

Fourth Supplement to Memorandum 87-1

Subject: Study L-1027 - Accounts (Comments of Beverly Hills Bar Association)

Attached to this memorandum is a letter from the Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association. The letter contains comments and suggestions relating to accounts. At the meeting we will orally take up the points raised in the letter in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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March 26, 1987

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RECEIVED

Nathaniel Sterling,
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California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94303

Re: Study L-1027 - Estate and Trust Code
Accounts

Dear Mr. Sterling:

The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association has reviewed the tentative recommendation regarding accounts and would like to make the following comments and suggestions:

1. \$10902. Production of supporting documents.

This new section, as drafted, requires a personal representative to submit the documents supporting an account for inspection and audit upon court order "or upon request by an interested person". In reviewing this provision, it was the opinion of the Legislative Committee that in most cases, the personal representative will be willing to submit documents requested by an interested person who is questioning a specific transaction or income and disbursements attributable to a specific asset (i.e. income producing real property). Unfortunately, however, we believe there are too many cases in which this provision will lead to a "fishing expedition" and will result in harassment of the personal representative, not to mention unnecessary cost to the estate, especially when there may be a hostile relationship between the representative and the beneficiaries.

In view of the fact that the Court can and will order the personal representative to submit supporting documents

when an account is not sufficiently itemized or when the Court believes that there is a sufficient basis for objections presented prior to or at the time of the hearing, we believe that the words "or upon request by an interested person" should be deleted from this section.

2. Section 10950. Court ordered account.

We believe that this Section should be consistent with the provisions of existing Section 1025.5 and, therefore, that the following language should be added to the end of subsection (c):

"...or, when a federal estate tax return is required, made more than eighteen months after issuance of letters to the personal representative."

3. Section 10952. Account after authority terminated.

This section, as drafted, provides that a personal representative whose authority is terminated "shall file an account when ordered by the court upon petition of a successor personal representative." The section further provides that the account shall be made within 90 days after the court order unless the time is extended by the Court.

We can conceive of only a limited number of cases in which a personal representative whose authority has terminated would not be required to file an account. Further, there appears to be no compelling reason to require a successor representative to file a petition with the court in order to obtain an order requiring the prior representative to account. Such a procedure would cause unnecessary delay and expense in the administration of the estate. We therefore suggest that the section be re-drafted as follows:

"Unless otherwise ordered by the Court, a personal representative who resigns, is removed from office, or whose authority is otherwise terminated, shall file an account within 90 days after receipt of notice of the appointment of a successor personal representative."

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Although the above language imposes a notice requirement, we believe that such requirement is much less burdensome than the requirement of a petition imposed by the current language of the proposed section.

4. Section 10953. Account where personal representative dies or becomes incompetent.

We make the same comments regarding the language of subsection (b) of this section as for Section 10952 above.

The following comments and/or suggested changes are made in order to resolve some questions that arise from the provisions of Section 10953 as drafted:

Subsection (c) specifically allows to the attorney who prepares an account on behalf of a deceased, absconding or incompetent representative "a fee...for this extraordinary service." No similar allowance is provided for in subsection (b) which relates to the accounting prepared by the legal representative. That omission raises the following questions: (i) whether the legal representative is to be allowed fees for such service; (ii) whether the fees are statutory or extraordinary; and (iii) from whose estate the fees are to be paid (i.e. the estate for which the account was prepared or the estate of the deceased or incompetent representative).

Logically it would seem that (i) the estate for which the account is prepared should not be "penalized" by having what would have been a statutory service converted to an extraordinary service because its personal representative died, absconded or became incompetent, and (ii) the legal representative, not being the personal representative of the estate for which the account is prepared, should not be entitled to share in commissions from that estate.

To resolve the above problems, we recommend that the Law Revision Commission redraft the proposed Section to provide that the legal representative or the attorney ordered to prepare the account be appointed by the Court as Special Administrator solely for that purpose and that such Special

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Adminsitrator shall be entitled to a portion of the statutory commission. This alternative would provide the attorney preparing the account with an additional fee but would not penalize the estate. For the legal representative preparing the account, it would provide a legal relationship between the representative and the estate and would thereby negate the argument that no commissions should be paid to the legal representative from the estate for which the account was rendered.

We also question why subsection (c) of Section 10953 provides that the Court may compel the attorney for the absconding, deceased or incompetent personal representative to file an account "...to the extent that the attorney has information or records available for the purpose", while subsection (b) does not contain similar language when the account is being filed by the legal representative. Subsection (c) also contains a provision that the account filed by the attorney need not be verified, while no similar provision is contained in subsection (b).

It is meaningless for the Court to order an account to be prepared on behalf of a deceased, incompetent, or absconding representative if there is not some requirement that the person ordered to prepare the account, whether it be the legal representative or the attorney of record, exercise some degree of diligence and effort to locate the necessary records and assets on hand in the estate. The competent probate attorney generally "guides" his client through the procedure of transferring bank accounts, securities, security accounts, etc. to the name of the estate and will have that information available. By contacting tenants of real property or payors of obligations due the estate and obtaining copies of cancelled checks, either the legal representative or the attorney of record would be able to ascertain the amount of income paid to the estate from such assets and the names of the banks to which the funds were deposited. Copies of checking account bank statements would provide information regarding disbursements. There appears to be no reason why the attorney of record ordered to prepare an account for his client should be under any lesser obligation than the legal representative, nor why the account prepared by one should be verified and the other shouldn't.

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In view of all of the foregoing comments, we recommend that subsections (b) and (c) of Section 10953 be redrafted and subsections (d), (e) and (f) be added, as follows:

"(b) Unless otherwise ordered by the Court, if the personal representative dies or becomes incompetent, the account shall be filed by the legal representative within 90 days from the date of his appointment or within 90 days after receipt of notice of the appointment of a successor of the deceased or incompetent representative, whichever last occurs.

"(c) If the personal representative dies or becomes incompetent and there is no legal representative appointed, or the personal representative absconds, the Court may compel the attorney for the absconding, deceased or incompetent personal representative or attorney of record in the estate proceeding to file an account of the administration of the absconding, deceased or incompetent personal representative.

"(d) Any legal representative or attorney required to file an account pursuant to the provisions of subsection (b) or (c) of this Section shall be appointed by the court to act as Special Administrator of the estate in which the account is to be filed, and Letters of Special Administration shall be issued to such legal representative or attorney granting such powers as might be required to enable the Special Administrator to prepare and file the account.

"(e) The Special Administrator shall be allowed a portion of the statutory commission for services rendered in preparing and filing the required account. The Court, in its discretion, may allow the Special Administrator additional compensation.

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"(f) The Special Administrator shall take such actions as are reasonably required to enable him to prepare the required account and, as part of the account, shall inform the the court of the actions taken in attempting to reconstruct the administration of the personal representative whose authority is terminated. The account shall be verified.

5. Section 11002. Contest of account.

This section provides that one of the matters that can be contested at the hearing of an account is "the value of property in the inventory and appraisal."

In many cases, an accounting may not be filed for a year or more following the obtaining and filing of the inventory. During that time, the federal estate tax return may have been filed based on the inventory values of property, income tax returns will have been filed showing gain, loss or depreciation based on the inventory value of the property, and the inventory values of property may have been used for numerous other purposes, including determining the amount of a family allowance, determining the ability of the estate to pay creditor's claims, and determining the sale price of assets belonging to the estate.

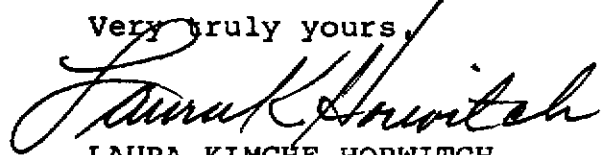
In view of the foregoing, we believe that the filing of an account is not the proper time to contest the inventory value of property. In order to give an interested person the opportunity to review the inventory values and to make any objections thereto while, at the same time, allowing the personal representative the opportunity to proceed with the administration of the estate without the uncertainty that would exist if the inventory values could be contested at a much later time, it is suggested that a new subsection be added to §8804, in the Inventory section of the Code, to provide that the personal representative may give an advice of the proposed filing, or notice of the filing, of an Inventory and Appraisement, together with a copy of said Inventory, to any person interested in the estate and that any objections not made within twenty (20) days after receipt of said advice or notice would be barred.

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If the above suggestion is adopted, subsection (b)(2) of Section 11002 should then be revised to read as follows:

"(2) The value of property in the inventory and appraisal, unless advice of the proposed filing, or notice of the filing, of said inventory was given to the interested person and no objections were made or presented pursuant to the provisions of §8804."

Very truly yours,



LAURA KIMCHE HORWITCH,
Legislative Committee
Estate Planning, Probate and
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LKH:ip
cc: Ralph Palmieri, Chairperson