

Memorandum 90-105

Subject: Study L-1036 - Probate Attorney Fees

BACKGROUND

The primary reason the Commission was directed to study probate law is the objections consumer groups have to the statutory fee schedule. Consumer groups were able to persuade the Legislature to direct the Commission to study the Uniform Probate Code, which requires that the compensation of the probate attorney be reasonable and contains no statutory fee schedule.

The Commission's recommendation concerning compensation of the probate attorney would be effectuated by the enactment of Assembly Bill 831. It is the purpose of this memorandum to inform the Commission and others concerning what is happening on this bill.

Assembly Bill 831 eliminates the existing statutory fee schedule for probate attorney fees. Under the statutory fee schedule, the attorney gets a fee for ordinary services based on a percentage of the estate. The attorney gets the percentage fee without regard to how much work is required for the particular estate. In addition to the percentage fee, the attorney may receive an additional fee fixed by the court for "extraordinary services." The courts spend a great deal of time reviewing probate attorney fees, since the fee for extraordinary services must be fixed by the court, even if all the beneficiaries of the estate are satisfied with the fee requested by the attorney. However, unless the personal representative makes an agreement for a lower fee, the attorney is entitled to the statutory fee, even though one or all of the beneficiaries of the estate object to the fee.

In practice, the statutory fee is the minimum fee charged. More than 93 percent of the attorneys who responded to a Law Revision Commission questionnaire reported they ordinarily charge the full statutory fee.

In place of the statutory fee, Assembly Bill 831 requires that the estate attorney make a fee contract with the person administering the

estate (the personal representative). The contract must state the attorney fee or the manner of computing the fee (such as an hourly rate). The court does not review the attorney fee unless a beneficiary of the estate objects to the fee.

The bill allows the personal representative to use the notice of proposed action procedure for the compensation of the estate attorney. Under this procedure, the personal representative must send each beneficiary of the estate a notice of the hiring of the estate attorney and a copy of the fee agreement. The notice must include an estimate of the total amount to be paid to the attorney under the fee agreement. If any beneficiary objects to the fee, the personal representative must obtain court approval of fee. If there is no objection, the court will not review the fee except on petition of a person not given the notice. However, a person who was given notice but did not object may obtain court review of the fee if the actual fee exceeds the amount estimated in the notice.

Assembly Bill 831 is supported by consumer groups and by responsible organizations representing probate attorneys. The following organizations support the bill:

American Association of Retired Persons

HALT - An Organization of Americans for Legal Reform

Consumer Action

Nolo Press

Consumer Advocates for Legal Justice

Executive Committee of State Bar Estate Planning, Trust and
Probate Law Section

Legislative Committee of the Beverly Hills Probate, Trust and
Estate Planning Section

Many individual probate attorneys and a San Francisco organization representing probate attorneys object to the bill and want to retain existing law without change.

Assembly Bill 831 also includes provisions designed to control increases in trustee's fees by making it easier to move a trust from one financial institution to another. This will permit movement of the trust to a financial institution charging a lower fee.

The new Probate Code enacted this year by AB 759 will go into effect only if AB 831 is enacted. This is because the new Probate Code is incomplete; it does not contain provisions covering probate attorney fees. We need to have provisions covering probate attorney fees in the new code if we are to repeal the existing Probate Code.

PROBLEMS WITH THE BILL

A few probate court commissioners and probate judges (and probably some probate attorneys) have written to Senator Lockyer (Chairman of the Senate Judiciary Committee and Senate Member of the Law Revision Commission) opposing Assembly Bill 831 because they believe the bill will increase the fees for small estates. These persons believe that small estates are subsidized by the excessive fees paid by large estates. (The American Association of Retired Persons disputes this belief, taking the position that the same attorneys that handle small estates do not get the large estates which go to firms specializing in taxes and estate planning and that those firms do not handle small estates.)

It appears that there is general dissatisfaction with the existing statutory fee schedule system among members of the Senate Judiciary Committee. But apparently some members of the Committee are not satisfied that the Commission proposal provides sufficient protection to consumers.

In addition to the Barbara Miller amendment (discussed below), ideas that have been mentioned to me in connection with the bill include the following, either alone or in combination with other ideas listed below:

(1) Keep the fee schedule, but allow the court on petition to lower the statutory fee.

(2) Substantially lower the statutory fee under the fee schedule. (HALT advocates a one percent fee schedule if a fee schedule is to be retained.)

(3) Require a disclosure statement to be signed by the personal representative (and perhaps estate beneficiaries) that discloses that the fee is a maximum fee for ordinary services and is subject to negotiation.

(4) Fix a maximum hourly rate that can be charged by the probate attorney.

Barbara Miller, a probate court commissioner in Alameda County has had considerable influence with Senator Lockyer on Assembly Bill 831. She suggested that consideration be given to amending Assembly Bill 831 to retain the existing fee schedule for estates of not more than \$300,000, and to permit the court to reduce the statutory fee if excessive and to increase the statutory fee for good cause shown. The Executive Secretary assisted the legal counsel for the committee in putting this idea in draft form so it could be reviewed by representatives of consumers and other interested persons. (Senator Lockyer indicated that he wanted to obtain the views of interested persons on the amendment before forming an opinion on the amendment.) I indicated to the representative of Senator Lockyer that the concept of the Miller amendment was inconsistent with the Commission's recommendation. It soon became clear that the amendment had no chance of adoption, since it was strongly opposed by representatives of consumer groups, who object to any statutory fee because they believe that in practice the statutory fee becomes a minimum fee. Senator Lockyer appears to have abandoned this concept in light of the objections of representatives of consumer groups. Apparently Commissioner Miller was unaware of this, since she presented the amendment for consideration by the Executive Committee of the State Bar Section. As a result of this presentation, the Executive Committee of the Estate Planning, Trust and Probate Law Section and the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association have written to Senator Lockyer to indicate they are opposed to the Miller amendments. Because it soon became apparent that the amendment was not going to be seriously considered, the staff did not present it to the Commission for consideration and action.

The staff of the Senate Judiciary Committee advises us that the Chairman (Senator Lockyer) and other committee members object to AB 831 because they fear it will result in a general increase in fees for small estates. Senator Lockyer takes the position that he has never seen a case where deregulation has benefited the consumer. On the other hand, the American Association of Retired Persons and HALT (consumer organizations) are satisfied with the bill, because their empirical studies have shown to their satisfaction that the bill would

result in lower probate attorney fees, including lower fees for simple small estates. They want a fee system that charges each estate for the legal services necessarily and actually provided. They claim that the attorney, not the consumer, now gets the benefit of use of the paralegal when the statutory fee is charged.

Representatives of consumer groups have been active in obtaining support for the bill as recommended by the Commission. Nevertheless, we understand, as a alternative, that they would support some of the concepts listed above, all of which were rejected by the Commission when it developed its recommendation to the Legislature. The Commission's staff has not seen any of these proposals (other than the Miller amendment) in draft form, and, as far as we know, Senator Lockyer has not yet made a careful study of the issues involved. The staff has been unable to obtain any information on Senator Lockyer's intentions. As indicated above, Senator Lockyer has stated that he believes that some form of additional protection for consumers should be added to the bill.

The Commission does not have a great deal of control over what will happen to this bill. The staff plans to present the bill at the August 7 hearing in the form recommended by the Commission. If possible, we would have the committee vote on the bill in this form. However, we cannot control amendments to the bill proposed by members of the committee, and various amendments may be offered at the August 7 hearing which are claimed to be necessary to provide sufficient protection to consumers. As indicated above, we do not know what these amendments might be, but we would oppose them on behalf of the Commission when the bill is heard.

Although the staff believes that we can obtain some committee support for the Commission's recommendation, there is a distinct possibility that the committee may divide into different groups of members who favor one or another of the alternatives to the Commission recommendation. If this happens, no proposal will get enough votes to be enacted, and the matter will be considered again when the consumer groups propose their own bill to the Legislature next session. On the other hand, a majority of the committee may approve the Commission recommendation because it has broad general support from organizations on both sides of the issue.

If an amendment is adopted by the committee over our objections, the Commission will need to review the amendment and decide whether to ask Assembly Member Harris to drop the bill. We will have to poll the Commission to obtain the views the members of the Commission on any such amendment.

STAFF RECOMMENDED ACTION IF AB 831 NOT APPROVED BY COMMITTEE

If Assembly Bill 831 is not approved by the Senate Judiciary Committee at the August 7 hearing, or if it is approved in a form not acceptable to the Commission, the staff would propose to the committee that an interim hearing be held on the issue so that an acceptable proposal can be developed. We believe that the members of the interim committee could be persuaded at an interim hearing that the Commission's recommendation is the best proposal that can be developed.

The problem remains what will happen to the new Probate Code if Assembly Bill 831 is not enacted. The bill enacting the new Probate Code includes a provision that the new code will not become operative unless Assembly Bill 831 is enacted. To deal with this problem, the staff is seeking to amend Senate Bill 1775 to insert a provision retaining the existing attorney fee law in the event that Assembly Bill 831 is not enacted, thereby leaving to the next session the task of providing an appropriate attorney fee provision. We do not know whether we will be successful in adding such a provision, since we are not aware of any support among members of the legislative committees for the existing fee provisions. Perhaps they would not object to the provision with the understanding that the probate attorney fee issue will be considered next year.

SUMMARY AND CONCLUSION

The staff plans to present Assembly Bill 831 in its present form which represents the Commission's recommendation and is supported by groups representing both consumers and probate lawyers. We will seek to have the Committee vote on the bill in the form recommended by the Commission.

The staff plans to oppose any substantive amendments to the bill that are proposed at the hearing. If the bill is amended by committee

amendment, the Commission will have to review the amendment and determine whether to ask Assembly Member Harris to drop the bill.

If the bill is not enacted, the staff will ask the Senate Judiciary Committee to hold an interim hearing on the matter so that we will have an opportunity to "sell" the members of the interim committee on the Commission's recommendation.

The staff will seek to amend Senate Bill 1775 (Lockyer) (the Commission's comprehensive probate clean up bill) to provide that if Assembly Bill 831 is not enacted, the compensation of the probate attorney will be determined as provided in the provisions of the existing Probate Code.

Does the Commission agree with the staff's plans with respect to Assembly Bill 831?

Respectfully submitted,

John H. DeMouilly
Executive Secretary