

Memorandum 91-65

Subject: Study L-812 - Preliminary Distribution Without Court Supervision Under Independent Administration of Estates Act

Attached is the Commission's *Recommendation Relating to Preliminary Distribution Without Court Supervision*. We have circulated it for comment. The only comment we received is from Team 1 of the State Bar Estate Planning, Trust and Probate Law Section. A copy of the report of Team 1 is attached as Exhibit 1.

Team 1 supports the *Recommendation* with a modification to subdivision (c) of proposed new Section 10520. Subdivision (c) permits preliminary distribution of:

(c) Cash to general pecuniary devisees entitled to it under the decedent's will or to the persons entitled to it under the laws of intestate succession, not to exceed ten thousand dollars (\$10,000) to any one person.

The report of Team 1 (Exhibit 1) says:

The problem with the Law Revision Commission Staff's recommendation is that general pecuniary devisees would only occur under a Will and not in cases where property passes by intestate succession. Accordingly, references to intestate succession should be deleted, thereby returning to the language proposed by the Executive Committee.

It may be that the recommendation of Team 1 is based on what Team 1 perceives as a drafting error. But subdivision (c) is drafted the way the staff and Commission intended: Cash may be distributed to general pecuniary devisees under a will, or to "the persons" entitled to it under the laws of intestate succession. Perhaps this could be made clearer by inserting a comma after "will" in subdivision (c).

As a policy matter, the staff would not delete intestate takers from subdivision (c) (cash) while leaving intestate takers in subdivision (b) (tangible personal property). With respect to tangible personal property and cash, the original staff draft only permitted preliminary distribution to devisees under a will, not to intestate takers. Team 1 and the Executive Committee of the Estate Bar Probate Section recommended expanding the draft to permit distribution of tangible personal property (but not cash) to intestate takers. See

Report of Team 1 dated May 3, 1991, attached to Memorandum 91-42.

The staff was concerned that there may be problems where there are multiple intestate takers, because each is entitled to a proportionate undivided interest in each item of tangible personal property. At the last meeting, Bob Temmerman, speaking for the Executive Committee, thought that ordinarily this will be resolved by agreement among the intestate takers. The Commission approved the draft section with the inclusion of intestate takers, both for tangible personal property and cash.

It is hard to justify limiting distribution of cash to devisees under a will, while permitting tangible personal property to be distributed either to devisees or to intestate takers. The problem with tangible personal property where there are multiple intestate takers does not exist with cash, because cash may be divided in kind. If Team 1 wants intestate takers to be deleted from subdivision (c) (cash) as a policy matter, then the staff would also delete intestate takers from subdivision (b) (tangible personal property).

In the absence of policy justification for the proposal of Team 1 not to permit distribution of cash to intestate takers, but to permit distribution of tangible personal property to intestate takers, the staff recommends against the suggested change.

The staff recommends the Commission approve the attached *Recommendation* for printing and submission to the Legislature.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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

OCT 21 1991

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Key: _____

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October 17, 1991

REPLY TO: 56570-000 Valerie J. Merritt (213) 688-2520

California Law Revision Commission 4000 Middlefield Road, D-2 Palo Alto, CA 94303-4739

Re: Tentative Recommendations, Studies L-3052, L-812, L-708 and L-3051

Dear Commissioners:

Enclosed is a Report from Robert L. Sullivan, Jr., Captain of Team 1 reporting the position of Team 1 on the above listed Tentative Recommendations. The position of Team 1 on Studies L-3052, L-812 and L-3051 have been previously reviewed and approved by the entire Executive Committee.

Members of the Executive Committee will be attending the meeting of the Commission on Friday, November 1, and will be able to expand upon these comments at that time.

Sincerely,

Handwritten signature of Valerie J. Merritt

Valerie J. Merritt Team Coordinator

VJM:gjm cc: William V. Schmidt, Esq. Team Captains Robert Temmerman, Terry Ross, Tom Stikker, Monica Dell'Osso, Clark Byam

OCT 11 1991

VALERIE J. MERRITT

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LRC REPORT

DATE: October 7, 1991

TO: Valerie J. Merritt

FROM: Robert L. Sullivan, Jr.
Captain, Team 1

RE: LRC Study #L-3052, L-812, L-708 and L-3051

SUMMARY

| <u>Study #</u> | <u>Subject</u> | <u>Recommendation</u> |
|----------------|--|-----------------------------------|
| L-3052 | Tentative recommendation - non-probate transfer to trustee | Support |
| L-812 | Tentative recommendation - preliminary distribution without court supervision | Support as modified |
| L-708 | Tentative recommendation - special needs trust for disabled person | Referred to Sterling L. Ross, Jr. |
| L-3051 | Tentative recommendation - transfer to trust of unintentionally omitted property | Support |

DISCUSSION

L-3052 - Non-Probate Transfer to a Trustee Named in Decedent's Will

This tentative recommendation is the same as the tentative recommendation dated April 25, 1991 which was previously approved by the Executive Committee and should be approved as distributed.

L-812 - Preliminary Distribution without Court Supervision under Independent Administration of Estates Act

With minor language modifications, the statutory modifications contained in the tentative recommendation incorporate all of the changes recommended by the Executive Committee based on the May 3, 1991 Team 1 Report. The minor language changes made by the Staff appear to be satisfactory except for the change made in Section 10520(c) which (as modified by the Law Revision Commission Staff) read as follows:

"(c) Cash to general pecuniary devisees entitled to it under the decedent's Will or to persons entitled to it under the laws of intestate succession, not to exceed Ten Thousand Dollars (\$10,000.00) to any one person."

The above subsection as modified by the Executive Committee read as follows:

"(c) Cash to general pecuniary devisees not to exceed Ten Thousand Dollars (\$10,000.00) to any one devisee."

The problem with the Law Revision Commission Staff's recommendation is that general pecuniary devises would occur only under a Will and not in cases where property passes by intestate succession. Accordingly, references to intestate succession should be deleted, thereby returning to the language proposed by the Executive Committee.

L-708 - Special Needs Trust for Disabled Minor or Incompetent Person

By previous agreement with Valerie Merritt and Terry Ross, consideration of this subject has been transferred from Team 1 to Terry Ross. Terry Ross will be providing the report on this study.

**L-3051 - Transfer by Conservator
to a Trust of Unintentionally Omitted Property**

This tentative recommendation follows the recommendation previously made by the Executive Committee and should be approved as distributed.

RLSjr:adb

**cc: Team 1
Sterling L. Ross, Jr.
Robert E. Temmerman, Jr.
Thomas J. Stikker**

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

**Preliminary Distribution
Without Court Supervision**

November 1991

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Preliminary Distribution Without Court Supervision*, 21 Cal. L. Revision Comm'n Reports 207 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation permits a personal representative administering a decedent's estate under the Independent Administration of Estates Act to make preliminary distribution without court approval of specified items to the persons entitled under the will or under the laws of intestate succession. The personal representative must first give notice of the proposed action to affected persons.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec
Chairperson

PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION

If the court authorizes a probate estate to be administered under the Independent Administration of Estates Act,¹ the personal representative may take many actions without court approval. Some actions that may be taken without court approval require the personal representative to give notice of the proposed action to affected persons,² while for others a notice of proposed action is unnecessary.³ A few actions may be taken only with court approval.⁴ The purpose of this three-tiered scheme is to allow the personal representative to perform routine duties with a minimum of paperwork, to require affected persons to be notified of proposed actions that may have a significant impact on the estate, and to require court approval for crucial steps and in potential conflict of interest situations.

Among the actions that may be taken only with court approval are preliminary distributions of estate property.⁵ This allows the

1. Prob. Code §§ 10400-10592. Sections 10450-10452 permit the court to authorize the personal representative to administer the estate under the Independent Administration of Estates Act.

2. Prob. Code §§ 10510-10519, 10580-10581. Actions that require notice of proposed action include a sale or exchange of real property of the estate, sale or incorporation of a business, abandonment of tangible personal property, borrowing money, encumbering estate property, and determining a third-party claim. Prob. Code §§ 10510-10519.

3. Prob. Code §§ 10550-10564. Actions that may be taken without court approval and without giving notice of proposed action include payment or rejection of claims against the estate, initiating and defending litigation, paying taxes and expenses of administration, exercising security subscription or conversion rights, and repairing or improving estate property. *Id.*

4. Court approval is required for allowance of the personal representative's compensation, allowance of attorney's fees, settlement of accounts, preliminary and final distributions and discharge, and transactions in which the personal representative or estate attorney has an interest. Prob. Code § 10501.

5. Prob. Code § 10501. See also Prob. Code § 11623 (petition for order for preliminary distribution).

court to ensure that the rights of beneficiaries and other interested persons are protected and that there will be enough remaining in the estate after distribution to pay estate creditors.⁶

But the preliminary distribution may be so small that a petition, notice, hearing, and an authorizing court order would involve too much time and expense in relation to the importance of the transaction. It may be appropriate to distribute to specific devisees under the decedent's will items of modest value — such as household furniture and furnishings, motor vehicles, clothing, jewelry, and personal effects — and moderate amounts of cash. It may also be desirable to distribute income received during administration to reduce or eliminate income taxation on the estate.⁷

The Independent Administration of Estates Act should permit these kinds of preliminary distributions of estate property without requiring a court proceeding. Affected persons would be protected by requiring the personal representative to give them notice of the proposed action.⁸ A person given notice can object and thereby prevent the personal representative from making distributions without court approval.⁹

The Commission recommends that a provision be added to the Independent Administration of Estates Act to permit the personal representative, after giving notice of proposed action, to make preliminary distribution as follows:

(1) Household furniture and furnishings, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature

6. See Prob. Code § 11621.

7. See Anderson & Elliott, *Income Taxation of Decedent, Estate, and Beneficiaries*, in 2 California Decedent Estate Practice §§ 14.2, 14.78-14.94 (Cal. Cont. Ed. Bar, 1990).

8. Notice of proposed action is given to each known devisee and heir whose interest in the estate would be affected by the proposed action, to each person who has filed a request for special notice, and to the Attorney General of California if any part of the estate is to escheat to the state and its interest would be affected by the proposed action. Prob. Code § 10581.

9. Prob. Code §§ 10587, 10589.

to the persons entitled to it under the decedent's will or under the laws of intestate succession, not to exceed a total value of \$50,000.

(2) Cash to the persons entitled to it under the decedent's will or under the laws of intestate succession, not to exceed \$10,000 to any one person.

(3) Income received during administration to the persons entitled to it under the applicable statute.¹⁰

This distribution would be authorized only if the time for creditors to file claims has expired¹¹ and distribution may be made without loss to creditors or injury to the estate or any interested person.¹² Other distributions under the Independent Administration of Estates Act would be made under the provisions for court supervision now applicable.

10. Persons entitled to receive income on estate property are determined under Probate Code Sections 12000-12007.

11. A creditor must file a claim with the estate before expiration of the later of the following times: (1) Four months after letters are first issued to a general personal representative, or (2) 30 days after notice of administration is given to the creditor, if notice is given either within four months after letters are first issued to a general personal representative or within 30 days after the personal representative first has knowledge of the creditor. Prob. Code §§ 9100, 9051.

12. Cf. Prob. Code § 11621 (supervised administration).

RECOMMENDED LEGISLATION

Prob. Code § 10501 (amended). Matters requiring court supervision

10501. (a) Notwithstanding any other provision of this part, whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

- (1) Allowance of the personal representative's compensation.
- (2) Allowance of compensation of the attorney for the personal representative.
- (3) Settlement of accounts.
- (4) *Preliminary Subject to Section 10520, preliminary and final distributions and discharge.*
- (5) Sale of property of the estate to the personal representative or to the attorney for the personal representative.
- (6) Exchange of property of the estate for property of the personal representative or for property of the attorney for the personal representative.
- (7) Grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative.
- (8) Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.
- (9) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.
- (10) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney

for the personal representative, owing to or in favor of the decedent or the estate.

(b) Notwithstanding any other provision of this part, a personal representative who has obtained only limited authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

- (1) Sale of real property.
- (2) Exchange of real property.
- (3) Grant of an option to purchase real property.
- (4) Borrowing money with the loan secured by an encumbrance upon real property.

(c) Paragraphs (5) to (10), inclusive, of subdivision (a) do not apply to a transaction between the personal representative as such and the personal representative as an individual where all of the following requirements are satisfied:

(1) Either (A) the personal representative is the sole beneficiary of the estate or (B) all the known heirs or devisees have consented to the transaction.

(2) The period for filing creditor claims has expired.

(3) No request for special notice is on file or all persons who filed a request for special notice have consented to the transaction.

(4) The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

Comment. Paragraph (4) of subdivision (a) of Section 10501 is amended to make it subject to Section 10520 (preliminary distribution using notice of proposed action procedure).

Prob. Code § 10520 (added). Preliminary distribution of specified personal property

10520. If the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or

injury to the estate or any interested person, the personal representative has the power to make preliminary distributions of the following:

(a) Income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10.

(b) Household furniture and furnishings, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature to the persons entitled to the property under the decedent's will or under the laws of intestate succession, not to exceed an aggregate fair market value to all persons of fifty thousand dollars (\$50,000) computed cumulatively through the date of distribution. Fair market value shall be determined on the basis of the inventory and appraisal.

(c) Cash to general pecuniary devisees entitled to it under the decedent's will or to the persons entitled to it under the laws of intestate succession, not to exceed ten thousand dollars (\$10,000) to any one person.

Comment. Section 10520 is new. The section permits the personal representative to take the specified action after giving notice of proposed action, but without court approval. Sections 10500, 10510. A person given notice of proposed action who fails to object waives the right to have the court later review the proposed action. Section 10590.

Section 10520 is permissive. See Section 10510. The personal representative may seek court approval if the personal representative so desires. Section 10500(b). If the personal representative seeks court approval of a preliminary distribution, the personal representative may proceed under Section 11623 which requires less notice than the general provision for a court-supervised distribution (Section 11601).