estoppel doctrine. On the other hand, it should be clear that the California Probate Court has the power to determine whether

or not minimum constitutional standards are met with regards to proceedings in foreign countries.

Section 12550. We do not believe that publication of notice imparts sufficient notice to provide interested persons the opportunity to object to the removal of personal property. As indicated above, we believe that actual notice to all interested persons is the minimum requirement to meet due process. When dealing with non-United States residents who may have non-English-speaking families who reside in California, actual notice may not be sufficient. Only the Probate Court is in a position to protect interested persons. It must be borne in mind that in establishing procedures for dealing with estates of non-residents, we are dealing with estates of significant value (in excess of $60,000). If the estate is less than $60,000, a child, a beneficiary under the Will, etc. can collect the estate without administration pursuant to Division 8 of the Probate Code. A spouse can collect property of unlimited value. There is no requirement under Division 8 that the decedent or the person collecting the property be a resident of California. Therefore, the procedure contained in the tentative recommendation as revised by Memo 86-204 relates to a limited number of estates where property is being collected by a personal representative for some reason. In those few estates it is not unreasonable to provide protection by the California Probate Court for all persons interested in the estate.

Section 12553. If the Commission is determined to proceed in its tentative recommendation to allow foreign personal representatives to collect significant amounts of California personal property by affidavit, we recommend that a statutory form of affidavit be established. At a minimum, the affidavit should require the affiant to list the names and addresses of all persons interested in the estate, of the decedent's spouse and children, of all of the decedent's heirs at law, and of all California creditors. A copy of the affidavit should be served on those persons, unless a waiver of the right to receive the affidavit is attached. In addition, we believe that the holder of the decedent's property should give notice to the foreign Court in which the foreign personal representative has obtained his or her authority specifying the property to be transferred to the foreign personal representative.

Section 12570. The issue here concerns the standing of a foreign personal representative to participate in a legal action in California. There needs to be some procedure for determining who has standing to represent the decedent's estate. We do not believe it is sufficient to acquire that standing merely by filing authenticated copies of documents with the Superior Court. We believe that a Court Order is necessary to bind all persons interested in the estate. At present, that determination is made by the Probate Court which appoints a personal representative to act in California. At a minimum, we believe that the determination must be made by the trial court, much in the same manner that it appoints guardians ad litem to represent interests of minors or unascertained beneficiaries. Without a procedure to judicially determine who represents the interests of the decedent's estate, we are concerned that finality may not be achieved.

It is apparent that the issues involved with estates of non-residents are issues in which neither the staff nor many attorneys have much experience. We presume that in addition to whatever substantive rights and procedures California might adopt, others may be mandated by federal laws or treaties. For example, federal income tax laws require that persons who buy real property from non-U.S. residents withhold a portion of the purchase price on account of U.S. income taxes which may be due from the non-resident. A claim by a foreign personal representative would be subordinate to the requirement of the Internal Revenue Code. Similarly, U.S. treaties may provide for certain types of recognition to be given to judicial proceedings in other countries. We suggest that it might be appropriate for the Law Revision Commission to retain an international law expert to analyze treaties and determine whether or not California is free to do what it will with respect to estates of non-residents, or if California must meet certain guidelines established by the United States in its international relations.

Very truly yours,

Kenneth M. Klug

cc: Goldring, Collier, Devine, Opel, Homer, Rogers, Fiore, MacMahon, Plageman, Cranston, Goodwin

City and County of San Francisco

PUBLIC ADMINISTRATOR
PUBLIC GUARDIAN
1212 Market Street
San Francisco, CA 94102
Telephone 558-4161

PUBLIC ADMINISTRATOR
PUBLIC GUARDIAN:
James R. Scannell

ATTORNEY:
Lou Aronian

June 26, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: John H. DeMoully,
Executive Secretary

IN REPLY REFER
TO OUR FILE NO

Dear Sir:

Your Memorandum 86-204 regarding Study L-280-Nonresident Decedents, has been reviewed.

The proposed changes in the law relative to estates of nonreisdent decedents portends an important change in policy which appears more concerned with "saving time and expense".

The policy should not be to subsidize and serve out-of-state, and particularly out-of-country, representatives at the potential and considerable loss of "time and expense" of our local creditors to chase assets outside California.

We, therefore, concur with the posititon expressed by State Bar Team 2 and comments of William H. Johnson, Probate Examiner, Sacramento Superior Court.

The following issues should be addressed:

1. Reciprocity. Are representatives of estates in the United States afforded the same privileges as proposed here when in a foreign country?

2. Out-of-State Claimants. Section 707 Probate Code allows out-of-state creditors who had no notice of death, an additional one year after notice to creditors expires to present claims. This procedure would be frustrated by your proposal. This would be harsh treatment for out-of-state creditors doing business with the decedent in California.

3. Federal laws have priority. Federal tax claims are not restricted by expiration of notice to creditors. What will the federal government do

when foreign representatives come into this state and remove assets? Your proposed Section 12554 providing for discharge of liability would have no effect.

4. Government Agencies listed under Section 707.5, Probate Code, Claims of public entities listed are entitled to written notice to present claims.

5. Known creditors who are not notified may be entitled to special notice. Many times known creditors are not given notice and the personal representative will wait the statutory notice period to expire and then deny payment on a claim presented late. This may be a denial of due process to the creditor. (683 Pacific 2d. 20).

Many special instances can otherwise be cited, but suffice it to say that the proposed change could be harmful to our local agencies, creditors and business people. Also, it creates a temptation to wrongfully remove property from this State.

Very truly yours,

LOU ARONIAN
Attorney for San Francisco
Public Administrator

LA:nfl