

Study L-1100

November 25, 1998

## First Supplement to Memorandum 98-84

### **New Probate Code Suggestions: Informal Probate Administration**

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Attached to this memorandum is a letter from Jim Birnberg, a probate practitioner who has worked with the Commission on past projects. Mr. Birnberg is greatly concerned that the Commission may take up the “thoroughly repudiated” informal probate administration proposal. He makes a number of points, including:

- The vast majority of probate practitioners oppose the concept, as do probate judges and commissioners.
- Their opposition is not self-interested but is the result of concern about abuses by unsupervised fiduciaries. (On the other hand, some proponents of the proposal may be self-interested — seeking freedom from judicial oversight.)
- Due to the risk of abuse to seniors, the elder law bar will oppose the proposal; AARP’s enthusiasm for informal probate will evaporate when it learns of the risk.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

**LOEB&LOEB**LLPA LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONSATTORNEYS AT LAW  
1000 WILSHIRE BOULEVARD  
SUITE 1800  
LOS ANGELES, CA 90017-2475TELEPHONE: 213-688-3400  
FACSIMILE: 213-688-3460CENTURY CITY  
10100 SANTA MONICA  
BOULEVARD  
SUITE 2200  
LOS ANGELES, CA  
90067-4164  
TEL: 310-282-2000  
FAX: 310-282-2192NEW YORK  
345 PARK AVENUE  
NEW YORK, NY  
10154-0037  
TEL: 212-407-4000  
FAX: 212-407-4990NASHVILLE  
45 MUSIC SQUARE WEST  
NASHVILLE, TN  
37203-3205  
TEL: 615-749-8300  
FAX: 615-749-8308WASHINGTON, D.C.  
2100 M STREET, N.W.  
SUITE 601  
WASHINGTON, D.C.  
20037-1207  
TEL: 202-223-5700  
FAX: 202-223-5704ROME  
PIAZZA DIGIONE, 1  
00197-ROME  
ITALY  
TEL: 011-396-806-8456  
FAX: 011-396-674-8223Direct Dial No.  
213-688-3408  
e-mail: jbirnberg@loeb.comLaw Revision Commission  
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November 18, 1998

Nathaniel Sterling  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739Re: Memorandum 98-84

Dear Nat:

Although you know who I am, since this letter is likely to be reprinted in one of your memoranda, I should identify myself to others. I have been in practice for over 32 years, both as an attorney for the State Controller's Office and in private practice. My practice consists of will and trust drafting, probate and trust administration, death and gift tax cases, assisting the State Bar in its legislative activities, and speaking on California legislative and case developments. From 1991 through 1997 I was the Legislative Chair for the Estate Planning Trust and Probate Law Section of the State Bar, and I am currently on the Executive Committee of the Los Angeles County Bar Trusts and Estates Section. I am a member of ACTEC.

I am greatly concerned that the Law Revision Commission is taking up the thoroughly repudiated Informal Probate proposal. Besides the letters of opposition attached to Memorandum 98-84, you need to be aware that the vast majority of probate practitioners (as contrasted with those attorneys who only draft trusts and who never see the inside of a court room) were, and undoubtedly remain, opposed to the informal probate concept. Such opposition is not based on self-interest but upon frequently expressed concerns about the recurrent and increasing abuse by unsupervised fiduciaries. Those concerns are echoed by the comments from those judges and commissioners who have written opposition letters (and I note that there were no letters by court officers in support of the proposal).

Nathaniel Sterling  
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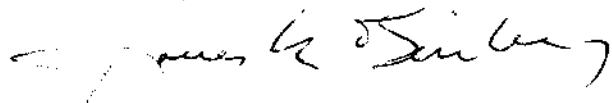
While some of the sponsors of the proposal are well-meaning, others have hidden agendas (for example, I have been told by some of the proponents that they dislike being questioned by probate referees, probate examiners and judges) and they expect to "get the court off their back" with this proposal.

If informal probate is intended to counter the perceived abuses of revocable trusts, it is not the solution. Rather, what should be done is to tighten trust requirements to reduce such abuses (for example, by legislation such as the new trustee notification requirements that were added in 1997).

Although your memorandum says that AARP would be supportive of informal probate, I believe that such support will evaporate when the risks to of abuse to seniors are demonstrated to them. For that same reason, I also think that the elder law bar (which was only beginning to become active when the proposal was originally made).will oppose the proposal.

I hope that the Law Revision Commission will decide not to undertake this project.

Very truly yours,



James R. Birnberg

JRB:jrb  
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cc: Matthew S. Rae, Esq.  
Don E. Green, Esq.