

First Supplement to Memorandum 90-105

Subject: Study L-1036 - Probate Attorney Fees

Attached for your information is a background statement on
Assembly Bill 831.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

BACKGROUND STATEMENT ON ASSEMBLY BILL 831

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. Unless the attorney has agreed to a lower fee, the attorney is entitled to the statutory percentage fee as a matter of right. There is no right to have the court review the reasonableness of the amount of the percentage fee in light of the necessary work actually provided to the particular estate.

In practice, the statutory percentage 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 percentage fee.

In addition to the percentage fee, the attorney may receive an additional fee fixed by the court for "extraordinary" services. Additional fees are awarded in about 25 percent of the cases.

The statutory percentage fee for ordinary services is substantial. The fee is computed using the full value of the estate property, not the decedent's equity in the property. On a \$300,000 estate, the fee is \$7,150. On a \$500,000 estate, the fee is \$11,150. If the estate does not present any problems, a paralegal can do almost all of the work in connection with the estate.

Assembly Bill 831 does not deregulate probate attorney fees. Instead, the bill provides a better system for court regulation. In place of the existing statutory fee scheme, the bill requires that the estate attorney make a contract with the personal representative (the person administering the estate). The contract must state the legal services to be provided and the attorney fee or the manner of computing the fee (such as an hourly rate). The bill requires that each beneficiary be given notice of the fee and gives each beneficiary a right to obtain court review of the reasonableness of the agreed fee upon request. This system provides court protection against unreasonable fees but conserves judicial resources since the court becomes involved only if there is an actual controversy concerning the reasonableness of the fee.

The bill allows the personal representative to send each beneficiary of the estate a notice of the fee agreement under the Independent Administration of Estates Act. The notice must include an estimate of the total amount to be paid to the attorney under the fee agreement. The notice also must include a simple form for objecting to the fee. A beneficiary who objects to the fee can return the form to the personal representative, and then the personal representative must obtain court approval of the fee. If none of the beneficiaries returns the objection form, 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 proposed to be paid exceeds the amount estimated in the notice.

A copy of the existing notice form is attached. This form will be revised to reflect the application of the Independent Administration of Estates Act to compensation of probate attorneys, advisers, and others hired by the personal representative to advise or assist in the administration of the estate.

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

State Bar Estate Planning, Trust and Probate Law Section

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

A slight majority of individual probate attorneys and a San Francisco organization of probate attorneys would prefer to keep the existing statutory fee provisions and do not support the Commission's recommendation. Some judges have indicated they also prefer the existing provisions.

Representatives of consumer groups support the concept of Assembly Bill 831 for the following reasons:

(1) A percentage fee is not necessarily related to the amount and difficulty of the legal work required for the particular estate. Thus, a percentage fee may undercharge an estate that presents difficult legal problems and overcharge an estate that does not. The attorney gets the percentage fee even though substantially all of the work on the estate is done by a paralegal at a low hourly rate. A beneficiary has no right to object to paying the attorney the statutory percentage fee.

(2) The percentage fee is only for "ordinary" services to the estate. The court may not reduce the percentage fee for ordinary services, but the court may award additional fees for "extraordinary" services. Additional fees are awarded in about 25 percent of the cases. Thus, if the estate is easy there is no discount, but if the estate is difficult the attorney may get more.

(3) Since the percentage fee may not provide the attorney with adequate compensation for the legal work needed to probate a small estate, it may be difficult to obtain a competent attorney to handle a small estate.

(4) The California statutory fee system imposes a significant burden on the courts because the court must review and fix the additional fees for "extraordinary" services even when no one objects to the fee.

(5) The statutory fee system is inconsistent with the general practice of fixing legal fees by private agreement. The Law Revision Commission reports that in most cases where a person dies in California the fee for legal services in connection with the person's property is fixed by agreement. In most cases where a person dies, there is no formal probate proceeding because the estate is so small probate is not required or the decedent had a living trust or the estate goes to a surviving spouse.

(6) California is one of three states that still use a statutory fee schedule to fix the fee of the estate attorney for ordinary services, without court discretion to vary the fee. Six other states use a statutory fee schedule with considerable court discretion in fixing the fee. Most of the other states now use the Uniform Probate Code scheme, which is the scheme that would be adopted by Assembly Bill 831.

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 bill makes other technical corrections, improvements, and clarifications in probate law and procedure. These include such matters as:

(1) Hiring and paying advisers and other experts to assist the personal representative in administering the estate.

(2) Compensation of the personal representative (existing law is retained with a few modifications).

In summary, Assembly Bill 831 provides a more effective method for court regulation of probate attorney fees than existing law. The court will review the reasonableness of the attorney fee in light of the legal services necessarily provided to the particular estate if any beneficiary objects to the fee. Experience in other states that have adopted a similar scheme demonstrates that the bill will reduce rather than increase the amount of court time that will be devoted to fixing probate attorney fees, because the bill will limit court review to cases where there is an actual controversy as to the reasonableness of the fee.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):		TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR (Name):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:			
ESTATE OF (NAME):		DECEDENT	
NOTICE OF PROPOSED ACTION Independent Administration of Estates Act Objection—Consent			CASE NUMBER:

NOTICE: If you do not object in writing or obtain a court order preventing the action proposed below, you will be treated as if you consented to the proposed action and you may not object after the proposed action has been taken. If you object, the personal representative may take the proposed action only under court supervision. An objection form is on the reverse. If you wish to object, you may use the form or prepare your own written objection.

- The personal representative (executor or administrator) of the estate of the deceased is (names):
- The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Act (Probate Code section 10400 et seq.)
 - ☐ with full authority under the act.
 - ☐ with limited authority under the act (there is no authority, without court supervision, to (1) sell or exchange real property or (2) grant an option to purchase real property or (3) borrow money with the loan secured by an encumbrance upon real property).
- On or after (date): , the personal representative will take the following action without court supervision (describe in specific terms here or in Attachment 3):

☐ The proposed action is described in an attachment labeled Attachment 3.
- ☐ Real property transaction (Check this box and complete item 4b if the proposed action involves a sale or exchange or a grant of an option to purchase real property.)
 - The material terms of the transaction are specified in item 3, including any sale price and the amount of or method of calculating any commission or compensation to an agent or broker.
 - \$ is the value of the subject property in the probate inventory. ☐ No inventory yet.

NOTICE: A sale of real property without court supervision means that the sale will NOT be presented to the court for confirmation at a hearing at which higher bids for the property may be presented and the property sold to the highest bidder.

(Continued on reverse)



