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COMMENTS

WAIVER OF ACCOUNTING IN ESTATE ADMINISTRATION—A LEGISLATIVE PROPOSAL

INTRODUCTION

Scope of the Comment

The executor or administrator of a decedent's estate has a general duty to account to the beneficiary; a duty based in common law, existing independently of statute.¹ The duty is, in essence, that of a fiduciary to account to those for whom he acts.² When certain conditions exist, however, the accounting may be waived, releasing the executor or administrator from his fiduciary duty. Since relief from the duty of accounting means a savings in time and expense in probating an estate, the busy attorney should be aware of those situations where waiver is applicable. But even more important, the attorney should attempt to reduce wherever possible the complexity of probate work for the sake of his client. Among laymen, there is a popular dislike of probate proceedings, particularly when the estate is relatively small.³ Such an attitude results in people turning to devices of doubtful legality to accomplish their testamentary goals, often contrary to professional advice.⁴

This comment, therefore, discusses and attempts to reconcile the advantages of saving time and expense by waiver of the executor's duty to account with the need of conforming to the strict requirements of law imposed upon one who stands in a fiduciary relation to others. The purpose of this analysis is to serve as a basis for suggested legislative clarifications of California's posture on waiver of accounting.

Present Posture of Waiver of Accounting

The accounting of the executor or administrator of an estate is a report, a synopsis of his administration.⁵ It sets forth the value

¹ Fidelity & Deposit Co. v. Lindholm, 66 F.2d 56, 59 (9th Cir. 1933).

² Smith's Estate, 122 Cal. App. 2d 216, 218, 264 P.2d 638, 639 (1953). See generally, 2 BANCROFT, PROBATE PRACTICE § 340 (2d ed. 1950); 20 CAL. JUR. 2d *Executors & Administrators* § 14 (1955).

³ Roseberry, *Handling Small Estates*, 85 TRUSTS & ESTATES 408 (1947).

⁴ *Ibid.*

⁵ Estate of Rose, 63 Cal. 349, 351 (1883).

and nature of all assets and income over which the representative had or has control, or received in his representative capacity.⁶

California's Probate Code section 922 says, ". . . the executor or administrator must render a full and verified account and report of his administration . . ." Such an accounting must be made (a) whenever required by the court upon suitable motion,⁷ (b) within thirty days after expiration of the time for filing claims against the estate,⁸ (c) when the estate is in a proper condition to be closed,⁹ and (d) annually after the order of distribution is made if there is any property remaining undelivered to distributees.¹⁰ An accounting may also be required of the executor or administrator when his authority is terminated or revoked,¹¹ or if he dies or becomes incompetent.¹²

Any of the above statutory accountings required of the executor or administrator may be waived by the sole beneficiary of the estate when (a) the beneficiary is also the executor, (b) all claims have been paid, and (c) the time for filing claims has expired. Waiver under such circumstances was established in California by *Middlecoff v. Superior Court*.¹³

In *Middlecoff*, the decedent's will left a small legacy to two daughters, and the residue to the widow-executrix. The legacy was paid, and the two daughters assigned all their rights in the estate to their mother, the widow-executrix. Thus the widow became the sole beneficiary of the estate. All claims having been paid, and the time for filing claims having expired, the executrix petitioned the court for distribution. She pointed out that an accounting was useless because she was the sole distributee. Agreeing, the probate court decreed as the executrix prayed. A few years later Mrs. Middlecoff, one of the daughters who had assigned her interest, brought mandamus proceedings to compel her mother, the executrix, to account. The highest state court pointed out that the statutory requirements of accounting were for the benefit and protection of the executor, beneficiaries, and creditors.¹⁴ Since the creditors had been paid, and the executrix was by assignment and conveyance the sole beneficiary, the requirements for accounting could be waived.¹⁵ The

⁶ 4 BANCROFT, PROBATE PRACTICE § 940 (2d ed. 1950).

⁷ CAL. PROB. CODE § 921.

⁸ CAL. PROB. CODE § 922.

⁹ *Ibid.*

¹⁰ CAL. PROB. CODE § 1063.

¹¹ CAL. PROB. CODE § 923.

¹² CAL. PROB. CODE § 932.

¹³ 149 Cal. 94, 84 Pac. 764 (1906).

¹⁴ *Id.* at 97, 84 Pac. at 765.

¹⁵ *Ibid.*

court said that in such a situation there was “. . . no real necessity for an accounting”;¹⁶ that the widow-executrix, “. . . as the sole person interested, had the right to waive the rendition and settlement of such account, and to consent that the distribution might be made without such intermediate proceedings.”¹⁷

The court did not give any statutory authority for the waiver of a law by the one for whose benefit it was intended. However, such authority existed. Then and now, the law is that, “Anyone may waive the advantage of a law intended solely for his benefit.”¹⁸

The statutory requirements of accounting litigated in *Middlecoff* were found in the Code of Civil Procedure¹⁹ which in part codified the Probate Act of 1851.²⁰ *Middlecoff*, however, is still applicable today. The duties to account there litigated are essentially the same as those in the present Probate Code.²¹

That *Middlecoff* is still good law in light of the present Probate Code is evidenced in a 1963 case, *Estate of McManus*.²² This case concerns an attorney who was discharged by the estate prior to final distribution. The attorney contended in the appellate court, among other points, that the probate court erred in allowing distribution without requiring an accounting upon his objection. The attorney-appellant argued that he was a party interested in the estate and could therefore compel an accounting. The court held in part that the probate court did not err in approving the administratrix's waiver of accounting, for the circumstances came under *Middlecoff*.²³ The court further said that the appellant lacked good faith as his only reason in demanding an accounting was to block and harass the administratrix.²⁴

In summary, then, California's present statutory requirements for accounting may be waived when (a) the executor is also the sole

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ CAL. CIV. CODE § 3513. Note that this statute continues: “But a law established for a public reason cannot be contravened by a private agreement.” Note further that “anyone” would probably be limited by California courts to any one of full age and sui juris, although there is no California authority on this point. See generally, 56 AM. JUR. *Waiver* § 11 (1947).

¹⁹ 149 Cal. 94, 97, 84 Pac. 764, 765 (1906). California Probate Code was not enacted until 1931; see Stat. of Calif., 1931, c. 281, p. 587.

²⁰ Stat. of Calif., 1851, c. 124, p. 448. See generally, legislative histories of California Probate Code sections 921-923, 932, 1063, contained in DEERING'S CALIFORNIA CODES ANNOTATED (1959).

²¹ See CAL. PROB. CODE § 2 regarding construction of the Probate Code. For a table of the derivations of the various California Probate Code sections, see Stat. of Calif., 1931, appendix p. 3178.

²² 214 Cal. App. 2d 390, 29 Cal. Rptr. 543 (1963).

²³ *Id.* at 398-99, 29 Cal. Rptr. at 548-49.

²⁴ *Ibid.*

beneficiary, (b) all claims have been paid, and (c) the time for filing claims has expired.²⁵ Suppose, however, that the situation was this—co-executors of a will are together the only beneficiaries; or this—the sole beneficiary is a person distinct from the executor. Would the *Middlecoff* rule permit waiver of accounting? Take an even more common situation: two or more adult beneficiaries, all children of the deceased. One is appointed executor; all are on good terms. May these beneficiaries waive accounting? Not under a strict application of *Middlecoff*. Yet logically and practically, there is much to say for the option of waiver of accounting in all these cases. In many situations, probably most, it is better for all concerned if the executor accounts as provided by statute. But in others, the option of waiver of the accounting by all interested parties would result in saving time and expense. Several states allow, even favor, private settlements of the estate to release the executor of the duty to account.²⁶

In essence, the question of when to waive accounting is based upon reconciliation between the advantages of saving time and expense and the duty of a fiduciary to account for the administration of the decedent's estate. Also involved is the extent to which those for whose benefit a law is intended may modify that law.

WAIVER OF ACCOUNTING

Arguments Pro

Waiver is the voluntary relinquishment of a known right.²⁷ It is a means of making the law flexible; a means to adapt general and static rules to the varying individual applications of the law. The general rule of waiver in California is established by statute: "Anyone may waive the advantage of a law intended solely for his benefit."²⁸ To accomplish waiver there must be (a) an existing right or benefit, (b) knowledge of its existence, and (c) actual intent to relinquish it.²⁹ There is an exception when the law exists for a public reason,³⁰ namely, there can be no waiver of a law which protects

²⁵ Brief references to waiver of accounting under *Middlecoff* are made in the following: CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA ESTATE ADMINISTRATION § 37.57 (1959); 21 CAL. JUR. 2D *Executors & Administrators* § 688 (1955); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills & Probate* § 285 (1960).

²⁶ 34 C.J.S. *Executors & Administrators* § 834 (1942).

²⁷ *Brown v. Cranston*, 214 Cal. App. 2d 660, 668, 29 Cal. Rptr. 725, 729 (1963). Note that waiver may be express or implied; that knowledge of the right may be actual or constructive.

²⁸ CAL. CIV. CODE § 3513.

²⁹ 51 CAL. JUR. 2D *Waiver* § 3 (1959).

³⁰ CAL. CIV. CODE § 3513.

the general public, and promotes general welfare rather than benefiting a small percentage of citizens.³¹

Middlecoff, Civil Code section 3513,³² and many cases applying section 3513 imply that waiver is limited to a single party transaction.³³ But words used in the Civil Code in the singular number include the plural.³⁴ Hence in other cases, two or more people are allowed to waive the benefit of a law intended solely for their benefit.³⁵

Waiver under California's Civil Code section 3513 has been extended by the court in *Estate of Shapiro*³⁶ to waiver by more than one person. Why, then, cannot waiver of accounting under *Middlecoff* be so extended? Note the similarities of *Middlecoff* and *Shapiro*, not factually, but in effect. In *Middlecoff*, a requirement intended to protect a beneficiary is waived; the same is true in *Shapiro*. In *Middlecoff*, the court interpreted the statutory requirements of accounting to be ". . . for the benefit and protection of the executor and the beneficiaries of the estate . . . including the creditors."³⁷ In *Shapiro*, the requirement that the trustee furnish a bond was ". . . for the benefit of the beneficiaries and creditors of a trust."³⁸ In both cases, the apparent purpose of the statutory requirements—accounting in *Middlecoff*, bonding in *Shapiro*—is to maintain high standards of fiduciary duty. In both cases, fiduciary duties are waived. Therefore, if more than one beneficiary can waive a bond in *Shapiro*, the same should be true of an accounting.

Before proceeding, a distinction must be made between a waiver of any accounting and waiver of statutory requirements of accounting. Of course, the situation in *Middlecoff* is a complete waiver

³¹ *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874, 878, 299 P.2d 750, 753 (1956).

³² Read literally, the language of this statute restricts waiver to a single party transaction: "Anyone may waive . . . a law intended solely for *his* benefit." [Emphasis added.]

³³ See, e.g., *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874, 878, 299 P.2d 750, 752 (1956), where the court refers to the doctrine of waiver saying, "Provided, however, such rights and privileges rest in the *individual* and are intended for *his* sole benefit." [Emphasis added.]

³⁴ CAL. CIV. CODE § 14.

³⁵ See, e.g., *Estate of Shapiro*, 79 Cal. App. 2d 731, 734, 181 P.2d 117, 118 (1947), where the court allowed the five sole beneficiaries of a testamentary trust to waive the requirements of California Probate Code section 1127 that a trustee of a testamentary trust shall give a bond; the court said, "The beneficiaries . . . were entitled to waive the advantages of a law intended for their benefit." However the court does not interpret California Civil Code section 3513 directly, but only in effect. There is no direct application in *Shapiro* of the rule in California Civil Code section 14 concerning plurality of the singular number.

³⁶ *Ibid.*

³⁷ 149 Cal. 94, 97, 84 Pac. 764, 765 (1906).

³⁸ 79 Cal. App. 2d 731, 734, 181 P.2d 117, 118 (1947).

of any accounting, including the one required by statute. Clearly it is pointless for one to account as executor when no one may contest that accounting but the same person in his capacity as the sole interested party. But there are other situations where it may be advantageous to waive the statutory accounting, yet still make some other form of accounting to interested parties. The interested parties may wish to agree among themselves and with the executor as to the performance of the executor's administration of the estate, and then waive the statutory accounting. They thereby accomplish a private accounting. Such a private accounting, written or oral, made only to the interested parties, withholds the affairs of the estate from the public records of the court. In the absence of fraud or misrepresentation, such private agreements, accompanied by a written waiver of statutory requirements of accounting, should be upheld.

Some states regularly allow waiver of formal or statutory accounting when an informal accounting or release has been made.³⁹ In New York, for example, waiver of statutory accounting is favored by the courts. *In re Amuso's Estate*⁴⁰ points out that there is a long line of cases in New York encouraging agreements and settlements which ". . . in effect dispense with the expense and delay inherent in formal accounting proceedings."⁴¹ Two early cases cited by *Amuso's Estate* in this line are two of the five *Middlecoff* relied upon for its holdings.⁴² One of these, *In re Pruyn*,⁴³ an example of waiver, upheld mutual releases between two co-executors and the guardians of two minor legatees. One of the co-executors, also a beneficiary, later attempted to compel an accounting by his co-executor. The court held that his release blocked a subsequent accounting for his benefit, but pointed out that the minors could have an accounting, if they wished, upon reaching their majority, notwithstanding release by their guardians.⁴⁴ Such a release is in effect a waiver of statutory accounting by private agreement. The effectiveness of private accounting and settlement, accompanied by release or waiver, is noted in a later case, *In re Kahn's Will*,⁴⁵ where the court says, ". . . such an informal accounting is as effectual for all intents and purposes as a settlement pursuant to a judicial decree."⁴⁶

Other states also allow private accounting and settlement to

³⁹ 34 C.J.S. *Executors & Administrators* § 834 (1942).

⁴⁰ 13 Misc. 2d 686, 176 N.Y.S.2d 175 (Surr. Ct. 1958).

⁴¹ *Id.* at —, 176 N.Y.S.2d at 176.

⁴² *In re Pruyn*, 141 N.Y. 546, 36 N.E. 595 (1894); *In re Wagner's Estate*, 119 N.Y. 28, 23 N.E. 200 (1890).

⁴³ *In re Pruyn*, *supra* note 42.

⁴⁴ *Ibid.*

⁴⁵ 144 N.Y.S.2d 253 (Surr. Ct. 1955).

⁴⁶ *Id.* at 254; *cf. In re Kirby's Will*, 90 N.Y.S.2d 324 (Surr. Ct. 1949).

waive statutory requirements of accounting. Another case cited in *Middlecoff* as authority is *In re Barber's Estate*.⁴⁷ This is a Pennsylvania case where the testator's partner, widow, and her brother were co-executors, the widow being sole beneficiary. The two men made a private accounting to the widow and she then released them from liability. By this release, all three co-executors waived statutory accounting ". . . simply to escape the expense of such a proceeding."⁴⁸ This waiver was upheld against the widow who later sought to compel the statutory accounting.

In an Arkansas case, *Herndon v. Adikisson*,⁴⁹ the creditors having been paid, the statutory requirements for accounting were waived by agreement of all the heirs and distributees of the estate. The court said, "Such agreements are not against public policy. Indeed, the settlement of decedent's estate by family agreement is greatly favored by the courts."⁵⁰

In Pennsylvania, *In re Estate of Hammer*⁵¹ saw petitioners seeking to force the co-executors to file an accounting. The petitioners contended that the executors had both a statutory duty and a fiduciary duty to account. Their petition was declined because they had been parties to a family agreement which dispensed with the statutory accounting, thereby waiving it.

In addition to waiver of statutory accounting by private agreement or accounting, New York appears to allow waiver of any accounting whatsoever. *In re Amuso's Estate*⁵² notes by way of dictum that even a private accounting by a fiduciary can be waived if the beneficiary receives a fair opportunity to have one, ". . . and he affirmatively waives his right."⁵³ Such waiver is no more than an application of the general rules of waiver.⁵⁴

Arguments Con

There is no California authority which directly opposes an extension of the *Middlecoff* rule along the lines of *Shapiro*. The literal application of Civil Code section 3513 seems to limit waiver

⁴⁷ 142 Pa. 581, 21 Atl. 986 (1891).

⁴⁸ *Ibid.*

⁴⁹ 208 Ark. 106, 184 S.W.2d 953 (1945).

⁵⁰ *Id.* at —, 184 S.W.2d at 955.

⁵¹ 389 Pa. 78, 132 A.2d 275 (1957).

⁵² 13 Misc. 2d 936, 187 N.Y.S.2d 519 (Surr. Ct. 1959). Note that this decision concerns an appeal after trial. The citation to the 1958 decision on *Amuso's Estate* in note 40 *supra*, concerns the same case, but on an appeal of the motions prior to trial. Both decisions discuss fiduciary duty and waiver of accounting when there is a private accounting or release. Only the 1959 decision discusses complete waiver.

⁵³ *Id.* at —, 187 N.Y.S.2d at 521.

⁵⁴ See generally, 56 AM. JUR. *Waiver* § 7 (1947).

to a single party transaction. But as already discussed, the courts apparently interpret this rule in light of Civil Code section 14, allowing waiver by more than one party.⁵⁵ The holding in *Middlecoff* uses no language which would limit waiver to the factual situation there contained. *Middlecoff* has already interpreted the statutory requirements of accounting as being intended for the sole benefit of the executors, beneficiaries, and creditors,⁵⁶ *i.e.*, the interested parties. Hence one cannot argue that the accounting is a public policy requirement not subject to waiver.

The only real argument against extending waiver of accounting in California is that it relieves a fiduciary duty, thus increasing the likelihood of fraud or misrepresentation. The statutory provisions for accounting are safeguards for the parties interested in the decedent's estate.⁵⁷ These interested parties may contest the account if they think something is amiss.⁵⁸ As a general statement of the fiduciary purpose of an executor's accounting, the following is apt: "The purpose of an accounting is to secure a judicial evaluation of the propriety of the representative's acts"⁵⁹ Such a judicial evaluation protects the interested parties by reviewing the actions of the executor-fiduciary as revealed in the accounting.

In *Larrabee v. Tracy*⁶⁰ there is a good discussion of the executor's fiduciary relation to the beneficiaries of the estate, saying in part that an executor is an officer of the court and must act like a trustee.⁶¹ Such being the role of the executor or administrator, a good argument against waiver of accounting is that an accounting helps to maintain high standards of fiduciary duty.

Other states have confronted the problems of waiving fiduciary duty. In New York, the 1958 decision on *Amuso's Estate*⁶² attempts to set out both sides of the problems of waiving the statutory requirements of accounting.⁶³ After discussing the favorable view the courts take toward private agreements which dispense with formal ac-

⁵⁵ See note 35 *supra* and accompanying text.

⁵⁶ 149 Cal. 94, 97, 84 Pac. 764, 765 (1906). The enactment of the Probate Code in 1931 did not materially change the statutes interpreted by *Middlecoff*; see notes 19-21 *supra*.

⁵⁷ *Parsley v. Superior Court*, 40 Cal. App. 2d 446, 450, 104 P.2d 1073, 1075 (1940).

⁵⁸ CAL. PROB. CODE § 927.

⁵⁹ 34 C.J.S. *Executors & Administrators* § 828 (1942).

⁶⁰ 21 Cal. 2d 645, 134 P.2d 265 (1943).

⁶¹ *Id.* at 650, 134 P.2d at 269. The court does not imply that the executor is a trustee. "Trustee" is used in a general sense.

⁶² 13 Misc. 2d 686, 176 N.Y.S.2d 175 (Surr. Ct. 1958). See note 52 *supra* for an explanation of the differences between the 1958 and 1959 decisions on *Amuso's Estate*.

⁶³ 13 Misc. 2d 686, —, 176 N.Y.S.2d 175, 176 (Surr. Ct. 1958).

counting, the court also points out a line of cases that emphasizes the high standard imposed upon a fiduciary. The court quotes with approval⁶⁴ that famous passage from *Meinhard v. Salmon*⁶⁵ where Justice Cardozo says, "Many forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties."⁶⁶ In the 1959 decision on *Amuso's Estate*, after again mentioning the two lines of New York cases, one favoring waiver, one compelling high standard of conduct from a fiduciary, the court says,

In every case the ultimate duty of the fiduciary is to render to the beneficiaries an accounting in some form. The nature of the accounting depends upon the nature of the estate and the circumstances present.⁶⁷

Yet as mentioned earlier, this very case goes on to point out that such ultimate duty may be waived by an affirmative act of the beneficiary.⁶⁸ In a Virginia case, *Harris v. Citizens Bank & Trust Co.*,⁶⁹ the court opposes any act which relieves an executor-fiduciary of accounting. The court upheld a private settlement which waived an accounting, but did so reluctantly, saying, "Contracts which relieve fiduciaries from giving accounts of their stewardships are not favored."⁷⁰

In essence, then, the argument against waiver of accounting is this: (a) the executor or administrator is a fiduciary, (b) a fiduciary must act with the highest standards of care, (c) one means of maintaining high standards of care is accounting to interested parties and/or the court, and (d) anything that relieves any of the traditional duties of a fiduciary (such as waiver of accounting) is disfavored.

Reconciliation

There is no question that in California an accounting by the executor or administrator is, and should be, the norm, and waiver the variant. Generally, the duty to account helps to keep the executor on his fiduciary toes, thwarting the possibilities of fraud. However the law must be flexible if justice is to be accomplished in all the varied situations to which it is applied. While the norm may require accounting, the option of the variant adds flexibility to those situa-

⁶⁴ *Id.* at —, 176 N.Y.S.2d at 177.

⁶⁵ 249 N.Y. 458, 164 N.E. 545 (1928).

⁶⁶ *Id.* at 464, 164 N.E. at 546.

⁶⁷ 13 Misc. 2d 936, —, 187 N.Y.S.2d 519, 521 (Surr. Ct. 1959).

⁶⁸ *Ibid.*

⁶⁹ 172 Va. 111, 200 S.E. 652 (1939).

⁷⁰ *Id.* at —, 200 S.E. at 665.

tions where an accounting may be unnecessary, or where a private accounting may suffice.

Although waiver of accounting may be useful in providing flexibility to the law, can it be reconciled with the high standards of fiduciary duty? If it were true that to extend waiver of accounting in California would materially remove control over the fiduciary performance of the executor or administrator through the courts, then extension would not be justified. But fiduciary standards would not be unleashed by extending waiver, for two reasons.

First, waiver requires a voluntary and knowing relinquishment of a benefit one has under the law.⁷¹ "Voluntary" and "knowing" connote a situation where the waiving party knows what he is doing in releasing the executor from his duty. If an alleged waiver is shown to have been made under circumstances where the waiving parties did not know what they were doing, then by definition, there has been no waiver.

Second, California's Probate Code takes an almost paternal attitude toward the estate, executor, and beneficiaries. *County of Los Angeles v. Morrison*⁷² says that, "The probate court or judge is the guardian of estates of deceased persons"⁷³ Illustrating this attitude is the Probate Code section that allows the court to require an accounting on its own motion: "Whenever required by the court or a judge thereof . . . upon its or his own motion . . . the executor or administrator must render . . . a verified account"⁷⁴ Accordingly, notwithstanding any extension of waiver, or even waiver under *Middlecoff*, the court must in effect grant its approval of every waiver. If it does not approve, or if it suspects mismanagement, the court need only require an accounting by its own motion. Therefore the advantages of waiver—privacy, reduction of both expense and delay—could be available while court supervision over the fiduciary remains.

By retaining court supervision through its discretionary approval, California approaches a reconciliation of waiver and fiduciary duty. In New York, on the other hand, *Amuso's Estate* attempts reconciliation through burden of proof.

Taken together, the two decisions on *Amuso's Estate* discuss two conflicting lines of cases, one encouraging informal settlements and accountings, and the other demanding the highest standards

⁷¹ See text accompanying notes 27-31 *supra*.

⁷² 15 Cal. 2d 368, 101 P.2d 470 (1940).

⁷³ *Id.* at 371, 101 P.2d at 472.

⁷⁴ CAL. PROB. CODE § 921.

of care from a fiduciary.⁷⁵ The court resolves the conflict by placing on the administrator who was released from his duty to account the burden of proving that the informal accounting resulting in release was handled fairly and without fraud or mismanagement.⁷⁶ After the administrator successfully demonstrated fair dealing, the court in effect upheld an informal, oral accounting by refusing petitioner's attempt to compel formal accounting.⁷⁷

Amuso's Estate does not attempt to reconcile fiduciary duty with waiver in the situation of total waiver. As discussed earlier, the court went no further than to affirm, by way of dictum, the possibility of waiver when not accompanied by an informal accounting.⁷⁸ The court noted that most cases upholding a release of accounting involved some type of informal accounting.⁷⁹

In the final analysis, the shortcut of waiver cannot be fully reconciled with the fiduciary duty to account. Common sense says that the fewer times an executor-fiduciary must report to the court and interested parties, the greater the possibility of fraud or mismanagement. But this does not mean that waiver should not be extended. There are sufficient opportunities for supervision and relief under California's Probate Code at present to prevent fraud and mismanagement even though waiver is extended beyond *Middlecoff*. The real question is how far such an extension should go.

PROPOSED LEGISLATION

Presently in California, there is no law which directly supports extension of waiver of accounting by the interested parties beyond the *Middlecoff* circumstances. Neither is there any law directly opposed. On the other hand, there are, as pointed out earlier, situations like *Shapiro* involving waiver of comparable duties which indirectly support an extension of waiver of accounting. Since waiver by more than one beneficiary can be advantageous in certain circumstances, there is a need for legislative clarification of the law on waiver of accounting.

First, the statutory provision for waiver in general, Civil Code section 3513, should be amended to affirm or extend its application to groups as well as individuals. While not really necessary in light of Civil Code section 14, such an amendment would codify the effect

⁷⁵ 13 Misc. 2d 686, —, 176 N.Y.S.2d 175, 176 (Surr. Ct. 1958); 13 Misc. 2d 936, —, 187 N.Y.S.2d 519, 520 (Surr. Ct. 1959).

⁷⁶ 13 Misc. 2d 686, —, 176 N.Y.S.2d 175, 176 (Surr. Ct. 1958).

⁷⁷ 13 Misc. 2d 936, —, 187 N.Y.S.2d 519, 524 (Surr. Ct. 1959).

⁷⁸ *Id.* at —, 187 N.Y.S.2d at 521.

⁷⁹ *Ibid.*

of present case law.⁸⁰ The first sentence of section 3513 could be amended to read, "Any person or group of persons may waive by voluntary and affirmative act the advantage of a law or a duty required by law intended solely for his or their benefit." The present prohibition of waiving laws established for public reasons should remain. Including "affirmative act" narrows the possibility of misuse or deceit in the general application of waiver.

Second, the accounting requirements of the Probate Code as it stands should be untouched, but a section should be added to the effect of the following suggestion:

WAIVER OF ACCOUNTING

When the time for filing or presenting claims against the estate has expired, any or all persons interested in the estate may waive in writing any accounting required of the executor or administrator intended solely for his or their benefit. Waiver pursuant to this section shall become effective only upon the approval of the court or a judge thereof, acting in its or his sole discretion. Once so approved waiver shall be conclusive against the waiving parties in the absence of fraud, misrepresentation, or inequitable conduct of the executor or administrator.

Such an addition to the Probate Code would permit waiver when there was no argument among the persons interested in the estate. Yet one dissenting beneficiary could demand the normal accounting requirements, retaining the protection of present law. In addition, the suggested section adheres to the philosophy of the probate court as guardian of the estate⁸¹ by requiring approval of the court before waiver of the statutory requirements of accounting is valid.

Whatever the changes, the present state of the law calls for some clarification concerning the possibilities of waiver of accounting. Any legislative action should attempt to protect both the estate and interested parties yet at the same time provide for increased flexibility in adapting the law to workaday applications.

Wm. F. Locke-Paddon

⁸⁰ See text accompanying notes 32-35 *supra*.

⁸¹ See text accompanying note 73 *supra*.