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Memorandum 89-82

Subject: Study L - New Probate Code (Miscellaneous Issues--more suggestions for substantive revisions)

We have received a number of suggestions for Probate Code substantive revisions that the Commission should review. These suggestions are drawn primarily from Strathmeyer, "Navigating the Sea of Paper: Clean-up Statute and New Forms Expected Before July 1 Probate Code Reform Effective Date", 10 Est. Plan. & Calif. Prob. Rep. 137 (No. 6, June 6, 1989), and from a letter circulated to the Commission at the July meeting from Henry A. Preston of Chicago, Illinois (July 7, 1989), relating his experiences as an executor in a simple estate in Los Angeles County. Other suggestions have been received from a number of different sources.

§ 7666. Compensation of public administrator

The County of Alameda has requested the following amendment:

> 7666. (a) Except as provided in Section 7623 and in subdivision (b), the commissions payable to the public administrator and the attorney, if any, for the filing of an application pursuant to this article and for performance of any duty or service connected therewith, are those set out in Sections 901, 902, and 910.
>
> (b) The public administrator is entitled to a minimum commission of three hundred fifty dollars ($350).

This amendment is intended to remove the conflict with Section 7623, which provides "additional compensation" for the public administrator in cases where the public administrator is required to take an estate because the person entitled to act as personal representative either refuses to seek appointment or has resigned or been removed.

The staff has no objection to this amendment, which appears theoretically sound. However, it will probably not have much practical impact, since it appears to the staff that it will be a rare case where

the activities of the public administrator under the summary disposition statutes will ever be sufficient to entitle the public administrator to "additional compensation" under Section 7623.

§ 8250. Contest of will

Jeff Strathmeyer notes that the will contest provisions refer in places to "objections" that initiate a will contest, but nowhere does the statute expressly require the filing of objections. This gap could easily be cured by a revision along the following lines:

> 8250. (a) When ~~an objection is made~~ a will is contested under Section 8004, the contestant shall file an objection to probate of the will and the court clerk shall issue a summons and a copy of the objection directed to the persons required by Section 8110 to be served with notice of hearing of a petition for administration of the decedent's estate. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons.
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> Comment. Section 8250 is amended to make clear that a will contest is initiated by filing an objection to probate of the will.

§ 8251. Responsive pleading

If there is a will contest, a summons must be served on the proponents of the will and on other interested persons, who have 30 days within which to respond to the objections. Failure of any person to respond renders that person ineligible to participate further in the contest proceedings. Jeff Strathmeyer observes that, while other persons might be ineligible, the original proponents of the will being objected to should not be made to file a responsive pleading in order to participate.

The staff agrees, and would amend Section 8251(c) to read:

> (c) If a person fails timely to respond to the summons:
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> (1) The case is at issue notwithstanding the failure and the case may proceed on the petition and other documents filed by the time of the hearing, and no further pleadings by other persons are necessary.
>
> (2) The person may not participate further in the contest, but the person's interest in the estate is not otherwise affected. Nothing in this paragraph precludes further participation by the petitioner.
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> (3) The person is bound by the decision in the proceeding.

§ 8571. Bond of nonresident personal representative

Under the Probate Code the general rule is that a bond is required of the personal representative, unless waived by the will or by all beneficiaries. Section 8481(a). Even if waived, the court may nonetheless, for good cause, require a bond. Section 8481(b).

If the personal representative is a nonresident, the court in its discretion may require a bond, whether or not "good cause" is shown. Section 8571. The implication of the statute is that the court may exercise discretion without having good cause for doing so. The Los Angeles County Superior Court, by court rule, has taken this a step further and requires a bond of a nonresident in all cases; no discretion is permitted. Rule 7.12.

Mr. Preston complains that he was required to give a bond to serve as personal representative in Los Angeles County despite the fact that both the will and beneficiaries waived bond, and despite the fact that Mr. Preston was a relative of the decedent, had served as her trustee for many years, and was, as trustee, the principal beneficiary of the estate. He points out that the cost of the required bond was $1,400 per year on a $360,000 estate, "a not inconsiderable amount in view of the total size of the estate. In Illinois, the Court can, in its discretion, require surety on an out-of-state executor's bond by a beneficiary or other person interested in the estate. In all my practice, I've never heard of a case in Illinois where a waiver of surety on an Executor's bond has been totally ignored, as was done in this case."

The staff agrees with Mr. Preston to some extent, but not completely. The bond is intended to protect other interested persons besides beneficiaries, such as creditors; in fact there was a major creditor that had to litigate in order to get the debt paid in Mr. Preston's case. For this reason California law allows the court on its own motion to require a bond despite the waiver by all beneficiaries:

> 8481. (a) A bond is not required in either of the following cases:
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> (1) The will waives the requirement of a bond.
>
> (2) All beneficiaries waive in writing the requirement of a bond and the written waivers are attached to the petition for appointment of a personal representative. This paragraph does not apply if the will requires a bond.

(b) Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person or on its own motion the court may for good cause require that a bond be given, either before or after issuance of letters.

However, the staff believes it is an abuse of discretion for the court to require a bond automatically without considering the circumstances of the case. The staff would repeal the special rule for out of state personal representatives (Section 8571) and instead rely on the general rule of Section 8481 that the court for good cause may require a bond on its own motion notwithstanding a waiver.

~~8571. Notwithstanding any other provision of this chapter and notwithstanding a waiver of a bond, the court in its discretion may require a nonresident personal representative to give a bond in an amount determined by the court.~~

Comment. Former Section 8571 is not continued. The court may for good cause require a bond of a nonresident personal representative under Section 8481.

§ 9053. Immunity of personal representative

During the 1989 legislative session, a compromise agreement on AB 158 was worked out between the banks, various bar groups, and the Commission. As part of the agreement, Probate Code Section 9053 was revised to provide:

9053. (a) If the personal representative believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative fails to give notice required by this chapter, the personal representative is not liable to any person for the failure, unless a creditor establishes all of the following:

(1) The failure was in bad faith.

(2) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the court made an order for final distribution, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed.

(3) Within 16 months after letters were first issued to a general personal representative, the creditor did both of the following:

(A) Filed a petition requesting that the court in which the estate was administered make an order determining the liability of the personal representative under this subdivision.

(B) At least 30 days before the hearing on the petition, caused notice of the hearing and a copy of the petition to be served on the personal representative in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(c) Nothing in this section affects the liability of the estate, if any, for the claim of a creditor, and the personal representative is not liable for the claim to the extent it is paid out of the estate.

(d) Nothing in this chapter imposes a duty on the personal representative to make a search for creditors of the decedent.

This section provides for personal representative liability after the estate has been closed, since under subdivision (b)(2) it imposes liability only where the creditor had no knowledge of administration before entry of an order for final distribution. This limitation is based on the assumption that if the creditor acquires knowledge of administration while the estate is still open, the creditor can make a claim in the ordinary course of administration. If the claim-filing period has passed, the creditor can apply for a late claim.

However, the late claim statute provides that property distributed before a late claim is filed is not subject to the claim. Section 9103(e). This raises the possibility that the personal representative can in bad faith neglect to notify a creditor of the administration and meanwhile distribute estate property under an order for preliminary distribution. Then, if before the estate is closed, the creditor becomes aware of the administration (or the personal representative notifies the creditor), the creditor will have no recourse either against the personal representative under Section 9053 (since the estate is still open when the creditor learns of administration) or against the distributees under Section 9103 (since the distributees take free of late claims).

The staff believes this points up a defect in the late claim statute. The statute should not immunize distributions made under an order for preliminary distribution, but only those made under an order for final distribution. A preliminary distribution should be just that, and distributees should take with the understanding that until there is an order for final distribution they may be liable for the property or its value if required for estate administration. This is

the implication of the preliminary distribution statute itself, which provides that the court may require a bond conditioned on "payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed." Section 11622(c).

We would amend subdivision (e) of Section 9103 (the late claims statute) to read:

> (e) Regardless of whether the claim is later established in whole or in part, ~~property distributed under court order~~ and payments otherwise properly made before a claim is filed under this section are not subject to the claim. The personal representative~~, designee,~~ or payee is not liable on account of the prior ~~distribution or~~ payment. Nothing in this subdivision limits the liability of a person who receives a preliminary distribution of property for payment of the distributee's proper share of the claim, not exceeding the amount distributed.
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> Comment. Subdivision (e) is amended so that it does not immunize a distribution made under an order for preliminary distribution from subsequent liability for a late claim. Only a distribution made under an order for final distribution is entitled to the immunity provided in the subdivision. Cf. Section 11622(c) (bond for preliminary distribution).
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> Subdivision (e) is also amended to delete an incorrect reference to a "designee".

§ 10501. Matters requiring court supervision under Independent Administration of Estates Act

Mr. Preston notes that he was hampered in making preliminary distributions under the Independent Administration of Estates Act. The estate was clearly more than adequate to pay all claims against it, but he nonetheless would have been required to go to court to make preliminary distribution. Since he was unwilling to run up that kind of expense for a small estate, his solution was to make preliminary distribution without court order, taking a personal risk:

> [I]t was apparent from the beginning that the cash assets of the estate would be much more than sufficient to pay all claims and expenses several times over. I was unable to obtain authority to pay the small bequests (totalling $15,000) without going to the difficulty and expense of obtaining an order of partial distribution. Nevertheless, I paid one of them about four months after the estate was opened without such authority because the beneficiary was in need and I paid the remaining two (including one to a charitable organization) about a year after the date of death, still without specific authority to do so [in order to

save the estate the expense of having to pay interest that accrues on a specific bequest one year after the date of death]. An independent executor should have authority to pay specific bequests, especially to charitable organizations and to needy beneficiaries, where the assets of the estate, after allowance for all claims, are more than sufficient.

The Commission's tentative recommendation on miscellaneous Probate Code revisions would address this problem somewhat by providing explicitly in Section 12250 that "Nothing in this section precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied." A further step would be to eliminate the court approval requirement from the independent administration statute, thus:

> 10501. (a) Notwithstanding any other provision of this part, whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:
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> (1) Allowance of the personal representative's commissions.
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> (2) Allowance of attorney's fees.
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> (3) Settlement of accountings.
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> (4) ~~Preliminary---and---final---distributions~~ Final distribution and discharge.
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> ....

Respectfully submitted,

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