

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

FEBRUARY 2 AND 3, 1978

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on February 2 and 3, 1978.

Present: Howard R. Williams, Chairman
Beatrice P. Lawson, Vice Chairman
Judith Ashmann
Jean C. Love
John D. Miller
Thomas E. Stanton, Jr.
Laurence N. Walker

Absent: George Deukmejian, Member of Senate
Alistair McAlister, Member of Assembly
Bion M. Gregory, Ex Officio

Members of Staff Present:

John H. DeMouilly
Stan G. Ulrich

Nathaniel Sterling
Robert J. Murphy III

Consultant Present:

Garrett H. Elmore, Guardianship-Conservatorship,
February 2 and 3.

ADMINISTRATIVE MATTERS

Minutes of January Meeting Corrected and Approved

The following corrections were made in the Minutes of the January 5, 6, and 7, 1978, meeting:

(1) On page 2, in the schedule for meetings, in the time scheduled for the May 4 meeting, "10:00 p.m." was substituted for "12:00 p.m."

(2) On page 12, in the fourth and fifth lines under the discussion of Section 2700, "address" was substituted for "whereabouts."

With these corrections, the Minutes as submitted by the staff were approved.

Awarding of Certificates to Retiring Members

The Commission determined that a suitably framed certificate, similar to that awarded to consultants, should be awarded to members of the Commission upon completion of their service on the Commission.

Commissioner's Compensation

The Commission considered Memorandum 78-10. The Executive Secretary was directed to send a letter to Senator Alquist's office, stating that the Commission supports Senate Bill 1305 (providing a uniform \$50 per diem for members of boards and commissions) in principle but that the Commission prefers Senate Bill 1426. Senate Bill 1426, introduced by Senator Deukmejian at the request of the Commission, would increase the compensation of members of the Law Revision Commission appointed by the Governor from \$20 for each day's attendance at a Commission meeting to \$50 and would provide, in addition, for payment of \$12.50 per hour for each hour spent in preparation for the meeting, with a limitation that not more than eight hours of preparation time for each meeting may be so compensated.

Addendum to Contract With Garrett H. Elmore

The Commission considered Memorandum 78-11 and directed the Executive Secretary to execute on behalf of the Commission the necessary addendum to the existing contract with Garrett H. Elmore to make the following changes:

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(1) Increase the limit on the maximum amount payable to Contractor for the \$20 for each day of attending meetings and legislative hearings from Two Hundred Dollars (\$200) to Four Hundred Dollars (\$400).

(2) Increase the limit on the maximum amount payable to Contractor for travel expenses from Five Hundred Dollars (\$500) to One Thousand Five Hundred Dollars (\$1,500).

(3) Increase the limit on the total of the amounts payable to Contractor under the contract from Two Thousand Five Hundred Dollars (\$2,500) to Three Thousand Seven Hundred Dollars (\$3,700).

Contract With John N. McLaurin

The Commission considered Memorandum 78-12. The Commission directed the Executive Secretary to execute on behalf of the Commission a contract, in the usual form for contracts with expert consultants, with John N. McLaurin to provide expert advice at Commission meetings on the subjects of eminent domain and inverse condemnation. Compensation is to be \$20 for each day of attendance at a Law Revision Commission meeting when such attendance is requested by the Commission through its Executive Secretary. Travel expenses are to be reimbursed for attending meetings upon request subject to the same standards that govern reimbursement of travel expenses of members of boards and commissions appointed by the Governor. The maximum expenditures under the contract are to be limited to a total of Nine Hundred Dollars (\$900). The term of the contract is to end on June 30, 1980.

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STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 78-5 and the attached staff draft of the statutory provisions concerning community or homestead property of an incompetent spouse. The Commission was of the view that the concept embodied in the staff draft of limited legal capacity should be abandoned. In the single transaction situation contemplated by the staff draft, the issue to be adjudicated should be whether the spouse whose capacity is questioned is or is not competent to consummate the particular transaction before the court. If the court finds the spouse to be competent, the court will so adjudge and the spouse will have the capacity to carry out the transaction. If the court finds the spouse to be incompetent, the transaction must proceed as approved and directed by the court. The draft should be completely revised to accomplish this.

The Commission also noted that, in view of the fact that the concept of limited legal capacity is contained in the proposed conservatorship legislation (proposed Section 1831), the staff should give thought to the question of whether a conservator may disaffirm an agreement made by the conservatee which is a type of transaction as to which the court has not withdrawn the conservatee's capacity. The Commission also requested that the staff research the comparable section in the Lanterman-Petris-Short Act (Welf. & Inst. Code § 5357) to see if this question has been addressed.

The Commission's consultant, Garrett Elmore, advised the Commission that at least three approaches were possible to the problem of managing or disposing of community property where one of the spouses is incompetent: (1) allow the competent spouse to manage the property, requiring court approval only where consent or joinder of the incompetent spouse would be required under Civil Code Section 5125 or 5127 if the latter were competent; (2) provide for the appointment of the competent spouse as conservator of the incompetent spouse, and permit the competent spouse to manage the property under court supervision (Texas approach); (3) provide for the appointment of a conservator for the incompetent

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spouse, with the conservator having equal rights of management with the competent spouse. The staff draft takes the first of these three approaches, and the Commission concurred that this is the desirable approach.

The Commission then went through the staff draft and made the following decisions:

§ 3600. Definitions

In subdivision (a), "quasi-community property" should be deleted from the definition of "community property." Subdivision (c) (definition of "full legal capacity") should be deleted in view of the Commission's decision not to keep the concept of limited legal capacity in the single transaction situation. The staff should consider whether the definition of "incompetent" in subdivision (e) should be drafted as a substantive provision or perhaps should incorporate by reference the similar conservatorship provision. The staff should review the definition of "real property" in subdivision (f)--it may include some personal property (e.g., chattels real) and thus may be too broad. The definition of "separately managed community personal property" in subdivision (g) should be deleted since it is used in only one section (proposed Section 3650).

§ 3601. Mandatory or permissive nature of proceedings

Proposed Section 3601 should be subdivided, with the first sentence to go in subdivision (a) and the second sentence to go in subdivision (b). The conditions set forth in the first sentence should be tabulated. The Comment should briefly indicate the subject matter of the code sections referred to in Section 3601.

§ 3602. Transactions which may be authorized

Proposed Section 3602 should be split into two sections, with the substance of subdivision (a) to go in one section and the substance of subdivision (b) to go in another. The Comment to the first of these two sections should give a broad overview of the entire part.

§ 3650. Right of management and disposition of competent spouse

In the introductory clause of proposed Section 3650, the words "[e]xcept as otherwise provided by statute" should be deleted. In the

introductory clause, the words "with full legal capacity" should be deleted as redundant. The Commission approved the proposal in Section 3650 to extend the right of control of the competent spouse to include a community business described in Civil Code Section 5125(d). The language of subdivision (a) of proposed Section 3650 ("provisions of Sections . . . of the Civil Code or of other statute and of this part") is awkward and should be revised.

§ 3651. Particular exclusions

The introductory clause of proposed Section 3651 should be revised to read: "Section 3650 does not apply to" In subdivision (b) the statute should address the question of how the competent spouse revokes consent to having the property dealt with in the conservatorship estate of the incompetent spouse. Subdivision (c) appears to be incorrect and should be deleted. Subdivision (d) (trust property) is not clear and should be reworked, perhaps as a separate section.

§ 3652. Effect of limitations upon third persons--community personal property

The negative form of proposed Section 3652 is not satisfactory. The section should be cast in the affirmative (if competent spouse purports to deal with the property, it is valid).

§ 3700. Nature of proceeding

The introductory language of proposed Section 3700 ("[w]hen one of both of the spouses is incompetent") should be put instead at the end of subdivision (a), and the word "sufficient" should be stricken in subdivision (b). The last sentence of the Comment should be revised to make clear that it refers to the declaratory judgment nature of subdivision (b).

It should be made clear in Section 3700 that if both spouses are incompetent one of them must have a conservator to seek court authority under this part.

§ 3701. Allegations in alternative

The last sentence of subdivision (b) of proposed Section 3701 should be deleted. The Comment should be expanded to indicate that the section implements the new declaratory judgment provision.

§ 3750. Petitioners

In the introductory clause of proposed Section 3750, "maintain" should be changed to "file a petition." The staff should check the procedure for "joining" in a petition in probate proceedings, and consider putting in language to authorize a person to join in a petition throughout proposed Division 4. There may also need to be additional provisions indicating how joinder is accomplished.

The Commission approved the concept of allowing the incompetent spouse to bring a petition under this part. Subdivisions (a) and (c) should be combined, and the reference should be to "either spouse." Possibly this can be further combined with subdivision (b) (e.g., "either spouse or his or her conservator").

It should be indicated under the section that the term "trust property" in subdivision (d) is a defined term. The staff should make sure that subdivision (d) is consistent with subdivision (d) of Section 3651 when these provisions are revised.

§ 3751. Petitioning spouse incompetent--representation

Following the words "is a petitioner" there should be added "or is one who has joined."

§ 3752. Venue

The language in parenthesis in subdivision (a) and (b) should be deleted. The Comment should note that "real property" is a defined term, and that if the proceeding affects a note secured by a mortgage on real property then subdivision (a) is the applicable venue provision. The language of the section should be recast to make clear that it is a venue provision, not a jurisdictional one (e.g., "the proper county for filing a petition is . . .").

§ 3800. Contents of petition

Proposed Section 3800 should be reorganized, either in three subdivisions or in three separate sections, to set forth first the contents required in every petition under this part; second, the contents required in a petition for court supervision; and, third, the contents required in a petition for a declaration of competency. Subdivision (e) should be revised to change "adult relatives of the non-petitioning spouse, other than a spouse" to "relatives of the incompetent or alleged incompetent spouse within the second degree." Relatives

of the competent spouse ought not be required to be named in the petition.

§ 3801. Citation to nonpetitioning spouse

It should be made clear that under Section 3801 no citation is required to a nonpetitioning spouse who has joined in the petition. Subdivision (b) should be revised to require a citation to the nonpetitioning spouse, whether or not the nonpetitioning spouse has a conservator. If the nonpetitioning spouse has a conservator of the estate, notice should also be given to the conservator.

§ 3802. Notice of hearing

In subdivision (a) of proposed Section 3802, "incompetent persons" should be changed to "incompetent or alleged incompetent persons." Alternatively, the staff should consider whether all of the declaratory relief provisions should be collected in a single article.

§ 3851. Right to counsel and jury trial

The Commission approved the addition of provisions relating to right to counsel and jury trial as set forth in proposed Section 3851.

§ 3852. Compensation of representatives and counsel

The last "or" in proposed Section 3852 ("guardian ad litem or by counsel") should be changed to "and." It should be made clear either in the statute or the Comment that "court-appointed counsel" includes the public defender.

§ 3855. Transaction not consummated--further proceedings

The staff should give further thought to the meaning of the word "party" in subdivision (a) of proposed Section 3855. The subdivision should not allow a nonpetitioning incompetent spouse to block a transaction which has been authorized by the court.

§ 4000. Definition

Proposed Section 4000 (definition of "competent spouse") should be deleted.

§ 4001. Alternative nature of proceeding

Proposed Section 4001, and particularly subdivision (b), is unclear and should be reworked by staff.

§ 4050. Homestead on separate property of spouse

The words "thereunto duly" should be stricken in the two places where they appear in proposed Section 4050.

§ 4053. Investment in another home

The language "on petition of the conservator of either estate or of the competent spouse" should be revised to read "on petition of the competent spouse or of the conservator of the estate of either spouse."

§ 4100. Incompetency of one or both spouses

In subdivision (a) of proposed Section 4100, the definition of "community real property" to include "homestead property" appears to include separate property subject to a homestead. This definition should be revised to avoid this possible misapplication.

STUDY F-30,300 - GUARDIANSHIP-CONSERVATORSHIP REVISION
(SUBSTITUTED JUDGMENT)

The Commission considered Memorandum 78-9 and the attached draft of material relating to substituted judgment prepared by the staff for transmittal to the members of the State Bar Subcommittee on Law Revision Commission Guardianship-Conservatorship Revision.

Subdivision (a) of Section 2550 (on page 3) was revised to read in substance:

2550. (a) The conservator or other interested person may file a petition under this article for an order authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

- (1) Benefiting the conservatee or the estate.
- (2) Minimizing current or prospective state or federal income, estate, or inheritance taxes or expenses of administration.
- (3) Providing gifts for such purposes, and to such charities, relatives, friends and other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

The last sentence of footnote 6 on page 3 was revised to read in substance: "However, it has been urged that the conservator should have such power."

The last paragraph of the Comment on page 4 should be revised to recognize that the conservator may be authorized or required to take the action requested in the petition, depending on who the petitioner is.

The last portion of Section 2552 was revised to read in substance:

or that the estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of those legally entitled to support from the conservatee, taking into account the age, physical condition, standards of living, and all other relevant circumstances of the conservatee and those legally entitled to support from the conservatee.

The Comment to Section 2553 should include a sentence that gives an example of a "trait," such sentence to be drawn from case law and the case cited if possible.

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A note should be included in the material sent to the State Bar Subcommittee indicating that the Commission plans to make the decision of a court on a petition under the substituted judgment article an appealable matter.

In revising the material before it is sent to the State Bar Subcommittee, the staff should give consideration to the editorial revisions indicated on the various drafts turned in by members of the Commission.

After the material has been revised, it is to be sent to the members of the State Bar Subcommittee.

STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 78-4 and the attached staff draft of a section relating to the duty of reasonable management by the guardian or conservator. The Commission was of the view that it should be made clearer in the proposed section that the duty of reasonable management is essentially a fiduciary standard, that it qualifies all of the powers and duties of a guardian or conservator, that when the guardian or conservator acts, he or she must do so reasonably, and that the section imposes an affirmative duty on the guardian or conservator to exercise a power when a fiduciary generally would have such a duty. The staff was requested to redraft the section and to bring it back for Commission review.

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STUDY D-39.165 - ATTACHMENT (UNLAWFUL DETAINER AND
MISCELLANEOUS MATTERS)

The Commission considered Memorandum 78-8 and the attached staff draft of a Recommendation Relating to Technical Revisions in the Attachment Law. A letter from Frank M. Manzo, handed out at the meeting, was also considered and is attached as an Exhibit to these Minutes.

The provision relating to attachment in unlawful detainer proceedings was revised in substance as follows:

§ 483.020 (added). Attachment in unlawful detainer proceeding

SEC. 2. Section 483.020 is added to the Code of Civil Procedure, to read:

483.020. (a) Subject to subdivision (d), the amount to be secured by the attachment in an unlawful detainer proceeding is the sum of the following:

(1) The amount of the rent due and unpaid as of the date of filing the complaint in the unlawful detainer proceeding.

(2) Any additional amount included by the court under subdivision (c).

(3) Any additional amount included by the court under Section 482.110.

(b) In an unlawful detainer proceeding, the plaintiff's application for a right to attach order and a writ of attachment pursuant to this title may include (in addition to the rent due and unpaid as of the date of the filing of the complaint and any additional estimated amount authorized by Section 482.110) an amount equal to the rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(c) The amount to be secured by the attachment in the unlawful detainer proceeding may, in the discretion of the court, include an additional amount equal to the amount of rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(d) Notwithstanding subdivision (b) of Section 483.010, an attachment may be issued in an unlawful detainer proceeding where the plaintiff has received a payment or holds a deposit to secure the payment of rent or the performance of other obligations under the lease. If the payment or deposit secures only the payment of

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rent, the amount of the payment or deposit shall be subtracted in determining the amount to be secured by the attachment. If the payment or deposit secures the payment of rent and the performance of other obligations under the lease or secures only the performance of other obligations under the lease, the amount of the payment or deposit shall not be subtracted in determining the amount to be secured by the attachment.

Comment. Section 483.020 makes clear that, upon the plaintiff's application therefor, the "amount to be secured by the attachment" in an unlawful detainer proceeding may include, in the court's discretion, an amount for the use and occupation of the premises by the defendant during the period from the time the complaint is filed until either the time of judgment or such earlier time as possession has been or is likely to be delivered to the plaintiff. One factor the court should consider in deciding whether to allow the additional amount is the likelihood that the unlawful detainer proceeding will be contested. There may be a considerable delay in bringing the unlawful detainer proceeding to trial if it is contested. In this case, there may be a greater need for attachment to include an additional amount to cover rent accruing after the complaint is filed. It should be noted that attachment is permitted only where the premises were leased for trade, business, or professional purposes. See Section 483.010.

The amount authorized under subdivision (c) of Section 483.020 is in addition to (1) the amount in which the attachment would otherwise issue (unpaid rent due and owing at the time of the filing of the complaint) and (2) the additional amount for costs and attorney's fees that the court may authorize under Section 482.110.

Subdivision (d) makes clear that the amount of a deposit (such as a deposit described in Civil Code Section 1950.7) held by the plaintiff solely to secure the payment of rent is to be subtracted in determining the amount to be secured by the attachment. However, the amount of the deposit is not subtracted in determining the amount to be secured by the attachment where, for example, the deposit is to secure both the payment of rent and the repair and cleaning of the premises upon termination of the tenancy. Under former law, it was held that a deposit in connection with a lease of real property was not "security" such as to preclude an attachment under former Section 537(4), superseded by Section 483.010(b). See *Garfinkle v. Montgomery*, 113 Cal. App.2d 149, 155-57, 243 P.2d 52, ___ (1952).

As thus revised, the recommendation was approved for printing and submission to the 1978 legislative session but, in preparing the recommendation for the printer, the staff is to take into consideration editorial changes suggested by members of the Commission.

Study D-39.165

EXHIBIT

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FRANK M. MANZO
EDGAR I. SHANE

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January 30, 1978

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

Thank you for your letter of January 24, 1978, inviting comments from me regarding attachment in Unlawful Detainer proceedings.

In addition to your proposed addition of Section 482.115, I would like to see Section 483.010 amended to specifically authorize attachments in commercial Unlawful Detainer actions. May I suggest that Section 483.010(a) be amended to add, after the word "implied", "including an Unlawful Detainer action where there is a claim for rent." Many judges do not feel an Unlawful Detainer action is a "contract" under Section 483.010. They cite Witkin to the effect that an Unlawful Detainer action is primarily for recovery of possession and incidentally an action for rent. See Witkin, California Procedure, Volume 2, Page 1552.

My other comment concerns whether you have considered the fact that most commercial leases require a substantial deposit, usually one or two months rent. Counsel for defendant will argue that the landlord has security by reason of this deposit, and, therefore, a Writ of Attachment should not issue or that the amount of the Writ should be decreased by the amount of the deposit.

This argument should not be allowed to prevail, however. Security deposits are governed by Civil Code Section 1950.5 and can be used by the landlord only for cleaning, repairs or default in rent. Quite frequently in my experience, the amount of damage to the premises at the hands of the defaulting tenant exceeds the security deposit. There is, therefore, no money available to satisfy unpaid rent.

Mr. John H. DeMouilly
January 30, 1978
Page 2

I would suggest language in your proposed Section 482.115
excluding any security deposit from the amount of the Writ.

Thank you again for your work in this difficult area of
law. Your proposed amendment meets a critical need in the
area of real estate law.

Sincerely,



FRANK M. MANZO

FMM:keb

STUDY D-39.200 - ENFORCEMENT OF JUDGMENTS
(COMPREHENSIVE STATUTE—EXEMPTIONS)

The Commission considered Memorandum 78-6 and the chapter on exemptions from enforcement of money judgments attached thereto. The Commission made the following decisions:

Chapter Heading

The chapter heading should be changed from "Exemptions From Enforcement of Money Judgments" to "Property Subject to Enforcement of Money Judgments and Exemptions" or something similar.

§ 707.140. Exemption rights of spouse

This section should be revised as follows:

707.140. The spouse of a judgment debtor may claim exemptions as provided in this chapter where the judgment creditor seeks to satisfy the judgment out of the community property or the spouse's separate property which is otherwise liable for the satisfaction of the judgment, regardless of whether the spouse is a judgment debtor.

§ 707.150. Exemptions inapplicable against support judgment

This section was approved.

§ 707.160. Tracing exempt amounts

Subdivision (a) should be revised to read substantially as follows:

707.160. (a) An exempt amount remains exempt after it is paid to the judgment debtor and an exempt amount may be traced ~~from~~ one form of money to another and into and out of through deposit accounts and in the form of cash and the equivalent of cash.

The staff should research whether judgment debtors may choose the manner of tracing under existing law. The staff should also reexamine United States Bond & Mortgage Corp. v. Grodzins to see if the discussion in the Comment is accurate.

§ 707.215. Applicable procedure for claiming exemptions

This section was approved in substance. The staff noted that further work needed to be done in subdivision (b) relating to claiming exemptions on noticed motion when property is sought to be applied toward the satisfaction of a money judgment other than by levy under a writ of execution.

§ 707.320. Liability for interference with exemption rights

This section was approved.

§ 707.460. Prosthetic and orthopedic appliances

This section should be replaced with the following exemption derived from Section 5(2) of the Uniform Exemptions Act:

707.460. Health aids reasonably necessary to enable the judgment debtor or a spouse or dependent of the judgment debtor to work or sustain health, including prosthetic appliances, are exempt.

The Comment should set out the substance of the relevant portion of the Comment to Section 5(2) of the Uniform Exemptions Act.

§ 707.500. Life insurance, endowment, annuity policies; death benefits

This provision should be redrafted to clearly carry out the policy of exempting \$5,000 in loan value and benefits necessary for support only in favor of the person who is the insured or a spouse or dependent of the insured. The Comment should state that the purpose of subdivision (a), providing a complete exemption for unmatured policies, is to prevent the judgment creditor from forcing the policy to be cashed in. However, subdivision (b) permits the judgment creditor to reach the loan value to the extent it exceeds \$5,000. Subdivision (c) was approved and the amount of the additional exemption permitted to the extent the homestead exemption is not used was set at \$10,000.

Election of Exemptions; Waiver; Marshalling of Funds

The Commission approved the following proposals set forth on page 4 of Memorandum 78-6. The judgment debtor should be required to describe other motor vehicles, tools, deposit accounts, and life insurance policies of the judgment debtor as a condition to claiming an exemption for such property which has been levied upon. The exemption claim would act as a waiver of claims for other motor vehicles or tools described or owned at the time the claim is made. The judgment creditor would be able to apply deposit accounts and life insurance loan value already levied upon if the other accounts and policies met or exceeded the exempt levels. The judgment creditor should also be permitted to obtain a court order determining which of several deposit accounts or life insurance loan values could be levied upon, analogous to Section 487.010(c)(7) in the Attachment Law.

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APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

Date

Chairman

Executive Secretary