

Memorandum 88-3

Subject: Study L - Transitional Provisions for 1988 Probate Bill

General Approach

The Commission has decided that the 1988 probate bill should have a deferred operative date of July 1, 1989. The Commission also decided that the bill should apply to the maximum extent possible to administration proceedings pending on that date. Exceptions should be made where necessary (e.g., a petition filed before the operative date should be heard and decided under the law applicable at the time of filing). However, an effort should be made to keep transitional provisions simple, so that broad blocks of the statute would be governed by a few basic transitional rules without detailed applicability provisions.

Consistent with these decisions, the staff recommends the transitional provisions outlined in this memorandum. The recommended provisions consist of general operative date and transitional provisions applicable to the bulk of the 1988 legislation, together with specific exceptions to the general rules that would be codified in connection with the specific matters to which they relate.

For the general operative date and transitional provision, the staff recommends the following. The reasons for the various facets of this provision we believe are self-evident.

SEC. . (a) This act becomes operative on July 1, 1989.

(b) Except as provided in this section or as otherwise expressly provided by statute, this act applies on the operative date to all matters governed by it regardless of whether an instrument was executed, a fiduciary relationship was created, a person died, a proceeding was commenced, an order was made, an action was taken, or any other event occurred or circumstance existed before, on, or after the operative date.

(c) If a petition, account, report, inventory, appraisal, or other document or paper is filed before the operative date, the contents of, and any notice of, objection or response to, hearing on, order concerning, or other matter relating to the petition, account, report, inventory, appraisal, or other document or paper is governed by the applicable law in effect before the operative date and is not governed by this act.

(d) If an order is made, including an order appointing a personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary or officer, or any action on an order is taken, before the operative date, the validity of the order or action is governed by the applicable law in effect before the operative date and is not governed by this act. Nothing in this subdivision precludes proceedings after the operative date to modify an order made or alter an action taken before the operative date to the extent proceedings for modification of an order or alteration of an action of that type are otherwise provided by this act.

(e) No personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary, officer, or person is liable for any action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and no such person has a duty to take any step to alter such an action or its consequences as a result of the enactment of this act.

(f) If this act does not apply to a matter that occurred before the operative date, the applicable law in effect before the operative date continues to govern the matter notwithstanding its repeal by this act.

(g) Notwithstanding any other provision of this section, if application of this act or of the applicable law in effect before the operative date in accordance with this section would result in a substantial and obvious impairment of administration or justice in the circumstances of a particular case, the court in the case may modify this section to the extent necessary to minimize the impairment of administration or justice in the case.

It should be noted that no matter how much detail and guidance we attempt to provide on transitional matters, there will always be uncertainties and ambiguities. For example, as a general rule we apply the new law to all actions that occur after its operative date; but one provision of the new law grants increased compensation to a public administrator for an action taken "under this article." Does this mean the increased compensation applies only to an action taken after the operative date (under "this article"), or is the increased compensation available for an identical action taken under old law before the operative date where compensation is awarded after the operative date? Because of the sheer size of the statute and the multitude of problems such as this, the best we can do (short of drafting transitional provisions that rival the statute itself in size) is to give general guidance and hope the parties will work out any problems without having to go to court for a resolution.

One problem is the location of the general operative date and transitional provisions. These provisions will govern a patchwork of the Probate Code as well as conforming changes in numerous other codes. An obvious solution is to place it as an uncodified statute at the end of the probate bill, applicable to the whole bill. This is not wholly satisfactory, however, since the existence of the uncodified statute will not be readily apparent to a person using an unannotated code. A second approach would be to repeat the entire operative date and transitional provision in each division, part, chapter, or section to which it relates. Alternatively, the provision could be codified and incorporated by reference everywhere it is relevant. The staff does not have any good answers; we would defer to the preference of practicing lawyers on this. In any case, it is really only a short-term problem, given our basic approach of making the new law apply immediately to the extent practical.

Opening Estate Administration

The staff suggests no special transitional rules for the opening administration recommendation; the general provisions relating to petitions filed before the operative date and to notices, orders, appointments, and other proceedings should be sufficient.

Inventory and Appraisal

Some of the most complex transitional problems occur in the area of inventory and appraisal and appointment of probate referees. The staff suggests a number of special provisions to deal with this area.

Because some of the procedures, terms, and other matters relating to the State Controller's selection of probate referees have been changed, it is important to make clear that the change does not affect any selection of a referee made under prior law. The staff would add to the draft a new Section 407:

§ 407. Appointment of probate referee before operative date

407. No appointment of a probate referee by the State Controller before the operative date of this chapter is invalidated by any change in law made by enactment of this chapter. Appointment of a probate referee before the operative date of this chapter may be revoked under this chapter only if revocation would otherwise be proper under this chapter.

Comment. Section 407 is new. It is a transitional provision intended to save an appointment made under old law that could not necessarily be made under new law. Revocation of an appointment under new law is authorized only if there are independent grounds for revocation, under the revocation provisions of the new law.

The new law also changes somewhat the standards governing political activities by probate referees, and imposes an annual reporting requirement on probate referees. Special transitional provisions are necessary here, not only for practical reasons but also to avoid possible ex post facto problems. We would revise Section 406 to read:

§ 406. Political activities of probate referee

406. (a) A probate referee, or any person who is an applicant for or seeking appointment or reappointment to act as a probate referee, shall not, directly or indirectly, solicit, receive, or contribute, or be in any manner involved in soliciting, receiving, or contributing, any of the following:

(1) Any assessment, subscription, or contribution to any party, incumbent, committee, or candidate exceeding two hundred dollars (\$200) in any one year for any partisan public office of this state.

(2) An assessment, subscription, contribution, or political service for the office of State Controller in any amount, notwithstanding paragraph (1).

(b) A violation of subdivision (a) is a misdemeanor, and the State Controller shall revoke the appointment of a probate referee who violates subdivision (a).

(c) Upon a person's application for appointment as a probate referee, and thereafter annually during the person's eligibility for appointment, during the person's tenure as a probate referee, and during the person's eligibility for reappointment, the person shall file with the State Controller a verified statement indicating whether the person has done any act described in subdivision (a)(1) or (a)(2) during the preceding two-year period.

(d) The State Controller may not appoint or reappoint as a probate referee any person who, within the two-year period preceding the date of the appointment or reappointment, violates any provision of this section, and any such appointment or reappointment is void and shall be revoked. However, all acts not otherwise invalid performed by the person before revocation of the person's appointment are valid.

(e) Subdivisions (a), (b), and (d) do not apply to any action that occurred before July 1, 1989, and the applicable law in effect before July 1, 1989, continues to apply to the action. Subdivision (c) applies on July 1, 1989, to persons who apply for appointment on or after July 1, 1989; a person

appointed before July 1, 1989, shall comply with the relevant provision of subdivision (c) within 90 days after July 1, 1989.

Comment. Subdivisions (a) and (b) of Section 406 restate former Section 1311, with the addition of references to incumbency, reappointment, and committees, and the deletion of references to campaigns. The two hundred dollar limitation of paragraph (a)(1) does not apply to the State Controller; solicitation, receipt, or contribution of any amount to a State Controller campaign is absolutely prohibited by paragraph (a)(2).

Subdivision (c) is new. It is intended to facilitate compliance with the other requirements of this section.

Subdivision (d) restates former Section 1312, with the added requirement of removal from office. The former transitional provision is ~~omitted because it is no longer necessary~~ replaced by a new transitional provision in subdivision (e).

If a probate referee is appointed to appraise an estate but the operative date of the new law occurs during the appraisal process, it makes sense to allow the referee to complete the appraisal under existing law, without trying to reallocate appraisal tasks between the referee and the personal representative or an independent expert under the new law. This is true both for practical reasons and because the probate referee appraisal is a short-term operation. The staff would add a provision along the following lines.

§ 8805. Transitional provision

8805. If a probate referee is designated by the court before the operative date of this part to make an appraisal of property in an estate, all matters relating to the appraisal by the referee, including the property to be included in the appraisal, waiver of the appraisal, and compensation of the referee, are governed by the applicable law in effect before the operative date and are not governed by Chapter 3 (commencing with Section 8900).

Comment. Section 8805 is an exception to the general rule that all provisions of this part apply immediately on its operative date to pending proceedings.

Accounts

The provisions governing accounts impose a new balance-sheet type account requirement. This may present problems for a personal representative who does not have the accounts readily available in this

form. During the first year of operation of the new law the staff would extend the time for an account in order to enable personal representatives to reorganize their books.

§ 10955. Transitional provision

10955. Notwithstanding any other provision of this chapter, a personal representative required by this chapter or by court order to file an account between July 1, 1989, and June 30, 1990, shall have an additional 90 days after the time required within which to file the account, unless the court for good cause orders otherwise.

Comment. Section 10955 recognizes that additional time may be required to prepare an account in the form prescribed in this part.

Abatement

The Commission has previously adopted a special transitional provision applicable to abatement provisions--the new rules govern only gifts made on or after July 1, 1989. Since abatement is precipitated by the character of a testator's gift, it is appropriate to defer application of the new law where the gift was made before the new law took effect.

Interest and Income Accruing During Administration

The Commission has previously adopted a special transitional provision applicable to interest and income accruing during administration. The changes in these provisions affect the substantive rights of the beneficiaries, and are subject to the control of the testator, settlor, or other donor. The transitional provision states that the new rules do not apply where the donor died before July 1, 1989, since the donor in that case would not have had an opportunity to revise the terms of the gift.

The recommendation on interest and income also provides rules governing trust distributions. In some cases this could present the issue of whether the new law affects rights of parties where, before the operative date, a distribution was not made but the new law would now seem to require it. The staff would add a transitional provision along the following lines:

§ 16315. Transitional provision

16315. The changes made in this chapter by the act that enacted this section apply to a trust created before July 1, 1989, but the changes apply to the trust as if created on

that date and do not affect any aspect of the trust administration that occurred, or rights of beneficiaries that existed, before that date.

Rules of Procedure

There do not appear to be any major transitional problems arising out of the rules of procedure recommendation. However, the Commission may wish to consider whether the new technical rules regarding signing and verification by attorneys should apply to papers filed after the operative date even though the petition was filed before the operative date, and whether the new rules governing the determination of oral objections or continuance of hearings should be applied to a proceeding where the petition was filed before the operative date. We have not drafted such a transitional provision, since the concept of simplicity dictates that all proceedings on a petition filed before the operative should be governed by the one body of law applicable at the time the petition was filed. However, we could without causing undue disruption adopt a general provision that applies procedural rules to all pending proceedings unless the court decides that it would be unfair to do so. This would expedite application of the new rules, though at the expense of simplicity and certainty.

A special transitional rule is provided in Section 7242 concerning appeals from orders under Sections 1190-1192 (determination of heirship or persons to whom distribution should be made) and orders fixing inheritance tax.

Litigation Involving Decedents

The Commission has previously adopted the rule that the new provisions governing litigation involving a decedent apply to actions against decedents who die after the operative date. For consistency, this rule should also be applied to claims in litigation, thus:

§ 9357. Application of chapter

9357. (a) This chapter applies only to an action against a person who dies on or after July 1, 1989.

(b) The applicable law in effect before July 1, 1989, continues to apply to an action against a decedent who died before July 1, 1989, notwithstanding its repeal by the act that enacted this chapter.

Is this rule too limiting? We could apply the new rules to actions commenced after the operative date, rather than turning the new law on the date of the decedent's death. If application of the new statute is based on the date of commencing an action, the parties in some cases would conceivably find an advantage in delaying commencement of an action. Similarly, a party who is unaware of the new law, might be at a disadvantage by commencing the action before the operative date instead of waiting. Some nervous types have suggested in this type of situation on past occasions that there may be some malpractice exposure from this type of situation. It is difficult to specify the exact nature of an advantage or disadvantage that might arise from inopportune commencement of an action under the new law. The new law will eliminate a host of complications, inconsistencies, and overlapping provisions, largely of a procedural nature. However, the new law relating to insured claims probably applies to some cases where existing law may not. The new law applies to all insured claims, whereas existing law is not so broad. Thus, a substantive right to proceed under the statute may depend upon the nature of the transitional provision. The date of death is, for all practical purposes, unpredictable. Applying the new law only to cases where the decedent dies after the operative date thus avoids the temptation to connive or to suffer a connivance.

In short, the approach previously adopted (applying these provisions only where the decedent in question has died after the operative date) avoids the risk of benefiting one party or the other and avoids the race to the courthouse (or its converse). The staff is not suggesting that we apply the new rules to any actions filed after the operative date, but only that the Commission should consider this alternative.

Public Guardians and Public Administrators

The changes in the public guardian and public administrator statutes can generally be handled by the broad general operative date and transitional provisions without the need for special rules. However, one area that presents difficulties is where the public guardian takes immediate possession of property for protective

purposes, without being appointed guardian of the estate. Our general transitional provisions are really designed with estate administration in mind and do not adequately deal with issues such as changes in the public guardian's jurisdiction, authority, and compensation and the impact of these changes on existing proceedings. This is a complex matter, and the staff would resolve it simply by providing that the new rules on seizing property apply only to activities that occur after the operative date.

§ 2903. Transitional provision

2903. This chapter applies only to possession or control of property by a public guardian on or after July 1, 1989. Possession or control of property by a public guardian before July 1, 1989, is governed by the applicable law in effect before July 1, 1989.

Comment. Section 2903 may be considered to be a specific application of portions of the general operative date and transitional provision.

Nondomiciliary Decedents

The nondomiciliary decedent recommendation should apply to all petitions filed or actions taken after the operative date, but should not displace proceedings commenced under the former law. Hence, the sister state personal representative should be able to take advantage of the affidavit procedure for collection of personal property, but should not be required to abandon proceedings under Sections 1043-1043a where the personal representative has published notice before the operative date of the new law. The staff thus recommends that an uncodified transitional provision be applied to Sections 1043-1043a as follows:

If the first notice has been published pursuant to former Section 1043 of the Probate Code before the July 1, 1989, the procedure provided by former Sections 1043 and 1043a of the Probate Code may be pursued to their conclusion notwithstanding the repeal of Sections 1043 and 1043a by the act that enacted this section.

The new procedural standards applicable to recognition of a sister state or foreign nation adjudication (see Sections 12522-12523) differ from those provided in Section 362. We do not believe that there is

any vested interest that would be affected by the change. The new law should apply to any petition for ancillary administration filed after the operative date.

The new law also imposes some conditions on distribution to a sister state personal representative. See Sections 12540 (conditions for distribution), 12541 (distribution of real property proceeds), 12542 (distribution where estate in sister state is insolvent). Again, we can identify no vested interest on the part of a sister state personal representative in the old law. In other words, neither the date of death of the decedent nor the date of commencement of ancillary proceedings in this state should immunize the sister state personal representative from these rules. These are rules that fall into the public policy category and should be applied to all pending proceedings unless the court determines that it would be unfair to do so under the circumstances.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Stan G. Ulrich
Staff Counsel