

0010W
May 7, 1986

Note. Changes may be made in this Agenda. For meeting information, please call John H. DeMouilly (415) 494-1335

Time

May 15 (Thursday) 3:00 p.m. - 8:00 p.m.
May 16 (Friday) 9:00 a.m. - 4:15 p.m.

Place

State Capitol
Room 125
Sacramento

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

May 15-16, 1986

1. Minutes of April 10, 1986, Meeting (sent 4/25/86)
2. Administrative Matters
3. 1986 Legislative Program

Legislative Program Generally

Memorandum 86-43 (sent 5/6/86)

4. Study L- Assembly Bill 2625 - Comprehensive Probate Bill

Memorandum 86-44 (sent 5/6/86)

Amended AB 2625 (sent 5/6/86)

First Supplement to Memorandum 86-44 (to be sent if needed)

5. Study L - Assembly Bill 2652 - Comprehensive Trust Bill

Generally

Memorandum 86-45 (sent 4/25/86)

Amended AB 2652 (sent 4/25/86)

Bond for Nonprofit Corporation

Memorandum 86-46 (sent 4/30/86)

6. Study L-1040 - Estate and Trust Code (Public Guardians and Public Administrators)

Public Guardians

Memorandum 86-48 (sent 4/30/86)

Public Administrators

Memorandum 86-49 (sent 4/25/86)

7. Study L-1029 - Estate and Trust Code (Distribution and Discharge)

Distribution of Estate

Memorandum 86-36 (sent 3/21/86)

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 86-36 (sent 4/7/86)

Second Supplement to Memorandum 86-36 (sent 4/25/86)

Closing Estate Administration

Memorandum 86-50 (sent 4/25/86)

Draft of Tentative Recommendation (attached to Memorandum)

8. Study L-1037 - Estate and Trust Code (Estate Management)

Generally

Memorandum 86-38 (sent 3/18/86)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 86-38 (sent 5/5/86)

SPECIAL
ORDER OF
BUSINESS
9:00 A.M.
MAY 16

Allocation of Broker's Commission

Memorandum 86-52 (enclosed)

Compromise of Claims and Actions; Extension, Renewal, or Modification of Obligations

Memorandum 86-39 (sent 3/28/86)

Draft Statute (attached to Memorandum)

Summary Resolution of Disputes

Memorandum 86-47 (sent 4/25/86)

Costs

Memorandum 86-42 (sent 3/28/86)

9. **Study L-1030 - Estate and Trust Code (Distribution Without Administration)**

Memorandum 86-41 (sent 3/18/86)
First Supplement to Memorandum 86-41 (sent 5/6/86)
Second Supplement to Memorandum 86-41 (enclosed)

10. **Study L-1045 - Estate and Trust Code (Definitions)**

Memorandum 86-51 (enclosed)
Draft Statute (attached to Memorandum)

11. **Study L - Terminology Used in Comments to Indicate How New Section Compares With Existing Law**

Memorandum 85-113 (sent 3/21/86)

To be Considered if Time Permits

12. **Handbook of Practices and Procedures**

Memorandum 85-107 (sent 4/7/86)
Draft of Revised Handbook (attached to Memorandum)

13. **Topics and Priorities for 1988 and Thereafter**

Memorandum 85-94 (sent 4/7/86)
First Supplement to Memorandum 85-94 (sent 4/7/86)
Second Supplement to Memorandum 85-94 (sent 3/5/86)

04/18/86

SCHEDULE FOR WORK ON ESTATE AND TRUST CODE

PORTIONS APPROVED FOR DISTRIBUTION FOR REVIEW AND COMMENT

Sent Out for Review and Comment 4/15/86

Opening Estate Administration

Independent Administration

To be sent Out for Review and Comment

Probate Practice Questionnaire

MAY MEETING

Approve Tentative Recommendations for Distribution for Comment

Distribution (Nat)

Closing Estate Administration (Nat)

Preliminary Consideration of New Material

Estate Management (Including Allocation of Broker's Commissions)
(Bob/John)

Definitions (Stan/Staff)

JUNE MEETING

Approve Tentative Recommendations for Distribution for Comment

Definitions (information for commentators) (Stan/Staff)

Public Administrators (Nat)

Public Guardians (Nat)

Establishing Identity of Heirs (Stan/Nat)

Administration of Estates of Missing Persons Presumed Dead (Stan/Nat)

Preliminary Consideration of New Material

Inventory and Appraisal (including Probate Referees) (Nat/John)

Abatement (Bob/John)

Distribution of Interest and Income (Bob/John)

Ancillary Administration (Stan/Nat)

JULY MEETING

Approve Tentative Recommendation for Distribution for Comment

Inventory and Appraisal (including Probate Referees) (Nat/John)

Ancillary Administration (Stan/Nat)

Estate Management (John/Bob)

Presentation and Payment of Claims (Nat/John)

Preliminary Consideration of New Material

Notices (John)
Rules of Procedure (Nat)
Orders (Nat)
Appeals (Stan)

SEPTEMBER MEETING

Approve Tentative Recommendations for Distribution for Comment

Accountings (Nat)
Abatement (Bob)
Distribution of Interest and Income (Bob)
Notices (John)
Rules of Procedure (Nat)
Orders (Nat)
Appeals (Stan)

Preliminary Consideration of New Material

Compensation, Commissions, and Fees (John)
Anti-Lapse Statute (Stan)
Multiple-Party Accounts (Bob)

OCTOBER MEETING

Approve Tentative Recommendation for Distribution for Comment

Compensation, Commissions, and Fees (John)
Anti-Lapse Statute (Stan)
Multiple-Party Accounts (Bob)

Preliminary Consideration of New Material

Operative Date of New Code
Conforming Revisions of Sections in Other Codes
Review Comments on Tentative Recommendations Sent Out for Comment

NOVEMBER MEETING

Review for technical and substantive changes and prepare Comments

Preliminary Provisions
General Provisions
Disclaimers
Guardianship-Conservatorship Law
Management of Disposition of Community Property Where Spouse
Lacks Legal Capacity
Authorization of Medical Treatment for Adult Without Conservator
Other Protective Proceedings

California Uniform Transfers to Minors Act
Wills
Intestate Succession
Family Protection
Escheat of Decedent's Property
Disposition Without Administration
Trusts

Approve Text of New Estates and Trusts Code for Introduction

Arrange for introduction as preprinted bill

Approve Printing of Recommendation for Estates and Trusts Code

DECEMBER AND JANUARY

Staff prepares Recommendation for Printing

FEBRUARY 1987 MEETING

Printed Bill available for review and distribution

APRIL 1987 MEETING

Printed Commission Recommendation Available for Distribution
Review Comments from Interested Persons on Bill Proposing New Code

NEW PROBATE STUDIES TO BE COMMENCED IN 1987

Prepare Statutory 630 Affidavit Form (for inclusion in new code) (John)
Uniform Transfers to Minors Act
 Make possible to make outright gift to remain in custody until age 25
 Co-custodians
Draft new Division 3 (Powers of Attorney; Powers of Appointment)
Claims Procedure for Trusts
Rights of Estranged Spouse
Anti-lapse and Construction of Instruments
Trustee's use of Section 650 Procedure
Ancestral Property Doctrine
Directive to Physicians (Uniform Act)

5/22/86

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
MAY 15-16, 1986
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 15-16, 1986.

Law Revision Commission

Present: Edwin K. Marzec, Chairperson Roger Arnebergh
 Arthur K. Marshall, Vice Chairperson Ann E. Stodden
 Bion M. Gregory

Absent: Bill Lockyer, Member of Senate
 Alister McAlister, Member of Assembly
 Tim Paone

Staff Members

Present: John H. DeMouilly Robert J. Murphy III
 Nathaniel Sterling Stan G. Ulrich

Consultant Present

Edward G. Halbach, Jr., Property and Probate Law

Other Persons Present

Bob Bannon, Los Angeles County Bar Association, Pasadena
Fred H. Bock, California Probate Referees' Association,
Lompoc (May 16)
Ronald C. Bock, California Probate Referees' Association,
Lompoc (May 16)
Edward V. Brennan, California Probate Referees' Association,
San Diego
Alex Greel, California Association of Realtors, Sacramento
(May 16)
James D. Devine, State Bar Estate Planning, Trust and Probate
Law Section, Monterey
Jonathan Ferdon, Public Administrator, San Francisco (May 15)
Nancy E. Ferguson, California Probate Referees, Chico
Len Pollard, State Bar Estate Planning, Trust and Probate
Law Section, San Diego (May 15)
James Quillinan, State Bar Estate Planning, Trust and Probate
Law Section, Mountain View
Jim Scannell, Public Guardian and Administrator, San Francisco
(May 15)
Theresa Taken, Public Guardian Office, San Francisco (May 15)

Gordon Treharne, Public Guardian and Administrator, Los Angeles (May 15)
James Willett, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Shirley Yawitz, California Probate Referees' Association, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF APRIL 10, 1986, SUBCOMMITTEE MEETING

The Minutes of the April 10, 1986, Subcommittee Meeting were approved as submitted by the staff. The Commission adopted the actions of the Subcommittee as actions of the Commission.

FUTURE MEETINGS

Future meetings are scheduled as follows:

June 1986

26 (Thursday)	3:00 p.m. - 7:00 p.m.	Monterey
27 (Friday)	9:00 a.m. - 4:00 p.m.	

Meeting Place:

Doubletree at Fisherman's Wharf
Two Portola Plaza
Monterey
(408) 649-4511

Hotel Where Commissioners are Staying:

Sheraton
350 Calle Principal
(408) 649-4234

July 1986

17 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
18 (Friday)	9:00 a.m. - 12:00 noon	

Meeting Place (Tentative):
Sheraton Harbor Island West
1590 Harbor Island Drive
San Diego
(619) 291-6400

September 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
5 (Friday)	9:00 a.m. - 3:30 p.m.	

November 1986

13 (Thursday)	3:00 p.m. - 8:00 p.m.	Orange County
14 (Friday)	9:00 a.m. - 4:00 p.m.	

December 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles
5 (Friday)	9:00 a.m. - 4:00 p.m.	

1986 LEGISLATIVE PROGRAM

The following report on the 1986 Legislative Program was presented to the Commission.

Enacted

Statutes of 1986, Ch. 49 -Assembly Bill 625 - Buol case urgency bill - provides that 1983 statute applies only to proceedings commenced after January 1, 1984

Passed First House

Assembly Concurrent Resolution 93 - Continues Commission Authority to Study Topics Previously Authorized for Study

Assembly Bill 2625 - Comprehensive Probate Bill (Disposition of Estate Without Administration; Small Estate Set-Aside; Proration of Estate Taxes; Technical and Clarifying Revisions)

Set for Hearing by Ways and Means Committee (First House)

Assembly Bill 2652 - Comprehensive Trust Statute (Set for hearing by Assembly Ways and Means Committee on May 21)

Dead

Assembly Bill 2626 - Reservation of Legislative Power for Disposition of Property in Marriage Dissolution Cases (Heard by Assembly Judiciary Committee on February 25 and not sufficient votes in favor of bill to approve it)

Referred to Inactive File

Assembly Bill 195 - Law Revision Commission Statute

STUDY L-ASSEMBLY BILL 2625

The Commission considered Memorandum 86-44 and the attached copy of Assembly Bill 2625 as amended in Assembly April 8, 1986.

The Commission approved Assembly Bill 2625 as amended and decided to further amend Assembly Bill 2625 so that the provisions relating to proration of taxes (Sections 20100-20225) will become operative on January 1, 1986. This change is to be made if the representative of the Judicial Council does not object.

The Commission considered the First Supplement to Memorandum 86-44 which had attached a letter from Benjamin D. Frantz. Mr. Frantz suggested in substance that the affidavit procedure should be revised to require that the affidavit procedure be required to be used (instead of an ordinary probate proceeding) in any case where the requirements are satisfied for use of the affidavit procedure unless the petitioner for use of ordinary probate proceedings shows good cause why a court proceeding is necessary to probate the decedent's will or administer the decedent's estate. The Commission determined that the suggested revision was not a desirable one.

STUDY L-ASSEMBLY BILL 2652

The Commission considered Memorandum 86-45 which reported the amendments made to Assembly Bill 2652 and had attached a copy of the bill as amended in Assembly April 17, 1986, and a copy of the Commission report concerning Assembly Bill 2652. The Commission report concerning Assembly Bill 2652 contained revised and supplemental Comments to the sections of Assembly Bill 2652.

The Commission decided that the amendments to be made to Assembly Bill 2652 after the bill has passed the Assembly should include an amendment to subdivision (e) of Section 15602 to make the provision read as follows:

(e) ~~Only trustees who are individuals may~~ A trust company may not be required to give a bond, notwithstanding a contrary provision in the trust instrument.

The pertinent portion of the Comment to Section 15602 is to be revised to read in substance as follows:

Comment. . . . Subdivision (e) makes clear that ~~separate-trustees trust companies~~ are not required to give a bond. See Section 83 ("trust company" defined). This restates part of former Probate Code Sections 480 and 481 without substantive change. A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 83, and thus is subject to the provisions of paragraphs (1) and (2) of subdivision (a) of this section relating to when a bond may be required. A bond may be required if the trust instrument requires a bond or the bond is found by the court to be necessary to protect the interests of beneficiaries. But a bond is not required of a nonprofit or charitable corporation that acts as trustee under a charitable trust merely because the corporation is not named as a trustee in the trust instrument. For provisions relating to nonprofit or charitable corporations acting as a trustee, see, e.g., Corp. Code §§ 5140(k) (power of nonprofit public benefit corporation to act as trustee), 7140(k) (power of nonprofit mutual benefit corporation to act as trustee), 9140(k) (power of nonprofit religious corporation to act as trustee); Gov't Code § 12582.1 ("charitable corporation" defined for purposes of Uniform Supervision of Trustees for Charitable Purposes Act).

STUDY L-1029 - ESTATE AND TRUST CODE (DISTRIBUTION AND DISCHARGE)

The Commission considered Memorandum 86-36 and the First and Second Supplements thereto, relating to distribution of the estate, and Memorandum 86-50, relating to closing estate administration. The Commission approved the draft provisions to distribute for comment, with the following changes.

§ 8706. After-discovered and other property not covered by order. This section was deleted from the draft.

§ 8720. Time for petition. Preliminary distribution should be available after two months, provided that if distribution is made between two months and four months, a bond is required. The bond must be in the amount of the distribution. The bond should be filed before an order for distribution is made. The reference to a "payment on account" should be deleted from the draft and the Comment should note that distribution of all or a portion of a beneficiary's share includes a payment on account. The Comment should also note the persons who may bring a petition for preliminary distribution.

§ 8721. Order for distribution. Any bond required must be filed before an order for distribution is made.

§ 8722. Distribution under Independent Administration of Estates Act. This section should refer to distribution of 50% of the net estate, rather than 50% of the estate in the aggregate. The Comment should emphasize that 50% is a limit on the total of the estate that may be distributed, and does not authorize distribution of 50% of the estate remaining after each prior distribution.

§ 8723. Costs of proceeding. Subdivision (a) was deleted from this section, with the result that in all cases the cost of proceedings is paid by the distributees or the estate in such proportions as the court in its discretion determines.

§ 8740. Petition and order. The reference to a "final order of distribution" should be changed to an "order of final distribution."

§ 8800. Petition. The Comment should note that a special administrator with powers of a general personal representative may not file a petition if there is a will contest pending.

§§ 12200-12253. Closing estate administration. The staff should take into account the comments and changes suggested by State Bar Team #1 (memorandum attached to these Minutes as Exhibit 4) in preparing the tentative recommendation for comment.

STUDY L-1037 - ESTATE AND TRUST CODE (ESTATE MANAGEMENT)

The Commission considered the following materials concerning estate management:

(1) Materials Relating to Estate Management Generally -- Memorandum 86-38 and the attached draft statute and the First and Second Supplements to Memorandum 86-38.

(2) Materials Relating to Compromise of Claims and Actions and Extension, Renewal, or Modification of Obligations -- Memorandum 86-39 and the attached Draft Statute and a letter handed out at the meeting from Probate and Trust Law Section of the Los Angeles County Bar Association (attached to these Minutes as Exhibit 1).

(3) Materials Relating to Costs -- Memorandum 86-42 and a letter handed out at the meeting from the Probate and Trust Law Section of the Los Angeles County Bar Association (attached to these Minutes as Exhibit 2).

(4) Materials Relating to Summary Resolution of Disputes -- Memorandum 86-47.

(5) Materials Relating to Allocation of Broker's Commissions -- Memorandum 86-52 and a letter from the James A. Willett to which was attached an Extract of Local Probate Rules (prepared by the staff) (letter and extract attached to these Minutes as Exhibit 3).

The Commission made the following revisions, deletions, and additions to the draft statute attached to Memorandum 86-38.

Generally

The staff should check the entire draft to determine whether the phrase "advantage of the estate" or "best interests of the estate" and like phrases are used consistently.

Where a provision is drawn from the guardianship-conservatorship law and a change is made in the provision, the comparable provision of the guardianship-conservatorship law should be conformed unless there is some reason why it should not be conformed.

Whenever a request is made for an order requiring the personal representative to take an action, the notice of hearing on the petition should be given to the personal representative by citation.

§ 7203. Verification required

The Commission approved this section insofar as it requires that an objection or response be verified. Commissioner Stodden pointed out that Los Angeles County has always required that an objection be verified. Verification tends to eliminate frivolous objections.

The Commission considered who should sign the pleading or make the verification. The Commission decided that Section 7203 should be revised to require that a petition, report, or account be verified by the petitioner or the person making the report or account and that an objection or response should be verified by the person making the objection or the respondent.

It was noted that a conforming change will be required in the comparable guardianship-conservatorship law provision.

§ 7308. Proof of giving of notice

This section was approved. The Commission decided not to change the phrase "foreman or principal clerk" in paragraph (4) of subdivision (a). It was noted that this language is used in Probate Code Section 1468 (guardianship-conservatorship law) and in Code of Civil Procedure Section 417.10 (civil proceedings generally). To change the language of Section 7308 would require a different form of printer's affidavit, depending on the particular statutory provision pursuant to which the affidavit is made.

The Comment to Section 7308 should be revised. The last sentence of the third paragraph, referring to the Joslyn, should be given further consideration. The staff should review the Joslyn case. The staff should report to the Commission the extent to which the Joslyn case should be overruled. Perhaps all that is needed is to state the subdivision (b) codifies existing law and the cases should be cited in the Comment with their holdings indicated. Whether the Joslyn case should be overruled depends on its precise holding.

§ 7411. Transfer or conveyance of property pursuant to court order

Language should be added to subdivision (a) to state specifically that the section applies to the creation of any lien or encumbrance on real property of the estate. Language should also be added to make clear that the section applies where the personal representative grants an option to purchase real property of the estate.

Subdivision (c) was revised so that the subdivision does not apply to a lease. The second sentence of subdivision (c) was retained, but it should be clear that this sentence does not apply to a lease made pursuant to a court order.

Subdivision (d) was approved as drafted.

§ 9600. Duty to manage estate using ordinary care and diligence

This section and the Comment was approved as drafted, except that the last sentence of the third paragraph of the Comment should include a reference to Section 9657.

A reference to subdivision (b) of Section 9600 should be added in the Comment to each section that gives the personal representative a power.

§ 9601. Measure of liability for breach of fiduciary duty

In the introductory portion of this section, "any one or more of the following that are" was substituted for "any of the following that is." When the trust provisions (Section 16440) are continued in the new Estate and Trust Code, Section 16440 should be conformed.

The Comment should make clear that the "profit made by the personal representative" refers to personal profit rather than profit to the estate.

§ 9603. Remedies not exclusive

The following section was substituted for Section 9603 of the draft statute:

9603. The provisions of Sections 9601 and 9602 for liability of a personal representative for breach of a fiduciary duty do not prevent resort to any other remedy available against the personal representative under the statutory or common law.

This new section is the same in substance as a provision of the trust bill. The section retains existing law insofar as it applies to a personal representative under existing law.

§ 9610. Extent of court supervision

This section was approved by the Commission. The Comment should refer to Section 9600, which states when the personal representative is to exercise a power and when the personal representative is not to exercise a power.

§ 9611. Instructions from or confirmation by court

This section was revised so that only the personal representative can petition for instructions. This continues existing law under Probate Code Section 588. The Comment should note that if an interested person believes that the personal representative should take some particular action or refrain from taking a particular action, the

remedy is not to petition for instructions (since Section 9611 does not permit anyone other than the personal representative to petition for instructions) but instead the remedy is to petition for removal of the personal representative.

A similar statement should be included in other sections that permit a permit a petition by the personal representative (but not other interested persons) for a particular purpose. While the persons who may petition under those sections is limited, the interested person still has the remedy of petitioning for removal of the personal representative.

The Commission approved the location of this provision as a general provision.

§ 9612. Effect of court authorization or approval

The preliminary portion of this section was revised to read: "When a judgment, order, or decree made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims" A comparable revision should be made in Section 2103 (guardianship-conservatorship law). The Comment should indicate the provisions that determine when a judgment, order, or decree made under the division becomes final.

The Commission discussed subdivision (b). The Comment to this subdivision should state that this subdivision codifies existing law and cite the pertinent cases.

§ 9620. Submission of dispute to temporary judge

The Commission discussed Memorandum 86-47 and the attached draft statute. Section 9620, revised as set out below, was approved in substance, but is to be reviewed by the Commission at the next meeting.

9620. If there is a dispute between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may do either of the following:

(a) Enter into an agreement in writing with the third person to refer the dispute a temporary judge designated in the agreement. The agreement shall be filed with the clerk, who shall thereupon, with the approval of the court, enter an order referring the matter to the designated person. The temporary judge shall proceed promptly to hear and determine the matter in controversy by summary procedure, without

pleadings or discovery. The decision of the designated person shall be subject to Section 632 of the Code of Civil Procedure. Judgment shall be entered on the decision and shall be as valid and effective as if rendered by a judge of the court in an action against the personal representative commenced by ordinary process.

(b) Enter into an agreement in writing with the third person that a judge of the court, pursuant to the agreement and with the written consent of the judge, both filed with the clerk, may hear and determine the dispute pursuant to the procedure provided in subdivision (a).

The Commission decided that the Comment to Section 9620, as set out in Exhibit 1 to Memorandum 86-47, should be revised to use the language in the Constitution (Article 6, Section 21) which provides for a temporary judge and that the Comment might explain what a temporary judge is, noting that a court commissioner may serve as a temporary judge. Also, the Comment should note that nothing in this procedure precludes a reference to a referee under the Code of Civil Procedure provisions. The Comment, revised by the staff to reflect the Commission's decisions and suggestions, is set out below, but has not been approved by the Commission.

Comment. Section 9620 restates and generalizes paragraph (2) of former Probate Code Section 718. Former Section 718 was limited to claims filed or presented, but Section 9620 applies to any dispute. Former Section 718 required a written decision; this requirement is replaced by a provision that adopts the statement of decision provision of Code of Civil Procedure Section 632. Summary proceedings under Section 9620 do not include a jury trial. See Section 7204 (trial by jury). The special provisions of former Section 718 that applied particularly to claims filed or presented are continued in Section 9307. The reference in paragraph (2) of former Probate Code Section 718 to "a commissioner or referee who is regularly attached to the court and designated in the agreement or to a judge pro tempore designated in the agreement" is replaced by a reference to "a temporary judge designated in the agreement." This substitution makes no substantive change in the law but makes the provision conform to the language used in Section 21 of Article 6 of the California Constitution ("On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."). Accordingly, under Section 9620, any member of the State Bar (including a court commissioner or referee) may be appointed as a temporary judge. See also Code Civ. Proc. § 259(5) (power of court commissioner to act as temporary judge). Section 9620

does not require that the temporary judge try the matter in a regular courtroom; the temporary judge may try the matter at his or her office or other place. Nothing in Section 9620 limits the alternative of reference and trial by a referee under Code of Civil Procedure Sections 638-645.1, and those provisions remain applicable to probate matters.

CROSS-REFERENCES

Definitions

Clerk § 27
Court § 29
Order § 53
Person § 56
Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2405

Conforming changes should be made in Section 2405 (guardianship and conservatorship).

The staff was asked to consider whether it should be necessary that the court approve the order referring the matter to the temporary judge. (It would appear that under Section 21 of Article 6 of the California Constitution ("On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause" [emphasis supplied]) that a court order is necessary to permit a matter to be tried by a temporary judge.

§ 9621. Submission of dispute to arbitration

The Commission discussed Memorandum 86-47 and the attached draft statute. Section 9621 as set out below was approved.

9621. If there is a dispute between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may enter into an agreement in writing with the third person to submit the dispute to arbitration under Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. Such an agreement is not effective unless it is first approved by the court and a copy of the approved agreement is filed with the court.

Comment. Section 9621 is a new provision. The section is drawn from Section 2406 (guardianship-conservatorship law). An arbitration award pursuant to this section is binding.

GROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2406

A conforming revision should be made in Section 2406 of the guardianship and conservatorship law.

§ 9630. Authority of joint personal representatives to act

This section was approved as drafted.

§ 9631. Liability of joint personal representative for breach of duty by another personal representative

The Commission revised paragraph (4) of subdivision (b) to read as follows:

(4) Where the personal representative~~----negligently~~
representative's negligence enables the other personal representative to commit a breach of fiduciary duty.

A conforming revision should be made in the trust law when the new Estate and Trust Code is drafted, but the pending bill need not be amended to make this technical revision.

§ 9640. Independent administration authority not limited

Section 10016 of the draft statute should be moved and compiled as a new article 5 (commencing with Section 9640) and be made applicable to all of Part 5.

§ 9650. Possession and management of decedent's estate

A reference should be added to the Comment to this section to refer to the provisions governing the duty of the personal representative to account where property is not in the possession or control of the personal representative. Also when the accounting provisions are reviewed, attention should be given to the problem of accounting where

the property is not in the possession or control of the personal representative.

The Comment to Section 9650 should contain a statement concerning the liability of the personal representative for failure to preserve and maintain property left with or surrendered to the person presumptively entitled to it. A personal representative may be liable for failing to take possession of estate property if the property is thereby lost to those entitled to it. Estate of Boggs, 33 Cal. App.2d 30, 33, 90 P.2d 814 (1939). However, under Section 9650, the property will be in possession of the person who will ultimately receive it, and the personal representative has no liability to the person having the property if it is not properly cared for by that person.

§ 9651. Profit or loss to estate

This section was approved as drafted.

§ 9653. Duty to recover property transferred in fraud of creditors

The first sentence of subdivision (d) was revised to read:

(d) If the property is sold, the proceeds shall be applied first to the portion of the costs and expenses of suit, including attorney's fees, that is to be borne by the estate, and then to the payment of the debts of the decedent in the same manner as other property in possession of the personal representative.

The following sentence was added at the end of subdivision (d):
"The property may be sold or assigned in its entirety, or in such portion as necessary to pay the debts."

A provision should be added to require that, in the case of an assignment under subdivision (c), notice is to be given to all creditors who have filed a claim in the estate proceeding.

§ 9654. Action by heirs or devisees for possession or to quiet title to real property

§ 9655. Voting rights with respect to corporate shares or memberships or property

These sections were approved as drafted.

§ 9656. Abandonment of valueless property

This section should be expanded, as suggested in the comment from the Los Angeles County Bar Probate and Trust Law Section, to permit the abandonment of assets where the cost of collecting, maintaining, and safeguarding the asset would exceed its value and where the asset is not subject to a specific devise (e.g., clothing, miscellaneous furniture and furnishings or an old car). The section should be revised to require that, before any asset is disposed of or abandoned pursuant to the authority granted in the section, a notice be given that is the equivalent of an advice of proposed action to those persons who would receive advice of proposed action if the estate were under independent administration and the matter were one for which advice of proposed action were required.

§ 9657. Insuring estate assets; insuring personal representative against liability

The Comment to this section should include a statement that the cost of insurance for estate property or to protect the personal representative against liability is a proper expense of estate administration. The Comment should also include a reference to subdivision (b) of Section 9600.

§ 9703. Accounts and deposits withdrawable only upon court order

The Comment to this section should refer to the provision that permits reduction in the amount of the bond where a deposit is made withdrawable only upon court order.

§ 9705. Interest on deposits by trust company

A portion of Section 9705 should be revised to read: "deposit money of the estate in an account in any department of . . ." and the Comment should refer to the definition of "account" in Section 21.

The substance of the following should be added to the Comment to this section:

The type of account into which moneys of the estate are to be deposited depends on the type of account which best serves the needs of the estate. The time within which the estate may be distributed, the time of the receipt of the

funds, and the immediate need for funds in order to meet the requirements of administration are all factors in determining the type of account in which the funds should be deposited. For example, where there is a substantial sum in excess of the immediate requirements and the sum is to be held over a period of time, the personal representative should deposit the funds in an account (which would include purchase of a certificate of deposit where purchase of a certificate would be appropriate under the circumstances) which not only would safeguard the funds but also allow a rate of interest on the funds that is advantageous to the estate. See *In re Estate of Smith*, 112 Cal. App. 680, 685-86, 297 P. 927 (1931). See also *Estate of Buchman*, 138 Cal. App.2d 228, 238-39, 291 P.2d 547 (1955).

§ 9730. Investments permitted without prior court authorization

The words "and reinvest" should be omitted in the introductory clause of Section 9730, and the Comment should note that the omission is not a substantive change, citing any relevant cases.

The definition of "repurchase agreement" in paragraph (2) of subdivision (b) was approved. The staff should check the language used in the trust law for describing the mutual funds that are intended to be covered by paragraph (2). The two statutes should be consistent. The staff should check with the California Bankers Association and obtain the views of the Association as to the appropriate language to be used to describe the mutual funds.

§ 9731. Investment in federal or state securities with court authorization

The words "and reinvested" should be omitted from this section. See the discussion under Section 9730, supra.

§ 9732. Investment of money as provided in will

The word "surplus" and the words "and reinvested" should be omitted from this section. See the discussion under Section 9730, supra.

Paragraph (2) of subdivision (a) was revised to read in substance:

(2) All uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, or there is sufficient cash in the estate aside from cash to be invested to pay all uncontested claims, or the court is otherwise satisfied that all uncontested claims will be paid.

The Comment should note that where money cannot be invested as provided in the will under Section 9732 because the conditions specified in that section are not satisfied, Sections 9730 and 9731 govern the investment of the money.

Subdivision (c) should require that notice of the hearing be mailed to the person nominated as trustee if the trustee has not yet been appointed at the time notice of hearing is given.

§ 9734. Exercise of restricted stock options

Subdivision (b) should be revised to read:

(b) A petition under this section may be filed by the personal representative or any interested person.

The provision of subdivision (c) for shortening notice should be retained unless this provision becomes unnecessary because this matter is covered by a provision of the portion of the new code covering notice generally.

§ 9735. Purchase of securities or commodities sold short

Paragraph (1) of subdivision (c) should be in brackets because this provision may be superseded by a provision of the portion of the new code covering notice generally.

Subdivision (b) was revised to read:

(b) A petition under this section may be filed by the personal representative or by any party to the contract.

§ 9760. Operation of decedent's business other than partnership

This section should be revised to provide that the decedent's business cannot be operated for more than six months after the death of the decedent unless a court order is obtained authorizing continued operation of the business. This would make the section consistent with the independent administration statute which requires advice of proposed action if a business is to be continued for more than six months after the death of the decedent. This limitation recognizes that the continuation of the operation of the business may result in the loss of estate assets if the business proves to be unprofitable.

§ 9761. Settlement of affairs of decedent's partnership

This section should not apply where the decedent's interest was as a limited partner, since the death of a limited partner does not terminate the partnership.

§ 9762. Personal representative continuing as partner in decedent's partnership

This section should not apply where the decedent's interest was as a limited partner, since the death of a limited partner does not terminate the partnership.

Subdivision (b) was revised to add "unless all surviving partners consent."

§ 9800. Borrowing money, refinancing, and encumbering property

At the end of the introductory clause of the section, the words "any one or more" were substituted for "either or both."

In paragraph (1) of subdivision (a), the introductory portion was revised to read: "Pay the debts of the decedent or the estate,".

In the introductory clause and in all similar provisions of the draft statute, the phrase "upon a showing it would be" was revised to read "upon a showing that it would be."

§ 9806. Effectiveness of encumbrance

Where the surviving spouse elects to have his or her share of the community real property administered in the estate, the personal representative should be permitted to borrow money against the property only with the consent of the surviving spouse. This should be made clear by an express provision in the statute.

§ 9808. Repeat authorizations

This section was deleted because it is not necessary.

§ 9823. Partition actions

This section was approved as drafted. The Comment should note that Section 9620 (referral to temporary judge) provides an alternative method if the personal representative and the third party agree.

Similar reference to Section 9620 should be made in the Comments to other comparable sections.

§ 9825. Costs in action against personal representative

The Commission considered Memorandum 86-42, relating to costs. Section 9825 was deleted. The proposed cost statute, attached to Memorandum 86-42, was approved as drafted.

§ 9850. Acceptance of deed in lieu of foreclosure or trustee's sale

The Comment should note that among the factors to be taken into consideration by the court is (1) whether there will be subordinate liens that will continue on the property that would be eliminated by foreclosure and (2) whether there is a right to a deficiency judgment if the property is foreclosed and fails to yield enough to pay the amount of the encumbrance. These factors would not necessarily preclude the granting of the order (as where the subordinate lien that would continue is for only a small amount or where the deficiency judgment would be uncollectible).

The staff should give further consideration to the need to include the phrase "made under this section" in this section. (It would appear that the phrase can be omitted in this section and other sections in this division since the instruction section has been revised to permit only the personal representative to petition for instructions.)

§ 9860. Petition for order

Any interested person should be permitted to file a petition under this chapter.

§ 9865. Abatement of petition if civil action pending

This section was approved as drafted.

§ 9883. Petition for order under Section 9881 or 9882

This section should be revised to provide in substance that the property authorized to be purchased shall be sold subject to the other requirements for a sale of the property under this part unless otherwise provided in the will or in the consents referred to in Section 9881.

The bracketed language was deleted from paragraph (1) of subdivision (b). The language should be "all heirs and devisees known to the petitioner." A note should be placed under the section indicating that the notice provision is subject to review when the general notice provisions are drafted.

The Comment should be reviewed to make clear whether the section continues existing law.

§ 9900. Dedication or conveyance of real property or easement with or without consideration

Subdivision (a) revised to limit the subdivision to "this state or any public entity in this state or the United States or any agency or instrumentality of the United States."

§ 9944. Notice of hearing

When the general notice provisions are considered, the special 20-day period of notice under subdivision (c) for leases for longer than 10 years will be reconsidered.

§ 9945. Notice and order

The language in brackets in subdivision (a) of Section 9945 was deleted.

§ 9946. Terms and conditions of leases

Subdivisions (c) and (d) (terms and conditions) of Section 9946 are to be recast to make them like subdivisions (a) and (b) (what the court may authorize).

Section 9946 should be divided into two sections. Subdivision (d) should be made a separate section, and the making of an oil or gas lease for more than 10 years should be left to the court's discretion even where there is an objection to the lease. Section 9946 should be revised to make clear the application of the 10 years limit in subdivision (a).

§ 9948. Repeat authorizations

This section was deleted as unnecessary.

§ 9961. Petition

This section was approved as drafted. The Commission decided that the right to file a petition should be limited to the personal representative.

§ 9962. Minimum purchase price

This section was revised to require that the appraisal be made within one year prior to the filing of the petition.

§ 9966. Final distribution of property subject to option

This section was deleted and the word "option" should be added to Section 7411 and a reference should be made in this chapter to the requirement that the option be recorded under Section 7411.

§ 9980. Option to purchase given in will

The Commission considered Section 9980 as set out in Exhibit 4 to the First Supplement to Memorandum 86-38. Section 9980 was approved in the form set out below.

9980. (a) When an option to purchase real or personal property is given in a will, the person given the option has the right to exercise the option at any time within the time limits provided by the will. For the purposes of this section, if a time limitation in the will is measured from the death of the testator, that time shall be extended by the period between the testator's death and the issuance of letters testamentary or of administration with the will annexed or by six months, whichever is the shorter period.

(b) When an option to purchase real or personal property is given in a will admitted to probate, the court may make an order under this chapter directing the personal representative to transfer or convey the property to the person given the option upon compliance with the terms and conditions stated in the will.

Comment. Section 9980 continues subdivision (a) and a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions

Court § 29
Person § 56
Personal property § 57
Personal representative § 58
Real property § 68
Will § 88
Effect of court authorization or approval § 9612
Transfer or conveyance pursuant to court order § 7411

§ 9981. Filing of petition; persons who may file; time for filing

The Commission considered Section 9981 as set out in the First Supplement to Memorandum 86-38. The section was approved in the form set out below.

9981. (a) To obtain an order under this chapter, the personal representative or the person given the option to purchase the property shall file a petition within any time limits provided in the will.

(b) Subject to subdivision (c), if the option given in the will is exercisable under the terms of the will after the time that the estate would otherwise be closed, the property subject to the option shall be distributed subject to the option.

(c) If the will does not provide a time limit for exercise of the option, the time limit is one year from the death of the decedent.

Comment. Subdivision (a) of Section 9981 continues a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change. Subdivisions (b) and (c) of Section 9981 continue subdivisions (c) and (d) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Person § 56
Personal representative § 58
Property § 62
Will § 88
Verification required § 7203

§ 9982. Notice of hearing

The Commission considered Section 9982 as set out in the First Supplement to Memorandum 86-38. The section was approved in the form set out below.

9982. Notice of the hearing on the petition shall be given for the period and in the manner required by [Section 1200.5].

Comment. Section 9982 continues the third sentence of subdivision (b) of former Probate Code Section 854.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Verification required § 7203

§\9983. Protection of rights of creditors

The Commission considered Section 9983 as set out in the First Supplement to Memorandum 86-38. The section was approved in the form set out below.

9983. The court shall not make an order under this chapter unless one of the following requirements is satisfied:

(a) The court determines that the rights of creditors will not be impaired by the making of the order.

(b) The court requires a bond in an amount and with such surety as the court shall direct or approve.

Comment. Section 9983 restates the fourth sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Granting of option to purchase real property §§ 9960-9966

§ 10011. Court order requiring sale of property

Notice also should be given to the persons and in the manner provided in Section [1200.5]. The provision for citation should be reviewed when the general notice provisions are drafted.

§ 10012. Directions in will as to mode of selling or property to be sold

This section was revised to read in substance as follows:

10012. If directions are given in the will as to the mode of selling or the particular property to be sold, the personal representative shall comply with the directions unless relieved of this responsibility by court order on showing of good cause therefor.

§ 10013. Discretion of personal representative as to property to be sold and mode of selling

Subdivision (a) of Section 10013 was revised to read in substance:

(b) The personal representative may use his or her discretion as to which property, real or personal, to sell first.

The staff should consider whether other qualifications on the rule of subdivision (b) should be stated in the text of the section, such as the rules concerning abatement where there is a specific devise of property.

§ 10014. Sale of assets, whether real or personal, as a unit

This section was approved as drafted.

§ 10016. Independent administration authority not limited

This section should be moved into the general provisions relating to estate management.

§§ 10150-10166 Generally -- Discussion Concerning Brokers' Commissions in Estate Sales

The Commission considered Memorandum 86-52 concerning brokers' commissions in estate sales. There was general agreement that the existing statutory provisions are unclear and that there is no consistent practice followed by the courts.

Alex Greel, representing the California Association of Realtors, provided the Commission with further background concerning this problem. He stated that the legal services program of the Association receives an incredible number of inquiries from members who call in asking what happens with respect to commissions in a probate situation. The Association is unable to provide an answer, advising the member that the answer given depends on who you talk to.

Mr. Creel give the following explanation of why the confusion exists. In 1974, the Section 760 of the Probate Code was amended to authorize an exclusive right to sell listing in probate. The California Association of Realtors sponsored the legislation. Prior to that amendment, you could enter into a listing agreement with a broker, but the listing was not exclusive. So prior to 1974, all the code sections dealing with multiple bids in probate and overbids in probate contemplated only two brokers for the transaction -- the broker who submitted the original bid for confirmation and maybe a broker representing a successful overbidder. If the listing broker was not one of those two brokers, the listing broker received nothing, because the listing was treated as an open listing. And with an open listing, the listing broker does not receive a commission unless the listing broker produces a buyer. In 1974, the statute was changed to permit an exclusive listing with court approval and limited to a 90-day period, but the other sections of the code were not changed. Thus, the concept of an exclusive listing broker was introduced into the law who will receive a commission even if he or she does not actually produce a buyer, but the other sections which contemplate only two brokers receiving a commission were not changed. So now we have introduced the possibility of three brokers receiving a commission but yet the code sections do not accommodate that situation.

Mr. Creel explained the difference between an open listing and an exclusive listing. An open listing permits the listing broker to receive a commission only if that broker produces the buyer. An exclusive listing permits the listing broker to receive a commission regardless of who produces the buyer. With the open listing, the listing broker does not make an effort to expose the property to other brokers, because the listing broker will receive a commission only if the listing broker produces the buyer, not if another broker produces the buyer. Hence, the listing broker does not have a lot of incentive to expose the property to other brokers who may effect the sale and thereby deprive the listing broker of a commission. With the exclusive right to sell, the listing broker receives a commission whoever sells, so there is an incentive to share the property with other brokers and to expose the property to a larger group of potential sellers.

Traditionally, most properties put in multiple listing are cases where the broker has an exclusive listing. In addition, where there is an exclusive listing, the broker is more inclined to expend money advertising the property.

Mr Creel stated that subdivision (d) of Section 10163 (staff draft attached to Memorandum 86-52) was not necessarily the necessary way to deal with the situation where three brokers are entitled to share the commission in a case where the contract grants the exclusive right to sell the property. Subdivision (d) is one approach. But another approach would be to clarify the state of the law in view of the 1974 amendment that permits exclusive listings. We can have three brokers: The exclusive listing broker (Broker A); the broker who produced the sale that is presented to the court for confirmation (Broker B); and the broker representing the successful overbidder (Broker C). No change is need in the code provision that says that the broker representing the successful overbidder (Broker C) is entitled to one-half of the commission on the original bid presented to the court for confirmation and all of the commission on the excess of the amount by which the successful bid exceeds the amount of the original bid. This takes care of the Broker C. But what happens as between Broker A and Broker B as to the other half of the commission on the original bid presented to the court for confirmation? The California Association takes the view that this matter should be left to the agreement between those two brokers.

The question was asked: How is the agreement made between the listing broker and the broker procuring the bid presented to the court? And the question was asked: What rule will apply absent such an agreement? Mr. Creel responded to these questions. One way to get the agreement is by the multiple listing, which is a unilateral offer extended when the listing broker lists the property with the multiple listing. In effect, the listing broker says bring in your offer and I will share my commission with you if we work out a purchase and sale transaction. There is an agreement by the members who join the multiple listing; the members agree to operative according to the terms of the multiple listing including the terms governing how the commissions will be shared. In addition, the brokers can include at

the bottom of the deposit receipt whatever agreement they have concerning sharing of the commission between the two brokers. In the situation where there is no agreement, the association would have no problem if the statute specified how the commission was to be shared.

Mr. Greel reported that the situation on sharing commissions is confused. But the most frequent result in the situation where three brokers are involved is as follows: Broker C (the broker producing the successful overbidder) receives one half of the commission on the original bid presented to the court and all of the commission on the excess over the original bid. Brokers A and B share equally the other one half of the commission on the original bid presented to the court.

The Commission discussed the situation where a bidder is not represented by a broker. For example, a person may submit a bid merely because he or she is aware that the property owner has died and the bid may not result from the efforts of the exclusive listing broker or any other broker. For example, the successful bidder may submit the bid because he or she became aware of the availability of the property for sale as a result of the published notice of sale. In such case, should the exclusive listing broker receive any commission?

Another problem arises where an exclusive listing agreement expires by its own terms. The listing broker or another broker may secure an offer on the property after the exclusive listing agreement expires. The Commission decided not to deal with this problem. The Commission took the view that it was the broker's obligation to see that the agreement was renewed if necessary.

The Commission adopted the following rules governing commissions:

(1) Where Broker A (the original exclusive contract holder) secures the original bid presented to the court or is instrumental in securing the bid presented to the court by Broker B (as where multiple listing is used to procure the bid), the original exclusive contract holder is entitled to share in the commission, even where the sale is to an overbidder represented by Broker C. In such case, Broker C should receive one-half of the commission on the original bid presented to the court (procured by Broker B) and all of the commission on the excess over that bid (on the amount between the original bid and the amount for which the property is sold to the overbidder). Absent an agreement

between Broker A and Broker B, they share equally the other one half of the commission on the original bid presented to the court.

(2) In any case where the the exclusive contract holder (Broker A) is not instrumental in producing a bidder, the exclusive contract holder should be entitled to a minimum of at least 25 percent of the commission.

The staff is to draft statutory provisions to implement these decisions. The staff should consider whether Broker A and Broker B should share on the entire commission computed on the sale price or on the commission computed on the original bid. The question of whether the sale should be made to the highest net bidder should be considered by the staff. The statute should make clear that the court can authorize the renewal of an exclusive listing contract. The statute provisions set out below are to be revised to reflect the decisions of the Commission outlined above.

§ 10150. Contract with agent or broker

Section 10150, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form:

10150. The personal representative may enter into a written contract with either or both of the following:

(a) A licensed real estate broker, or multiple group of licensed real estate brokers, to secure a purchaser for any real property of the estate.

(b) One or more agents or brokers to secure a purchaser for any personal property of the estate. If the particular property to be sold or the particular manner of sale requires that the agent or broker be licensed, the contract may be made only with an agent or broker that is so licensed.

Comment. Section 10150 continues a portion of the first sentence of former Probate Code Section 760 without substantive change except that the former reference to a "bona fide agent or broker" is replaced by the reference to a "licensed real estate broker" in subdivision (a) and by the second sentence of subdivision (b). For various licensing provisions, see Bus. & Prof. Code §§ 5731 (auctioneer), 10000-10602 (real estate brokers); Fin. Code § 22200 (personal property brokers); Health & Safety Code §§ 18006, 18045 (sale of mobilehomes and manufactured housing).

CROSS-REFERENCES

Contract with auctioneer § 10152

Definitions

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Rights of purchaser of personal property § 10153

§ 10151. Commission; exclusive right to sell; limitation of liability

Section 10151, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form:

10151. With respect to a contract described in Section 10150:

(a) The contract may provide for payment of a commission out of the proceeds of sale, but the contract is binding and valid as against the estate only for such amount as the court allows pursuant to Article 3 (commencing with Section 10160).

(b) The contract may grant an exclusive right to sell property for a period not in excess of 90 days if prior to execution of the contract granting an exclusive right to sell the personal representative obtains permission of the court to enter into the contract upon a showing of necessity and advantage to the estate. The court may grant the permission when the personal representative is appointed or at any subsequent time upon ex parte application. The personal representative may execute one or more extensions of the contract granting an exclusive right to sell property, each extension being for a period not in excess of 90 days, if for each extension the personal representative obtains permission of the court upon ex parte application to extend the contract upon a showing of necessity and advantage to the estate of the extension.

(c) The personal representative is not personally liable on the contract by reason of execution of the contract.

Comment. Subdivision (a) of Section 10151 continues the last portion of the first sentence and the fourth sentence of former Probate Code Section 760 without substantive change.

The first two sentences of subdivision (b) of Section 10151 continue the third sentence of former Probate Code Section 760 without substantive change. The third sentence of subdivision (b) is new and makes clear that the exclusive right to sell contract may be extended for any number of additional periods (each period not in excess of 90 days) if the personal representative obtains permission of the court for each such extension.

Subdivision (c) of Section 10151 restates the first portion of the fifth sentence of former Probate Code Section 760 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Property § 62

§ 10152. Contract with auctioneer

Section 10152, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form. "Approved by the court" was substituted for "confirmed by the court" in recognition of the fact that the sale is a completed transaction as far as the purchaser at the auction is concerned and that the court in "approving" the sale is passing on the propriety of the action of the personal representative.

10152. (a) The personal representative may enter into a written contract with any auctioneer who holds a valid license under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code to conduct a public auction sale and to secure purchasers by such method for any personal property of the estate to the extent authorized under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code.

(b) The contract may provide for payment to the auctioneer of a fee or commission out of the proceeds of sale and for reimbursement of expenses, but the contract is binding and valid as against the estate only if the sale is approved by the court and only for such amounts as the court allows pursuant to Section 10166. No liability of any kind is incurred by the estate under the contract or a sale unless the sale is approved by the court, except for its obligations to the purchaser of personal property as to which title passes pursuant to Section 10259 without court confirmation or approval. The personal representative is not personally liable on the contract by reason of execution of the contract.

(c) The contract may provide that personal property of two or more estates being administered by the same personal representative may be sold at the same public auction sale. Items of personal property may be sold separately or in a lot with other items from the same estate. A sale pursuant to the contract shall be with reserve. The auctioneer shall comply with the instructions of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters.

Comment. Subdivision (a) of Section 10152 restates the first sentence of former Probate Code Section 760.5 with the following changes:

(1) The reference in former Section 760.5 to a "bona fide" auctioneer "authorized to act as such in the locality" is replaced by the reference to an auctioneer licensed under

the Auctioneer and Auction Licensing Act (Bus. & Prof. Code §§ 5700-5791.5).

(2) The provision of former Section 760.5 authorizing auction sale of "tangible" personal property is revised to authorize auction sale of all personal property an auctioneer may auction under the Auctioneer and Auction Licensing Act (see, e.g., Bus. & Prof. Code §§ 5701(j), 5774, 5775-5776).

Subdivisions (b) and (c) of Section 10152 restate the remainder of former Probate Code Section 760.5 without substantive change.

See also Section 10259 (personal representative responsible for the value of property title to which passes without court approval unless the court subsequently approves the sale).

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Rights of purchaser of personal property § 10153

Sales at public auction § 10254

§ 10153. Rights of purchaser of personal property not limited

Section 10153, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form:

10153. Nothing in this article limits the rights of a purchaser of personal property to whom title passes pursuant to Section 10259 without court confirmation.

Comment. Section 10153 continues without substantive change the last portion of the third sentence of former Probate Code Section 760.5 (contract with auctioneer) and extends the provision to apply also to the rights of the purchaser of personal property when the contract is with a broker or agent.

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

§ 10160. Limitation on liability of estate

Section 10160, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form.

10160. (a) Except as provided in subdivision (b), the estate is not liable to an agent, broker, or auctioneer under

a contract for the sale of property or in connection with a sale of property for any fee, commission, or other compensation or expenses unless the following requirements are satisfied:

(1) An actual sale is made.

(2) If court confirmation is required, the sale is confirmed by the court.

(3) The sale is consummated.

(b) Where the successful bidder is produced by an agent or broker described in Section 10150 and the sale is confirmed by the court but estate does not receive the purchase price for the property sold because the successful bidder fails to complete the purchase, any deposit made by the successful bidder that is forfeited because the successful bidder fails to complete the purchase shall be divided between the estate and the agent or broker producing the successful bidder in such proportions as the court, in its discretion, determines to be reasonable under the circumstances of the particular case.

Comment. Subdivision (a) of Section 10160 restates the last portion of the last sentence of former Probate Code Section 760 and a portion of the third sentence of former Probate Code Section 760.5 with the addition of paragraph (3) which makes clear that the sale must be consummated before the estate is liable to the agent, broker, or auctioneer. In the case of real property, the requirement that an actual sale be made and be consummated requires that the estate receive the purchase price and that a deed be given to the purchaser and a mortgage or deed of trust be taken for payments due in the future. See Estate of Rule, 25 Cal.2d 1, 16, 152 P.2d 1003 (1944); Wilson v. Fleming, 106 Cal. App. 542, 549, 289 P. 658 (1930). As to when court confirmation is not required, see Section 10259 (personal property).

Subdivision (b) is new. This subdivision makes clear that the court has authority to divide any forfeited deposit between the agent or broker producing the successful bidder and the estate. Under this authority, the court may order that all of the forfeited deposit be paid to the estate where that is reasonable under the circumstances or may divide the deposit in such proportions as the court determines reasonable under the circumstances. In determining the amount of the forfeited deposit the estate is to receive, the court should take into account such costs and expenses to the estate as those resulting from the delay caused by the uncompleted sale and the cost of any court proceedings to confirm the sale and to vacate the sale.

CROSS-REFERENCES

Contract with agent or broker § 10150

Contract with auctioneer § 10152

Definitions

Court § 29

Property § 62

§ 10161. Compensation of agent or broker

Section 10161, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form.

10161. Subject to the provisions of this article, whether or not the agent or broker has a contract with the personal representative, the fee, commission, or other compensation of an agent or broker in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate.

Comment. Section 10161 restates a portion of the fourth sentence of former Probate Code Section 760 (contract binding "for an amount to be allowed by the court"), a portion of former Probate Code Section 761.5 (overbidder's agent entitled to "reasonable compensation" fixed by the court), and a portion of the second and third sentences of former Probate Code Section 785 (overbidder's agent entitled to "reasonable compensation" fixed by the court), without substantive change. Section 10161 uses language drawn primarily from the last portion of former Probate Code Section 761.5.

The compensation to an agent or broker may be for the sale of real or personal property of the estate. See Section 10150.

GROSS-REFERENCES

Contract with agent or broker § 10150

Definitions

Court § 29

Personal representative § 58

Property § 62

§ 10162. Sale on increased bid where original bid made by purchaser direct to estate

Section 10162, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form, subject to any revisions necessary to conform to the Commission's decisions regarding division of commission among brokers.

10162. If the original bid is made direct to the estate by a purchaser who is not represented or procured by an agent or broker and thereafter an agent or broker described in Section 10150 procures a bidder who makes an increased bid at the time of the hearing on the petition for confirmation of the sale on the original bid and the property is sold on the increased bid, the court shall allow the compensation determined under Section 10161 to the agent or broker who procured the purchaser to whom the sale is confirmed.

Comment. Section 10162 restates the substance of former Probate Code Section 761.5. Section 10162 refers to Section 10161 which continues the last portion of former Section 761.5 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

§ 10163. Allocation of commission among competing agents or brokers

Section 10163, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form, subject to revisions necessary to conform to the Commission's decisions concerning division of the commission where there are three brokers.

10163. (a) If the court confirms a sale on an increased bid made at the time of the hearing on the petition for confirmation to a purchaser not procured by the agent or broker holding the contract with the personal representative, the court shall allow a commission determined under Section 10161 on the full amount for which the sale is confirmed, to be allocated as provided in this section.

(b) Except as provided in subdivisions (c) and (d), if the successful bidder is produced by an agent or broker described in Section 10150, the commission determined under Section 10161 on the full amount for which the sale is confirmed shall be allocated as follows:

(1) One-half of the commission on the original bid to be paid to the agent or broker whose bid was returned to the court for confirmation.

(2) The balance to be paid to the agent or broker who procured the purchaser to whom the sale is confirmed.

(c) In the case of a sale of real property, the compensation of the agent or broker who produces the successful bidder shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid. This limitation does not apply to the compensation of the agent or broker who holds the contract with the personal representative.

(d) If the contract grants an exclusive right to sell the property as provided in Section 10151, the agent or broker having the exclusive right to sell the property is entitled to a commission on the amount of the sale to the successful bidder, determined as provided in Section 10161, whether or not the agent or broker having the exclusive right to sell the property has returned a bid to the court.

(e) Subject to subdivision (d), if the successful bidder is not produced by an agent or broker described in Section 10150, the agent or broker holding the contract with the personal representative shall be allowed a full commission on the amount of the original bid returned by him or her, determined as provided in Section 10161.

Comment. Subdivisions (a), (b), and (e) of Section 10163 restate former Probate Code Section 761 without substantive change.

Subdivision (c) restates the fourth sentence of former Probate Code Section 785 without substantive change. See Review of Selected 1955 Code Legislation, at 160 (Cal. Cont. Ed. Bar 1955) (50-50 split of former Section 761 subject to one-half of the difference limit of former Section 785).

Subdivision (d) is new and makes clear that, if the agent or broker holding the contract with the personal representative has an exclusive right to sell the property, the agent or broker is allowed a commission whether or not he or she returns a bid to the court. Subdivision (d) is consistent with what appears to have been prior law. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:50, at 301 (rev. ed. 1975).

The references to Section 10161 in Section 10163 make clear that the court has discretion to determine the total amount of compensation to be allocated under Section 10163.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

§ 10164. Allocation of commission among cooperating agents or brokers

Section 10164, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form, but the section is to be revised to reflect the decisions of the Commission concerning the manner of division of commission where there are three brokers.

10164. Subject to subdivision (c) of Section 10163, without limiting the court's discretion under Section 10161, if the bid returned to the court for confirmation is procured by an agent or broker other than the agent or broker holding the contract with the personal representative, the court shall order the commission divided as provided in any agreement between the agent or broker holding the contract and the agent or broker procuring the bid. If there is no such agreement, the court may order that the commission or compensation determined under Section 10161 be shared among the agents or brokers in such manner as the court determines is reasonable.

Comment. Section 10164 supersedes the second sentence of former Probate Code Section 760. If there is an agreement concerning the sharing of commissions, Section 10164 requires the court to divide the commission as provided in the

agreement, rather than requiring the court to "give consideration" to the agreement as under former Probate Code Section 760.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

§ 10165. Condition of bid that certain amount of bid be paid to agent or broker

Section 10165, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form:

10165. Notwithstanding that a bid contains a condition that a certain amount of the bid shall be paid to an agent or broker by the personal representative, only such compensation as is proper under this article shall be allowed. Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition.

Comment. Section 10165 restates the last portion of the sixth sentence of former Probate Code Section 785 (real property) without substantive change, and generalizes it to apply also to sales of personal property.

CROSS-REFERENCES

Definitions

Court § 29

§ 10166. Compensation and expenses of auctioneer

Section 10166, set out in the staff draft attached to Memorandum 86-52, was approved in substance in the following form:

10166. Whether or not the auctioneer has a contract with the personal representative, the fees, compensation, and expenses of an auctioneer in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable amount for the services of the auctioneer to the estate.

Comment. Section 10166 is a new provision that is consistent with the second sentence of former Probate Code Section 760.5 (auctioneer's fee "to be determined by the court"). The language of Section 10166 is drawn from the language used in Section 10161 (compensation of agent or broker). The compensation to an auctioneer may be for the sale of personal property only. See Section 10152.

CROSS-REFERENCES

Contract with auctioneer § 10152
Definitions
Court § 29
Personal representative § 58

§ 10200. Sale or surrender for redemption or conversion of securities

Subdivision (f) of Section 10200 was revised to read:

(f) No notice of sale or of the redemption or conversion need be given if any of the following conditions is satisfied:

(1) The minimum selling price is fixed by the court.
(2) The securities are to be sold on an established stock or bond exchange.

(3) The securities to be sold are securities designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, inc., sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.

(4) The securities are to be surrendered for redemption or conversion.

The Comment to Section 10200 should be revised to read:

Comment. Section 10200 restates subdivisions (a) and (b) of former Probate Code Section 771 with the addition of the first sentence of subdivision (c) and the addition of paragraph (3) of subdivision (f). See also Section 10201 (sale or withdrawal of savings accounts and mutual capital certificates without court order).

§ 10205. Decedent's interest in personal property pledged

As suggested by the State Bar Team, this section was deleted "as an unnecessary antiquity."

§ 10207. Decedent's contract right to purchase real property

This section should be revised so that title does not pass until the bond is furnished.

§ 10259. Passage of title without court approval

This section should be revised in light of the decision to require "court approval" of auction sales of personal property. Court approval may be obtained at the next accounting, for example, without following the procedure for "confirmation" of a sale. The concept of "court

approval," as distinguished from "confirmation of sale," is that the court is "approving" the action of the personal representative and the approved sale is not affected. If the personal representative acted improperly in making the sale, the personal representative would be personally liable for the improper sale, but the sale itself would not be affected.

It was suggested that subdivision (b) might be revised to read:

(b) The personal representative is responsible for the value of the property described in subdivision (a) unless the sale is reported to and approved by the court.

In the introductory clause of subdivision (a), the phrase "confirmation or approval" should be substituted for "confirmation."

Consideration should be given to restoring the provision of Probate Code Section 772 that title to tangible personal property sold at public auction passes "upon receipt of the purchase price and delivery of the property to the buyer." Also some comparable provision may be needed to cover the sale of intangible personal property at auction.

The entire draft should be reviewed to be sure that the concept of "approval" and the concept of "confirmation" are properly used.

§ 10262. Overbid

Paragraph (1) of subdivision (a) was revised to add "or, if the original bid is for less than \$100, the increased bid is for not less than \$100 more than the original bid."

§ 10301. Notice of sale where property appraised at not more than \$1,000

The amount was raised from \$1,000 to \$5,000. The value was last increased (to \$1,000) in 1959. It was noted that under the affidavit procedure for transfer of property of small value, the affidavit procedure can be used for property having a value of \$10,000 or less.

§ 10302. Shortening time of notice of sale

The section was approved, but the staff should check to determine if the five and 10 day periods are "court days" or "calendar days." It was suggested that the days should be "court days."

§ 10305. Sale at public auction

The time in subdivision (b) was changed so that the period for sale of real property will be from 9:00 a.m. to 9:00 p.m.

§ 10308. Report of sale and petition for confirmation of sale

Subdivision (b) was revised to read:

(b) If the personal representative fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation of the sale.

§ 10310. Hearing on petition for confirmation of sale

Subdivision (b) was revised to read:

(b) The court shall examine into the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable.

§ 10311. Overbid

This section was approved as drafted.

§ 10314. Conveyance or assignment after confirmation

Consideration should be given to dividing this section into two sections.

The phrase "or of the persons otherwise entitled to the interest of the decedent" in subdivision (d) should be included in subdivision (c) or omitted. Perhaps subdivisions (c) and (d) could be combined in one subdivision. The staff is to give further consideration whether this phrase is needed. See also Sections 7411 and existing Section 2551.

§ 10350. Order vacating sale and directing resale

This section was approved as drafted.

§ 10361. Application of purchase money on sale of encumbered property

The word necessary was eliminated from paragraph (1) of subdivision (a), but it should be made clear that the personal representative can be surcharged or can otherwise be held liable to the extent that the expenses of the sale that are paid under Section 10361 are unreasonable.

Paragraphs (1) and (2) of subdivision (a) were revised to read in substance as follows:

(1) The payment and satisfaction of the amount secured by the liens on the property sold if required under the terms of the sale.

(2) The payment of the expenses of the sale.

§ 10382. Limitation of actions for recovery of property

This section should be conformed to the will contest rules which provide limited tolling for minors and others under legal disability (but not beyond final distribution of the estate). See proposed Section 8270.

STUDY L-1040 - ESTATE AND TRUST CODE (PUBLIC ADMINISTRATOR
AND PUBLIC GUARDIAN)

The Commission considered Memoranda 86-48 and 86-49, together with a letter from the Public Administrator and Public Guardian for San Francisco (copy attached to Minutes as Exhibit 5), relating to the statute governing public administrators and public guardians. The Commission made the following decisions concerning the draft statutes.

Public Administrators

§ 7621. Authority of public administrator. "Misappropriation" should be added to the grounds for ordering property into the possession or control of the public administrator. An express immunity should be added in the case of property that is beyond the control of the public administrator.

§ 7682. Payment of demands. The cutoff time for payment of claims should be the time of distribution of the estate. Distribution should not be made until after 4 months have elapsed from the commencement of administration.

§ 7683. Distribution of property. The Commission decided not to recommend that property escheat to the county instead of the state, but to recommend that where property escheats to the state the public administrator is entitled to recover the reasonable cost of administration. The staff will investigate the possibility of making a minimum fee in this situation also. Meanwhile, the staff will monitor

the progress of SB 1550 (Lockyer), which provides that property that would escheat to the state may be applied to community foundations for charitable or educational purposes that are public purposes of the county.

§ 7685. Public administrator's statement of disposition. This section should be revised to require filing of receipts for distributions rather than expenditures. The public administrator should maintain a file of all receipts and records of expenditures for a period of two years.

Public Guardians

§§ 2545, 2610. The Commission deferred decision concerning the changes in these sections proposed by the public guardians in order to give the probate referees an opportunity to comment on them.

§ 2906. Official bond. A provision should be added to this section to allow the public guardian to recoup from each estate a pro rata share of the cost of the bond, comparable to the provision the Commission has drafted in Section 7641 (appointment of public administrator).

§ 2910. Application for appointment. Subdivisions (a) and (b) were eliminated because they are obsolete. Subdivision (c) should apply to persons domiciled in the county, even if institutionalized in another county.

§ 2911. Where person or property ordered into possession or control of public guardian. The statute should be revised to require the public guardian to accept a guardianship or conservatorship when ordered by the court in an appropriate case. The staff should attempt to develop a standard for determining what cases are appropriate.

§ 2913. Taking possession or control of property. Subdivision (a) should be revised to delete the limitation that property be located in the county, and to add a requirement that the person be domiciled in the county.

§ 2922. Appraisal of estate. This section was replaced with the substance of the following provision:

(a) The public guardian need not request appointment of a conservatorship referee if the proposed conservatee is eligible for Social Security Supplemental Income Benefits.

(b) The public guardian need not file an appraisal of assets

other than cash if the assets are not to be sold. However, the public guardian shall file a verified declaration of the assets other than cash held by the public guardian. Special notice requests shall be applicable to the declaration.

(c) If the conservatee's assets other than cash have an estimated value of \$2,000 or less, the public guardian shall be allowed to sell the assets upon the filing of a verified declaration stating the estimated value. Section 2545 remains applicable to the sale.

§ 2923. Disposition of property on death of ward or conservatee.

Subdivision (b) was revised to add a \$5,000 limit to disposition of the decedent's estate by the guardian or conservator. In connection with this section, Section 2631 should be revised to cover unpaid court approved attorney's fees and other reasonable guardian or conservator charges, as well as last illness and burial expenses.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for
corrections, see Minutes of next
meeting)

Date

Chairperson

Executive Secretary



May 9, 1986

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Memorandum 86-39
Study L-1037 Estate and Trust Code
(Estate Management - Compromise of Claims and
Actions; Extension, Renewal or Modification of
Obligations)

Dear Commissioners:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submits the following comment on Memorandum 86-39 which is scheduled for discussion at your May 15-16 meeting.

Section 9830. Authority to Compromise Claims and Actions and to Extend, Renew or Modify Obligations.

We agree with the substance of this proposed section, which would provide flexibility for the personal representative to compromise claims and modify obligations without court authority. Any interested party may seek an order limiting the authority of the personal representative and is thereby protected.

Section 9831. Compromise Before Time for Filing Creditors' Claims has Expired.

We also agree with the substance of this proposed section. Until the personal representative has received all of the claims, the representative is not fully informed as to the total amount of obligations which will be owed by the estate.

We presume that Section 9831 is limited to the actions of the personal representative regarding matters set forth in §9038(a)(1). Perhaps this section should be modified to clarify that extension or modification of obligations as set forth in §9830(a)(2) may be done before the expiration of the period for filing creditors' claims. Compromise of rental obligations and similar items described in §9832(b) should not necessarily be delayed until the period for filing creditors' claims.

Section 9832. Matters Relating to Real Property.

We agree with the provisions of §9832(b) regarding the modification of leases which do not exceed \$1,500 per month for a term of not to exceed one year. This expansion from Probate Code §2501 will allow the personal representative greater flexibility in administering the estate without being required in administering the estate without being required to seek court approval.

Section 9837. Petition for Court Authorization;
Notice.

This section does not authorize a third party to petition for an order authorizing approval of a modification or compromise in accordance with the above sections. In some instances the personal representative may desire to have an outside party bear the legal expense of obtaining the court approval, or the estate beneficiaries may be interested in seeking court approval of a modification. Consideration should be given to the expansion of §9837 to allow for a petition by any interested party to file the appropriate petition with approval of the personal representative.

Section 9838. Application of Other Statutes.

We agree with the Commission's staff that §9838 does not appear to be necessary. We recommend the deletion of this section, which would simplify the statutory system and avoid confusion as to whether two separate procedures must be followed to obtain court approval of a compromise or modification.

We trust that these comments will be useful in your work. If you require clarification on any points, please contact Michael J. Harrington, Hahn & Hahn, 301 East Colorado Blvd., Suite 900, Pasadena, California 91101, Telephone 818-796-9123.

Sincerely,

Executive Committee
Probate and Trust Law Section

By Michael J. Harrington
Michael J. Harrington

1805f



May 9, 1986

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Memorandum 86-42
Study L-1032 Estate and Trust Code
(Estate Management - Costs)

Dear Commissioners:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submits the following comment on Memorandum 86-39 which is scheduled for discussion at your May 15-16 meeting.

We agree with the proposed legislation which will clarify the rules regarding the allocation of costs. If the superior court or appellate court has discretion to order costs, and the discretion to require those costs paid by any party or from the assets of the estate, the court may fashion an order in the interest of justice. In many instances, costs should be paid from the estate, as the action benefited all of the estate beneficiaries. However, on occasion the costs should be charged against the personal representative for negligence, or charged against the party bringing the proceeding if the proceeding had no merit. This flexibility may expedite the estate administration, and also act as a potential bar to unfounded or unwarranted claims against the personal representative.

We trust that these comments will be useful in your work. If you require clarification on any points, please contact Michael J. Harrington, Hahn & Hahn, 301 East Colorado Blvd., Suite 900, Pasadena, California 91101, Telephone 818-796-9123.

Sincerely,

Executive Committee
Probate and Trust Law Section

By *Michael J. Harrington*
Michael J. Harrington

1808f

Minutes
May 15-16, 1986

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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JAMES A. WILLETT, Sacramento
Vice-Chair
LLOYD W. HOMER, Campbell

Directors
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JAMES D. DEVINE, Monterey
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JAMES C. OPEL, Los Angeles
WILLIAM H. FLAGEMAN, Jr., Oakland
JAMES F. ROGERS, Los Angeles
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Telephone: (916) 441-0131

May 9, 1986

Robert J. Murphy III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Memorandum 86-52/Study L-1037

Dear Bob:

I have your Memorandum 86-52 concerning brokers' commissions. I think the practice concerning the so-called exclusive listing in a probate sale varies considerably. For instance, in Sacramento County the court will not award a commission to a broker having an exclusive listing contract unless he was part of the procuring of the sale. In general, I think the practice is that brokers regard the exclusive listing contract as protection to them to put the property into the multiple listing service. I believe the rules of the multiple listing service, in general, provide that the selling broker and the listing broker will share the commission. I've had many sales where the commission was split without any significant dispute among the brokers. I think this area of the law is somewhat uncertain. The practice undoubtedly varies from county to county.

Personally, I would be somewhat opposed to the provision that you provide for in Section 10163(d) which could well require the payment of a commission, presumably at a rate which is agreed in the listing to a broker who had absolutely nothing to do with the sale and obligate the estate to pay an additional commission to another broker who brought the sale in totally independent of any multiple listing service and the like.

Robert J. Murphy III
May 9, 1986
Page Two

Incidentally, our court feels that the standard form of the Board of Realtors is not correct under the probate law since any commission is still necessarily subject to approval by the probate court and it will not authorize executors to enter into such contract without modification of the language requiring payment of commission irrespective of producing the buyer.

These views, of course, merely reflect my own reaction. This matter has not been discussed at all in the Executive Committee deliberations.

Best regards,

James A. Willett /kt

JAMES A. WILLETT
Chair

JAW:kt

cc: James V. Quillinan, Esq.
James D. Devine, Esq.
Lloyd W. Homer, Esq.
(Dictated but not read)

LOCAL PROBATE RULES
(taken from California Local Probate Rules, 4th ed. 1983)

Court Rules Reflecting Antipathy to Exclusive Listings

San Joaquin County: "[T]he Court takes the position that in almost all cases it is to the advantage of the estate to have its real property exposed to the sales efforts of as many brokers as possible. In extraordinary cases (for example sale of undivided interests, or sales of real property whose value is very small in proportion to the problems involved), upon proof of sufficient necessity or advantage to the estate, the Court may grant the petition [for an exclusive listing]." § 602.

San Mateo County: "Listing to multiple listing service alone shall not justify an exclusive listing." Rule VI, para. III-E(10).

Court Rules Relating to Brokers' Commissions
in Exclusive Listings

Alameda County: A petition for court approval of an exclusive listing agreement should show that "the court sets commissions and that they are due only if the sale is confirmed, and that duplicate commissions are not payable should there be a successful overbid in court." § 809.

Los Angeles County: An order authorizing the personal representative to grant an exclusive listing "shall provide that a reasonable broker's commission will be determined by the court at the time of confirmation of sale." § 12.03.

Sacramento County: No exclusive listing agreement "shall provide for the payment of a commission to the broker holding the listing in the event of sale to a buyer produced by the personal representative or through any other person; although, commissions will be allowed pursuant to the Probate Code in the event of increased bids in open court." § 604.

San Diego County: In case of an exclusive listing, "a reasonable broker's commission will be determined by the court at the time of confirmation and shall be paid from proceeds of the sale confirmed by the court. The court will consider current community practices and standards in making its determination. The court will also inquire into the broker's services in fixing the commission." § 12.5.

San Francisco: The probate court determines the commission of the exclusive listing broker without regard to the terms of the exclusive listing agreement. § 8.02.

Stanislaus County: In exclusive listings, "the order shall provide that a reasonable broker's commission will be determined by the court at the time of confirmation of sale." § 903.

MEMORANDUM

DATE: May 14, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLETT
IRV GOLDRING
JAMES OPEL
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN
STUDY TEAM NO. 1

RE: REPORT OF STUDY TEAM NO. 1 on LRC MEMO 86-50
STUDY L-1029 - Estate and Trust Code (Closing Estate
Administration -- Draft of Tentative Recommendation)

Conference Call: A conference call was held on Tuesday, May 13, 1986. All members of the team participated. These members are Charles Collier, Richard S. Kinyon, W. S. "Gus" McClanahan, Robert Schlesinger and William V. Schmidt.

Study Team No. 1 reviewed the general comments and the proposed section and has the following comments in regard to them.

We first examined the general comments on the pink paper entitled "CLOSING ESTATE ADMINISTRATION." We believe that the word "trustees" in the last sentence of the second paragraph should be "personal representative's" as it refers to the deed of the personal representative.

The heading of the Table of Contents on the yellow page is inconsistent with the heading on page 2 of the white pages. The yellow page refers to Part 11. Whereas, the heading on the white pages refers to Part 10. Both refer to "CLOSING ESTATE ADMINISTRATION."

Section 12200: Satisfactory.

Section 12201: The section is satisfactory. We believe that the words in the brackets in subsection (b) should be included in the section and the brackets should be deleted.

Sections 12202 through 12206: Satisfactory.

Section 12250: We are concerned with the words "record location" in the last sentence of subsection (b). The word "location" could be construed to refer only to the place or location of the recording. We feel that the petition should identify the recording information which would include at least the date of the recording and the location or the county recorder's office in which it was recorded. We believe that most counties would also give the recorded order or deed an instrument number and that some counties would give it a book and page number. We would like to see this information included, but we do not wish to impose a requirement which may be inconsistent with the practice of a particular county. We therefore suggest that the words "record location" be changed to "recording information" and then state in an appropriate place in the section that such recording information shall include at least the date and place or location of the recording.

Section 12251: The section is satisfactory. However, we believe that the first two sentences of the Comment should be combined to read more accurately as follows: "Section 125551 restates the former Probate Code §1066 except that the provision for production of vouchers is not continued, and the petition is made ex parte."

We note that existing Probate Code §1065 is not continued in the new sections. This section basically provides that where a specific legacy is for life only, the life tenant must sign and deliver to the remainderman, or to the personal representative if

there is no remainderman, an inventory of the property with a statement that the property is his for life only and that upon his death it is to be delivered to the remaindermen. Most of the life estates that we encounter are in a trust to which this section does not apply. However, we occasionally see a legal life estate (not in trust) in a residential home sometimes accompanied by the furniture and furnishings or other contents of the home. We feel that if the remainderman desires that the life tenant provide him with an inventory of the items of personal property, that he should be entitled to receive such an inventory and that the continuance of existing §1067 with this modification would be worthwhile.

Respectfully submitted,

TEAM CAPTAIN #1



WILLIAM V. SCHMIDT,
Captain

Minutes
May 15-16, 1986

EXHIBIT 5

CITY AND COUNTY OF SAN FRANCISCO

May 15, 1986

PUBLIC ADMINISTRATOR
PUBLIC GUARDIAN
1212 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE 558-4161

IN REPLY REFER
TO OUR FILE NO.

California Law Revisions Commission
4000 Middlefield Road, Room No. D-2
Palo Alto, CA 94306-4739

Dear Commissioners:

The following proposed changes to study L-1040 are offered for your consideration from the San Francisco Public Administrator/Guardian office.

In March of this year, at the State meeting of the Public Administrators, Public Guardians, Public Conservators Association, a unanimous vote at the legislative meeting was recorded directing that I attend your meetings and report back to the Association.

SUGGESTED CHANGES:
(Public Administrators)

Section 7621: Change "shall" to "may"

Does shall subject the Public Administrator and counties to liabilities for any lost property from a deceased estate which is beyond his/her control.

Example: Death on weekends, hotel managers, friends holding property, etc.

Section 7680: Add (3) "No probate referee need be appointed unless real property belonging to the estate is to be sold."

According to author and sponsors of AB 2896, the Probate Referees do not want to expend their jurisdiction. I have been informed that was the reason for amending bill to read "or as otherwise provided by law."

California Law Revisions Commission
4000 Middlefield Road, Room No. D-2
Palo Alto, CA 94306-4739

Section 7685: Change "All expenditures" to distributions"

"All expenditures" would include utilities, rent, postage, etc.
"Distributions" would indicate where and to whom balance of estates was paid.

Section 7685: Add: "Public Administrators shall maintain a duplicate set of the records filed for a period of five (5) years after distribution or escheatment."

SUGGESTED CHANGES:
(Public Guardians)

Section 2906: Should be funded as in Section 7641 (c) to avoid counties subsidizing estates of conservatees who would pay for bond if family member acted.

Section 2910: Add (d) - "Any person domiciled within the county and may have been placed in an institution in another county for treatment or care.

Note: As written it would seem to prohibit the Public Guardian from petitioning the court for conservatorship on a "resident" of the county who, because of a lack of facilities, is placed in another county. This may inhibit the conservatee.

(Or delete (a) and (b) entirely as anachronistic.)

Section 2911: Change "Notices" to "15-day notice."

This would not exclude court from appointing Public Guardian on letters

May 15, 1986

Page Three

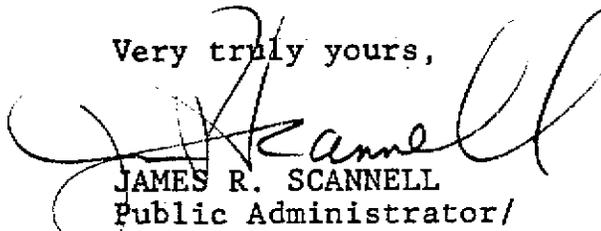
California Law Revisions Commission
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Palo Alto, CA 94306-4739

of temporary conservatorships when situation warranted. This would prohibit private conservators from "dumping" conservatees without proper inventories, accountings, etc.

Section 2922: Delete

Section 2923: Add - "Court approved fees or obligations incurred during the life of conservatorship."

Very truly yours,



JAMES R. SCANNELL
Public Administrator/
Public Guardian

JRS:lca

cc: Philip Reinheimer
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