

Second Supplement to Memorandum 86-55

Subject: Study L-1037 - Estate and Trust Code (State Bar Comments on Estate Management)

Attached to this Supplement are two reports from State Bar study teams on the estate management provisions attached to Memo 86-55. The report of Team 1 deals with Sections 9600-9885. The report of Team 3 deals with Sections 9900-10259. These reports are discussed below:

TEAM 1 REPORT

§ 9602. Measure of liability for interest

Under Section 9705, a trust company depositing estate funds with its own savings department is chargeable with interest at the rate prevailing among banks in the locality. The last sentence of the Comment to Section 9602 notes this provision.

Team 1 would revise this sentence to refer to a bank as well as to a trust company. However, Section 9705 applies only to a trust company. "Trust company" is a defined term, and means a corporation or the trust department of a bank which is authorized to act as personal representative of estates. See Fin. Code §§ 106, 107. So the Comment to Section 9602 is correct as it is.

§ 9610. Extent of court supervision

Team 1 wants Section 9610 to say that a personal representative acting without court approval shall do so "in accordance with the fiduciary duties" of the personal representative. The Comment to Section 9610 notes that the section is subject to the general duty to use ordinary care and diligence prescribed in Section 9600. This should be sufficient. The staff would not put the statement in the statute itself, because that would cast doubt on the application of Section 9600 to all the other powers and duties of a personal representative.

§ 9611. Instructions from or confirmation by the court

Team 1 would relocate this section at or near the end of the estate management provisions. The staff would keep this provision with general provisions at the beginning of the draft statute where it

is presently located. Since Section 9611 is general in nature, one would expect to find it with other general provisions.

Team 1 is concerned about the statement in the Comment to this and other sections that, if the personal representative refuses to petition, an interested person may seek to have the personal representative removed. Team 1 thinks that "removal is too harsh an action," since the personal representative may have good reason for not petitioning. Team 1 thinks there should be a less drastic remedy, such as an order to show cause why the personal representative has not acted. Team 3 has a similar comment under Section 9961 infra.

The Commission previously rejected a provision permitting an interested person to compel the personal representative to act. Does the Commission want to reconsider this decision?

§ 9612. Effect of court authorization or approval

Team 1 is still "very concerned" about subdivision (b) (no immunity where order obtained by misrepresentation, including omission of material fact). The Commission previously considered this point, and decided to keep the language in subdivision (b). The staff favors subdivision (b). The subdivision codifies case law and states a desirable rule. Does the Commission want to reconsider this?

A staff note under Section 9612 asks whether the second sentence of subdivision (a) is inconsistent with the first sentence, and whether the settling of an interim account is a "final" order. Team 1 thinks there is no inconsistency, and that an interim account can be "final" as to matters adjudicated and settled in it.

§ 9620. Submission of dispute to temporary judge

Section 9620 expands existing law by permitting submission of any dispute to a temporary judge, not merely disputes over creditors' claims as under existing law. Team 1 questions this expansion. The Commission discussed this and decided to keep Section 9620 broadly drafted, particularly since agreement of the parties is required.

Earlier, Team 1 objected to the word "referee" in the section, but the Commission has deleted it.

§ 9621. Submission of dispute to arbitration

Section 9621 requires an arbitration agreement to be approved by the court. Team 1 would make clear that court approval may be

obtained ex parte. Does the Commission want to include such a provision?

Team 1 thinks the statement in the Comment that the arbitration award is binding is inaccurate. The staff recommends that the Comment be revised to say the award is "ordinarily" binding, citing Code of Civil Procedure §§ 1285-1288.8, and 6 B. Witkin, California Procedure Proceedings Without Trial § 320, at 612 (3d ed. 1985).

§ 9630. Authority of joint personal representatives to act

If one of two or more joint personal representatives is absent from California, Section 9630 permits the court to authorize the remaining ones to act. Team 1 would limit this by requiring a showing that the absent one is unable to act. This seems like a good suggestion, and is consistent with the Commission's view that absence alone should not deprive the personal representative of power to act.

This could be accomplished by revising subdivision (c) as follows:

(c) Where joint personal representatives have been appointed and one or more are (1) absent from the state and unable to act, or (2) are legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint personal representatives to act as to all matters embraced within its order.

Does the Commission approve this change?

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

A staff note under Section 9631 asks whether a transitional provision should be adopted, applying the section prospectively only. Team 1 would adopt the transitional provision suggested in the note. Does the Commission approve this change?

§ 9650. Possession and management of decedent's estate

Team 1 asks whether the personal representative must account for estate property not in his or her possession. In the Comment, we have added a cross-reference to the section, not yet drafted, which will govern this.

Team 1 notes a possible inconsistency in the reference in subdivision (a) to the personal representative taking property "into possession," and in subdivision (b) to property "under his or her control." Does the Commission want to revise this?

§ 9656. Abandonment of valueless property

Subdivisions (c) and (d) of Section 9656 provide for notice of proposed abandonment and opportunity to object, drawn from the Independent Administration of Estates Act. Team 1 is concerned because the procedure "comes close to, but does not precisely follow" the Independent Administration of Estates Act. Team 1 would prefer to have the procedures be the same.

Section 9656 is drawn from the Independent Administration of Estates Act as revised in our Tentative Recommendation of March 1986. The persons entitled to notice under subdivision (c) of Section 9656 are the same as those entitled to notice under subdivisions (a)-(c) of Section 10552. The manner of giving notice under subdivision (d) of Section 9656 is the same as the manner of giving notice under Section 10556, except that the period of notice is shortened.

The IAEA provides a form for advice of proposed action (see proposed Section 10601), while Section 9656 does not. However, it seems unnecessary to provide a statutory form in Section 9656.

§ 9700. Savings accounts

Section 9700 permits deposits in a bank "in this state" or in a trust company, insured savings and loan association, or insured credit union. Team 1 asks whether the last three should also be "in this state." Under Section 83, "trust company" means one authorized to do business in this state. However, apparently savings and loans and credit unions are not similarly limited. This presents an important policy question.

§ 9701. Deposit of personal property with trust company

§ 9702. Deposit of securities in securities depository

Team 1 asks whether Sections 9701 and 9702 should be revised to permit deposit of personal property with banks as well as trust companies. The limitation of these sections to trust companies is consistent with the Financial Code, which provides for deposit of personal property with trust companies, but not banks. See Fin. Code § 1586. A bank must be authorized to conduct a trust business to act as personal representative, and in such a case the bank is a "trust company." So Sections 9701 and 9702 appear satisfactory.

§ 9705. Interest on deposits by trust company

In response to a question by Team 1, the terms "bank" and "trust company" overlap, but are not synonymous. Compare Fin. Code § 102 with Fin. Code § 107.

Team 1 asks whether Section 9705 (rate of interest chargeable when trust company deposits estate funds in its own savings department) should be expanded to apply to a "bank or trust company" or to "any corporate fiduciary." This seems unnecessary, since a corporate fiduciary may not act as personal representative unless it is authorized to conduct a trust business. See Fin. Code §§ 106-107, 1500.

§ 9730. Investments permitted without prior court authorization

A note under Section 9730 asks whether we should replace the language referring to mutual funds which invest in direct obligations of the U. S. or in repurchase agreements with language drawn from the Commission's trust bill (AB 2652). Team 1 thinks we should make this replacement. Does the Commission approve this change?

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

A note under Section 9760 asks whether the language "unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death" should be used instead of "business that was operated by the decedent." Team 1 would make the substitution. Does the Commission approve this change?

§ 9761. Settlement of affairs of partnership in which decedent was a general partner

A note under Section 9761 says a general provision should be drafted concerning enforcement of orders against third persons, such as partners or others who have property of the decedent. Team 1 agrees. The staff will draft such a general provision and bring it to the Commission.

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

At the May meeting, the Commission limited Section 9761 (settlement of affairs of decedent's partnership) to apply only where decedent was a general partner. In Memo 86-55, the staff recommended

a conforming revision to Section 9762 to delete subdivision (d) dealing with when the PR may be authorized to act as a limited partner. Team 1 concurs with this staff recommendation. Does the Commission approve this deletion?

Team 1 would limit Section 9762 so the court could authorize the personal representative to continue as a partner only where the decedent was a general partner. This seems inconsistent with the purpose of the section.

Team 1 does not like the portion of the Comment saying that the power granted by Section 9762 must be exercised to the extent required by ordinary care and diligence, and must not be exercised to the extent forbidden by ordinary care and diligence. This statement appears in many of the Comments in this draft, and was put there at the suggestion of the Commission. Does the Commission want to revise or delete this statement?

§ 9805. Liability of personal representative

Team 1 is concerned that Section 9805 omits the former provision that the mortgage or deed of trust shall set forth that it is made by authority of the court, giving the date of the order. This provision will be continued in Section 7411 (orders generally).

TEAM 3 REPORT

§ 9944. Notice of hearing

Section 9944 provides a longer period of notice -- 20 days -- when a lease is to be for a term longer than 10 years. Team 3 thinks 10 days is sufficient, particularly since continuances are granted as a matter of course. The Minutes of the May meeting note that the 20-day notice of this section will be reconsidered when the general notice provisions are considered. The staff will flag this for reconsideration.

§ 9948. Effectiveness of lease

Section 9948 gives finality to an order authorizing a lease. In a note under Section 9948, the staff recommends a revised version of the section, to give finality only if the lease sets forth that it is made by authority of the order and a certified copy of the order is recorded. Team 3 prefers the section as drafted, and not as proposed in the note. Team 3 argues:

[P]robate law ought not to affect the law of conveyancing. As a general matter, the probate procedures ought to be limited to defining the relationship between the personal representative and the beneficiaries and creditors of the estate, and the relationship between the personal representative and the court from which the personal representative derives his or her authority. As a general matter, the Probate Code ought not to attempt to deal with relationships between the personal representative and third parties. Thus, while it is appropriate to require that the personal representative obtain court approval for certain actions, it is unnecessary for the Probate Code to require that the order for approval be recorded.

Team 3 recommends a permissive general provision as follows: "Any probate order affecting title to real property may be recorded in the county in which the real property is located."

Team 3 objects to the statement in the Comment that if the personal representative unreasonably refuses to petition, an interested person may seek to have the personal representative removed. Team 1 had a similar comment in its portion. One of team 3's concerns is that the Comment implies that removal is the only remedy. It is not clear whether team 3 would be satisfied by a statement in the Comment that removal is one of several possible remedies.

§ 10150. Contract with agent or broker

In response to the staff note, team 3 would keep the requirement of court approval for exclusive listings, and would keep the 90-day maximum period for the listing. This is what the Commission decided at the last meeting.

§ 10160. Limitation on liability of estate

Team 3 agrees with the staff note to omit the bracketed material. This is obviated by the Commission's decision at the last meeting to delete subdivision (b) entirely.

§ 10162. Limitation on compensation of agent or broker producing successful overbidder

Team 3 agrees with the staff note recommending that Section 10162 (half-the-difference limit) be broadened to apply to all sales, not just real property. This is what the Commission decided at the last meeting.

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

Under subdivision (e) of Section 10200, no notice need be given if securities are surrendered for redemption or conversion. This continues existing law.

Team 3 has a problem with this provision as it applies to closely held corporations, and would revise the provision to read:

(4) The securities ~~are~~ to be surrendered for redemption or conversion are listed on an established stock or bond exchange or are designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., and the redemption or conversion is at a price or value not less than the market price on the date of the redemption or conversion.

Does the Commission want to make this change?

§ 10250. Notice of sale

Section 10250 provides a general requirement that notice of sale of personal property be given by posting or publication or both, as the personal representative may determine. There are a number of exceptions to this requirement, e.g., for sale of securities, subscription rights, perishable property, and property directed by the will to be sold. This continues existing law.

Team 3 would substitute a more limited notice to the persons who have an interest in the property to be sold for the general requirement of notice of sale of personal property. This presents an important policy question.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

MEMORANDUM

DATE: June 23, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLETT
IRV GOLDRING
JAMES DEVINE
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 86-55
STUDY L-1037 - Estate and Trust Code (Estate
Management) New Estate and Trust Code §§9600-
9885

Conference Call: A conference call was held on Monday, June 23, 1986. Robert Schlesinger did not participate, but the other four members, Charles Collier, W. S. "Gus" McClanahan, and Richard S. Kinyon and William V. Schmidt participated.

Study Team No. 1 received this memo and its First Supplement on Friday, June 20, 1986. The previous day, June 19, 1986, we received LRC Memo 86-53. A conference call was arranged for Monday, June 23 at 1:00 p.m. The attorneys were required to spend their time on the weekend preparing first for LRC Memo 86-53 and its First Supplement and secondly for LRC memo 86-55 which is 160 pages in length. I was able to talk to Neal Wells, Captain of Study Team No. 2, on

Monday, June 23 and was informed by him that his Study Team was trying to cover sections 9900 through the last section. Even with this help, none of the members of the our study team were able to complete all 76 pages of this memorandum after having completed memorandum 86-53 and its supplement.

We understand that the law revision commission and its staff is working hard to meet certain deadlines. Nevertheless, we feel that it may not be in the best interest of the public to try to have the Executive Committee or one of its Study Teams review close to 100 pages of what will become our new Estate and Trust Code on such short notice. A conference call had to be done no later than Monday afternoon so that the reports could be prepared, proofed, revised, finalized and mailed by Federal Express no later than Tuesday evening to be received by LRC Representatives of our Executive Committee no later than Wednesday, June 25 to be available for the law revision commission meetings on Thursday and Friday, June 26 and June 27. We have been informed that this memo is on the June 26-June 27 LRC Calendar.

We strongly feel that being put under such time pressure is not in the best interest of the public. None of the five members of our study team could complete all 76 pages or one-half of this memorandum. The pages that they were able

to review were reviewed only briefly and hurriedly. Our job was made more difficult by the fact that this LRC memo 86-55, unlike 86-53, did not attach as a copy our report on its predecessor, LRC memo 86-38, and more importantly, did not contain any notes indicating that the staff or the commission had even read or considered our comments as set forth in our April 3, 1986 memorandum to LRC memo 86-38. It is extremely difficult to read, check and proof these sections without notes which refer to our earlier report which tell us how the section was modified, if it was modified at all, and tell us which of our ideas were accepted and which of them were rejected. We feel badly that a big gap in this memo was not reviewed at all by any of our members. This gap begins on page 50 starting with section 8920 and ends on page 75 with 8985. One member of our Study Team stated that if this workload continued he would have to seriously consider resigning from the team.

Not knowing whether LRC and the staff have really seen our April 3, 1986 Report on LRC Memorandum 86-38 dealing with these same sections, we have attached a copy of it hereto for convenience of reference.

Under the circumstances set forth above, Study Team No. 1 reviewed the proposed Sections to the best of its ability and has the following comments in regard to them.

Section 9762: The first four pages to the materials we received were dated June 16, 1986. On page 3 thereof proposed section 9762 was set forth as modified. We agree with the staff's revision of the statute to limit its application to cases where the decedent was a general partner and to eliminate its application to where the decedent was a limited partner. We feel that the last portion of the sentence in subparagraph (a) would be more clearly stated if it read "... the personal representative may continue as a general partner in any partnership in which the decedent was a general partner at the time of death."

We feel that the last paragraph to the Comment is awkward. We generally do not see the words "ordinary care and diligence" used to require that a power be exercised or not exercised. The word "requires" refers to a mandatory act or omission. To say that ordinary care and diligence "mandates" the exercise or non-exercise of a power is expressing the concept in a way that lawyers and judges do not usually see it expressed, and therefore, in our opinion, is awkward.

Section 9602: We refer to our comment in our April 3, 1986 report attached hereto. We also feel that the last sentence of the Comment could refer to a Bank as well as a Trust Company and could limit its application to a Bank or

Trust Company acting in its capacity as personal representative.

Section 9610: We refer to our comments April 3, 1986 report attached hereto.

Section 9611: We refer to our comments in our April 3, 1986 report attached hereto. In addition, we are concerned with the third to the last paragraph of the Comment which refers to the remedy of a person other than a personal representative and states that since the section does not permit anyone other than the personal representative to petition for instructions, the remedy of such other person is to petition for removal of the personal representative. Our Study Team feels that removal is too harsh an action as the personal representative may very well have good reason for not petitioning for instructions. We feel that there should be some interim step or interim procedure where the personal representative could be ordered to show cause why the personal representative has not filed the petition for instructions.

Section 9612: We refer to our comments in our April 3, 1986 report attached hereto, particularly the second paragraph of our comments under that section. We are pleased that the staff and commission has adopted our suggestion in

regard to subsection (a), but we are still concerned about subsection (b). Charles Collier points out that this section was drawn from the guardianship-conservatorship law which was an act in 1981 before the Anderson case was decided in 1983. We are concerned here with the lack of finality of orders and the uncertainty which can arise therefrom. We are concerned that subsection (b) applies where any decree is obtained by misrepresentation in the petition or account as to "any material fact". We feel that this is worded too broadly. Perhaps the judgment, order or decree should remain final in all aspects, except that aspect pertaining to the "material fact" that was omitted or misrepresented. We do not see the reason why this type of case law needs to be codified. We feel that it can cause more harm than good.

The Note: The Note asks two questions. In answer to the first question, we do not believe that the first section of subsection (a) is inconsistent with the second sentence. In answer to the second question, we believe that an interim account can constitute a "final" order as to matters adjudicated and settled in that account.

Section 9620: We refer to our comments in our April 3, 1986 report attached hereto.

Section 9621: The last sentence to the section states that the agreement is not effective unless it is first approved by the Court. This section however does not explain how Court approval is obtained. Can it be obtained Ex Parte? We feel that it should be able to be obtained Ex Parte.

Charles Collier of our Study Team feels that the last sentence to the Comment is not necessarily true. He states that an arbitration award is not necessarily binding. In some cases the parties have a right to a new trial even after an arbitration award.

Section 9630: We refer to our comments in our April 3, 1986 report attached hereto. We are still concerned with subsection (c). We sometimes see personal representatives who are non-residents of the state of California. This does not necessarily prevent them from performing their duties properly as a co-representative. Non-residency or absence from the state should not, by itself, in our opinion, permit the Court to authorize the remaining joint personal representatives to act by themselves, especially if the court order can be made without notice. We feel that if the absence from the state of California causes an inability to act as a personal representative then the concept in subsection (c) makes sense, but absence from the state alone is not sufficient.

Section 9631: We refer to our comments in our April 3, 1986 report attached hereto. We would answer the question posed in the Note to the section in the affirmative.

Section 9650: We refer to our comments in our April 3, 1986 report attached hereto. We note that there is a difference between the words "take into possession" as used subsection (a)(1) and the words "under his or her control" as used in subsection (b).

Section 9656: We feel that the procedure set forth in subsection (d) and (e) comes close to, but does not precisely follow, the procedure used by a personal representative acting under the Independent Administration of Estate Act when a personal representative is required to give advice of proposed action. We note that the section is new. We would be much happier if the procedure was the same as the procedure we now use for giving advice of proposed action rather than an entirely new procedure.

Section 9700: We question whether the "in this state" requirement should refer to trust companies, savings and loan associations, insured credit unions as well as banks. The way the section is worded it does not.

Section 9701: We wonder whether a Bank is included within the definition of trust company. If not, should the section permit the deposit of personal property of the estate with a Bank as well as with a trust company?

Section 9702: We ask the same question that we asked in regard to section 9701 above.

Section 9705: The section uses the word trust company in one place and the word Bank in another. Do they include each other? Would it be better to replace the words "trust company" in the first line with the words "a trust company" with the words "any Corporate Fiduciary" or perhaps would the words "any bank or trust company". Do we ask a question would it be better if we have?

Section 9730: We feel that subsection (b) as set forth in the Note to this section should be substituted for subsection (b) of this section.

Section 9735: Once again we feel that the petition for removal of the personal representative as discussed in the last paragraph of the Comment is too harsh and some interim procedures should be considered.

Section 9760: The Note at the end of the section asks two questions both of which we would answer in the affirmative.

Section 9761: The Note at the end of the section states that a general provision should be drafted for a procedure enforcing orders against third persons such as partners and other persons who have property of the decedent. We agree wholeheartedly. Also, we once again note the reference in the last paragraph of the Comment to a petition for removal of the personal representative. Again, we think such a petition is too harsh and an interim type of petition should be developed and codified.

Section 9805: This section is taken in part from existing Probate Code Section 833 however, Section 833 states that the Mortgage or Deed of Trust should set forth therein that it is made by authority of the Court, giving the date of the court order. We feel that this concept is a good one and should be retained, but it is not proposed section 9805.

Sections 9820-9885: Our Study Team did not have an opportunity to review these sections. We refer to our comments to the sections in our April 3, 1986 report. We realize that some of our earlier comments may well have

already been seen and acted upon by the Staff and the
Commission.

Respectfully submitted,

STUDY TEAM NO. 1

By: 

WILLIAM V. SCHMIDT
Captain

MEMORANDUM

DATE: April 3, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLETT
IRV GOLDRING
JAMES DEVINE
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 86-38
STUDY L-1037 - Estate and Trust Code (Estate Management)
New Estate and Trust Code §§7202, 7203, 7308, 7411 and
§§9600 Through 9885

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Conference Call: A conference call was held on Tuesday, April 1, 1986. Robert Schlesinger and Richard S. Kinyon did not participate, but the other three members, Charles Collier, W. S. "Gus" McClanahan, , and William V. Schmidt participated.

Study Team No. 1 reviewed the proposed sections of the new code set forth above in chronological order and has the following comments in regard to them.

Section 7202: Satisfactory.

Section 7203: The section is satisfactory. However, it raises the broader question of who should sign petitions, reports, accounts, objections and responses: whether they should be signed by the attorney and verified by the client in a manner similar to civil pleadings, or whether they should be both signed and verified by the client, or whether they need to be signed by anyone in addition to being verified by the client.

Section 7308: The section is satisfactory. We suggest, however, that reference to the "affidavit" in (a)(3) and (4) be changed to refer to a "declaration under penalty of perjury" as it

is more commonly used. The last sentence to the first paragraph of the Comment of the section could then be reversed to state that an affidavit may be used in lieu of a declaration under penalty of perjury.

Our Study Team is also concerned with the last sentence in the third paragraph of the Comment. It states "If notice is jurisdictional, it may not be waived. Estate of Joslyn, 256 Cal. App. 2d 671, 674-76, 64 Cal. Rptr. 386 (1967)." Members of our Study Team did not have time to read this case, but they are concerned because they believe that notice is jurisdictional in many cases, and they know from experience that notice is commonly waived as a practical matter. Such a statement in the official Comment is therefore questioned.

Section 7411: Subsection (a)(2) defines a "transaction" to include "the creation of a mortgage or deed of trust on real property of the estate." We question whether the words "mortgage or deed of trust" are broad enough or whether the words "or other encumbrance" should be inserted into the subsection to broaden it.

Subsection (d) states that a transaction carried out by a personal representative in accordance with a court order has the "same effect as if the decedent were living at the time of the transaction and had carried it out himself or herself while having legal capacity to do so." We wonder whether this language drawn from the guardianship-conservatorship provisions of the code where the ward or conservatee is still living could have any undesirable results when applied to a probate situation where a death has occurred and a different set of procedural rules necessarily come into play. We are concerned that the language used may be too broad.

Section 9600: The second paragraph of the Comment states that a professional personal representative is held to a higher standard of care based on its presumed expertise. Should this language be written into the statute or is it covered by the last sentence of subsection (a)?

Section 9601: It is not clear to us whether the three measures of damage set forth in (a)(1), (2) and (3) are mutually exclusive or whether recovery can be had under more than one of them. Once that question is answered, the first sentence of (a) should be modified to clarify the intention.

We assume that the "profit made by the personal representative" in section (a)(2) is a profit which is personal to the personal representative and accrues to his or her benefit and is not a profit which accrues to the benefit of the estate. The language is not completely clear.

Section 9602: This is a change in the law. As a matter of policy, we feel it is a good change. It states that the personal representative is liable for interest which he actually received or which accrues at the legal rate on judgments, whichever is higher.

Section 9603: We are concerned about the word "fraud" used in this section, particularly in view of existing Civil Code §2234 which reads "every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust." The preceding Civil Code sections refer to a trustee using or dealing with trust property for his own profit, having an adverse position to the beneficiary, gaining an advantage from his position, and other acts which may well not be considered "fraud" in its strictest sense. If Civil Code §2234 and its preceding sections are going to be repealed and not carried over into the new code, then this concern disappears. Lastly, as a matter of policy, we agree that the exemplary damages should be limited to three times the amount of the liability determined under §9601.

Section 9604: Satisfactory.

Section 9610: We feel that the first sentence of the section should be modified to provide that the powers and duties exercised by the personal representative without court authority

instruct .n, approval or confirmation should be done "in accordance with the fiduciary duties" of the personal representative.

Section 9611: We feel that this section is out of place and perhaps should come at or near the end of those provisions specifically providing for different court procedures. This is a section for instructions which is to apply where no other or different procedure is provided for by statute. It would then logically follow provisions for other or different statutory procedures.

In its present position immediately following Section 9610 which provides for action by the personal representative without court approval, it could be argued that this section requires the personal representative to always seek instructions when he is not empowered to act without a court order.

Section 9612: We feel that the first portion of the first sentence is not completely clear. A judgment is not necessarily final merely because it has not been reversed on appeal. However, this section says that "unless reversed on appeal, a judgment..... is final." Perhaps it should 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....."

We are very concerned about subparagraph (b) and particularly the last sentence of subparagraph (b). We feel that its inclusion invites trouble. We are also uncertain of the definition of "a material fact." It is our belief that in most complicated accountings and orders of distribution, it is relatively easy to find one omission of what some people may feel is a "material fact." Under this proposed section the order would apparently not become final and be subject to attack for the "omission of a material fact." We feel this is too broadly worded. If subparagraph (b) is to be retained, we recommend that the judgment, order or decree remain final as to all aspects except that aspect pertaining to the "material fact" that was omitted.

Section 9620: This section is not limited to creditor's claims but applies to any dispute. It therefore, for example, could be used in an 851.5 dispute. We question whether the scope of the section should be limited to creditor's claims or should be broadened to include any dispute.

The word "referee" in subsection (a) is questioned by our Study Team. As we understand the word, it is used to refer to a person to whom referrals by the court have been made and who is expected to do certain work or make certain findings and report back to the court. The ultimate decision is then made by the court. We are concerned that the word "referee," as used in this section, may be inappropriate.

Section 9621: Satisfactory.

Section 9630: Subsection (c) changes existing California law. Existing Probate Code §570 states that when two or more personal representatives have been appointed and one or more is absent from the state, the act of the other or others shall be effectual for all purposes. No court order is required. Subsection (c) of this proposed new §9630 permits the court to authorize the remaining joint personal representatives to act. Thus, the new law requires court authorization whereas the existing law does not. This is a question of policy to be decided by the Executive Committee. Subsection (c) also raises the question of two or more personal representatives one of whom resides outside the State of California. Are they to be treated in the same manner as personal representatives all of whom reside in California?

Section 9631: This section rewrites and expands upon that portion of existing Probate Code §920 which states that a personal representative is not liable for the negligence of a co-personal representative except for collusion or gross negligence. The section is new to the commission, and the Executive Committee may

wish to review it. The section seems satisfactory to our Study Team.

Section 9650: Subsection (c) is taken from the Uniform Probate Code. It permits the personal representative to leave real property or tangible personal property with the person presumptively entitled thereto unless the personal representative believes that possession of the property is necessary for purposes of administration. This raises the question of whether the personal representative must account for an asset not in his possession, whether he should inventory such asset, and what duty, if any, he has to preserve and maintain the asset. Our Study Team felt that this question deserved more thought.

Section 9651: This section is taken almost verbatim from the second sentence of existing Probate Code §920. Even though it has been California law since 1931, one member of our Team felt that it could more clearly be stated in two separate sentences, one relating to profit by an increase in the estate, and the other relating to a loss by a decrease in a part of the estate. The other two members of our team felt that it was more important to retain the existing language of the present code as a matter of general policy.

Section 9652: Satisfactory.

Section 9653: After some discussion our Team concluded that subsection (a) was probably satisfactory although we were concerned about the recovery of a gift of property in view of death under subsection (a)(2).

Our Study Team recommends that the bracketed words "or a judge thereof" in section (b) be deleted.

We recommend that subsection (c) be modified to refer to a sale or an assignment of all, or an appropriate portion of, the recovered property.

Sections 9654, 9655 and 9656: Satisfactory.

Section 9657: We recommend that the section be modified to provide that the insurance is a proper expense of the estate.

Sections 9700, 9701 and 9703: We assume that the purpose of these sections is to permit the personal representative to reduce his bond. However, that purpose is not stated in the language of any of the three sections. Should it be?

Sections 9702 and 9704: Satisfactory.

Section 9705: This section raises the question of whether the personal representative has a duty to maximize the interest earned. The section does not require the personal representative to deposit the money in any particular type of account. The "rate of interest prevailing among banks of the locality" obviously varies depending upon which type of account is selected.

Section 9730: Satisfactory.

Section 9731: Please note that this section has two subsection (b)s. The second subsection (b) should be relettered subsection (c).

In reply to the note of the staff contained at the bottom of page 33 of the memo pertaining to Sections 9730, 9731 and 9732, we agree that the word "invest" alone is sufficient as opposed to "invest and reinvest." We also agree that the word "moneys" is sufficient as opposed to "surplus moneys."

Section 9732: It is not completely clear to our Study Team that the words "or otherwise" contained in subsection (a)(2) provide for the situation where there is sufficient cash to pay all uncontested, unpaid claims.

Subsection (d) prevents the court from making an order if an objection has been filed by an interested person. We recommend that the subsection be modified to permit the court to make the order after considering any objections made by an interested person. The objections may not be well taken, and the court should be empowered to make the order.

Section 9733: Satisfactory.

Section 9734: We recommend that the bracketed language in subsection (c) be included in the section. This bracketed language refers to the power of the court to dispense with notice or to set a shorter period.

Section 9735: Satisfactory.

Section 9760: Note that subsection (b) allows the personal representative, with or without prior court authority, to continue the operation of the decedent's business without any time limitation. Under current law an Advice of Proposed Action is required for the continuance of the decedent's business for a period of more than 6 months. This is a policy question to be decided by the Executive Committee.

Sections 9761 and 9762: We agree with the note of the staff that the application of these two sections where the decedent was only a limited partner should be reviewed. Consideration should be given to limiting §9761 to the situation where the decedent was a general partner. The interaction of these two sections should also be considered. The provision in a written partnership agreement that the partnership will not dissolve on the death of a partner is also a matter that should be considered in reviewing these sections.

Section 9800: The words "in order to do either or both of the following;" at the end of the first sentence of subsection (a) should be revised to read "in order to do any or all of the following:".

Sections 9801, 9802, 9803, 9804, 9805, 9806 and 9807:
Satisfactory.

Section 9808: We agree with the recommendation of the staff that the section should be deleted.

Sections 9821, 9822, 9823 and 9824: Satisfactory.

Section 9825: Our Team has not had an opportunity to review Memorandum 86-42. We, therefore, do not know why the staff recommends that this section not be included in the Estate and Trust Code. If the section is retained, we believe that consideration should be given to charging these costs to the estate and not to the personal representative individually.

Section 9850: We recommend that the bracketed language in subsection (a) be deleted.

Section 9851: Satisfactory.

Section 9860: We feel that this section is satisfactory. In answer to the question raised by the staff, we feel that only the personal representative or a claimant, and not an interested person, should be able to file a petition under this §9860. This section generally provides for those matters set forth in existing Probate Code §850 and 851.5.

Sections 9861, 9862, 9863, 9864: Satisfactory.

Section 9865: Contrary to the recommendation of the staff, we recommend that the word "shall" in subsection (a) be changed to "may." If this change is made, subsection (b) can be deleted. This is a question of policy which should be discussed by the Executive Committee.

Sections 9866, 9867: Satisfactory.

Section 9868: Existing Probate Code §853 states that the order (under 850 and 851.5) shall be prima facia evidence of the correctness of the proceedings and of the authority of the executor of administrator or other person to make the conveyance or transfer. This language is not in proposed §9868. The staff asked the question whether the provisions of 9612 and 7411(d) are

adequate to replace the language of the former §853 that is not continued. Our Study Team did not have before it §7411(d).

Section 9880: Satisfactory.

Section 9881: This section is new, but we feel that it should be adopted as a matter of good policy.

Section 9882: Satisfactory.

Section 9883: This section is satisfactory. We recommend that the bracketed words in subsection (b)(1) be deleted. In answer to the question of the staff posed on page 66 of the Memorandum, we feel that an interested person should not be authorized to file a petition under §9883.

Sections 9884 and 9885: Satisfactory.

Respectfully submitted,

STUDY TEAM NO. 1

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June 25, 1986

TO: James B. Quillinan
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FROM: Kenneth M. Klug

RE: LRC Memo 86-55

The following are the comments of Team 3 (Wells, Pollard and Klug) relating to the portion of LRC Memo 86-55 which was assigned to Team 3 (Pages 76 through 128). Valerie Merritt and Hermione Brown did not participate in our discussion.

Page 82, Section 9944(c). As drafted, this section provides for a 20-day mailed notice. We believe 10-day mailed notice is sufficient wherever mailed notice is required by the Probate Code. The purpose of notice is to make persons interested in the estate aware of the relief sought by the petition. Anyone who objects to the relief sought will almost always be able to obtain a continuance for purposes of preparing for hearing, obtaining more information,

or filing written pleadings. Since every court will grant a continuance as matter of course, we believe ten days provides a sufficient notice time.

Pages 86 and 87, Section 9948. We prefer the version of Section 9948 as it appears on Page 86. We are opposed to the staff proposal for Section 9948 as appears on Page 87. Insofar as recording probate documents is concerned, we make the general observation that the probate law ought not to affect the law of conveyancing. As a general matter, the probate procedures ought to be limited to defining the relationship between the personal representative and the beneficiaries and creditors of the estate, and the relationship between the personal representative and the court from which the personal representative derives his or her authority. As a general matter, the Probate Code ought not to attempt to deal with relationships between the personal representative and third parties. Thus, while it is appropriate to require that the personal representative obtain court approval for certain actions, it is unnecessary for the Probate Code to require that the order for approval be recorded. The effect of the recording or the failing to record any document should be the same in probate and in non-probate contexts. We recommend that all references to recording in the Probate

Code be handled by one statutory provision which provides substantially as follows: "Any probate order affecting title to real property may be recorded in the county in which the real property is located." Thus if a title company or any party feels that recording is necessary to protect someone's rights, the order can be recorded; but the Probate Code ought not require recording as a prerequisite to validity.

Specifically, we believe that Section 9948 as recommended by the staff is the result of a misunderstanding by the staff as to how real-world leases are handled. In fact, the great majority of leases between individuals are neither acknowledged nor recorded. There is no reason to require that leases authorized by the Probate Court be recorded in order to have a valid lease. Section 9948 as appears on Page 86 adequately deals with the subject.

Page 88, Comment to Section 9961. We note what appears to be a trend to provide legal advice by way of comment. We believe that comments should be limited to explaining the derivation and meaning of the section, and not to providing legal advice. Thus, we would strike the last sentence of the comment. (Similarly, we would strike the last sentence to the comment following Section 10258, and anywhere else a similar comment appears.) While the last sentence in each case accurately states the law, it

overlooks the fact that there may well be other remedies available, such as an action for breach of contract. The last sentence to the comment creates a misleading impression that removal of the personal representative is the only available remedy.

Page 101, Note. We recommend keeping the section as drafted which limits exclusive listings to 90 days. It is our experience that many brokers are willing to take listings for 90 days. The effective and speedy administration of estates requires that listings be limited to 90 days. A 180-day listing is much too long for the average estate. A broker who diligently attempts to sell property will normally be able to obtain an extension if the client is satisfied with the broker's efforts. We believe that expansion to 180-day listings will delay administration of estates.

Similarly, we believe that absent independent administration authority, the personal representative should be required to obtain court authority prior to entering into an exclusive listing agreement. If a personal representative does not have independent administration authority, there is usually a reason for its absence: there may well be controversy involving the estate. Most courts require that

persons making ex parte applications give at least telephone notice to opposing parties. By requiring court approval where independent administration authority has not been granted, all parties will have the opportunity to present all issues to the Court.

Page 105, Note. We agree with the staff recommendation to exclude the bracketed material from Section 10160(b).

Page 106, Note at middle of page. We agree with the staff recommendation that Section 10162 be made applicable to all sales.

Page 112, Section 10200(e)(4). This subsection would allow securities to be surrendered for redemption or conversion without notice. While that is acceptable with regards to securities listed on an established exchange or NASDQ, the provision as written would also apply to redemptions or conversions of stock of closely held family corporations. Redemption of closely held stock involves not only valuation issues, but (more importantly) may also shift control of the corporation among family members. Unless there is agreement among all persons interested in the estate, the court needs to look very carefully into any proposed redemption or conversion of closely held stock.

Such redemption or conversions should certainly not be done without notice. We recommend that Subsection (e)(4) be amended to read as follows:

"(4) The securities to be surrendered for redemption or conversion are listed on an established stock or bond exchange or are designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., and the redemption or conversion is at a price or value not less than the market price on the date of the redemption or conversion."

Page 119, Section 10250. We believe this section is unnecessary and ought to be eliminated. Neither posting at the courthouse nor publication pursuant to Section 6063a of the Government Code is an effective marketing tool. Most personal property sold by modest estates is sold under the depreciating or perishable property rules now embodied in proposed Section 10252. Few estates give the notice required by Section 10250. Sales of valuable property are more likely to be advertised in the classified ads of the newspaper or by some other means to obtain the best exposure. Sales of personal property in modest estates are normally accomplished by garage sale, swap meet, or similar informal arrangements that do not lend themselves to public notice. Probably the only notice that should be given is a notice to all persons interested in the property being sold.

DATED: June 25, 1986.

K.M.K.

cc: Wells, Pollard, Willett, Homer, Brown, Merritt