

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 11, 1981
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on September 11, 1981.

Law Revision Commission

Present: Beatrice P. Lawson, Chairperson
Jean C. Love, Vice Chairperson

Robert J. Berton
Thomas S. Loo

Absent: Omer L. Rains, Senate Member
Alister McAlister, Assembly Member

Bion M. Gregory, Ex Officio

Staff Members Present

John H. DeMouilly
Robert J. Murphy III

Nathaniel Sterling
Stan G. Ulrich

Consultants Present

Paul E. Basye, Property Law
James L. Blawie, Property Law
Jesse Dukeminier, Probate Law, Property Law
Susan French, Probate Law, Property Law
Russell Niles, Probate Law, Property Law

Others Present

Doreen T. Denitz, private citizen, Los Angeles
Ronald P. Denitz, Tishman West Management Corp., Los Angeles
James Devine, State Bar Estate Planning, Probate & Trust Law
Section, Monterey
James M. Hughes, California Association of Professional Process
Servers, San Diego

ADMINISTRATIVE MATTERS

MINUTES OF THE JULY MEETING

The Minutes of the July 9-11, 1981, meeting of the Law Revision Commission were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The following schedule for future meetings was adopted.

Minutes
September 11, 1981

1981

October - No meeting scheduled

November 20 (Friday)	10:00 a.m. - 5:00 p.m.	Los Angeles
December 3 (Thursday)	7:00 p.m. - 10:00 p.m.	San Francisco
December 4 (Friday)	9:00 a.m. - 5:00 p.m.	
December 5 (Saturday)	9:00 a.m. - 12:00 noon	

1982

January 14 (Thursday)	7:00 p.m. - 10:00 p.m.	San Diego
January 15 (Friday)	9:00 a.m. - 5:00 p.m.	
January 16 (Saturday)	9:00 a.m. - 12:00 noon	

February - no meeting scheduled

March 18 (Thursday)	7:00 p.m. - 10:00 p.m.	San Francisco
March 19 (Friday)	9:00 a.m. - 5:00 p.m.	
March 20 (Saturday)	9:00 a.m. - 12:00 noon	

BUDGET FOR 1982-83 FISCAL YEAR

The Commission considered the staff proposed budget attached to Memorandum 81-49. The staff proposed budget was approved without change.

The Commission also approved the promotion of the Staff Counsel I to Staff Counsel II, effective October 1, 1981, or as soon thereafter as the promotion may be made.

1981 LEGISLATIVE PROGRAM

The following report concerning the Commission's 1981 legislative program was presented by the Executive Secretary.

Enacted or Adopted

Assembly Concurrent Resolution No. 5 (authorizes Commission to continue its study of previously authorized topics) (1981 Stats. Res. ch. 14)

Assembly Bill No. 132 (guardianship-conservatorship revisions) (1981 Stats. ch. 9)

Assembly Bill No. 327 (powers of appointment) (1981 Stats. ch. 63).

Assembly Bill No. 78 (technical clean-up amendment to special assessment lien statute enacted upon Commission recommendation last session) (1981 Stats. ch. 139)

Senate Bill No. 202 (technical clean-up amendment to state tax lien revision enacted upon Commission recommendation last session) (1981 Stats. ch. 217)

Sent to Governor

Assembly Bill No. 329 (durable power of attorney)

Concurrence in Assembly Amendments Pending

Senate Bill No. 203 (increases interest rate to 10 percent)

To be Set for Hearing January 1982

Assembly Bill No. 325 (nonprobate transfers)

Assembly Bill No. 707 (comprehensive enforcement of judgments law)

Assembly Bill No. 798 (conforming additions, amendments, and repeals to enforcement of judgments law)

CONSULTANT CONTRACT

The Commission directed the Executive Secretary to make a contract with Professor Gail Bird of Hastings College of the Law to provide expert advice and information at Law Revision Commission meetings on the subject of probate law. The contract should provide for travel expenses in attending Commission meetings and legislative hearings when this subject is discussed and for \$50 per day when attending a Commission meeting or legislative hearing. Authorized expenditures under the contract are not to exceed \$1,000.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS

The Commission considered Memorandums 81-43 and 81-44 relating to Assembly Bills 707 and 798. The Commission approved the substance of the amendments to Assembly Bills 707 and 798 that are attached to these Minutes.

The Commission considered Memorandum 81-42 concerning the authority of registered process servers under the Enforcement of Judgments Law and heard the comments of Mr. James Hughes representing the California Association of Professional Process Servers. The Commission made the following decisions.

(1) The authority of registered process servers to levy under writs of execution should be expanded as set forth in Amendments 7-13 (AB 707) attached hereto.

(2) The fee of the registered process server should be recoverable in the court's discretion by way of the motion procedure of Section 685.080 in the Enforcement of Judgments Law. If the court determines that a fee is appropriate, the amount of the fee should be determined under the standards of Code of Civil Procedure Section 1032b which provides for a fee not exceeding the amount allowed a public officer for performing the same task or a higher amount in the case of an unusually difficult service. See Amendment 15 (AB 707) attached hereto.

(3) The Comment to Section 699.080 in the Enforcement of Judgments Law should make clear that the registered process server is required when appropriate to serve the judgment debtor under Section 700.010 and the legal owner of a vehicle or vessel under Section 700.090.

(4) Registered process servers should be permitted to serve or post a writ of possession of real property, particularly in light of the delay encountered in unlawful detainer cases. See Section 715.040 in Amendment 22 (AB 707) attached hereto.

AMENDMENTS TO ASSEMBLY BILL NO. 707

Amendment 1

On page 17, line 31, of the printed bill, as amended in Assembly August 25, 1981, strike out "and Section 684.125"

Amendment 2

On page 17, strike out lines 33 to 36, inclusive, and insert:
(c) Unless the court prescribes a shorter period of time, any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after a paper is served by mail is extended:

Amendment 3

On page 18, strike out lines 8 to 23, inclusive

Amendment 4

On page 19, strike out line 8 and insert:
server provided in this title.

Amendment 5

On page 32, line 8, strike out "and delivery" and insert:
or delivery of possession

Amendment 6

On page 58, strike out lines 9 to 20, inclusive

Amendment 7

On page 60, between lines 36 and 37, insert:
(3) Personal property in the custody of a levying officer,
pursuant to Section 700.050.

Amendment 8

On page 60, line 37, strike out "(3)" and insert:
(4)

Amendment 9

On page 60, line 39, strike out "(4)" and insert:
(5)

Amendment 10

On page 60, after line 40, insert:

(6) Property in a safe deposit box, pursuant to Section 700.150
or 700.160.

Amendment 11

On page 61, line 1, strike out "(5)" and insert:
(7)

Amendment 12

On page 61, line 3, strike out "(6)" and insert:
(8)

Amendment 13

On page 61, between lines 4 and 5, insert:

(9) Interest of an heir, devisee, or legatee in personal
property in the estate of a decedent, pursuant to Section 700.200.

Amendment 14

On page 61, line 16, strike out "At the time of" and insert:
Within five days after

Amendment 15

On page 61, strike out lines 32 to 34, inclusive, and insert:

(e) The fee for services of a registered process server under
this section is recoverable by a motion pursuant to Section 685.080. If
in the court's discretion a fee is allowed as a recoverable cost, the
amount of the fee is governed by Section 1032b.

Amendment 16

On page 81, line 34, strike out "party" and insert:
person

Amendment 17

On page 81, line 36, strike out "party" and insert:
person

Amendment 18

On page 83, line 34, after "intangibles" insert:
consisting of any right to payment

Amendment 19

On page 143, line 40, after the period, insert:
In the case of a state employee, the office from which the employee is paid does not include the State Controller's Office unless the employee works directly for the State Controller's Office.

Amendment 20

On page 169, line 21, strike out "court, cause," and insert:
the court and the cause

Amendment 21

On page 173, line 22, strike out "execution" and insert:
withholding under an earnings withholding order

Amendment 22

On page 189, between lines 35 and 36, insert:
715.040. (a) A registered process server may execute the writ of possession of real property as provided in subdivisions (a) and (b) of Section 715.020.

(b) Within five days after executing the writ under this section, all of the following shall be filed with the levying officer:

- (1) The writ of possession of real property.
- (2) An affidavit of the registered process server stating the manner in which the writ was executed.
- (3) Proof of service of the writ.
- (4) Instructions in writing, as required by the provisions of Section 687.010.

(c) Upon receipt of the fee provided by Section 26733 of the Government Code, the levying officer shall perform all other duties under the writ and shall return the writ to the court.

(d) The fee for services of a registered process server under this section is recoverable by a motion pursuant to Section 685.080. If in the court's discretion a fee is allowed as a recoverable cost, the amount of the fee is governed by Section 1032b.

Amendment 23

On page 202, line 23, strike out "or 720.270," and insert:
, 720.270, or 720.660,

AMENDMENTS TO ASSEMBLY BILL NO. 798

Amendment 1

In lines 8 and 9 of the title of the printed bill, as amended in Assembly August 25, 1981, strike out "482.100, 484.530, 485.610, 487.020, 488.020, 488.090, 488.530, 490.010, 490.020,"

Amendment 2

In line 18 of the title, strike out "490.050,"

Amendment 3

On page 28, strike out lines 38 to 40, inclusive

Amendment 4

On page 29, strike out lines 1 to 10, inclusive, and insert: conditions as the judge shall prescribe. Immediately upon receipt of payment of the judgment, the judgment creditor or his or her assignee of record shall file with the court an acknowledgment of satisfaction of judgment. Any judgment creditor or assignee of record who, after payment in full of the judgment, and after written demand by the judgment debtor fails without just cause for a period of 15 days to execute, and file an acknowledgment of satisfaction of judgment with the court is liable to the judgment debtor or his or her grantees or heirs for all damages ~~which he or she or they may sustain~~ sustained by reason of such failure and ~~shall also forfeit to him or her or them~~ , in addition, the sum of fifty dollars (\$50).

A canceled check or money order which was written subsequent to the judgment by the judgment debtor for the full amount of the judgment, made payable to and endorsed by the judgment creditor, or a cash receipt written subsequent to the judgment for the full amount thereof and signed by the judgment creditor, shall constitute a rebuttable presumption of satisfaction of judgment when filed with the clerk of the small claims court together with a statement signed by the judgment debtor under penalty of perjury stating that: (1) the judgment creditor has

been paid in full the amount of the judgment and costs; (2) the judgment creditor has been requested to file an acknowledgment of satisfaction of judgment and refuses to do so or the present address of the judgment creditor is unknown; and (3) the documents attached constitute evidence of receipt of this payment. In the event a rebuttable presumption of satisfaction of judgment is created pursuant to this section, a satisfaction of judgment shall be entered.

Amendment 5

On page 32, strike out lines 12 to 40, inclusive

Amendment 6

On page 33, strike out lines 1 to 40, inclusive

Amendment 7

On page 34, strike out lines 1 to 40, inclusive

Amendment 8

On page 35, strike out lines 1 to 40, inclusive

Amendment 9

On page 36, strike out lines 1 to 40, inclusive

Amendment 10

On page 37, strike out lines 1 to 27, inclusive

STUDY D-330 - ATTACHMENT

The Commission considered Memorandum 81-45 and the Tentative Recommendation Relating to Attachment that was attached to the memorandum. The Commission approved the Tentative Recommendation for printing and for introduction in the Legislature for the 1982 session.

STUDY H-404 MARKETABLE TITLE (RIGHTS OF
ENTRY AND POSSIBILITIES OF REVERTER)

The Commission considered Memorandum 81-62 and the attached staff draft relating to rights of entry and possibilities of reverter. The Commission approved the draft for distribution for comment with a five-year rather than two-year grace period for bringing an action to enforce a power of termination.

STUDY H-405 - MARKETABLE TITLE (UNPERFORMED
LAND SALE CONTRACTS)

The Commission considered Memorandum 81-63 and the attached staff draft of a tentative recommendation relating to unperformed land sale contracts. The Commission changed the terminology to refer to "real property sales contracts" for consistency with Civil Code Section 2985. The Commission requested the staff to develop more adequate remedies, such as attorney's fees and damages, where the defaulting purchaser fails to execute a release; the staff should examine the statute governing release of a mortgage or deed of trust for possible language. As thus revised, the tentative recommendation is to be distributed for comment.

STUDY H-406 - MARKETABLE TITLE
(ABANDONED EASEMENTS)

The Commission considered Memorandum 81-63 and the attached staff draft of a tentative recommendation relating to abandoned easements. The point was made in discussion that as a practical matter a provision that precludes abandonment of an easement if it is used within a five-year period requires a court proceeding to determine abandonment. However, the court proceeding would be somewhat simplified since intent

to abandon would not be an issue. A suggestion was made that the requirement of intent for abandonment be retained but a presumption of intent to abandon would arise from a period of nonuse. Professor French indicated that she is completing an article that recommends treatment of abandoned easements in the same manner as obsolete restrictions. The Commission decided to defer further consideration of this matter until it has received a copy of Professor French's article.

STUDY H-407 - MARKETABLE TITLE (OBSOLETE RESTRICTIONS)

The Commission deferred consideration of Memorandum 81-55 and the attached staff draft of a tentative recommendation relating to obsolete restrictions until it has received a copy of an article being completed by Professor French that deals with this matter.

STUDY L-603 - PROBATE CODE (WILLS)

Holographic and Nuncupative Wills

The Commission considered Memorandum 81-53 and the attached staff draft of a Tentative Recommendation relating to Holographic and Nuncupative Wills. The Commission approved the Tentative Recommendation for distribution for comment. The staff will make some technical revisions before it is sent out.

Revocation of Wills; Proof of Lost or Destroyed Wills; Revival of Revoked Wills

The Commission considered Memorandum 81-54. The following decisions were made:

(1) UPC Section 2-507 (revocation by writing or by act) should be adopted in place of Probate Code Sections 72 and 74.

(2) Probate Code Section 73 (revocation by instrument affecting property) should not be retained as a revocation provision. (See also discussion of Section 73 below in the context of ademption.)

(3) The UPC rule that the contestant of a will has the burden of establishing that a will has been revoked, as well as establishing any

fraud or mistake (UPC Section 3-407), should be adopted in place of the California decisional law rule that presumes revocation if the will was in possession of the testator and cannot be found after the testator's death.

(4) Probate Code Section 76 (destruction of duplicate original will) should be retained. The language of the section should be conformed to UPC Section 2-507 as follows:

76. A will executed in duplicate is revoked if one of the duplicates is ~~burnt~~ burned, torn, canceled, ~~defaced~~, obliterated, or destroyed under the circumstances mentioned in subdivision 2 (2) of ~~section 74~~ Section [comparable to UPC § 2-507] ~~of this code~~.

(5) Probate Code Section 350 (proof of lost or destroyed will) should be repealed.

(6) Probate Code Section 79 (revocation of a will revokes all its codicils) should be repealed.

(7) UPC Section 2-509 (revival of revoked will) should be adopted in place of Probate Code Section 75.

Lapsed and Void Gifts; Residue of a Residue

The Commission considered Memorandum 81-56. The Commission decided to adopt the language of UPC Section 2-605 in place of Probate Code Section 92 with revision of the UPC language to eliminate any requirement of blood relationship of the predeceased named taker to the testator, and therefore to apply the anti-lapse statute to any predeceased named taker whether related to the testator or not. This will make the general anti-lapse statute consistent with the anti-lapse provision of the powers of appointment statute (Civil Code Section 1389.4). As thus revised, the language of UPC Section 2-605 would read:

If a devisee ~~who is a grandparent or a lineal descendant of a grandparent of the testator~~ is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

The anti-lapse provision of the California powers of appointment statute (Civil Code Section 1389.4) should be conformed to make the rule of representation the same as under UPC Section 2-605:

1389.4. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the ~~surviving~~ issue of such appointee who survive the appointee by 120 hours shall take the appointed property ; per stirpes and not per capita, and if they are all of the same degree of kinship they take equally, but if of unequal degree then those of more remote degree take by representation as provided in [section comparable to UPC § 2-106]. Such issue shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

The Commission decided to adopt UPC Section 2-606 (residue of a residue) in place of the California decisional law rule.

Exoneration

The Commission considered Memorandum 81-59. The Commission decided to adopt UPC Section 2-609 (exoneration) in place of the California decisional law rule. The staff should consider whether Probate Code Section 736 should be made consistent with UPC Section 3-902 (order of resort to property) when the latter section is considered. The Commission requested the staff to research the question of how an encumbrance which blankets several parcels of the testator's real property is apportioned among devisees.

Ademption

The Commission considered Memorandum 81-60. The Commission made the following decisions:

(1) UPC Sections 2-607 (change in form of securities) and 2-608 (unpaid proceeds of sale, condemnation, or insurance) should be adopted.

(2) UPC Section 2-612 (ademption by satisfaction) should be adopted in place of Probate Code Sections 1050, 1051, and 1052, except that the provision in Probate Code Section 1052 for the donor or donee of an

inter vivos gift to make a written valuation of the gift which will be binding in probate should be retained and incorporated into the UPC provision.

(3) Probate Code Section 73 should be repealed.

(4) Probate Code Sections 77 and 78 should be retained.

(5) The question of whether Probate Code Section 1054 (determination by court) should be repealed or retained is deferred until the staff determines whether there is a general provision in the UPC covering the matter.

(5) Probate Code Sections 77 and 78 should be retained.

(6) A statement should be included in an appropriate Comment to the effect that the rules of nonademption in the legislation are not exclusive, and nothing in the legislation is intended to increase the incidence of ademption in California.

Contract Concerning a Will

The Commission considered Memorandum 81-61. The Commission decided to adopt UPC Section 2-701 in place of the last portion of subdivision (6) of Civil Code Section 1624 (Statute of Frauds).

Renunciation or Disclaimer

The Commission considered Memorandum 81-58 and the attached exhibits. The Commission decided to retain Probate Code Sections 190 to 190.10, and not to adopt UPC Section 2-801.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary