

Second Supplement to Memorandum 89-23

Subject: Study L-1036/1055 - Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative

Attached is a letter from Commissioner Walker concerning compensation of probate attorneys and personal representatives.

Use of Independent Administration Procedure for Compensation of Personal Representative

Commissioner Walker suggests that the independent administration procedure should be available for use to avoid court supervision for the allowance of compensation of the personal representative and the estate attorney.

The staff draft of the Commission recommendation already permits use of independent administration for the compensation of the estate attorney. Under the staff draft, the personal representative and the estate attorney make a contract for an agreed fee for the services of the estate attorney. The agreed fee is not subject to court review unless an interested person petitions for review or contests the final account. In addition, the staff draft permits use of the notice of proposed action procedure under independent administration to preclude a person receiving the notice of proposed action from later obtaining court review. The staff draft applies this scheme to all persons hired by the personal representative, including the estate attorney, accountants, and others. The staff draft specifically eliminates the existing provision that precludes use of independent administration for the compensation of the estate attorney.

The staff draft of the Commission recommendation does not permit use of independent administration for the compensation of the personal representative. The draft has no effect on the provision of the existing statute that specifically excludes this as one of the matters for which the independent administration procedure can be used. To follow through on Commissioner Walker's analysis, the Commission may wish to delete the existing provision that precludes the use of independent administration for the compensation of the personal representative.

The use of independent administration for the compensation of the personal representative would permit a notice of proposed action with respect to both of the following:

(1) The compensation for "ordinary" services (computed using the statutory percentage fee table).

(2) The compensation for "extraordinary" services ("reasonable compensation").

In other words, a notice of proposed action could be given for the compensation of the personal representative (both for ordinary and for extraordinary services); and, if no objections are made, court review would be precluded. If there is no objection to the compensation stated in the notice of proposed action and all persons required to be given the notice are given the notice, the use of the independent administration procedure would avoid the need for a court petition and the need for the court reviewing the computation of the percentage compensation and the fixing of the "reasonable" compensation, if any, for extraordinary services. The considerations (stated in the staff draft) that caused the Commission to keep the substance of the existing provisions would be opposed to permitting the use of independent administration for compensation of the personal representative. These considerations recognize that persons interested in the estate are not in a position to challenge the compensation of the personal representative.

Does the Commission wish to eliminate the provision that precludes use of independent administration for the compensation of the personal representative? If so, the staff suggests that this be an item for which notice of proposed action is required.

If the Commission decides to permit use of the notice of proposed action procedure for compensation of the personal representative, the closing of the estate could be simplified. In a case where a final account has been waived, the Commission could eliminate the need for a statement of the compensation of the personal representative in the final report of administration if the notice of proposed action procedure has been used for the compensation of the personal representative. (Where a final account has been waived, the final report of administration is required at the time the final account otherwise would have been required.) If the statement concerning the compensation of the personal representative were omitted from the final

report of administration, consideration should be given as to whether a final report of administration should be required at all or, if required, what should be included in the report.

Duty of Lawyer Drafting a Will to Advise Client Concerning Need to Plan for Use of Independent Administration Procedure

Commissioner Walker raises another issue:

Whether, and to which extent, the legal service provider should be required as a matter of law, rather than simply as a matter of professional responsibility, to point out these options and encourage testators to plan and provide for economical estate administration may be a policy decision for the Commission and, if so, should the staff frame the issue for the Commission.

The practice under existing law is to request independent administration authority in almost every probate administration. Absent any limiting provision in the decedent's will, the personal representative can request that independent administration authority be granted, and the statute requires that the authority be granted unless the court determines that there is good cause not to do so. Accordingly, there is no need to plan at the time the will is drawn for the use of the independent administration procedure.

Even though the personal representative has been granted independent administration authority, the personal representative may elect to use the supervised administration procedures instead of the independent administration procedures for a particular transaction, such as a real property sale. The estate attorney (at the time the transaction is being considered) can advise the personal representative as to the consequences of using either supervised administration procedures or independent administration authority for the particular transaction.

In view of this scheme, the staff recommends against a specific statutory requirement that the attorney advise the client at the time the will is drawn of the need to plan for use of independent administration authority.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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January 26, 1989

RECEIVED

Mr. John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear John:

The Commission's policy decision at our January meeting to repeal the statutory fee schedule for attorneys in probate and permit testators to provide for compensation in lieu of the personal representative's fee schedule affords an opportunity for the Commission to realize tangible economies for the public in the probate system. To achieve that objective, our revisions should encourage people to use the in-lieu procedure for personal representative compensation and should establish the personal representative's duty to beneficiaries to achieve all reasonable economies.

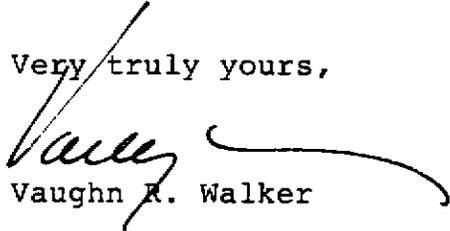
The Independent Administration of Estate procedure seems to me to be the most obvious device. Inconsistent with our January policy decision, the Independent Administration of Estate procedure still requires court supervision for allowance of personal representative and attorney fees (Prob. Code, § 10501(a)(1) and (2)). That restriction will obviously have to be relieved in light of the Commission's policy determinations earlier this month. But does not the in-lieu option we determined to afford testators also suggest that they could make the independent administration election for personal representative fees. Certainly, the independent administration procedure is a possible means of implementing the in-lieu option.

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Whether, and to which extent, the legal service provider should be required as a matter of law, rather than simply as a matter of professional responsibility, to point out these options and encourage testators to plan and provide for economical estate administration may be a policy decision for the Commission and, if so, should the staff frame the issue for the Commission.

Fulfillment of the Legislature's directive to the Commission requires that our legislative proposals in the probate field encourage economic estate administration and I would hope these suggestions move us toward that objective.

Very truly yours,


Vaughn R. Walker