#L-1046 ns32e
08/19/87

Second Supplement to Memorandum 86-204

Subject: Study L-1046 - Nonresident Decedent (Further Comments of State Bar Study Team 2)

We have received an additional letter from State Bar Study Team 2 suggesting that the statute be redrafted to treat out-of-state personal representatives separately from out-of-country personal representatives. The staff has no problem with doing this to the extent the Commission decides the law affecting them should be different; that will depend on the Commission's decisions on the underlying substantive issues.

As a related matter, the Bar Team believes that it would be helpful to develop different terms for out-of-state and out-of-country personal representatives. The current draft uses "foreign personal representative" to mean both. The staff agrees that it would be helpful to distinguish between the two to the extent we treat them differently. It may even be helpful to use a different term to the extent we treat them the same, e.g. "non-California personal representative".

Other points made by the Bar Team are:

§ 12550. Informal collection authorized

The Bar Team disapproves of the existing informal collection procedure available to an out-of-state personal representative. They point out that the existing affidavit procedure for California property under $60,000 has now been improved to the point that it is a preferable alternative. The problem with this position is that the affidavit procedure is only available to the decedent's "successors" and not to the decedent's personal representative. A "successor" is defined in Section 13006 to mean the decedent's beneficiaries. The affidavit procedure does not provide a means by which the out-of-state personal representative may gather the decedent's California assets for

administration and payment of debts in the other state. Ancillary administration would be required, unless the law were expanded to include the out-of-state personal representative among persons entitled to use the affidavit procedure.

The Bar Team also notes that the informal collection procedure fails to clearly establish that the decedent's successors who can collect property by affidavit have an entitlement right prior to the right of the out-of-state personal representative. The staff agrees with the Bar Team that the law should be clarified. However, successors who use the affidavit procedure acquire no rights in the property other than possession. The property is subject to subsequent administration. Section 13111. The staff would add a provision that the property is also subject to subsequent collection by an out-of-state personal representative. An alternate or supplemental approach would be to add a provision that the decedent's successors may not use the affidavit procedure if an out-of-state probate is pending.

§ 12552. Payment or delivery to foreign personal representative

The Bar Team urges the addition to the law of a requirement that an out-of-state personal representative notify the decedent's successors when the personal representative is about to remove assets for administration in the jurisdiction of the decedent's domicile. The Bar Team would then allow the successors to object to removal of the assets and instead take possession of the property themselves, to the extent the affidavit procedure is available.

We are not sure what this would accomplish. Since the assets are needed for administration in the jurisdiction of domicile, the out-of-state personal representative would have to commence ancillary administration proceedings, take the assets back from the decedent's successors under court order, and then remove the assets to the domiciliary jurisdiction.

Respectfully submitted,

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July 21, 1987

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Re: Study L - 1046
First Supplement to Memo 86-204

Dear Irv:

The First Supplement to Memo 86-204 has continued to be nonresponsive to our concerns. We suggest that the Tentative Recommendation be abandoned and re-drafted in its entirety, segregating the treatment of personal representatives from other states from personal representatives from other countries. In many respects, the tentative recommendation is acceptable insofar as it deals with personal representatives from other states. It does need some minor clean-up, the specifics of which we have previously recommended. Insofar as the Tentative Recommendation deals with foreign personal representatives from other countries, it needs major surgery.

I will not repeat in this letter the comments raised in our earlier letters of November 7, 1986, and June 16, 1987. By and large, the staff has not responded to our concerns. Instead, I will limit my comments in this letter to what we feel to be gross inadequacies in the First Supplement to Memo 86-204.

The staff states that our team "in effect... would remove the informal collection procedure from the law and require ancillary administration of the California property of a non-resident decedent in every case." That is not our position and is not the effect of our recommendation. In making its observation, the staff has totally overlooked all of the improvements to the summary administration procedures over the last several years. The Probate Code provisions which allow for spouses, children, beneficiaries under Will, and other persons entitled to receive a

decedent's property, to collect property without probate are applicable in cases of non-residents. (One of the problems with the proposal is that it does not clearly establish that the persons who can collect property by affidavit pursuant to Division 8 have an entitlement prior to the right of the foreign personal representative.)

The summary procedures allow all property passing to a spouse to be transferred without intervention by a foreign personal representative, and allow personal property up to $60,000.00 and real property up to $10,000.00 to be transferred to other persons without intervention by a foreign personal representative. An ancillary probate will be required in only a very minute percentage of non-resident decedent estates: specifically, those estates in which the property in California not passing to a spouse exceeds $60,000.00. The staff greatly exaggerates the effect of our position by stating that an ancillary probate would be required in every case.

Continuing with §12550, the staff proposes to require actual notice to creditors, in accordance with our recommendation. While we agree that actual notice to creditors is a positive step, we are perplexed by the staff's reluctance to give actual notice to beneficiaries under §12552.

In §12552, the staff concludes that giving notice to beneficiaries would simply increase the time and expense of administering the decedent's estate without any real benefit to anyone. On the contrary, we believe that by notifying the beneficiaries of the existence of California property the beneficiaries would have the opportunity to collect the property by summary procedures and avoid the expense and delay of having the property administered in the domiciliary probate. We submit that the public policy of avoiding administration where unnecessary would better be served by actual notice to all beneficiaries.

We have previously expressed our concern about the definition of "foreign personal representative", which includes personal representatives from other states as well as from other countries. Article 1 (commencing with §12550) provides that the foreign personal representative from another state may collect personal property by the summary method. The section implies, but does not state, that the procedure is not available for foreign personal representatives from another country. We believe this is an unintended trap. While it would be nice to assume that everyone

dealing with property is fully knowledgeable of all of the provisions of the Probate Code, we know from experience that such is not the case.

It is too easy for someone to read, for example, §12552 which directs the person holding property of the decedent to deliver the property to "the foreign personal representative"; to refer back to §12504 and §12503 to determine that "foreign personal representative" means a personal representative appointed in the jurisdiction of a non-resident decedent's domicile; and to completely overlook the fact that "foreign personal representative" has a limited definition for the purpose of Article 1. We recommend that the staff abandon the use of the term "foreign personal representative" and instead develop new terms that can be used more selectively throughout the statutes, such as "United States personal representative" or "non-United States personal representative". In that manner, each section will stand on its own, and we will avoid setting a trap to be sprung on unknowing lawyers, bankers and debtors, who might otherwise deliver property to personal representatives from other countries. The entire matter of dealing with property of non-resident decedents will be improved by bifurcating the definition and providing for separate statutory structures.

Very truly yours,

Kenneth M. Klug

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