Study L-1100 December 10, 1998

Second Supplement to Memorandum 98-84

New Probate Code Suggestions: Informal Probate Administration

Attached are newly received letters concerning informal probate administration from the following persons:

Mr. Klug and Mr. Collier support a Commission study of informal probate administration, and the Los Angeles County Bar Association, Trusts and Estates Section opposes the proposal. Their reasons are elaborated in their letters, which we will discuss at the Commission meeting.

Susan House, current Chair of the State Bar Estate Planning, Trust and Probate Law Section, indicates that the policy of the Executive Committee is not to undertake and promote legislation in this area due to lack of a Committee consensus on it. But if the Law Revision Commission decides to study this matter the Executive Committee will monitor and comment on our work. Ms. House notes that the Executive Committee has not taken a position on the question of informal probate administration, but her personal sense is that if polled, there would still be a serious difference of opinion among the committee members about the advisability of the proposal.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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December 9, 1998

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-1
Palo Alto CA 94303-4739

Re: Memorandum 98-84

Dear Nat:

For more than a quarter century, whenever proposals have been considered which would simplify the passage of property on death, "[s]ome groups of attorneys" and "[s]ome judges who have specialized in probate matters"[1] have predicted wholesale abuse upon unsuspecting heirs.[2] And for just as long, the alarmist predictions have been proved unfounded.[3]

I have been practicing law for more than 25 years and have limited my practice to estate planning, trust and probate law for my entire professional career. You may recall that in 1984-85 I served as chair of the State Bar's Estate Planning, Trust and Probate Law Section, and that I worked closely with the California Law Revision Commission in its revision of the Probate Code in the 1980's. I am also a fellow of the American College of Trust and Estate Council, and I serve on the Member's Consultative Group of The American Law Institute's project on the Restatement of the Law Property (Wills and Other Donative Transfers). I have more than a passing interest in the improvement of the law.[4]

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[1] These two groups were identified as the primary opponents to the Uniform Probate Code. See Introduction to Response of the Joint Editorial Board for the Uniform Probate Code to the State Bar of California's "The Uniform Probate Code: Analysis and Critique" (February, 1974), at page viii.

[2] In March, 1973, a State Bar committee opined that "...the form of independent administration suggested by the UPC is so devoid of fundamental safeguards that the advantages it offers in the ordinary, competently administered estate are far outweighed by the potential injury to the unwary in the incompetently or dishonestly administered estate." The Uniform Probate Code: Analysis and Critique, The State Bar of California (March, 1973), at pages xvi and xvii.

[3] Actual experience over the past 25 years in the numerous other states which have adopted the UPC establishes that the State Bar committee's concern about potential for injury was grossly overstated.

[4] Despite my present and former affiliations, my comments in this letter are my own, and I am not writing on behalf of any of those organizations.

California has made a great deal of progress in the last several decades in simplifying the passage of property on death. The amounts which can be collected by affidavit have been greatly increased to an amount where many heirs can now enjoy their inheritances without depletion by attorney fees and administration expenses. In addition, vast amounts of wealth are now transmitted by revocable living trusts, POD designations, public and private pension plan beneficiary designations, life insurance beneficiary designations and joint tenancy survivorship, all without the intervention of any court. Not only has the public benefited from savings in attorney fees and related administrative expenses, but the courts have also benefited because matters which once required court involvement are now handled privately. Those benefits have been achieved without suffering the dire consequences which were previously predicted and which are being predicted yet again with respect to informal probate. [5]

Indeed, the formal probate system, itself, may well be the source of many abuses. How many elderly persons are persuaded to transfer their homes to their children in order to avoid probate? How many parents add their children's names to bank accounts to avoid probate? In my practice, I have seen far more abuse in probate avoidance attempts than in post-death property transfers.

The public dislikes probate. Beneficiaries dislike sharing their inheritances with lawyers. They will continue to devise their own methods of avoiding probate unless a simple system is created which will provide the economical efficiencies they want. The California Law Revision Commission has the ability to study the matter and to make a scholarly recommendation to the legislature. Please don't let the unfounded and discredited fears of a few alarmists divert the Commission from this opportunity to do so much good for the citizens of California.

Very truly yours,

Kenneth M. Klug

[5] In addressing transfer without administration of amounts less than $5,000, the 1973 State Bar committee had reported that the then-applicable requirements that "a petition to set aside the estate must be filed with the court and the court must determine that the expenses of last illness and funeral and expenses of administration have been paid" and that "a court appointed referee ... appraise the property" were "safeguards...necessary to prevent abuses of these provisions for summary administration." The Uniform Probate Code: Analysis and Critique, supra, page 130. Since then, passage of property to surviving spouses no longer requires administration, and small estates less than $100,000 in value can now be collected by affidavit without court involvement. Dispensing with the "safeguards" some lawyers and judges thought necessary did not result in the predicted abuses.

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December 8, 1998

California Law Revision Commission
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Re: Possible Study of Informal Probate Administration

Dear Commissioners:

The purpose of this letter is to set forth some considerations relating to possible study of informal probate administration which I understand is an agenda item for December 11, 1998. The views set forth herein are those of the writer. Some of you will recall that I worked closely with the Commission during much of the 1980's on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, in connection with the revisions of the Probate Code. I am a former chair of the Estate Planning, Trust and Probate Law Section, State Bar of California.

This letter discusses generally the various kinds of estate administration currently available under the Probate Code and where informal administration might fit into the existing administrative provisions.

1. Fully Supervised Probate Administration:

Fully court-supervised administration of the estate is the basic structure of the existing Probate Code, Sections 7000-12252, and with few exceptions provides for a noticed petition to be filed with the court for an order on each step taken in the administration of the estate, requires the filing of an inventory and appraisement, filing of accountings, unless waived, and requires court orders for distribution.

2. Independent Administration of Estates:

This part of the Probate Code is found in Sections 10400-10592. It relates to administration of the estate after the formal opening of an estate as provided in Sections 8000 and subsequent. It provides for "full authority" or for "limited authority" under independent administration. Under independent administration certain actions require court petitions and supervision, Sections 10501 and subsequent. Another group of powers can be

exercised only after giving notice of proposed action, Sections 10510 and subsequent. A third group of powers can be exercised where notice of proposed action is required only in some situations, Sections 10530 and subsequent. A fourth group of powers can be exercised without giving notice of proposed action, Sections 10550 and subsequent. Whenever there is an objection to a proposed action on notice, then the matter has to be the subject of a court petition and determination, Sections 10587 and subsequent. Under independent administration, as noted, the formal provision for opening a probate under Sections 8000 and subsequent applies. Compensation is also subject to court supervision as is the settlement of accounts and with a limited exception under 10520, preliminary and final distribution. As the title to that portion of the Code indicates, it deals with "administration" of estates and eliminates some of the court involvement in the day-to-day administration of a probate estate.

3. Provisions Where Full Probate Administration Is Not Required:

There are a number of provisions in the Code which eliminate the need for probate administration or provide a summary proceeding. These include the following:

(a) Property passing to surviving spouse: Property passing outright to the surviving spouse whether by will or intestacy does not require administration, Section 13500.

(b) Transfer by affidavit: For estates with assets valued at $100 ,000 or less that would otherwise require probate , those assets may be transferred whether passing by intestacy or will, by an affidavit, Sections 13100 and subsequent, without any court administration. Many items are excluded in determining what would constitute $100,000 of assets that would otherwise be probated and those are listed at least in part in Section 13050. Excluded property includes, among other things, joint tenancy, property in a revocable trust, multiple party accounts, vehicles, vessels, manufactured homes, etc.

(c) Mini-proceeding where real property involved: Under Sections 13150 and subsequent where the total value of probate assets is under $100,000 but part of it is real property, there is a simplified provision for a court order transferring title to the real property.

(d) Affidavit procedure for real property of small value: Sections 13200 and subsequent provide an affidavit procedure for transfer of real property where the value of the real property does not exceed $20,000.

(e) Intervivos trusts: Under the trust law, Sections 15000 and subsequent, there is no automatic court supervision of trusts or their administration (except

petition the court for a determination of specific matters involving the trust and its administration, Sections 17200 and subsequent. If a petition is filed, the court may dismiss the petition if it appears that the proceeding is not reasonably necessary to protect the interests of the trustee or beneficiary, Section 17202. In the case of a revocable trust so long as it remains revocable, all rights belong to the person holding the power of revocation, normally the Settlor of the trust, Section 15800. The jurisdiction provided by Sections 17000 and subsequent contemplates the right of a trustee or beneficiary as individual issues arise in connection with trust administration to petition for a ruling on that specific issue. That does not make the trust subject to continuing court supervision. In practice, most revocable trusts when they become irrevocable on the death of the grantor are administered for many years, often for several generations, without any court involvement whatsoever.

Under 1997 legislation, when a revocable trust becomes irrevocable or certain other changes take place in an irrevocable trust, notice is to be given to the beneficiaries of the trust of those occurrences, Sections 16061.7 and 16061.8. That notice limits the time during which the trust can be contested. Those provisions were added at the suggestion of the Executive Committee, Estate Planning, Trust and Probate Section, State Bar of California. Those noticed provisions do not directly involve the court or create ongoing court supervision of a trust upon its becoming irrevocable.

4. Revocable Trusts as Basic Estate Planning Document:

For the last decade or more, the principal estate planning document in California for most people has been the revocable trust, which has replaced the will as the primary vehicle for transfer of wealth at death. While a so-called pourover will is normally used in connection with the execution of the trust, its purpose is only to transfer any assets at death that were not transferred to the trust during lifetime and is in many instances never operative as all assets were placed in the trust during lifetime. As the Commissioners are aware, there have been innumerable articles over the last several decades on how to avoid probate by use of intervivos trusts and most clients express a preference for a revocable to avoid probate. Exactly the same tax savings can be achieved whether using a will or a revocable trust. Its popularity is based upon the desire to transfer assets at death as simply as possible without court involvement except where a particular problem may arise in the administration of the trust, Sections 17200 and subsequent.

Preparation of an intervivos trust is somewhat more complicated than preparation of a will and the costs of setting up a trust are commensurately higher than a will. A number of persons, especially those with modest estates, do not wish to incur the expenses incurred in creating trusts and, therefore, continue to use wills as the primary estate planning vehicle.

5. Study of Informal Probate:

The Commission is considering whether it should study the possibility of adding provisions to the existing Probate Code to authorize informal administration of a probate estate. Informal administration, if adopted, would provide a system for administration and distribution of probate estates that would in many ways parallel the administration and distribution of revocable trusts which become irrevocable on the death of the settlors.

The following items have relevance to possible adoption of an informal probate procedure in California:

a. The concept of informal probate has been included in the Uniform Probate Code since its initial approval in 1969. The Uniform Probate Code in its entirety has been adopted in some 15 states. Many more states have incorporated significant portions of the Uniform Probate Code into their probate laws but have not adopted the entire Code. Thus, a great many state probate codes for 25 years or more have provided for some type of informal administration based upon the Uniform Probate Code concepts. Under the Uniform Probate Code the provisions on informal probate are few in number. Sections 3-301-3-303 relate to the application for appointment of the personal representative under informal probate. Section 3-306 provides for notice upon appointment to the interested parties. Section 3-704 authorizes a personal representative to proceed with the administration and settlement of the estate without court order but reserves the right to seek court authorization on any issues that may arise from time to time or seek supervised administration for the balance of the administration. Section 3-711 authorizes the personal representative as the fiduciary to administer the estate without noticed hearing or court order. Section 3-715 lists some 27 specific powers that the personal representative can exercise under informal administration, including the authority to distribute the estate. Section 3-1003 provides that the personal representative may close the estate by filing with the court a verified statement indicating that creditors have been paid, expenses of administration have been paid, death taxes have been paid and that the estate has been distributed. A copy is to be sent to all distributees and to all creditors. If no proceedings involving the personal representative are pending in the court one year after the close the estate, the personal representative is discharged. If anyone objects to the final verified statement, that person has six months from the date of that closing statement to bring the matter before the court, Section 3-1005.

When informal probate is undertaken, it can be converted to supervised probate at any time on application of the personal representative or an interested party, Sections 3-502 and 3-704. A personal representative under informal administration is a

fiduciary and is liable for any damages resulting from breach of fiduciary duty, Section 3-712.

b. The procedures under informal probate are in many ways comparable to procedures now applicable to administration of intervivos trusts where court supervision is available as appropriate but where the assets of the trust are otherwise administered and distributed without court involvement.

6. Desirability of Studying Informal Probate:

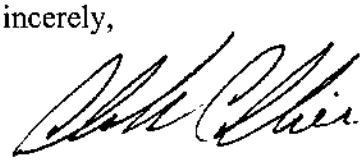
Informal probate administration, if adopted, would provide a mechanism for distribution of assets under a will which in many ways would parallel distribution of assets under a revocable trust upon the death of the settlor. The court would be available as needed to pass on particular petitions that might be filed even if the estate was otherwise being administered under informal administration. The personal representative would initially be appointed by a court filing or procedure (a formal opening pursuant to Sections 8000 and subsequent might be appropriate), the verified statement of administration would be filed with the court, but the court would not otherwise be involved unless there were objections to that report or other petitions were filed for specific court orders on individual transactions in the administration of the estate. Making informal administration available to those who prefer to use wills to provide a simplified procedure similar to that available to them if they use a revocable trust would seem in the public interest. Adoption of informal probate procedures would give the personal representative three different options to administer an estate, namely, fully supervised administration, independent administration or informal administration. The vast majority of estates do not involve any controversy. A person's assets should be distributed expeditiously and with minimal court involvement whether that person uses a will or an intervivos trust as his or her basic estate planning document.

7. In Summary:

The writer believes that it is appropriate for the Law Revision Commission to instruct its staff to study informal probate administration as an additional option to be available for administration of estates under the Probate Code. Once that study is completed, the Commission would have to decide whether it wished to propose specific legislation to implement its recommendations. As noted, the sections in the Uniform Probate Code dealing with informal administration are quite limited in number and the addition of informal administration procedures in the California Code should not be a major undertaking. The availability of informal administration as an option would provide an administrative system that would compliment that already in place for revocable trusts.

Thank you for giving this letter your consideration.

Sincerely,



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December 9, 1998

Nathaniel Sterling
Executive Secretary
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Re: **Proposed Legislation for Informal Administration of Decedent Estates in California**

Dear Commissioners:

On November 24, 1998, I was asked by the Executive Committee of the Trust and Estates Section of the Los Angeles County Bar Association to convey our strong opposition to the proposed legislation for Informal Administration of Decedents' Estates in California. This matter came before the Estate Planning, Trust and Probate Section of the State Bar of California in 1996 and was withdrawn. At that time, our section was firmly against the legislation and we remain just as adamant in our opposition.

The probate practitioners on our committee (especially those involved in litigated probate matters) believe that informal probate will invite abuse and misuse of the probate system. The remedies available to rectify abuse of the probate process, such as will contests, after probate will contests, Petition for Reconveyance, Petition to Determine Heirship, etc., will by rendered useless by the 45 day minimum time period needed to distribute estate assets.

Creditors will be at a distinct disadvantage. The 45 days involved in distribution of an estate will severely curtail the four months from issuance of Letters creditors now have to become aware of a death and to file a Creditor's Claim. At the very least, the Creditor's Claim statutes will have to be rewritten to afford even minimal protection to creditors. Beneficiaries and intestate heirs will likewise be put at a distinct advantage. It often takes time to locate all beneficiaries and, in the case of intestate heirs, time is of great assistance in being able to thoroughly research the existence and whereabouts of

relatives and issue. Such information is not always readily available. It is not unusual in intestate matters for it to take a few months to locate all persons who are entitled to notice.

Informal probate sets up a "race to the courthouse" scenario. Get in, get the estate probated, the assets distributed and the fewer people who know about it, the better. Once the 45 days have passed and the money distributed, it will be like putting toothpaste back into the tube, to get the assets returned if any "mistakes" have been made. If anything, probate procedures should be subject to more court scrutiny, not less. The argument that trust administration is now done without judicial supervision and the same should be done for probate administration is fallacious. Court supervision is needed to make sure that the decedent's wishes are carried out or that the heirs of an intestate decedent are given their fair share of the estate. Family members are scattered all over the United States and the world. People do not keep in touch as they should. Persons whose consciences would prohibit them from entering into a criminal or tortuous activity, somehow believe that it is acceptable to bend the rules in order to reap the benefits of wealth left behind by a relative to the exclusion of other heirs and beneficiaries. The "mom loved me best" and "I was the only one who took care of mom" type of thinking allows people to rationalize conduct which, in other circumstances, they would consider to be unethical, dishonest and even criminal.

Lawyers should also be weary of informal probate and the potential for malpractice claims arising. In informal probate, there is no requirement that a probate referee value the assets. The opportunity for the client to misevaluating assets either out of ignorance or greed is something that can come back to haunt the lawyer. There will be no protection provided by the probate referee. Also, if all intestate heirs are not located, it will be the attorney who will conceivably be held responsible. The attorney will be caught between a client who wants everything done as soon as possible and the knowledge that the location of all heirs may take more time than the client wants to spend.

With the new 13100 and 13150 statutes, the need for a full probate for estates worth under $100,000 has been largely eliminated. Accordingly a statutory scheme equivalent to informal probate has been given an appropriate place in our probate system since small estates need not be supervised by the courts and may be distributed quickly and without the need for substantial legal work.

Under the proposed informal probate statutes and, in particular, the speed with which an estate will be distributed, the lack of judicial supervision coupled with the traditional absence of need for a bond in many testate estates will make it much easier for persons to take advantage of the probate system in their efforts to exclude other heirs, beneficiaries and creditors. We believe informal probate is poor public policy which should not be enacted in the State of California.

Sincerely,

SUSAN J. COOLEY
Member of the Executive Committee
Trust and Estates Section of the
Los Angeles County Bar Association

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December 9, 1998

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Attn. Mr. Nat Sterling

Re: Informal Probate

Dear Nat:

I am the current Chair of the State Bar Estate Planning, Trust and Probate Law Section (we don't have our new letterhead yet). I understand that the Law Revision Commission has been receiving testimony from various proponents and opponents of Informal Probate, and a number of people have expressed to me their concern that the CLRC may have received misinformation regarding the position of the Executive Committee of our Section on this subject. Lest the ultimate decision of the CLRC on whether or not to proceed with this project be influenced by such misinformation, I am writing to clarify that position.

During the 1994-1995 State Bar year, the Executive Committee of our Section studied the subject of Informal Probate and drafted proposed legislation to enact a new system of California informal probate. This proposal was circulated statewide and a debate ensued between those who supported and those who opposed the concept. While many people felt strongly that greatly simplifying California probates was a good idea, there was also strong opposition from the probate courts and judges and from a significant portion of the probate bar.

Similarly, there was not a consensus on the Section's Executive Committee to proceed with the project. Because of this lack of consensus, the project was abandoned.

It is currently the policy of the Executive Committee not to undertake and promote legislation when there is not a consensus on the Committee. On the other hand, we do view it as our responsibility to take an active role in reviewing and commenting on CLRC proposals which affect our area of the law. Should the CLRC vote to study and make a recommendation regarding informal probate, we will undoubtedly carefully monitor and comment on your work product if and when there is a specific proposal before us.

While it is my personal sense that if polled, there would still be a serious difference of opinion among the Committee members about the advisability of informal probate, as a concept, that vote has not actually been taken. Whether or not such a vote will be taken sometime in the future will depend upon what is proposed because the one thing most people agreed upon in our previous experience with this area was that "the devil is in the details."

I hope this will be helpful in clarifying the position of the Section's Executive Committee. Please give me a call if you would like to discuss the subject further.

Very truly yours,

Susan T. House

By Facsimile and mail

cc: James B. Ellis, Esq.
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