First Supplement to Memorandum 87-96

Subject: Study L-1046 - Nondomiciliary Decedents (State Bar Comments)

Attached to this supplement is a report from a team of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section relating to the statute on nondomiciliary decedents. Much of the letter relates to an earlier draft. For the most part, the team is in agreement with the draft attached to Memorandum 87-96. This supplement discusses only the issues that still remain.

§ 12520. Applicable procedure

The State Bar Team suggests that we provide a procedure "to deal with the effect of a determination of another jurisdiction that the decedent died intestate or that a will offered for probate is not valid where the basis for that determination is inconsistent with California law." (See Exhibit 1, p. 2, ¶ 7.) This issue was discussed at the October meeting and the Commission decided not to attempt to provide comprehensive rules in this statute. One of the team's concerns is answered by existing law. Under Section 6113, a will that is not valid under the law of a decedent's domicile may still be valid as to property subject to California jurisdiction under applicable conflict of laws rules.

§ 12525. Appointment of personal representative

The Team suggests the omission of this section requiring the appointment of a personal representative. (See Exhibit 1, p. 3, ¶ 9.) The team states that there are cases where admission of the will to probate is needed, but a personal representative is not. The staff agrees that this section is unnecessary.

12530. Application of general provisions

The Team suggests that the comment to this section be revised as follows and the staff concurs:

Comment. Section 12530 makes clear that the general

provisions relating to estate administration apply to administration ~~by a foreign personal representative~~ under this chapter, except as otherwise provided. For exceptions, see, e.g., Section 12540 (conditions for distribution to sister state personal representative).

§ 12570. Collection of personal property of small estate without ancillary administration

The Team asks why the procedure for collection of property without administration is limited to personal property. (See Exhibit 1, p. 4, ¶ 13.) The affidavit procedure for personal property is a substitute for the more cumbersome procedure of existing Sections 1043-1043a. The sister state personal representative is given the power to collect the property on the same footing as a beneficiary since personal property is subject to the jurisdiction of the court of domicile. The situation is different for real property, since it is subject to California jurisdiction.

§ 12573. Liability of sister state personal representative taking by affidavit

The Team believed that there was a "severe problem" with regard to the liability of the sister state personal representative and of beneficiaries under the affidavit procedure as set out in the earlier draft, but the Team appears to be generally satisfied with the approach taken in the current draft. (See Exhibit 1, p. 4-5, ¶ 14, p. 6, ¶ 5.)

Code of Civil Procedure § 1913. Sister state judicial records

The Team believes that the clause "except to the extent authorized by statute" creates a trap and suggests that we refer specifically to the sections involved. (See Exhibit 1, p. 5, ¶ 15.) The staff is not clear on the nature of the "trap" created by this language. The general language avoids the need to amend this section in the future. Section 1913 is not a model of good drafting, but we have generally not attempted to redraft ancient general provisions in the Code of Civil Procedure. If the Commission is interested in cleaning this section up, it could be rewritten along the following lines:

SEC. . Section 1913 of the Code of Civil Procedure is amended to read:

1913. ~~The~~ (a) Subject to subdivision (b), the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced ~~here~~ in this state by an action or special proceeding~~,--and-except-also-that-the~~.

(b) The authority of a guardian, conservator, or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which such person was invested with authority, except to the extent expressly authorized by statute.

The word "expressly" has been added in the last clause to avoid the inference that an exception may be implied. If desired, we could refer specifically to Probate Code Sections 12570-12572 in the last clause.

Respectfully submitted,

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Re: LRC Memo 87-72 and LRC Memo 87-96
(Nonresident Decedent -- Revised Recommendation)

Dear Jim:

This letter was drafted prior to receipt of LRC Memo 87-96 which was received November 9 after our team had discussed the subject. The letter, other than this paragraph, is being sent unchanged. A P.S. has been added to the letter to attempt to deal with LRC Memo 87-96, but the committee as a whole has not considered the most recent memo. I believe, however, that most of the changes that have been made are consistent with our suggestions. What follows in the body of this letter, then, is our evaluation of LRC Memo 87-72.

We believe that the revised recommendation takes a direction far preferable to that of LRC Memo 86-204. We believe that in general the proposals made in this memorandum are good ones. We do, however, have some specific comments:

1. We agree with the recommendations of the staff set forth in the yellow pages which precede the proposed statute itself.

2. We do not believe that Section 3-202 of the Uniform Probate Code (set forth on page 10 of the recommendation) is necessary. We do believe that this should be left a case law.

3. We concur with the suggestion in the draft that the term "nondomiciliary decedent" be substituted for "nonresident decedent" since it is technically more accurate. The concept of domicile is the relevant concern here, and it does not seem that there is any reason to refer to residency. There is enough confusion on this subject in a number of other contexts, and it seems inappropriate to further confuse the matter here.

4. The terminology "sister-state," in light of the usage of this term in other contexts, seems to contribute to clarity of thought and expression, and it does not seem that the goal of neutering all statutes in California should carry the day here.

5. We believe that the addition of Section 3-203(g) of the Uniform Probate Code (reproduced on page 11) would be useful. In the absence of a contrary provision in the decedent's will, it would appear that this provision would lead to better coordination of multiple probates.

6. We concur with the Commission's decision at its prior meeting to keep Section 12511 in this part and put a cross-reference to it in the comment to the appropriate section in the General Rules of Procedure.

7. With regard to Section 12520, we believe that California should have a procedure to deal with the effect of a determination of another jurisdiction that the decedent died intestate or that a will offered for probate is not valid where the basis for that determination is inconsistent with California law. If the other jurisdiction determined that the decedent died intestate but the decedent's will satisfies the requirements of a holographic will in California, California should be able to make a determination that the will is valid for California purposes and admit it to probate here. If a will is invalidated in another jurisdiction because it had only two witnesses' signatures, California courts should have an opportunity to determine that the will is valid under California law and may be admitted to probate here. We believe that wills valid under California law should be admitted to probate and control disposition of property in California even though the wills may not satisfy the requirements of the domiciliary jurisdiction. We see nothing to be gained by a contrary rule.

8. Under Section 12522, if the will of a nondomiciliary was admitted in a sister-state, our court is directed to admit the will to probate here. This provision is, as noted, consistent with the requirements of the full faith in credit clause of the U.S. Constitution. California courts are not, however, required to give full faith in credit to the order of a foreign nation. We suggest that the word "shall" in line 3 of Section 12523 be changed to "may." California can and should question the order of a foreign nation if it is determined that the rights of the parties have not been protected as deemed appropriate by California law. If our notions of fairness (with proper notice, hearing, etc.) are not part of the foreign proceeding, the court here should not be required to follow the order of a foreign court. We believe that use of the provisions of Section 1713.4 of the Uniform Foreign Money -- Judgments Recognition Act would be useful here. The court could be given the discretion not to follow the foreign court's action where any of the objectionable conditions set forth in the statute were found to exist.

9. We are not certain why Section 12525 is required. There may be reasons for admitting a will of a nondomiciliary to probate where a personal representative is not required. Quite frequently this can occur where a power of appointment has been exercised in a will before it is admitted to probate, and third parties will not recognize the exercise under the will as effective. We cannot think of a reason why this section is necessary.

10. It appears that there may be a typographical error in the comment to Section 12530. We suggest that the words "by a foreign personal representative" be deleted from lines 2 and 3 of the comment. The term "foreign personal representative" is not defined anywhere, and it appears that the meaning of the comment remains without those words.

11. The title to Article 4, we believe, should read "Distribution of Property to Sister-State Personal Representative."

12. The provisions of Section 12541 authorizing distribution of real property to a sister-state personal representative expands the law. We do not know whether this proposed expansion is feasible. It would seem, by implication, to incorporate the terms of the law of another state. How will

a title company here in California know whether or not the sister-state personal representative has the power to transfer the property at a subsequent time? What restrictions will be imposed upon the sister-state personal representative in dealing with the real estate? Does this not permit the law or court of another state to affect real property in California? Has this provision been checked with the representatives of the title companies of California to see whether the title companies will insure title passed by a sister-state personal representative pursuant to a sister-state court order?

13. Section 12570 relating to the collection of property without administration is specifically made applicable to personal property but not to real property. If Section 12541 works with respect to real property, why not extend the affidavit procedure for real property to a sister-state personal representative?

14. If a sister-state personal representative uses the affidavit procedure, presumably that personal representative picks up the liability under Sections 13109-13112. It is suggested that the sister-state personal representative would be liable only to the extent the property has not been distributed to the beneficiaries and the beneficiaries are liable to the extent they have received the property. If the property is cash, and there is other cash in the estate, it will be difficult to determine whether or not "the property has been distributed to the beneficiaries." The creditor could be left with an impossible burden of proof to establish the liability of either the personal representative or the beneficiary. Further, does the creditor have to go to the other jurisdiction to enforce liability against the personal representative or the beneficiary? We believe there is a severe problem in this area and that it should be resolved before the language of the sections is finalized. At this point, however, we are not sure of what the solution should be. So far, the best proposal we have come up with is as follows:

a. As regards personal property, if the non-California fiduciary follows the requirements relating to publication of notice in California (which would be voluntary), once all of the terms of the statute have been complied with, the personal representative can take the personal property free of creditors' claims. If the affidavit procedure is used, the

personal representative takes the property subject to the rules concerning liability established in the procedure, and that liability stays with the fiduciary whether or not distributions are made thereafter to beneficiaries.

b. With regard to real property, we believe there may be a title problem with the proposed statutes. If we are correct, an ancillary probate would be required in every case, regardless of the value of the real estate. If we are not correct and somehow the problem can be resolved, the affidavit procedure ought to be available to non-California fiduciaries, but the fiduciaries should take subject to the liability prescribed by that procedure. Any non-California fiduciary that does not wish the liability can commence probate here and limit liability.

15. In the conforming revision to Section 1913 of the Code of Civil Procedure, we believe the last clause ("except to the extent authorized by statute") creates a trap. Why not specify with a specific reference to sections that are involved? Does the word "state" refer to California statutes or statutes of the sister-state? We would hope that the language of the section could be improved and clarified to make its meaning clear to the reader.

Very truly yours,

Theodore J. Cranston

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P.S. LRC Memo 87-96 states that only certain sections of the proposal will be considered at the November meeting. I will attempt to discuss those portions only in this portion of the letter:

1. Section 12513 is new and contains material we believe should be in the bill. We commented upon the absence of this material in paragraph 5 of this letter above.

2. Sections 12520 through 12523 are commented upon in paragraphs 7 and 8 above. As you will see, we believe Section 12520 should be further revised, but we are in agreement with respect to the change made in Section 12522.

3. Section 12541 has been modified in a fashion that we think is consistent with our comments in paragraph 12 above.

4. Section 542, which is new, appears appropriate.

5. Sections 12572 and 12573 appear appropriate. In paragraph 14 above, we discuss the issues addressed in these two sections. While the resolution of the various problems involved there is not exactly what we suggested, it appears that the proposed changes are acceptable. If there is another detailed discussion of these sections, perhaps the ideas contained in paragraph 14 above could be discussed with the Commission.

6. All of the conforming amendments seem appropriate in light of the other changes that have been made in the statute.