

Memorandum 89-42

Subject: Study L-1061 - Brokers' Commissions in Probate

At the December meeting, the Commission approved statutory language to deal with the situation where the personal representative makes an exclusive listing contract with a broker to sell estate property and the contract provides that if the personal representative sells the property to a particular named person, no commission is payable to the exclusive listing broker. The staff put this language in the Commission's urgency probate bill (AB 156). Shortly before the hearing in the Senate Judiciary Committee, the staff received a phone call from attorney-broker Ed Heron of Merrill Lynch Realty in Santa Barbara, calling for the California Real Estate Association and expressing concern about the proposed language. As a result, the staff took this language out of the probate urgency bill for further study.

Attached to this Memorandum is revised language to deal more comprehensively with the original problem. (See draft Section 10162.6.) The staff has sent a copy of this new proposal to Mr. Heron for his comment. The staff proposes to put this language in the Commission's general probate bill (AB 158).

In the course of reviewing the brokers' commission provisions, we discovered several other gaps in coverage, particularly as relates to cases where a broker with an exclusive listing contract procures the successful overbidder. The attached draft would also make revisions to deal with these matters.

Respectfully submitted,

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Probate Code § 10162.5 (amended). Compensation where there is an exclusive contract and no other broker or agent is involved

10162.5. Where Subject to Section 10162.6, where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the court shall allow to the agent or broker holding the contract the compensation determined under Section 10161 on:

(a) The full amount for which the sale is confirmed if both of the following circumstances exist:

(1) The bid returned to the court for confirmation is made by a person who is not represented by an agent or broker.

(2) The court confirms the sale to that purchaser on that bid.

(b) The amount of the original bid if both of the following circumstances exist:

(1) The bid returned to court for confirmation is made by a person who is not represented by an agent or broker or who is represented by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

Comment. The introductory clause of Section 10162.5 is amended to make the section subject to Section 10162.6 (rules for commission where exclusive contract provides that no commission is payable if sale is confirmed to particular purchaser). See also the Comment to Section 10162.6. Subdivision (b)(1) is amended to apply the rule in subdivision (b) to situations where the bid returned to court is procured by an agent with an exclusive listing. For an illustration of the application of this rule, see Example 2 in the Comment to Section 10161.

Probate Code § 10162.6 (added). Exclusive contract providing that no compensation payable if sale confirmed to particular purchaser named in contract and purchaser named in contract makes original bid or successful overbid

10162.6. (a) This section applies only if all of the following circumstances exist:

(1) There is an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The contract provides that no compensation is payable to the agent or broker holding the contract if sale is confirmed to a particular purchaser named in the contract.

(3) The purchaser named in the contract makes the original bid returned to the court for confirmation or makes an increased bid that is confirmed by the court.

(b) If the court confirms the sale to the purchaser named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation:

(1) No compensation is payable to the agent or broker holding the contract.

(2) The compensation of any other agents or brokers involved in the sale is determined as if there is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property and as if the agent or broker holding the contract is not involved in the sale.

(c) Where the bid returned to the court for confirmation is made by the purchaser named in the contract who is not represented by another agent or broker:

(1) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser not represented by an agent or broker, the court shall allow to the agent or broker holding the contract half the compensation on the amount of the original bid the court would otherwise allow under subdivision (a) of Section 10161.

(2) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser represented by an agent or broker (other than the agent or broker holding the contract), the court shall allow (A) to the agent or broker who procured the purchaser to whom the sale is confirmed the compensation determined under subdivision (b) of Section 10165 and (B) to the agent or broker holding the contract the compensation that would be awarded under paragraph (3) of subdivision (c) of Section 10165 to an agent or broker holding an exclusive contract in a case where the original bid returned to the court was made by a purchaser who was procured by another agent or broker.

(3) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser procured by the agent or broker holding the contract, the court shall allow to that agent or broker the compensation determined under subdivision (b) of Section 10165.

(d) Where the bid returned to the court for confirmation is made by the purchaser named in the contract who is represented by another agent or broker:

(1) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser not represented by an agent or broker, the compensation determined under Section 10161 on the amount of the original bid shall be divided equally between the agent or broker holding the contract and the agent or broker representing the purchaser named in the contract.

(2) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser represented by another agent or broker, the court shall allow to the agent or broker holding the contract, to the agent or broker for the purchaser named in the contract whose bid was returned to the court for confirmation, and to the agent or broker who procured the purchaser to whom the sale is confirmed, the compensation determined under Section 10165.

(3) If the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to another purchaser procured by the agent or broker holding the contract, the court shall allow to the agent or broker holding the contract and to the agent or broker for the purchaser named in the contract whose bid was returned to the court for confirmation the compensation determined under Section 10165.

Comment. Section 10162.6 is new, and deals with the situation where the personal representative makes an exclusive listing contract with a broker (Broker A) to sell estate property, but the contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser named in the contract. See subdivision (a)(1)-(2). In addition, for this section to apply, the original bid or successful overbid must be made by the purchaser named in the contract. See subdivision (a)(3). In a case where the agent or broker has a contract of a type described in subdivisions (a)(1)-(2), but the purchase Named in the contract does not make the original bid or successful overbid as required by subdivision (a)(3), this section does not apply and the other rules in this article governing to cases where there is an exclusive listing contract are applicable. For applicable

examples, see the Comment to Section 10161.

Subdivision (b) applies in any case where the sale is confirmed to the purchaser named in the contract. Subdivision (b)(2) makes clear that the compensation of other agents or brokers involved in the sale are determined without regard to the exclusive listing contract governed by this section. Hence, the other rules in this article governing cases where there is no exclusive listing contract are applicable. For applicable examples, see the Comment to Section 10161.

The following examples illustrate the application of Section 10162.6. Broker A is the broker holding an exclusive listing contract with the personal representative that provides for no compensation if the property is sold to a named purchaser. As in the Comment to Section 10161, Broker B is the broker whose bid is returned to the court for confirmation (if other than Broker A). Broker C is a broker who does not have a contract with the personal representative and who procures a successful overbidder.

Example 1. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, not represented by a broker; no overbid. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser. The bid returned to court for confirmation is made by that purchaser, who is not represented by a broker. The court confirms the sale to that purchaser. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to any commission.

Example 2. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, not represented by a broker; successful overbid by purchaser not represented by a broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides for a commission of 6% of the sale price. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is not represented by a broker. At the confirmation hearing, however, the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder.

Under subdivision (c)(1) of Section 10162.6, the commission is half the amount the court would otherwise allow under subdivision (a) of Section 10161 on the amount of the original bid. (The commission payable on the original bid is such amount as the court determines is reasonable. See Section 10161 & Example 1 in the Comment thereto.)

For example, suppose the original bid returned to the court is \$100,000 and sale is confirmed to the successful overbidder at \$140,000. The court determines that a reasonable commission would be 6%, equal to \$6,000 (6% of \$100,000). Broker A (the broker holding the exclusive contract) is entitled \$3,000 (half of 6% of \$100,000). The

estate gets the benefit of the other half of the \$6,000 commission, since the personal representative in effect produced the successful bidder.

Example 3. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, not represented by a broker; successful overbidder represented by Broker C. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is not represented by a broker. At the confirmation hearing, however, the highest bid is made by an overbidder who is represented by Broker C. The court confirms the sale to the overbidder. Under subdivision (c)(2) of Section 10162.6, Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid (by application of Section 10165(b)), subject to the limitation on overbids in such cases provided in Section 10162. Broker A is entitled to one-fourth of the commission on the original bid (by application of Section 10165(c)(3)). The estate gets the benefit of the remaining one-fourth of the commission on the original bid.

For example, suppose the original bid returned to court is \$100,000 and Broker C brings in a overbid of \$140,000 on which the sale is confirmed. The court determines that a reasonable commission on the \$140,000 sale is 6%, equal to \$8400. Broker C receives \$5,400, which is made up of one-half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) and all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). Broker A (the broker holding the exclusive contract) receives one-fourth of the commission on the original bid (one-fourth of 6% of \$100,000 = \$1,500). The estate gets the benefit of the other one-fourth of the \$6,000 commission on the original bid (\$1,500), since, in effect, the personal representative is responsible for producing the original bid.

Example 4. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, not represented by a broker; successful overbidder represented by Broker A. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is not represented by a broker. At the confirmation hearing, however, the highest bid is made by an overbidder who is represented by Broker A. The court confirms the sale to the overbidder. Under subdivision (c)(3) of Section 10162.6, Broker A is entitled to half of the commission on the original bid plus all of the commission on the overbid (by application of Section 10165(b)). The

estate gets the benefit of the remaining one-half of the commission on the original bid.

For example, suppose the original bid returned to court is \$100,000 and Broker A brings in a overbid of \$140,000 on which the sale is confirmed. The court determines that a reasonable commission on the \$140,000 sale is 6%, equal to \$8400. Broker A receives \$5,400, which is made up of one-half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) and all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). The estate gets the benefit of the other one-half of the \$6,000 commission on the original bid (\$3,000), since, in effect, the personal representative is responsible for producing the original bid.

Example 5. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, represented by Broker B; no overbid. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is represented by Broker B. The court confirms the sale to that purchaser. Under subdivision (b)(2) of Section 10162.6, the reasonable compensation allowed by the court on the amount for which the sale is confirmed is paid to Broker B and Broker A is not entitled to any commission.

Example 6. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, represented by Broker B; successful overbid by purchaser not represented by a broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is represented by Broker B. At the confirmation hearing, the highest bid is made by a different bidder, who is not represented by a broker. The court confirms the sale to the overbidder. Under subdivision (d)(1) of Section 10162.6, the commission payable to the two brokers is a reasonable commission on the amount of the original bid, and is divided equally between them.

For example, suppose the original bid returned to court by Broker B is \$100,000, sale is confirmed to the successful overbidder at \$140,000, and the court determines that a reasonable commission is 6%. The commission on the original bid is \$6,000 (6% of \$100,000), which is divided between Broker A and Broker B, each receiving \$3,000.

Example 7. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, represented by Broker B; successful overbid by purchaser represented by Broker C. The

personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is represented by Broker B. At the confirmation hearing, the highest bid is made by an overbidder, who is represented by Broker C. The court confirms the sale to the overbidder. Under subdivision (d)(2) of Section 10162.6 (which applies Section 10165), Broker A and Broker B are entitled to share equally in one-half of the commission on the original bid; Broker C is entitled to the remaining one-half of the commission on the original bid plus all of the commission on the overbid.

For example, suppose that the original bid returned to court by Broker B is \$100,000, that sale is confirmed to a successful overbidder represented by Broker C at \$140,000, and that the court determines a reasonable commission to be 6%. The commission on the original bid is \$6,000 (6% of \$100,000). Broker A and Broker B each receive \$1,500, splitting one-half of the commission on the original bid. Broker C receives \$5,400, which is made up of the other half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) plus all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400).

Example 8. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; named purchaser is original bidder, represented by Broker B; successful overbid by purchaser represented by Broker A. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by that purchaser, who is represented by Broker B. At the confirmation hearing, the highest bid is made by an overbidder, who is represented by Broker A. The court confirms the sale to the overbidder. Under subdivision (d)(3) of Section 10162.6 (which applies Section 10165), Broker A is entitled to one-half of the commission on the original bid plus all of the commission on the overbid.

For example, suppose that the original bid returned to court by Broker B is \$100,000, that sale is confirmed to a successful overbidder represented by Broker A at \$140,000, and that the court determines a reasonable commission to be 6%. The commission on the original bid is \$6,000 (6% of \$100,000). Broker A receives \$5,400, which is made up of half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) plus all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). Broker B receives \$3,000, which is the other half of the commission on the original bid (half of 6% of \$100,000 = \$3,000).

Example 9. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by a different purchaser, not represented by a broker; successful overbid by purchaser named in contract, not represented by a broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is not represented by a broker. At the confirmation hearing, an overbid is made by the person named in the contract who is not represented by a broker. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission.

Example 10. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by a different purchaser, not represented by a broker; successful overbid by purchaser named in contract, represented by Broker C. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is not represented by a broker. At the confirmation hearing, an overbid is made by the person named in the contract who is represented by Broker C. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission. Broker C receives the commission on the entire amount of the sale (subject to the limitation on overbids in Section 10162). See Sections 10162.6(b)(2), 10163.

Example 11. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by different purchaser, produced by Broker A; successful overbid by purchaser named in the contract, not represented by a broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is represented by Broker A. At the confirmation hearing, the highest bid is made by an overbidder, who is not represented by a broker. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission.

Example 12. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by different purchaser, produced by Broker A; successful overbid by purchaser named in the contract, represented by Broker C. The personal representative has entered into an exclusive contract with Broker A. The

contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is represented by Broker A. At the confirmation hearing, the highest bid is made by an overbidder, who is not represented by a broker. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission. Broker C receives a commission on the entire amount of the sale. See Sections 10162.6(b)(2), 10163(b).

Example 13. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by different purchaser, produced by Broker B, a cooperating broker; successful overbid by purchaser named in the contract, not represented by a broker. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is represented by Broker B. At the confirmation hearing, the highest bid is made by an overbidder, who is not represented by a broker. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission. Broker B is entitled to a commission on the amount of the original bid. See Sections 10162.6(b)(2), 10164(a)-(b).

Example 14. Exclusive listing contract provides for no compensation if sale is confirmed to a named purchaser; original bid by different purchaser, produced by Broker B, a cooperating broker; successful overbid by purchaser named in the contract, represented by Broker C. The personal representative has entered into an exclusive contract with Broker A. The contract provides that no commission is payable to Broker A if sale is confirmed to a named purchaser. The bid returned to court for confirmation is made by a different purchaser, who is represented by Broker B. At the confirmation hearing, the highest bid is made by an overbidder who is procured by Broker C. The court confirms the sale to the overbidder. Under subdivision (b)(1) of Section 10162.6, Broker A is not entitled to a commission. Under Section 10165(b) (applicable by operation of Section 10162.5(b)(2)), Broker C is entitled to one-half of the commission on the original bid plus all of the commission on the overbid. Under Section 10165(c)(2) (applicable by operation of Section 10162.5(b)(2)), Broker B is entitled to the remaining half of the commission on the original bid.

For example, suppose that the original bid returned to court by Broker B is \$100,000, that sale is confirmed on an overbid of \$140,000 to the person named in the contract who is represented by Broker C, and that the court determines a reasonable commission to be 6%. The commission on the

original bid is \$6,000 (6% of \$100,000). Broker A receives nothing, since sale was confirmed to the purchaser named in the contract. Broker C receives \$5,400 which is made up of half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) plus all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). Broker B receives \$3,000, which is the other half of the commission on the original bid (half of 6% of \$100,000 = \$3,000).

Probate Code § 10162.8 (added). Limitation on compensation where original bidder is successful overbidder

10162.8 (a) This section applies if all of the following circumstances exist:

(1) The original bid returned to court for confirmation is made by a purchaser who is represented by an agent or broker.

(2) An increased bid is made by another purchaser at the time of the hearing on the petition for confirmation, regardless of whether that purchaser is represented by an agent or broker.

(3) The court confirms the sale on another increased bid, made at the time of the hearing on the petition for confirmation, to the purchaser who made the original bid returned to the court.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 only on the amount of the original bid returned to court.

Comment. Section 10162.8 is a new provision applicable to all situations where the original bidder becomes the successful overbidder following one or more intervening overbids made at the time of the hearing on the petition for confirmation. The rule of this section is intended to encourage higher original bids returned to the court for confirmation. This rule is also consistent with the rule that applies where (1) an agent or broker has an exclusive contract, (2) the bid returned to the court for confirmation is by an unrepresented purchaser, and (3) the sale is confirmed to an unrepresented overbidder, in which case the agent or broker with the exclusive contract is entitled to a commission only on the amount of the original bid returned to court. See Section 10162.5(b).

Probate Code § 10163 (amended). Compensation where original bid made by purchaser directly to estate and sale made on increased bid

10163. Subject to ~~Section~~ Sections 10162 and 10162.6, where the original bid returned to the court for confirmation was made by a purchaser who was not procured by an agent or broker, the court shall

allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed to the agent or broker who procured the purchaser to whom the sale is confirmed if ~~all~~ either of the following ~~circumstances-exist~~ conditions is satisfied:

(a) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(b) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

~~(b) The original bid was made direct to the estate by a purchaser who was not procured by an agent or broker.~~

(c) ~~The~~ and the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker.

Comment. Section 10163 is amended to extend its rule to cases where the original bidder is not procured by an agent or broker and a successful overbidder is procured by an agent or broker holding an exclusive listing contract and to recognize the special rules in Section 10162.6 (exclusive listing contract providing for no compensation if sale made to named purchaser).

Probate Code § 10165 (amended). Compensation where sale made on increased bid by purchaser procured by agent or broker and either the original bid returned to court was made by a purchaser procured by another agent or broker or there is another agent or broker who holds exclusive right to sell contract

10165. (a) Where Subject to Section 10162.6, where the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed, as provided in this section, if either of the following conditions is satisfied:

(1) The original bid returned to the court for confirmation was made by a purchaser who was procured by another agent or broker.

(2) Another If the original bid returned to the court for confirmation was made by a purchaser who was not represented by an agent or broker, and another agent or broker holds a contract under

Section 10150 granting the exclusive right to sell the property.

(b) The agent or broker who procured the purchaser to whom the sale is confirmed shall be paid one-half of the compensation on the amount of the original bid and all of the compensation on the difference between the original bid and the amount for which the sale is confirmed.

(c) The other one-half of the compensation on the amount of the original bid shall be paid as follows:

(1) If the original bid returned to the court is made by a purchaser who was procured by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(2) If the original bid returned to the court is made by a purchaser who was procured by a bona fide agent or broker and there is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(3) If there is an agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the one-half of the compensation on the amount of the original bid shall be divided between the agent or broker holding the contract granting the exclusive right to sell the property and the other agent or broker whose original bid was returned to the court for confirmation as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the one-half of the compensation on the amount of the original bid shall be divided equally between the agent or broker holding the contract and the other agent or broker whose original bid was returned to the court for confirmation.

(4) If there is an agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property, the original bid returned to the court is made by a purchaser who is not represented by an agent or broker, and the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by another agent or broker, the

entire one-half of the compensation on the original bid shall be paid to the agent or broker holding the contract.

(5) If the agent or broker compensated under subdivision (b) holds a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to the other agent or broker who procured the original bid returned to the court.

Comment. Section 10165 is amended to add paragraphs (4) and (5) to subdivision (c) to cover situations not previously covered in Section 10165.

The following examples illustrate the application of subdivisions (c)(4) and (c)(5) of Section 10165. Broker A is the broker holding an exclusive listing contract with the personal representative. As in the Comment to Section 10161, Broker B is the broker whose bid is returned to the court for confirmation. Broker C is a broker who does not have a contract with the personal representative and who procures a successful overbidder.

Example 1. Exclusive listing contract; original bidder not represented by a broker; successful overbid by purchaser represented by Broker C. The personal representative enters into a written exclusive sales contract with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of 6% of the sale price. The bid returned to the court for confirmation is made by a person who is not represented by a broker. At the confirmation hearing, the highest bid is made by a different purchaser who is represented by Broker C. The court confirms the sale to the overbidder. Under subdivision (b) of Section 10165, Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid, subject to the limitation on overbids in Section 10162. Under subdivision (c)(4) of Section 10165, Broker A is entitled to the other half of the commission on the original bid.

For example, suppose the original bid returned to court is \$100,000 and Broker C brings in a overbid of \$140,000 on which the sale is confirmed. The court determines that a reasonable commission on the \$140,000 sale is 6%, equal to \$8400. Broker C receives \$5,400, which is made up of one-half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) and all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). Broker A (the broker holding the exclusive contract) receives the other half of the commission on the original bid (one-half of 6% of \$100,000 = \$3,000).

Example 2. Exclusive listing contract; original bidder represented by Broker B; successful overbid by purchaser represented by Broker A. The personal representative enters into a written exclusive sales contract with Broker A for the

sale of real property of the estate. The contract provides for a commission to Broker A of 6% of the sale price. The bid returned to the court for confirmation is made by a person who is represented by Broker B. At the confirmation hearing, the highest bid is made by a different purchaser who is represented by Broker A. The court confirms the sale to the overbidder. Under subdivision (b) of Section 10165, Broker A is entitled to half of the commission on the original bid plus all of the commission on the overbid, subject to the limitation on overbids in Section 10162. Under subdivision (c)(5) of Section 10165, Broker B is entitled to the other half of the commission on the original bid.

For example, suppose the original bid returned to court is \$100,000 made by a purchaser represented by Broker B. Broker A brings in a overbid of \$140,000 on which the sale is confirmed. The court determines that a reasonable commission on the \$140,000 sale is 6%, equal to \$8400. Broker A receives \$5,400, which is made up of one-half of the commission on the original bid (half of 6% of \$100,000 = \$3,000) and all of the commission on the difference between the original bid and confirmed overbid (\$140,000 - \$100,000 = \$40,000; 6% of \$40,000 = \$2,400). Broker B receives the other half of the commission on the original bid (one-half of 6% of \$100,000 = \$3,000).