

Third Supplement to Memorandum 89-101

Subject: Study L - Staff Proposed Amendments to AB 759

§ 1485. Effect on guardianships of adults and married minors

The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section has advised the Commission that it believes that Section 1485 (proposed to be deleted by the Staff Proposed Amendments attached to Memorandum 89-101) serves a continuing useful purpose. Although the staff believes that this section could safely be deleted, we recommend that the section be retained in view of the communication from the State Bar Section.

The text of the section to be retained is set out at lines 17-29 on page 82 of Assembly Bill 759 as amended on May 30, 1989.

The following is the Comment we will insert to Section 1485.

§ 1485. Effect on guardianships of adults and married minors

Comment. Section 1485 continues Section 1485 of the repealed Probate Code without substantive change.

§ 10006. Cotenant's consent to sale or partition

Section 10006 would be added under the staff proposed amendments to provide:

10006. If property in the estate to be sold is an undivided interest in a cotenancy, the cotenants may file in the estate proceeding written consent to have their interests sold pursuant to this chapter. Thereafter, the court's orders made pursuant to this chapter are as binding on the consenting cotenants as on the personal representative.

The purpose of this section is to enable the estate to obtain a higher price by selling the entire ownership where a sale of the decedent's interest is necessary and the other cotenants agree to the sale.

The State Bar Executive Committee would omit this section as unnecessary. They say that a buyer can purchase the interest being sold by the estate and deal separately with the other cotenants. While

this may be possible, it is not particularly practical or expedient, and seems designed to ensure that the estate gets bottom, rather than top, dollar.

Currently if the personal representative needs to sell property held in cotenancy and wants to get the best price for the estate's interest, the personal representative will bring a partition action under authority of Probate Code Section 9823. But this involves a possible lengthy civil action, even though all parties may agree to the partition.

At the time of distribution the personal representative may seek probate court partition in order to avoid distribution of undivided interests. Under Probate Code Section 11950, the court may include in the partition the interests of coowners "to the extent the owners of other interests in the property consent to be bound by the partition, allotment, or other division."

Partition by sale or division of all interests is done at distribution with the consent of the coowners; why shouldn't this occur during administration as well if sale of the property is necessary? Section 10006 would fill an obvious gap in the statute, avoid the need to file a civil action for partition, and would parallel existing authority in the code for consent of coowners for division or sale at distribution. The objection of the Executive Committee does not appear well-founded.

Respectfully submitted,

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