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Administration of Estates

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Administration of Estates

Administration of Estates; mortmain statutes

Probate Code §§ 40, 41, 42, 43 (repealed).
AB 1732 (Moorhead); STATS 1971, Ch 1395

Chapter 1395 repeals §§40, 41, 42 and 43 of the Probate Code which restricted bequeaths or devises to charitable or benevolent societies or corporations, or to any person or persons in trust for charitable uses.

Unlike a true mortmain statute, the California Probate Code sections were not designed to penalize charities, but merely to discourage hasty decisions and death-bed wills which exclude persons who would ordinarily receive the property. [Estate of Adams, 164 Cal. App. 2d 698 (1958); Estate of Reardon, 243 Cal. App. 2d 221 (1966)]. For example, §41 provided that no gift could be made to a charitable or benevolent society under a will executed less than 30 days before the death of the testator if he was survived by a spouse, brother, sister, nephew, niece, descendant, or ancestor who would otherwise have taken the property under the will or by the laws of succession.

Despite the restrictions of the Probate Code, these statutes could be effectively circumvented by a charitable protection clause in the will. Pursuant to this procedure a provision was added for a substitutional gift to either a person not a member of the protected class, or to an institution exempted under §42 of the Probate Code. Since the failure of the charitable gift would therefore not benefit the heirs, they were unlikely to attack it, and even if they did the gift would remain valid because an essential condition for a valid challenge was that the voidable distribution must otherwise have passed to a protected relative. If the will contained the substitutional gift the members of the protected class would not take by will or succession, and §41 would not be applicable [Estate of Haines, 76 Cal. App. 2d 673 (1946); Estate of Davis, 74 Cal. App. 2d 357 (1946); Robinson Estate, 242 Cal. App. 2d 19 (1946)].

COMMENT

Because the Probate Code preserved the mortmain principle, but at the same time provided a method of circumventing it available to the

legally sophisticated, it could be argued that the restrictions came into play only as a trap for the unwary testator and the attorney not familiar with the mortmain provisions.

See Generally:

- 1) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§ 30, 31, 32, 33 (7th ed. 1960), (Supp. 1969).

Administration of Estates; suits against estates on claims covered by insurance

Code of Civil Procedure §§353, 385 (amended); Probate Code §§709.1, 721 (new), 707 (amended).

SB 661 (Moscone); STATS 1971, Ch 1226

AB 1815 (Hayes); STATS 1971, Ch 1638

Modifies the statute of limitations for actions against a decedent's estate in specified cases; provides that an action may be commenced or continued against a deceased defendant without appointment of a representative or successor in interest in specified cases in which the decedent had insurance coverage; provides that presentation of a claim against the executor or administrator is not a prerequisite to continuing such an action.

Section 353 of the Code of Civil Procedure is amended to provide that if a person against whom an action may be brought dies before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action against the estate (as an alternative to an action against the representative of the decedent) pursuant to §385(b) of the Code of Civil Procedure, §707(b) of the Probate Code or §721 of the Probate Code, may be commenced within one year after the expiration of the time otherwise limited for the commencement thereof.

Section 385 of the Code of Civil Procedure, which provides for the continuance of an action by or against the representative or successor in interest of a decedent, is amended to include within §385(b), an exception in the case of an action for the injury or death of a person caused by the wrongful act or neglect of the defendant, when the defendant is dead or dies after commencement of the action. In such a case, the action may be continued against the decedent as the original party defendant without appointment of a representative or successor in interest, under the following circumstances:

- 1) If the decedent had liability insurance applicable to the cause of action;
- 2) The amount of damages sought in the action does not exceed

the maximum amount of such insurance, or recovery of excess thereof is waived; and

3) The estate of the decedent otherwise qualifies for summary probate proceedings pursuant to the provisions of §630 of the Probate Code.

No action may be continued under these circumstances unless the insurer has been served with the complaint filed in the action. The court, for good cause, upon motion of an interested person or upon its own motion, may order the appointment of a personal representative and his substitution as defendant.

Section 707 of the Probate Code requires the filing and presentation of a claim against the executor or administrator of a decedent as a prerequisite to commencing, maintaining, or continuing an action against the decedent, or to recover upon a judgment in an action. Chapter 1226 adds in §707(b), an exception to this requirement if the decedent had liability insurance applicable to the cause of action, the amount of damages sought in the action does not exceed the maximum amount of such insurance (or recovery thereof is waived), and the estate otherwise qualifies for summary probate proceedings pursuant to the provisions of §630 of the Probate Code.

If the amount of damages sought in the action exceeds the maximum amount of the insurance, filing and presentation of a claim is required only with respect to the amount sought in excess of the maximum amount of the insurance. No action is to be maintained under this subdivision unless the insurer has been served with a copy of the complaint. The defendant in such an action may be designated as "Estate of (name and decedent), Deceased."

Section 709.1 is added to the Probate Code to permit an action pending under §709 to be continued against the defendant in the name of "Estate of (name of decedent), Deceased," upon petition of the plaintiff, pursuant to the same procedure, and upon the same conditions and terms, as are provided in §721 for claims which were not subject to an action pending at decedent's death. It further provides that this section is cumulative and does not supersede the procedure provided in §385(b) of the Code of Civil Procedure.

Section 721 is added to the Probate Code to provide procedures by which a person may maintain an action to recover from the decedent's liability insurance coverage. Action is to be initiated by the filing of a petition alleging:

- 1) the nature and amount of his claim,

- 2) the decedent was protected, in whole or in part, by liability insurance with respect thereto,
- 3) the interests of the estate will not be prejudiced, and
- 4) any recovery in such action will be limited solely to the decedent's insurance protection.

The court may grant leave to the claimant to file such action unless it finds that the interests of the estate will be prejudiced. However, the court may deny leave to file such action if the insurer denies coverage or admits liability only conditionally or with reservation. Further provisions of §721 include:

- 1) The court may order appointment of a personal representative and his substitution as defendant for good cause, upon motion of an interested person or upon its own motion.
- 2) A judgment in favor of the claimant in an action pursuant to this section is only enforceable against the insurance protection and does not create a lien upon real or other property of the estate.
- 3) The insurer may deny or otherwise contest its liability by cross-complaint in the action or by an independent action against the claimant, but the judgment on the cross-complaint or in the independent action shall not adjudicate rights of persons who are not parties.
- 4) The remedies of this section are cumulative, and may be pursued concurrently with other remedies. Both Chapters 1226 and 1638 provide that retroactive application of the provisions of the respective Chapters is *not* authorized.

COMMENT

The chaptered version of SB 661 contains a technical error in that the name of the defendant in an action pursuant to §707(b) should be designated as "Estate of (name of decedent), Deceased," rather than "Estate of (name and decedent), Deceased."

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§258, 258A (Supp. 1969).
- 2) REVIEW OF SELECTED 1969 CODE LEGISLATION, CONTINUING EDUCATION OF THE BAR 3, 189.
- 3) CONTINUING EDUCATION OF THE BAR, 2 *California Decedent Estate Administration* §§13.3-13.62 (1971).
- 4) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 285 (1971).

Administration of Estates; transfer of trusts

Probate Code §§179, 1138.1 (amended); §§1132, 1139-1139.7 (new); §§1132-1136 (repealed).

SB 1295 (Cologne); STAs 1971, Ch 958

Provides for transfer of the place of administration or of the assets of specified trusts to another jurisdiction outside of California.

Section 179 of the Probate Code, relating to the jurisdiction of the court before or after payment or transfer of benefits and rights or their proceeds to the trustee, is amended to provide that the court in which proceedings are pending for administration of the estate of the decedent shall have jurisdiction to authorize or direct removal of the trust, or assets of the trust, to another jurisdiction pursuant to a special procedure specified in Article 3 (commencing with §1139) of the Probate Code.

Section 1139 is added to the Probate Code to provide that Article 3 shall apply to testamentary trusts over which jurisdiction continues after distribution (Probate Code §1120), life insurance and other trusts subject to Chapter 10 of Division 1 (Probate Code §175 *et seq.*), inter-vivos trusts (Probate Code §1138), and all other trusts where the transfer provisions are made applicable by statute or the trust instrument.

Section 1139.5 is added to provide for transfer of the place of administration of a trust or the transfer of some or all of the assets of a trust to another jurisdiction outside of California where, under §1120, jurisdiction is retained over any trust created by the will of a nonresident decedent, the will has been probated in the state of his residence, and a domiciliary trustee has been appointed; or where the trustee or beneficiary of a trust desires a transfer to another state, unless the trust instrument precludes the transfer.

Section 1139.2 is added to the Probate Code and specifies the detailed information which is required to be included in the petition for transfer; section 1139.3 requires the clerk of the court to give at least 30 days notice of the hearing on a petition for transfer. The petitioner is required to give a copy of the notice to each person named in the petition, and if the trust involves a charitable trust, bequest or devise, the attorney general must be given a copy of the notice at least 20 days before the hearing. Section 1139.3 permits any person interested in the trust to appear and file written grounds in opposition to the transfer petition.

Section 1139.4 is added to provide that the court may, at its discretion, grant the transfer if it appears that:

1) The transfer would facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein;

2) That the substantial rights of residents of this state will not be materially affected thereby;

3) That transfer will not violate the terms of the trust; and

4) That any new trustee, to whom the trust assets are to be transferred, is qualified and able to administer the trust.

Section 1139.5 is added to the Probate Code to enable the court to direct the manner of transfer and impose such terms and conditions as may be just, including a requirement for the substitution of a successor trustee in any pending litigation in this state.

Former sections 1132-1136, which provided for transfer of the assets of a testamentary trust of a nonresident decedent to a domiciliary trustee, are repealed, and a new §1132 is added to the Probate Code to provide that where, under §1120, jurisdiction is retained over any trust created by the will of a decedent, the court may order that the place of administration, or the assets of the trust, be transferred to another jurisdiction pursuant to the procedure established by Article 3 (Section 1139 *et seq.*).

Section 1138.1 is amended to allow a trustee, beneficiary, or remainderman to petition the superior court to authorize or direct removal of the trust or assets of the trust to another jurisdiction, as specified in Article 3.

COMMENT

Prior to the enactment of Chapter 958, the law permitted transfer of the place of administration or transfer of the assets of a testamentary trust created by the will of a nonresident decedent where assets in this state did not exceed \$7,000 and there was a trustee in the out-of-state jurisdiction administering the same trust; but the law made no provision for such transfer of inter-vivos trusts.

The apparent intent of the Legislature in adopting this chapter was to facilitate the transfer of the place of administration, or of the assets, when desirable due to present day mobility of population. Chapter 958, as indicated in §1139(b), was not intended to be restrictive of transfers which heretofore have been properly made without court intervention.

Administration of Estates; letters testamentary

Probate Code §540 (amended).

AB 940 (Hayes); STATS 1971, Ch 863

Section 540 of the Probate Code provides that before letters testamentary or of administration are issued, the executor or administrator must take and subscribe an oath that he will perform the duties of his office according to law. Such oath must be attached to or endorsed upon the letters. Chapter 863 adds to this section the provision that "the oath may be taken and dated on or after the time when the petition for letters testamentary or letters of administration is filed, and may be filed with the county clerk at any time after the petition is granted."

Prior to amendment, Probate Code §540 did not contain a statutory time requirement for the taking and filing of the letters.

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 201 (7th ed. 1960), (Supp. 1969).

Administration of Estates; bonds in probate

Probate Code §§541, 543, 550, 554 (amended).

SB 618 (Cologne); STATS 1971, Ch 527

Section 541 of the Probate Code provides for the posting of a bond by a person to whom letters testamentary or of administration have been directed. Chapter 527 adds to this section that the court may eliminate or reduce the amount of such a bond if all of the following conditions exist:

- (a) The will does not provide for the requirement of a bond.
- (b) A verified petition for letters testamentary or of administration alleges that the petitioner is the sole beneficiary under the will or he has the right to succeed to the estate of the decedent as sole heir.
- (c) The petition requests the elimination of the amount of the bond.

Section 543 of the Probate Code as amended, now provides that for good cause the court may require a bond even though the will provides that no bond shall be required of the executor, or the court pursuant to §541 (*supra*) has directed that no bond be filed or that it be filed in a reduced amount. The court may order the filing of a bond upon its own motion or upon petition of any person interested in the estate.

Section 550 as amended permits the court to suspend temporarily the powers of an executor or administrator when a petition is filed alleging that such executor or administrator is wasting the property of the estate and he has not been required to post a bond as security.

Section 554 sets forth the liability of a principal or surety upon the bond of an executor, administrator, guardian, or conservator. Subsection (b) is added to §554 to provide that the liability of the executor, administrator, guardian, or conservator shall not be limited to the penal amount of the bond. Subsection (c) is added to §554 to provide that the liability of the surety upon such bond shall be limited to its penal amount plus interest if the surety fails to satisfy such liability upon demand made after the liability of the principal has become established.

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §201 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, *Will Drafting* §§1.38, 16.8, 19.21 (1965).
- 3) CONTINUING EDUCATION OF THE BAR, *California Decedent Estate Administration* §§2.56, 6.21, 6.22, 7.7, 7.16, 7.39, 7.41, 7.52, 7.59, 7.72, 8.1-8.4, 8.6, 8.12-8.13, 8.18, 8.26, 8.29, 8.16, 8.35, 8.38 (1971).

Administration of Estates; continuation of partnership business

Probate Code §§571, 572 (amended).

AB 2416 (Moorhead); STATS 1971, Ch 1648

Chapter 1648 amends §§571 and 572 of the Probate Code authorizing the court to allow an executor or administrator to continue, as a partner, in any partnership in which the decedent was a partner at the time of his death; unless inconsistent with the terms of any written partnership agreement signed by all of the partners prior to the decedent's death.

The executor or administrator acquires all the rights, powers, duties and obligations provided in a written partnership agreement, subject, however, to the written approval of all the surviving partners, and to such restrictions as the court may determine to be for the best interests of the estate and those interested therein.

In the absence of a written partnership agreement, subject to the written consent of the surviving partners, the executor or administrator acquires all the rights, powers, duties and obligations which the court may specify.

If the decedent was a general partner, the executor or administrator may be authorized to act as either a general or limited partner. If the

decedent was a limited partner, the personal representative may only be appointed as a limited partner.

Prior to the enactment of this provision, §571 prohibited the personal representative of the decedent from continuing as a partner other than doing those actions necessary to wind-up the partnership or attain appraisal and value for the decedent's interest in the partnership [CONTINUING EDUCATION OF THE BAR, *California Decedent Estate Administration* §§ 9.51-9.53 (1971)].

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §210 (7th ed. 1960).

Administration of Estates; estates less than \$5,000

Probate Code §§641, 643 (amended).

AB 2821 (Maddy); STATS 1971, Ch 1610

Section 640 provides that the whole estate of the deceased may be set aside for the surviving spouse or minor children without formal probate if the net estate, excluding homestead, is less than five thousand dollars (\$5,000).

Section 641 of the Probate Code is amended to provide that the allegations which would qualify a person under §640 may be presented without filing a petition for probate of the estate or for letters of administration.

Section 643, relating to notice of hearing, is similarly amended to provide that the notice provisions of this section shall apply to proceedings pursuant to §641, without there having been any other petition filed.

COMMENT

Former §§641 and 643 were somewhat confusing in that although both referred to filing the allegations to set aside probate pursuant to §640, the sections implied that a petition for probate had to be filed even though §640 states that no probate is necessary in certain instances.

Chapter 1610 appears to clarify a procedure established in many counties whereby the allegations pursuant to §641 may be filed without filing a petition for probate or letters of administration.

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §313 (Supp 1969).
- 2) CONTINUING EDUCATION OF THE BAR, *California Decedent Estate Administration* §§3.24, 3.28 (1971).

Administration of Estates; sale of real property

Probate Code §785 (amended), §785.1 (new).
SB 907 (Cologne); STATS 1971, Ch 948

Section 785 of the Probate Code sets forth the procedure for returning a sale of real property of an estate for confirmation. Chapter 948 amends §785 and adds §785.1 to clarify the authority of the court with respect to "overbids" in, or related to, such confirmation proceedings.

The amendment to §785 provides that higher offers and bids are subject to the provisions of §785.1. Section 785.1 (a) provides:

If the *sale* returned for confirmation is upon a *credit*, a *higher offer* made to the court pursuant to §785, *either for cash or upon a credit*, whether on the same or different credit terms, shall be considered only if the personal representative informs the court in person or by counsel that the offer is acceptable prior to the confirmation of the sale. (Emphasis added).

Section 785.1 (b) provides:

If the *sale* returned for confirmation is for *cash* and a *higher offer* made to the court pursuant to §785 is *upon a credit*, the offer shall be considered only if the personal representative informs the court that the offer is acceptable prior to confirmation of the sale. (Emphasis added).

COMMENT

Apparently some courts had taken the position that if the original bid returned to court for confirmation included terms of credit and a higher bid of cash was made at the hearing in court for confirmation of sale then all subsequent increased bids were required to be for cash.

Under the provisions of Chapter 948, the personal representative is given discretion to approve or disapprove higher bids which include terms of credit. This permits the original bidder whose bid included terms of credit acceptable to the personal representative to make a higher bid of similar terms. The estate continues to be protected because the court is not obligated to confirm a higher bid, but may in its discretion order a new sale (Probate Code §785).

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§213, 277-284 (7th ed. 1960), (Supp. 1969).

Administration of Estates; special notice of inventory and appraisal

Probate Code §1202.5 (new).

AB 558 (Z'berg); STATS 1971, Ch 115

This chapter specifies a procedure by which any person interested in an estate may receive notice of when the inventory and appraisal of such estate is filed. The required procedure is for an interested person or his attorney to serve upon the executor or administrator, or the attorney of the executor or administrator, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of such service, a written request for notice. Such request is to contain a statement that the interested person desires special notice of the filing with the court, of the inventory and appraisal, and further state the post office address of the interested person or his attorney. Upon such request the executor or administrator must, within 10 days of the filing of the inventory and appraisal, mail notice of such filing to the post office address given in the request for special notice. Proof of mailing of the notice must be filed with the court.

Prior to the enactment of this chapter the Probate Code contained no specific provision permitting an interested party to request and receive special notice of the filing of an inventory and appraisal.

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §249 (7th ed. 1960).
- 2) 2 PAC. L.J., REVIEW OF SELECTED 1970 CODE LEGISLATION 457 (1971).

Administration of Estates; inheritance taxation

Revenue and Taxation Code §§14560-14564 (new), 13988.1, 14371, 14372 (amended).

AB 234 (MacDonald); STATS 1971, Ch 119

Provides that the State Controller may appoint an inheritance tax referee to determine the amount of inheritance tax due on a transfer of property subject to such tax; provides that tax paid in excess of the amount due by Controller's determination of inheritance tax is refundable; provides that attorney fees paid for services rendered in obtaining a Controller's determination of tax are deductible from the appraised value of the property subject to the tax.

Under the provisions of §14560 of the Revenue and Taxation Code,

when it appears that no court proceeding is pending or is likely to be filed to determine the amount of inheritance tax due on a transfer subject of such taxation (§13601 *et seq.*), the State Controller is authorized to appoint an inheritance tax referee to ascertain, and submit a report of: the market value at the time of transfer of property subject to tax, the amount of tax due and payable on each transfer, and such other facts as will assist the Controller in the determination of the tax. After the referee has submitted this report to the Controller, in accordance with §14562 of this code, the Controller must give notice of the amount of tax determined by personal service or by mail to the person or persons liable for the tax, or to the person filing the inheritance tax declaration at the address stated in the declaration. [The declaration is an allegation of a transfer subject to the tax, and a request filed with the superior court for a determination of tax liability (§14551)]. If no court proceeding in which inheritance tax liability may be ascertained is initiated within 60 days after notice of the Controller's determination is given, such determination is final (§14563). Payment of such tax will be made to the county treasurer as provided in §14104 of this code.

Under the provisions of §13988.1 of this code, fees paid for attorney services rendered in obtaining a Controller's determination of inheritance tax liability may be deducted from the appraised value of property subject to taxation.

The right to a refund of excessive inheritance tax paid is insured by §14371 of the Revenue and Taxation Code. Where there has been no court order fixing tax, §14372 of this code enables a person who has paid tax in excess of the amount due to make application to the State Controller or file with the superior court having jurisdiction, for a refund. Such application or filing must be accomplished within one year of erroneous payment, or within two years of the decedent's death, whichever is later. Where there has been an order or determination fixing tax, application or filing for refund must be made within one year of the entry of the order fixing tax or decree of final distribution of the estate, whichever is later, or within one year after the Controller's determination of tax becomes final.

COMMENT

The addition of provisions enabling the State Controller to make determination of inheritance tax liability may be a means designed to expedite the settlement of estates which are uncontested. This alterna-

tive means of ascertaining tax liability should prove far speedier than resort to the courts for such determination, and reduce the cost.

Administration of Estates; account of fiduciaries

Probate Code §§920.3, 1556.3, 1912 (new).

AB 1809 (Hayes); STATS 1971, Ch 1702

Chapter 1702 adds provisions to the Probate Code which require that upon each accounting, the executor or administrator, guardian, or conservator, must show that during the period covered by the account he has kept all cash in his possession invested in interest-bearing accounts or investments as authorized by law, except such amounts of cash as are reasonably necessary for the orderly administration of the estate being administered. Such a showing is not required of an executor or administrator where the will provides otherwise.

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §326 (7th ed. 1960).