

First Supplement to Memorandum 87-78

Subject: Study L-940 - Fiduciaries' Wartime Substitution Law (Comments on Staff Draft)

Attached to this supplement is a technical report by Theodore J. Cranston (of Team 2 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section) concerning the revised Fiduciaries' Wartime Substitution Law attached to Memorandum 87-78.

Mr. Cranston queries whether the law is needed at all and suggests that existing procedures are adequate. He recommends that this law be deleted from the Code of Civil Procedure in favor of the Probate Code. This issue was considered when the Commission considered an earlier staff draft in September. The Commission decided that the substance of existing law should be continued and that temporary substitution of fiduciaries should be limited to wartime and not be generally available.

Mr. Cranston also makes several technical comments that will be raised in relation to the relevant provisions when we review the draft.

Respectfully submitted,

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October 20, 1987

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Re: LRC Memo: 87-78

Dear Jim:

Team 2 did not have an opportunity to meet by conference call to discuss the above memorandum. The following comments, therefore, are mine alone.

First, I wonder whether the provisions are necessary at all. It seems to me that there are existing procedures in each of the areas (probate, guardianship, conservatorship and trust) that would be applicable and could be used to accomplish the same result. A second set of procedures may only be confusing. Perhaps the Fiduciary's Wartime Substitution Law was used actively at some point and made sense when court procedures were more complex and difficult to use; however, it seems to me that the updated Probate Code provisions we now have are certainly adequate to take care of the problems addressed by this law. I would recommend that it simply be deleted from the Code of Civil Procedure and that the existing Probate Code, as modified and to be modified, be left to deal with these situations.

If the LRC determines it will proceed with this Law, I have the following comments:

1. With respect to Section 356, I agree with the staff that there seems little reason to retain reference to the 49th Parallel, etc. The references in subsection (c) and subsection (f) should be modified accordingly.

2. Under Section 366, notice is to be mailed to each fiduciary and consultant. If the proceeding has been brought at a time when the whereabouts of the fiduciary or consultant

Mr. James V. Quillinan
October 20, 1987
Page 2

are unknown (for example they are prisoners of war), what notice procedure should be followed? One could, perhaps, refer to the procedure relating to the particular type of matter before the court (such as the Probate rules) for a procedure to follow where an individual's whereabouts are unknown. It seems preferable, however, to provide for this sort of circumstance since it is foreseeable.

3. Section 373 provides that on reinstatement of the original fiduciary, the substitute fiduciary "shall be removed." It would seem preferable to leave this to the discretion of the court since the continued service of the substitute fiduciary as a co-fiduciary may make sense under all the facts and circumstances.

4. Section 374 provides that a substitute fiduciary does not have any responsibility for the acts or omissions of a predecessor fiduciary. Should the reference here to "responsibility" be changed to "liability" to be consistent with other provisions in the law? I can understand the reason for this rule, but I question whether the section should also provide that there is no duty to inquire into the acts of the predecessor fiduciary absent a court order expressly directing inquiry. It would seem better, from a policy standpoint and from the point of view of the protection to beneficiaries, to return the duty to inquire unless removed by the court. With no liability for prior acts and no duty to inquire, absent a court order to the contrary, the beneficiaries seem to be given very little protection as contrasted with the normal situation.

5. There is an extensive note under Section 380, and I tend to agree with the staff's assumptions and recommendations in every respect. As suggested by the staff, if the trust instrument contemplates the matter, the trust instrument controls per Section 361. If the trust instrument does not contemplate the matter, delegation without court authority does not appear wise and may lead to administrative or tax problems.

6. Section 383 provides that the original fiduciary is not liable for the acts or omissions of the delegate. It does not go on to provide that the delegate is not responsible or liable for the omissions of the original fiduciary, nor does it address the question of a duty to inquire as is done in Section 374 relative to substitute fiduciaries. It seems to me

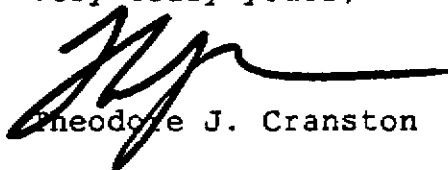
Mr. James V. Quillinan
October 20, 1987
Page 3

these paragraphs should be parallel. If the two proceedings for substitution and delegation are combined, presumably one paragraph along these lines would be sufficient.

7. Section 388 is parallel to Section 383, although it relates to a consultant who has delegated power. The same comments made with respect to Section 383 would be applicable to Section 388.

Although I have not taken the time to study the Probate Code in detail, as I mentioned at the outset of this letter, I believe the procedures available under existing law are sufficient to cover these situations. I would recommend that the Fiduciary's Wartime Substitution Law merely be revoked.

Very truly yours,



Theodore J. Cranston

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