

Memorandum 83-24

Subject: Study L-625 - Probate Law (Assembly Bill No. 24 - Missing Persons)

Assembly Bill No. 24 was introduced to effectuate the Commission's recommendation relating to missing persons. The bill was approved by the Assembly Judiciary Committee with some technical amendments and one substantive amendment--an amendment that precludes distribution of the missing persons's estate until one year after the petition for administration of the estate or probate of the will is filed.

Assemblyman McAlister (and others) have expressed concern about the provision of the bill that prevents reappearing missing persons from recovering estate assets or their proceeds in the hands of distributees. Assemblyman McAlister does not want to preclude the reappearing missing person from recovering from a distributee. The relevant provision of Assembly Bill No. 24 is the second sentence of Section 1358. This section provides:

1358. If the missing person reappears, the missing person may recover property of the missing person's estate in the hands of the executor or administrator. No action for recovery may be brought against a distributee of the property.

We have also received a letter from Charles W. Jamison (Exhibit 1 attached) raising two matters in connection with this section: (1) the applicable procedure for determining the identity of a person claiming to be a reappearing missing person if a dispute exists as to that person's identity and (2) the lack of a precise definition for determining when a person becomes a "distributee of the property."

Attached (Exhibit 2) is a staff recommended revised version of Section 1358. The revised version substitutes the relevant UPC provision for the second sentence of existing Section 1358 and adds a provision limiting the time within which the action can be brought against a distributee and a provision protecting good faith purchasers and encumbrancers. The revised version will satisfy Assemblyman McAlister's concern. The revised version also adds a new provision--subdivision (c)--as suggested by Mr. Jamison to indicate the procedure for determining the identity of a reappearing missing person if the person's identity is disputed.

The substitution of the staff drafted new provision for the second sentence of existing Section 1358 avoids the need to define when a person becomes a distributee (as suggested by Mr. Jamison).

Attached as Exhibit 3 is a Comment to revised Section 1358.

The staff requests that the Commission approve the revision of Section 1358 for inclusion in Assembly Bill No. 24.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 83-24

EXHIBIT 1

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January
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OUR FILE NUMBER

129,611-1

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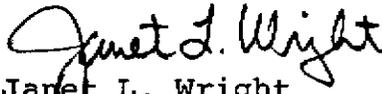
Re Assembly Bill No. 24

Dear Stan:

Pursuant to our telephone conference of last week, enclosed is a copy of Charles W. Jamison's comments regarding AB-24. As we discussed, Mr. Jamison prepared these comments in his capacity as a subcommittee member of the State Bar Pre-Death Estate Planning Techniques Subcommittee. I believe Mr. Jamison's suggestions have also been submitted to the Law Revision Commission through the State Bar representative.

As we discussed, I am not in a position to advise you as to the State Bar's position regarding this legislation. You should contact Kenneth Klug directly at (209) 442-0600 in this regard.

Very truly yours,


Janet L. Wright
for O'MELVENY & MYERS

JLW:dm

Enclosure

cc: Kenneth Klug, Esq.
Charles W. Jamison, Esq.

1/17/83

FURTHER SUGGESTIONS

AB 24

This bill is superbly drafted. In its present form I will approve and support it. However, I feel that two additions would substantially reduce danger of potential litigation through removal of minor ambiguities.

One

My first suggestion relates to inserting a new section at 1308, whereby it would become 1309. Section 1307 deals with establishing presumption of death. Section 1308 then deals with the reappearance of a missing person. In some instances, identity of the returned missing person would be no problem. In other cases it becomes a problem of major significance. It appears that between the present 1307 and 1308 is the most coherent place to deal with the problem.

Recently I was called as a consultant where an imposter claimed to be a boy's "missing father", after a presumption of death order had been issued. Court proceedings for proof of identity appeared imminent. Some might quickly say Section 1080 provides the answer. In studying that section in relation to our problem I noted it is couched in terms of an already clearly literal decedant, as foundational.

This opens the door for litigation on the premise that identification of a living person, presumed deceased, should be determined under broader principles of law, than that denoted by Section 1080. Although that section appears adequate I had some trepidation about recommending it, in view of its narrower context.

To remove all danger of potential litigation over the form for legal procedure for testing identity of a professed returning missing person and to place at ease attorneys when engaging in such test, I recommend the following, immediately preceding the present 1308.

Section 1308. If a dispute exists as to the identity of a person claiming to be a reappearing missing person under this chapter, either he or any other interested person may initiate court proceedings for determination of identity and heirship of such person under the provisions of Probate Code Section 1080, and that section only.

Two

My second suggestion relates to present section 1308, also. Ordinarily split-second timing concerning distribution is rarely crucial. Under this section it becomes literally a matter of "life or death".

Extensive litigation as to when a person becomes a distributee would probably arise due to pressure by non-missing person distributees for the position that an order for distribution constitutes constructive distribution; that rights to assets have become final by the order and that actual transfer of title is only an after the fact, ministerial act.

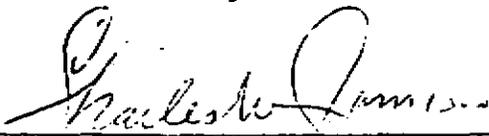
While present section 1308 literally states that a returning missing person may receive property "in the hands of" the executor or administrator, this still does not bar attack on the meaning of that phrase. It is submitted that greater precision can be attained very simply.

To close the door on any claim of ambiguity or grounds of controversy, the following sentence could be added to the last sentence in Section 1308.

For purposes of this section, one becomes a distributee only upon completion of transfer of title to assets to such person, after order for distribution.

I believe this retains the intent of the present draft while removing possibility of argument concerning variation in interpretation.

Dated: January 17, 1983



CHARLES W. JAMISON

EXHIBIT 2

AMENDMENTS TO ASSEMBLY BILL NO. 24 AS AMENDED IN ASSEMBLY
1983

Substitute the following for existing Section 1358:

1358. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the hands of the executor or administrator.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all the circumstances, but any action under this paragraph is forever barred five years after the time the petition is filed under Section 1354.

(3) The missing person has no rights against any of the following:

(A) A good faith purchaser from a distributee of property of the missing person's estate that was distributed to the distributee.

(B) A good faith lender to a distributee who has acquired a security interest in the property of the missing person's estate that was distributed to the distributee.

(C) A transferee from a person described in subparagraph (A) or (B).

(b) The remedies available to the missing person under paragraphs (1) and (2) of subdivision (a) are in addition to any remedies available to the missing person by reason of any fraud or intentional wrongdoing.

(c) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under Section 1080 for the determination of the identity of the person claiming to be the reappearing missing person.

EXHIBIT 3

§ 1358. Recovery of property by missing person upon reappearance

Comment. Subdivisions (a) and (b) of Section 1358 are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code. The Uniform Probate Code provision has been revised to add a provision barring an action under paragraph (a)(2) five years after the time the petition is filed under Section 1354. This additional provision continues the general effect of the portions of former Sections 287-292 that gave a distribution conclusive effect after the missing person has been missing 10 years. Paragraph (3) of subdivision (a) has also been added so that a distributee has the ability to transfer or encumber property of the missing person's estate that is distributed to the distributee. This provision gives the protection to the good faith purchaser or encumbrancer that is needed in order to obtain title insurance. Subdivision (c) makes clear that a petition may be filed under Section 1080 to determine the identity of a person claiming to be a reappearing missing person.