MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 18-19, 1983

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on March 18-19, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	Bion M. Gregory
	Debra S. Frank, Vice Chairperson	Beatrice P. Lawson
	Robert J. Berton	
Absent:	Barry Keene, Member of Senate	James H. Davis
	Alister McAlister, Member of Assembly	John B. Emerson
	Roslyn P. Chasan	

Staff Members Present

John H. DeMoully	Nathaniel Sterling
Robert J. Murphy III	Stan G. Ulrich

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law (March 18)

Other Persons Present

Edward H. Bordin, Alameda County Bar/ Medical Association, Bioethics Subcommittee, Castro Valley (March 18)
Charles Collier, State Bar, Estate Planning, Trust and Probate Law Section, Los Angeles (March 18-19)
Theodore Cranston, State Bar, Estate Planning, Trust and Probate Law Section, San Diego (March 18-19)
Jan C. Gabrielson, State Bar, Family Law Section, Los Angeles (March 19)
Kenneth M. Klug, State Bar, Estate Planning, Trust and Probate Law Section (March 18-19)
Mark S. Rapaport, State Bar, Subcommittee on Trust Administration, Los Angeles (March 18)
Leslie Rothenberg, Attorney, Los Angeles (March 18)
Irene Silverman, Los Angeles County Bar Association, Bioethics Committee, Los Angeles (March 18)
Harley Spitler, Attorney, San Francisco (March 18)
Lucinda Surber, Menlo Park (March 18)
Gordon Treharne, Public Administrator of Los Angeles County, Los Angeles (March 18)

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY 1983 MEETING

The Minutes of the January 21-22, 1983, Meeting were approved as submitted by the staff.

AWARD OF CERTIFICATES OF DISTINGUISHED SERVICE TO CONSULTANTS

The Commission awarded certificates in recognition of distinguished service to the following consultants:

Carol S. Bruch - in recognition of distinguished service as a consultant to the California Law Revision Commission on the community property study, 1979-1982

Garrett H. Elmore - in recognition of distinguished service as a consultant to the California Law Revision Commission on the dismissal for lack of prosecution study, 1979-1983

SCHEDULE FOR FUTURE MEETINGS

May 1983

May 5 (Thursday) - 7:30 p.m. - 10:30 p.m. — Burbank
May 6 (Friday) - 9:00 a.m. - 5:00 p.m.

June 1983

June 2 (Thursday) - 7:00 p.m. - 10:00 p.m. — San Francisco
June 3 (Friday) - 9:00 a.m. - 5:00 p.m.
June 4 (Saturday) - 9:00 a.m. - 12:00 noon

July 1983

No meeting

August 1983

No meeting

September 1983

September 22 (Thursday) - 7:00 p.m. - 10:00 p.m. — San Diego
September 23 (Friday) - 9:00 a.m. - 5:00 p.m.
September 24 (Saturday) - 9:00 a.m. - 4:00 p.m.

1983 LEGISLATIVE PROGRAM

The Executive Secretary made the following report on the 1983 Legislative Program.

Sent to Governor

Assembly Bill 29 - Emancipated Minors

Approved by Committee in Second House

Assembly Bill 28 - Disclaimers
Assembly Bill 31 - Bonds and Undertakings

Passed First House

Assembly Bill 24 - Missing Persons
Assembly Bill 27 - Limited Conservatorships
Assembly Bill 69 - Vacation of Streets, Highways, and Public Service Easements
Assembly Bill 99 - Creditors' Remedies
Assembly Concurrent Resolution No. 2 - Authority to Study Topics

Set for Hearing in First House

Assembly Bill 25 - Wills and Intestate Succession and Related Matters (set for hearing on April 18)
Assembly Bill 26 - Division of Marital Property (set for hearing on April 18)
Assembly Bill 30 - Claims Against Public Entities (set for hearing on April 4)
Assembly Bill 53 - Nonprobate Transfers (set for hearing on April 4)
Assembly Bill 68 - Wills, Intestate Succession, and Related Matters (Conforming Revisions) (set for hearing on April 18)
Assembly Bill 1460 - Liability of Marital Property for Debts (set for hearing on April 18)

Introduced

Assembly Bill 835 - Support After Death of Support Obligor
Senate Bill 762 - Durable Power of Attorney for Health Care

Unable to Find Author to introduce

Dismissal of Civil Action for Lack of Prosecution

STUDY D-301 - CREDITORS' REMEDIES (AB 99)

The Commission considered Memorandum 83-23, the First Supplement to Memorandum 83-23, and Assembly Bill 99 which was introduced to effectuate the Commission's Recommendation Relating to Creditors' Remedies. The following decisions were made by the Commission.

Subdivision (b)(2) of Section 683.180 of the Code of Civil Procedure is to be amended to require proof of service to be filed with the court clerk within 90, rather than 30, days after the filing of the application for renewal. Section 683.180 provides a special procedure for extending the duration of a judgment lien on real property. The judgment lien is extended only if a certified copy of the application for renewal of the judgment is recorded while the judgment lien is still in effect.

Subdivision (b) deals with the situation where an interest in real property has been transferred subject to the lien and the transfer has been recorded before the application for renewal is filed. In this situation, an extension of the duration of the judgment lien pursuant to Section 683.180 extends the lien on the interest transferred only if a copy of the application for renewal is personally served on the transferee and proof of such service is filed with the court clerk. It has been suggested that the 30 days now provided in Section 683.180 is not sufficient time within which to file proof of service if service on the transferee is by publication or if the service is a difficult one to make. For this reason, the Commission decided to amend AB 99 to provide more time for filing proof of service under subdivision (b) of Section 683.180.

The draft of the amendments attached as Exhibit 1 to Memorandum 83-23 was approved. Also approved was the draft of the report prepared for adoption by the Senate Judiciary Committee (attached to Memorandum 83-23) that contains new and revised Comments to the provisions of AB 99.

The Commission determined not to add the word "superior" or a similar phrase before the words "liens and encumbrances" in various provisions relating to the amount of the minimum bid in case of an execution sale of a dwelling. It was concluded that such a revision would not appropriately be included in Assembly Bill 99 which is a "clean up" bill. The Commission also declined to make a revision of Section 726 and other provisions in order to clarify the law relating to judicial foreclosure.

The Commission decided to substitute "deposit" for "file" in Section 488.080(b) and in Section 699.080(b). The substitution makes clear that a registered process server must deposit a copy of the writ with the levying officer before serving the writ merely in order that the levying officer will have a copy of the writ available when a payment or exemption claim or other communication is made by the judgment debtor or a third person after the writ is served.

The Commission was opposed to giving a registered process server the same immunity as is given to the levying officer. It was pointed out that the levying officer is a public official who acts to protect the interests of judgment debtors as well as judgment creditors. The

registered process server, however, is an agent of the judgment creditor and not a disinterested person.

Sections 488.455 and 700.140 are to be amended to add a sentence reading substantially as follows:

> The [attachment] [execution] lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

STUDY D-312 - LIABILITY OF MARITAL PROPERTY FOR DEBTS

The Commission considered Memorandum 83-20 relating to the problems Assemblyman McAlister sees in AB 1460 (liability of marital property for debts). The Commission decided, on the issue of the liability of the earnings of a spouse for a child support obligation of the other spouse, that the earnings of the spouse should not be liable. The staff should so inform Mr. McAlister and request that he amend AB 1460 to reflect this decision, notwithstanding the fact that the District Attorneys involved with child support are opposed to this.

STUDY F-601 - DIVISION OF JOINT TENANCY AND TENANCY IN COMMON PROPERTY

The Commission considered Memorandum 83-27, relating to the status of AB 26 (division of joint tenancy and tenancy in common property). The Commission also reviewed AB 1976 (a copy of which is attached as an Exhibit to these Minutes). In light of the comments of the organized bar on AB 26, the Commission decided to amend the bill as follows:

(1) The bill should govern only property acquired by the spouses during marriage as joint tenants and not as tenants in common.

(2) Property acquired by the spouses during marriage as joint tenants should be presumed to be community property, for the purpose of dissolution of marriage. The presumption should be rebuttable by a written agreement between the parties, in the title or otherwise, that the property is separate and not community.

(3) In the dissolution, a party who has made a separate property contribution to the property is entitled to reimbursement of the contribution without interest or appreciation. The amount of the reimbursement may not exceed the net value of the property.

CALIFORNIA LEGISLATURE—1983-84 REGULAR SESSION

ASSEMBLY BILL No. 1976

Introduced by Assemblyman Calderon

March 4, 1983

An act to add Section 4800.7 to the Civil Code, relating to family law.

LEGISLATIVE COUNSEL'S DIGEST

AB 1976, as introduced, Calderon. Family law.

Existing law does not provide that upon division of property in an action under the Family Law Act, a spouse who has contributed separate property for a payment on the principal of an obligation secured by a community asset shall be reimbursed therefor.

This bill would so provide, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 4800.7 is added to the Civil Code, to read:

4800.7. Upon a division of property under this part, any separate property contributed for a payment on the principal of an obligation secured by a community asset shall be reimbursed to the party making the contribution without interest or appreciation, absent an agreement to the contrary; however, the amount to be reimbursed shall not exceed the net value of the asset at the time of division.

STUDY F-661 - CONTINUATION OF SUPPORT OBLIGATION AFTER DEATH OF SUPPORT OBLIGOR

The Commission considered Memorandum 83-21 and the letters distributed at the meeting (attached to these minutes as Exhibits), containing comments on the tentative recommendation relating to survival of support obligations beyond the death of the support obligor. The Commission concluded that it would be inadvisable to provide for survival of support obligations, but requested the staff to prepare further material for consideration of the Commission relating to insurance and other means of giving security for the support obligation in the event of the death of the support obligor.

VALENSI AND ROSE
PROFESSIONAL LAW CORPORATION
1880 CENTURY PARK EAST, SUITE 1518
CENTURY CITY
LOS ANGELES, CALIFORNIA 90067-1653

TELEPHONE (213) 277-8011
CABLE ADDRESS: VALEROSE

JONATHAN A. BROD
STUART L. BRODY
ROGER P. HEYMAN
HOWARD S. KLEIN
LAWRENCE E. MAY
SIDNEY R. ROSE
STEPHEN G. VALENSI

OF COUNSEL
IRVING KELLOGG
A LAW CORPORATION

March 16, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Your tentative recommendation F-661:
Continuation of Support Obligation
After Death of Support Obligor

Gentlemen and Ladies:

I am writing on behalf of the Legislative Subcommittee of the Probate, Trust and Estate Planning Committee of the Beverly Hills Bar Association. Melinda Tooch and I were assigned the review and analysis of F-661.

The Subcommittee believes that it would be unwise for a spousal support obligation automatically to survive the death of the support obligor, for the reasons that (1) the obligor's income normally ceases upon his or her death, (2) the obligor's estate is typically of modest size, (3) there is competition for limited dollars between the obligor's former spouse and obligor's present family, (4) the death of the obligor is the sort of change of circumstances which would almost always justify a significant downward modification, or termination, of support to the former spouse, (5) the burden of proof should be on that former spouse to show continued ability on the part of the obligor's estate to pay support to the former spouse, (6) the Commission's recommendation seriously underestimates the importance of (1) - (4), above and misplaces the burden of proof, to wit: by favoring the former spouse through continuing his or her support unless the present family is able to prove manifest injustice in so doing.

The Subcommittee proposes that spousal support terminate upon the death of the support obligor subject to the right of the former spouse to seek an order from the Family Law Department after notice given to the estate of the deceased obligor, and within a time co-extensive with the creditor claim period, for reinstatement of spousal support in the same or in a different amount. The burden

of proof would be on the former spouse to demonstrate the ability of the estate to pay post-mortem support. Further, the former spouse should have the right to seek a family allowance and/or probate homestead through the estate of the deceased support obligor. Finally the Family Law right of reinstated support and the Probate rights of probate homestead and family allowance should be considered in the context of one another; for example, the granting of a substantial family allowance should probably weigh heavily against the reinstatement of support in a substantial amount, and vice versa.

(The Subcommittee also wonders, in passing, whether the Commission has considered the situation where the support obligor has established and fully funded an intervivos trust, so that, on his or her death, there is no probate estate but a trust which continues for the benefit of other persons.)

Thank you for the opportunity to present the Subcommittee's thoughts on this matter.

Sincerely,

Howard Klein

Howard S. Klein
for Valensi and Rose, PLC

HSK/sm

cc: Ms. Melinda J. Tooch
Lance M. Weagant, Subcommittee Chair
Gerald M. Yaroslow, Committee Chair

DINKELSPIEL, DONOVAN & REDER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ONE EMBARCADERO CENTER · 27TH FLOOR
SAN FRANCISCO 94111
(415) 788-1100

TELECOPIER:(415)397-5949
TELEX: 172-083

March 8, 1983

CLARE H. SPRINGS

IN REPLY REFER TO:
8061-4675-5

John De Moully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 99306

LRC Study - Spousal Support Obligation

Dear Mr. De Moully:

As a member of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California, I reviewed the tentative recommendation relating to the continuation of a support obligation after the death of the support obligor. I am very disturbed by the approach taken in the tentative recommendation. It seems to me that the ramifications of this approach have not been carefully considered, although the recommendation says exactly the opposite.

First, I agree with the fundamental philosophy espoused by the current California rule. If a person is married and his or her spouse dies, the surviving spouse suffers the loss of support from the deceased spouse. I cannot find any good reason for putting former spouses on a level higher than present spouses when the supporting spouse has died. However, this recommendation would do just that. A former spouse would be entitled to a support obligation from the estate whereas if the testator left all of his property to his children by a prior marriage or otherwise, a present spouse would not be entitled to any support other than the family allowance for a short period of time.

Second, the right of a former spouse to put in a claim against the estate could result in the former spouse actually "taking away" from the present spouse and children of this second marriage, the latter of whom will be younger and in need of support for a longer period than other children. For example, it is not unusual for a person to have a reasonably good salary and live comfortably but have very little in assets. So long as the wage earner is working, he

or she can afford to pay spousal support and also provide for his or her second family. However, upon the death of the wage earner, the estate is relatively small, forcing the present spouse to go to work to support himself or herself, as well as any children. Now we are going to allow the former spouse to come in and take, through a lump sum claim, everything except the family allowance amount and the probate homestead, regardless of the fact that the present spouse has herself, as well as young children, to support. I just can see no justification for the law intentionally creating this situation.

Further, I am opposed to any provision which allows women who are supposedly on their own to continue to lean on former spouses for support. I understand that there are circumstances where a woman has never worked and is left "high and dry" after twenty years of marriage and must have support. However, it has been the stated policy of our divorce courts to put these women on their feet financially as quickly as possible. By prolonging the support period beyond death, the proposed statute flies in the face of this stated philosophy.

Thank goodness they would not allow modification of the support order after the death of the support obligor as a general rule. However, I am concerned that the exception which allows the court to mitigate a manifest injustice will result in open ended litigation. This provision leaves a great deal to the court. Indeed, I can see the entire divorce being tried all over again except this time, it would be between the former spouse and the present spouse or members of each separate family.

I am opposed to the provision that allows the spouses to alter the new rule by written agreement. As far as I can see, this just adds another factor to be negotiated during the divorce proceeding. There is little question in my mind that the supported spouse is going to argue in favor of the new rule and the supporting spouse will argue against it. Don't we already have enough "legally oriented" issues to be negotiated in connection with a divorce along with the traumatic emotional baggage that always accompanies divorce?

Finally, I can see that this proposal will create more havoc in the estate planning process. Is it not enough that we have all these variables such as whether to take a lump

sum or installment payment of retirement benefits and the tax consequences of each? Now we will have to estimate what the support obligation will be at the anticipated date of death. If the amount is apt to be substantial, should it be paid from the credit shelter amount or from the marital deduction? In connection with the divorce proceedings, will the supporting spouse be required to carry decreasing term insurance to cover the support obligation existing at death? Who should be responsible for the premiums on such a policy? And so on.

It occurs to me that if a supported spouse is greatly concerned about the termination of support because of the death of the supporting spouse, the supported spouse can carry term insurance on the life of the supporting spouse to cover this eventuality. This is certainly preferable to depriving the second spouse of needed funds.

My conclusion is that I cannot believe that there are that many spouses who suffer irreparable damage under the present rule and the proposed rule will cause irreparable damage to second spouses, children of a second marriage and the general estate planning process that these couples undertake. In my opinion, if this proposal becomes law, we will rue the day it was done.

Sincerely yours,

Clare H. Springs

(Ms.) Clare H. Springs

cc: Mr. Kenneth M. Klug
Mr. Charles A. Collier, Jr.
Mr. William H. Plageman

STUDY G-100 - LATE CLAIM AGAINST PUBLIC ENTITY

The Commission considered Memorandum 83-25 and the First Supplement to Memorandum 83-25 and Assembly Bill 30 introduced to effectuate the Commission's Recommendation Relating to Rejection of Late Claim Against Public Entity.

The Executive Secretary reported that the Board of Control and some local public entities were concerned that Assembly Bill 30 did not conform to the procedures they are now using when a claim is returned because it was not timely presented. Existing Government Code Section 912.4 requires that the public entity shall act on a claim within 45 days after the claim has been presented or the claim is deemed to have been rejected. However, this requirement causes confusion where the public entity does not want to grant or deny the claim but instead wants to return it without action on the ground that the claim was not timely filed. Accordingly, the Commission amended Assembly Bill 30 to make clear that a claim not presented within the time allowed by law may be returned to the person presenting the claim without further action and to specify a notice that may be used in such a case. The Amendments conform to the procedure now used by the Board of Control and to the procedure used by many local public entities.

The following are the amendments to Assembly Bill 30 approved by the Commission:

Amendment 1

In line 1 of the title, strike out "amend Section 913 of" and insert:
add Section 911.3 to

Amendment 2

On page 1, strike out lines 1 to 8, inclusive, and on page 2, strike out lines 1 to 33, inclusive, and insert:

SECTION 1. Section 911.3 is added to the Government Code, to read:

911.3. (a) When a claim that is required by Section 911.2 to be presented not later than the 100th day after accrual of the cause of action is presented after such time without the application provided in Section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action. The notice shall be in substantially the following form:

"The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within 100 days after the event or occurrence as required by law. See Government Code Sections 901 and 911.2. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Government Code Sections 911.4 to 912.2 and 946.6. Under some circumstances, leave to present a late claim will be granted. See Government Code Section 911.6.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

(b) Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice under subdivision (a) within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

STUDY L-601 - NONPROBATE TRANSFERS

The Commission considered Assembly Bill 53 which was introduced to effectuate the Commission's recommendation relating to nonprobate transfers. The Executive Secretary reported that the bill is opposed by the California Bankers Association. The California Bankers Association opposed the bill introduced at the 1980-81 session to effectuate the Commission's earlier recommendation relating to nonprobate transfers and was successful in defeating the bill. The Executive Secretary reported that the representative of the California Savings and Loan Associations takes the position that if the Banks do not like the bill, that the Savings and Loan Associations also will be in opposition to the bill.

On the other hand, the credit unions and industrial loan companies are in support of the bill. The representative of the credit unions has suggested that the bill be amended to limit its application to the financial associations that desire to be covered by the bill.

Based on experience with the 1980-81 bill, the Commission concluded that there was little chance of obtaining enactment of the bill in its present form. As a practical matter, the choice is either to abandon

the bill or to limit its application to the financial institutions that desire to be covered by the bill. The Commission decided to amend the bill to limit its application to credit unions and industrial loan companies. This limitation would not preclude a court from applying a rule stated in the bill to an account held by another type of financial institution, and this is likely to occur in cases where there is no California law on the particular legal issue to which a particular rule applies.

STUDY L-605 - PROBATE LAW
(ASSEMBLY BILL NO. 25 - PRINCIPLES OF CONSTRUCTION)

The Commission considered Memorandum 83-15 and the attached material from the Commission's consultant, Professor Edward Halbach, and the Third Supplement to Memorandum 83-22, concerning rules of construction of wills and for determining parent-child relationships for intestate succession. The Commission approved the substance of Professor Halbach's proposals with a few revisions noted below. The Commission approved Professor Halbach's reorganization of sections to group like subjects together. Professor Halbach agreed to submit a cleaned-up draft of these provisions for inclusion in AB 25. The staff should look carefully at the general definitions in AB 25 to make sure they work properly in the context of Professor Halbach's sections.

Specific matters are discussed below.

Admissibility of Extrinsic Evidence to Construe the Will (Third Supplement to Memorandum 83-22)

The Commission decided to make clear that the rule of existing California law is preserved to the effect that in construing ambiguous language in the will the court may consider the circumstances surrounding the execution of the will. See 7 B. Witkin, Summary of California Law Wills and Probate § 160, at 5676 (8th ed. 1974). The Commission decided to revise proposed Sections 6140 and 6141 as follows:

§ 6140. Intention of testator

6140. ~~The intention of a testator as expressed in his or her will controls the legal effect of the dispositions in the will.~~ A will is to be construed according to the intention of the testator.

§ 6141. Rules of construction apply in absence of contrary intention

6141. The rules of construction in this chapter apply ~~unless~~ in the absence of a contrary intention ~~is indicated by the will~~ of the testator.

Worthier Title; Rule in Shelley's Case; Destructibility of Contingent Remainders

The Commission approved the substance of Professor Halbach's proposed Section 6146. This will replace the more detailed statement of Section 6151 (worthier title) in AB 25. The Comment should make clear what these various rules (worthier title, Shelley's case, destructibility of contingent remainders) mean.

Anti-Lapse

The Commission approved the substance of Professor Halbach's proposed Section 6150, and the substance of proposed Section 6151 (to replace Section 6145 in AB 25) with two changes: The introductory paragraph of Section 6151 should begin with "Except as provided in subdivision (c)," and subdivision (c) should end with "and that fact was known to the testator."

Professor Halbach pointed out that under subdivision (a) of his Section 6151, the anti-lapse rule would not be applied in the context of a class gift with respect to a member of the class who was dead when the will was executed and that fact was known to the testator. This is a departure from existing law. This may create a problem when one class member is dead when the will is executed, and another class member dies after execution of the will but before the testator: Under the Halbach proposal, the issue of the first-to-die class member would not be substituted but the issue of the later-to-die would be substituted--an arguably arbitrary result. Nonetheless, Professor Halbach thought the scheme was satisfactory in most cases, and the Commission approved it.

Professor Halbach thought the anti-lapse rules in the powers of appointment statute (Civil Code §§ 1389.4, 1389.5) should be made consistent with the Probate Code rules, and the Commission agreed.

Failure of Devise

The Commission approved the substance of Professor Halbach's proposed Section 6152 (to replace Section 6146 in AB 25). Subdivision (b) of that section applies a rule to a gift of a future interest which fails

that is analogous to the rule that passes a failed residuary gift to other residuary devisees: The failed portion of the future interest passes to the other devisees of the future interest.

Meaning of Death With or Without Issue

The Commission approved the substance of Professor Halbach's proposed Section 6153 (constructional preference for making the determination whether person died with or without issue at the time the devise is to take effect in enjoyment).

Class Gifts

The Commission approved the substance of Professor Halbach's proposed Section 6154, and approved the substance of proposed Section 6155 with the deletion of the word "then" from line 4 of the proposed section. Proposed Section 6155 would replace Section 6148 in AB 25.

Location of Powers of Appointment Provisions

The staff should consider whether the powers of appointment provisions presently located in the Civil Code (§§ 1380.1-1390.5) should be relocated in the Probate Code.

Halfbloods, Adopted Persons, and Persons Born Out of Wedlock

The Commission approved the substance of Professor Halbach's proposed Section 6156 (to replace Section 6147 in AB 25). The words "brother, sister," should probably be substituted for "sibling."

Parent-Child Relationship for Intestate Succession

The Commission approved the substance of Professor Halbach's proposed Section 6408 (to replace Section 6408 in AB 25). Professor Halbach's section would sever the natural line in the following stepparent adoption case, contrary to the UPC: If the father sires an illegitimate child who never lives with the natural father, the mother marries someone else, and the new stepfather adopts the child, inheritance rights between the child and the natural father would be cut off. The Commission approved this change. The Commission also approved Professor Halbach's scheme for more limited inheritance by the natural parent from the adopted-out child than inheritance by the adopted-out child from the natural parent.

The staff should consider whether a specific provision is needed to govern the adoptee's status with respect to family allowance and probate

homestead. If such a provision is to be drafted, it should probably go in Section 6408 as paragraph (3) of subdivision (c).

Professor Halbach suggested that the staff give consideration to allowing a wholeblood brother or sister to inherit from an adopted child under certain circumstances.

The Commission approved the substance of Professor Halbach's proposal to include a foster child within the protection of the intestate succession statute by adding to his proposed Section 6408(a)(2) the following language: "The relationship of foster parent or stepparent to foster child or stepchild shall be treated as if it were an adoptive relationship (i) if the relationship began during the child's minority and continued throughout the parties' joint lifetimes and (ii) if it appears by clear and convincing evidence that the foster parent or stepparent would have adopted the child but for a legal barrier."

Professor Halbach's proposed Section 6408 excludes the possibility that a paternity judgment made after the death of the father may be used to establish the parent-child relationship for the purpose of intestate succession or construction of wills. Professor Halbach thought existing law is unclear in this respect.

STUDY L-625 - PROBATE LAW (ASSEMBLY BILL 24 - MISSING PERSONS)

The Commission considered Memorandum 83-24. The following amendments to Assembly Bill No. 24 (as amended in Assembly March 9, 1983) were approved:

Amendment 1

On page 3, line 20, after "no" insert:
preliminary or final

Amendment 2

On page 3, line 21, after "made" insert:
pursuant to Chapter 16 (commencing with Section 1000)

Amendment 3

On page 5, line 29, after "1357." insert:
(a)

Amendment 4

On page 5, line 32, strike out "(a)" and insert:
(1)

Amendment 5

On page 5, line 35, strike out "(b)" and insert:
(2)

Amendment 6

On page 5, between lines 35 and 36, insert:

(b) The administrator or executor to whom letters have been issued as provided in this chapter shall administer and distribute the estate of the missing person in the same general manner, method of procedure, and with the same force and effect as provided by statute for the administration and settlement of the estates of deceased persons, except as otherwise provided in this chapter.

Amendment 7

On page 5, strike out lines 37 to 40, inclusive

Amendment 8

On page 6, strike out line 1, and insert:

1358. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the hands of the executor or administrator.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all the circumstances, but any action under this paragraph is forever barred five years after the time the petition is filed under Section 1354.

(b) The remedies available to the missing person under subdivision (a) are in addition to any remedies available to the missing person by reason of any fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person and the rights of the heirs, devisees, and legatees of the missing person.

(d) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under Section 1080 for the determination of the identity of the person claiming to be the reappearing missing person.

Amendment 9

On page 7, line 34, strike out "state" and insert:
estate

The following is the draft of a Comment to Section 1358 prepared by the Staff for Adoption by the Senate Committee on Judiciary.

406/190

Probate Code § 1358 (added). Recovery of property by missing person upon reappearance

Comment. Section 1358 supersedes former Sections 287-290 and a portion of former Section 292. Subdivisions (a) and (b) are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code. The Uniform Probate Code provision has been revised to add a provision barring an action under paragraph (a)(2) five years after the time the petition is filed under Section 1354. This additional provision continues the general effect of the portions of former Sections 287-292 that gave a distribution conclusive effect after the missing person had been missing 10 years. Subdivision (c) is consistent with Section 1021 (effect of a decree of final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey a good title to property of the missing person prior to the time an action by the missing person against the distributee would be barred under subdivision (a)(2). This is because subdivision (c) provides a rule that the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a)(2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a)(2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a)(2), the reappearing missing person might recover from the distributee the property subject to the encumbrance. Subdivision (d) is drawn from a portion of former Section 287.

STUDY L-625 - PROBATE LAW (PASSAGE OF PROPERTY WITHOUT ADMINISTRATION OR WITH SUMMARY ADMINISTRATION)

The Commission considered Memorandum 83-18 and the attached staff draft of provisions relating to passage of property without administration or with summary administration. The Commission decided to defer consideration of the provisions drawn from the Uniform Probate Code provisions for succession without administration. The Commission will consider the need for such provisions in the context of the general provisions concerning administration of estates. The Commission asked the staff to develop a finished draft of the provisions relating to surviving spouse's election concerning administration (drawn from Probate Code Sections 202-206 and 650-657), small estate set-aside (Prob. Code §§ 640-647), and collection

of small estates by affidavit (Prob. Code §§ 630-632). There was sentiment on the Commission to increase the maximum estate value for use of the provisions for collection by affidavit from the present $30,000 (Prob. Code § 630) to $100,000, and to increase the maximum limits for use of the provisions for collection by affidavit of the decedent's bank account (Prob. Code § 630.5).

When the staff eventually looks at the succession without administration provisions, a problem may be that the IRS will treat estates in this situation as a grantor trust without separate taxpayer status. There may be an IRS ruling to this effect in Lousiana.

STUDY L-625 - PROBATE CODE (ASSEMBLY BILL NO. 25 - MISCELLANEOUS)

The Commission considered Memorandum 83-22, and the First, Second, and Third Supplements, attached materials, and proposed amendments to Assembly Bill 25 which were handed out at the meeting. The Commission made the following decisions:

Surviving Spouse's Waiver of Rights

The Commission approved the proposed amendments to Sections 143 and 146 to permit waiver of disclosure after advice by independent legal counsel. The Commission also decided to delete the requirement of "full and complete" disclosure, and to substitute a requirement of "fair and reasonable" disclosure, in Sections 143 and 146.

Effect of Homicide

The Commission approved the proposed amendment to Section 204 to add the language: "The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part."

Simultaneous Death--Insurance

The Commission approved the proposed amendment to delete subdivision (c) from Section 224 (non-retroactivity provision).

Interested Witness

The Commission decided to amend Section 6112 to provide that there is a rebuttable presumption of undue influence where a witness to the will receives benefits under the will.

Statutory Will

The Commission approved the proposed amendments to Sections 6240 and 6241 explaining the purpose of a bond. The Commission decided that the proposed new alternative for acknowledgment of a will before one notary public instead of two witnesses should apply also to statutory wills. It would be useful to note in a Comment that notarization affords a permanent record of the date, time, and type of each official act, and the character of every document notarized. See Gov't Code § 8206.

Trust--Lapse of Devise

The Commission rejected the proposed amendment to add a new Section 6304 to the Uniform Testamentary Additions to Trusts Act to permit the court, where a devise to trust has lapsed because the trust has been revoked or terminated, to order distribution of the estate as if the terms of the trust at the time of execution of the will were incorporated by reference in the will.

Intestate Succession by Grandparents

The Commission rejected the proposed amendment to Section 6402 and decided to keep the scheme in AB 25 (same as the UPC rule) for intestate succession by grandparents and issue of grandparents.

Probate Homestead

The Commission rejected the proposed amendment to include an adult disabled child of the decedent within those eligible for a probate homestead. The Commission rejected the proposed amendment to make the probate homestead subject to local zoning ordinances. The amendment would have reversed the holding of Wells Fargo Bank v. Town of Woodside, 33 Cal.2d 379 (1983). The Commission did not believe that Assembly Bill 25 should be used as a vehicle to make this change and some Commissioners object to the change as a matter of principle.

STUDY L-628 - TESTAMENTARY CAPACITY OF CONSERVATEE

The Commission considered Memorandum 83-26 in which the staff proposed to add to Assembly Bill 27 provisions that would permit a court to determine whether or not a conservatee has the capacity to make or revoke a will using the same procedure as is now provided for determining whether the conservatee has the capacity to give informed consent for medical treatment.

A representative of the State Bar Section on Estate Planning, Trusts and Probate Law stated that the head of the Section's Subcommittee on Conservatorships had advised that the Subcommittee strongly opposed the staff proposal. The head of the Subcommittee notes that many times conservatees go in and out of a state that would permit the making or revocation of a will. Maybe on the day the court hears the petition the person will be "out," but the person might be "in" on other days. The Subcommittee believes that it would be a mistake to permit a court order that deprives the conservatee of the ability to make a will. In the case of informed consent for medical treatment, there is an immediate need for a decision to be made. But it is not critical to cut off the right of a person to make a will. If in fact testamentary capacity is gone and that is the determination of the court ultimately, there are intestate succession statutes that will take care of the problem. The Subcommittee therefore opposes the staff proposal.

Another observer present at the meeting commented that in his experience conservatees are very reluctant to attend court hearings and the net result of the staff proposal would be to deprive conservatees of the capacity to make a will because the conservatee would seldom appear in court to oppose the issuance of the order. In addition, a prospective conservatee is given much advice now by the court investigator and the court. If, in addition, the conservatee is advised that an order is sought to deprive the conservatee of the capacity to make a will, it will become more difficult to establish needed conservatorships.

In view of the fact that the Subcommittee of State Bar Section strongly opposes the staff proposal and that other persons present at the meeting also opposed the proposal, the Commission decided not to include the staff proposal as an amendment to Assembly Bill 27.

STUDY L-703 - DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The Commission considered Memorandum 83-14 and the First and Second Supplements thereto concerning the Commission's Recommendation Relating to Durable Power of Attorney For Health Care Decisions. The Commission also heard the views of several interested persons who attended the meeting and considered the views of the State Bar Committee on the Legal Rights of the Handicapped as set out in the letter attached to these Minutes. The Commission reviewed the approach the proposed legislation should take and reaffirmed its decision to use the durable power of attorney statute as the vehicle rather than the separate health care representative statute. Any necessary revisions can be made within the framework of the durable power of attorney statute. The proposed statute, as revised, should be amended into Senate Bill 762, Senator Keene's spot bill introduced on behalf of the Commission.

The Commission approved the draft statute as presented in the materials considered at the meeting, subject to the following revisions:

Civil Code § 2411. Who may petition for review

This section of existing law should be amended to permit a treating health care provider to petition the court for the purposes provided in proposed Section 2412.5.

Civil Code § 2412.5. Petition with respect to durable power of attorney for health care

Proposed Section 2412.5, as set out in the tentative recommendation attached to Memorandum 83-14, should be revised to read substantially as follows:

> 2412.5. With respect to a durable power of attorney for health care, a petition may be filed under this article for any one or more of the following purposes:
>
> (a) Determining whether the durable power of attorney for health care is still effective or has terminated.
>
> (b) Determining whether the acts or proposed acts of the attorney in fact are ~~in the best interests~~ consistent with the desires of the principal ~~taking into consideration the desires of the principal~~ as expressed in the durable power of attorney or otherwise made known to the court.
>
> (c) Compelling the attorney in fact to report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit such a report within 10 days after written request from the person filing the petition.

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court of both of the following:

(1) The attorney in fact has violated or is unfit to perform the ~~fiduciary duties~~ duty under the durable power of attorney for health care to act consistent with the desires of the principal.

(2) ~~The termination of the durable power of attorney for health care is in the best interests of the principal in order to carry out the desires of the principal as expressed in the power of attorney.~~ At the time of the determination by the court, the principal lacks the capacity to give or to revoke a durable power of attorney for health care.

Civil Code § 2421. Restriction in power of attorney of authority to petition

The proposed amendments to Section 2421 should be revised to permit the attorney in fact to petition to determine whether the durable power of attorney is still effective or has terminated or to obtain a court order passing on the acts or proposed acts of the attorney in fact under the durable power of attorney, notwithstanding a provision in the durable power expressly eliminating the authority of persons to petition for such purposes.

Civil Code § 2431. Application of article

Proposed Section 2431, as set out in the tentative recommendation attached to Memorandum 83-14 and revised in the Second Supplement, should be revised to make clear that the new statute is not intended to affect the validity of a decision made under a durable power of attorney before January 1, 1984.

Civil Code § 2432. Requirements of durable power of attorney for health care

Proposed Section 2432, as set out in Exhibit 4 to the First Supplement to Memorandum 83-14, should be revised to read substantially as follows:

2432. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless both of the following requirements are satisfied:

(1) The durable power of attorney specifically authorizes the attorney in fact to make health care decisions.

(2) The durable power of attorney either (a) is signed by at least two witnesses who are present when the durable power of attorney is signed by the principal or when the principal acknowledges his or her signature or (b) is acknowledged before a notary public at any place within this state.

(b) Neither the treating health care provider nor an employee of the treating health care provider may be designated as the attorney in fact to make health care decisions under a durable power of attorney. A health care provider or employee of a health care provider may not act as an attorney in fact to make health care decisions if the health care provider becomes the principal's treating health care provider.

(c) None of the following may be used as a witness under subdivision (a):

(1) ~~The~~ A health care provider.

(2) An employee of ~~the~~ a health care provider.

(3) The attorney in fact.

Civil Code § 2433. Requirements for printed form

The warning provided for printed forms in proposed Section 2433, as set out in the tentative recommendation attached to Memorandum 83-14, should be split into two separate statements, one concerning the effect of the durable power of attorney for health care, and the other concerning the formalities for executing the power of attorney.

Civil Code § 2434. Authority of attorney in fact to make health care decisions

Proposed Section 2434, as set out in Exhibit 4 to the First Supplement to Memmorandum 83-14, should be revised to read substantially as follows:

2434. (a) Unless the durable power of attorney provides otherwise, the attorney in fact designated in a durable power of attorney for health care who is known to the health care provider to be ~~reasonably~~ available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care, but the attorney in fact does not have priority over the principal with respect to a particular health care decision if the principal is able to give informed consent with respect to that decision.

(b) Subject to any limitations in the durable power of attorney, the attorney in fact designated in a durable power of attorney for health care may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so.

The language concerning the directive to physicians under Sections 7185-7195 of the Health and Safety Code in the Comment to Section 2434 as set out in Exhibit 4 to the First Supplement should be deleted. A statement should be added to the Comment that the principal is free to provide any desired limitations on types of treatment in the durable power of attorney.

Civil Code § 2434.5. Limitation concerning certain types of health care

The draft of a provision limiting the authority of the attorney in fact in certain areas of health care set forth as Section 2434.5 in the Second Supplement to Memorandum 83-14 was not approved by the Commission.

Civil Code § 2436. Revocation

The provision governing revocation by the principal of the appointment or authority of the attorney in fact and the entry of the revocation of authority in the principal's medical records was approved in the form set out in Exhibit 4 to the First Supplement to Memorandum 84-14.

Civil Code § 2437. Protection of health care provider from liability

To be consistent with revisions made in Section 2412.5, proposed Section 2437 should be revised to read substantially as follows:

> 2437. A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health care decision and both of the following requirements are satisfied:
>
> (a) The decision is made by an attorney in fact who the health care provider believes in good faith is authorized by a durable power of attorney under this article to make the decision.
>
> (b) The health care provider believes in good faith that the decision is ~~in the best interests of the principal in order to carry out~~ consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the health care provider.

Civil Code § 2438. Other authority not affected

Proposed Section 2438, as set out in the Second Supplement to Memorandum 83-14, should be revised to read substantially as follows:

> 2438. (a) Subject to Section 2434, nothing in this article affects ~~the law governing when one~~ any right a person may have to make health care decisions on behalf of another.
>
> (b) This article does not affect the law governing health care treatment in an emergency.

The Comment to this section should state that the provisions of the article on durable powers of attorney for health care are cumulative to whatever other ways there may be to consent for another.

THE LEGAL SERVICES SECTION

OF THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO 94102-4498
TELEPHONE 561-8250
AREA CODE 415

March 16, 1983

John H. DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: Durable Power of Attorney to Make Health Care Decisions
March 7, 1983 draft

Dear Mr. DeMoully:

The Committee on the Legal Rights of the Handicapped considered the above at its March 11, 1983 meeting.

The Committee concluded that any mechanism to provide substitute decision making as to health care decisions should not be based on an undefined standard of capacity/incapacity. Rather, any such mechanism should be applicable only to persons totally unable to make and communicate such decisions. Any issue of capacity/incapacity should be resolved according to existing Probate Code procedures.

The Committee recommended that such limitations be included in any legislation on this subject.

The State Bar's Board of Governors has not reviewed or taken a position on this item. Consequently, the views expressed herein are those of the Legal Services Section and its Committee on the Legal Rights of the Handicapped only.

Very truly yours,

John C. Lamb

John C. Lamb, Chair
Committee on the Legal Rights of the Handicapped
Legal Services Section
State Bar of California

cc: Hon. Barry Keene

STUDY L-800 - PROBATE LAW (ADMINISTRATION OF ESTATES OF DECEDENTS)

The Commission considered Memorandum 83-16 and the First and Second Supplements thereto, relating to the general approach to be taken in preparing new Division 3 of the California Probate Code. The Commission also considered a memorandum from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar relating to the approach to Division 3 of the Probate Code, along with comments from the State Bar Probate Law and Administration Committee, copies of which are attached as Exhibits to these Minutes.

After discussion of the various possible approaches to this study, and after an expression of views of individual Commissioners as to desirable reforms in the California probate law, the Commission directed the staff to proceed by working on ways to substantially improve the existing law, taking into consideration the views expressed by the Commissioners, suggestions of the State Bar for reform, concepts from the Uniform Probate Code, and other means that appear proper to expedite, simplify, and reduce the cost of probate procedure.

APPROVED AS SUBMITTED _____

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

_____
Date

_____
Chairperson

_____
Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO 94102-4498
TELEPHONE 561-8200
AREA CODE 415

March 18, 1983

TO: CALIFORNIA LAW REVISION COMMISSION:

RE: APPROACH TO DIVISION III OF PROBATE CODE

At its March 12 meeting, the Executive Committee again discussed at length possible approaches to Division III of the Probate Code. The results of that discussion are as follows:

1. The Executive Committee unanimously supports retention of the existing system in California subject to appropriate amendments to improve its operation.

2. The Executive Committee supports inclusion of real property under Probate Code Section 630 which allows transfer of property by affidavit.

3. The Executive Committee supports an increase of property passing under Section 630 to $50,000 from the present limitation of $30,000. (Based upon statistics from the State Controller's Office for 1980 relating to inheritance tax, more than twenty percent of all estates in California would therefore be subject to transfer by affidavit under Section 630.)

4. The Executive Committee supports inclusion of separate property passing outright by Will to a surviving spouse under Section 202(a).

5. The Committee was fairly even divided as to whether separate property passing by intestate succession outright to a spouse should be included under §202(a). This relates in part to whether the proposed changes as to separate property contained in AB 25 are in fact enacted.

6. The Executive Committee considered, but rejected, passing of property pursuant to a 202(a) type affidavit outright to children.

7. Adoption of the informal appointment, informal probate and informal administration provisions of the UPC as an alternate system was opposed 16 to 2.

8. Universal succession as an alternate to supervised administration was supported by only two members of the Executive Committee. Universal succession without administration with a dollar limit, such as $150,000, was also supported by two only members of the Executive Committee. However, five members of the Executive Committee would support universal succession if limited to property passing to a spouse or children.

9. The Executive Committee also considered a procedure whereby, after a Will had been admitted to probate and the four months had lapsed for filing of creditor's claims and for contest of a will, the probate could be terminated and the property transferred to universal successors. Various procedural questions were raised, such as who became liable for taxes, what the duties of the executor would be, how his powers would be terminated, etc. The Committee by a vote ratio of 2 to 1 opposed this type of limited probate.

10. The Executive Committee also considered a Formal opening of a probate with the personal representive having the right to fully administer the estate and make distribution without further orders of the court. This concept was opposed at a ratio of approximately 5 to 1.

11. The Executive Committee also gave consideration to having the Will formally admitted to probate and then allowing the universal successors to take possesion of the assets and assume liability for death taxes, cash bequests, etc. (Essentially Memorandum 83-4). There was no support for this concept.

12. The Executive Committee unanimously supported expansion of independent administration to eliminate sales of real property and granting of options for real property from court supervision. It also unanimously supports making an advice binding on all competent persons who receive the advice.

The above set forth the views of the Executive Committee. These views have resulted from extensive discussions about the present Californ law, the UPC and various alternatives over a period of months. We hope this will be of assistance to the Commission in its consideration of possible alternatives to the present California system.

LAW OFFICES OF
JAMES V. QUILLINAN
MOUNTAIN BAY PLAZA
444 CASTRO STREET, SUITE 900
MOUNTAIN VIEW, CALIFORNIA 94041
(415) 969-4000

JAMES V. QUILLINAN

OF COUNSEL
DIENER, SCHNEIDER, JEFFERS & LUCE

December 10, 1982

Mr. James H. Willett
Attorney at Law
Downey, Brand, Seymour & Rohwer
555 Capitol Mall
Sacramento, California 95814

Mr. William A. Plageman, Jr.
Attorney at Law
Two Embarcadero Center
San Francisco, California 94111

RE: DIVISION III AMENDMENT RECOMMENDATIONS

Dear Jim and Bill:

Our local subcommittee has had an opportunity to review and discuss Division III of the Probate Code and to make suggestions for changes to be brought before the Law Revision Commission by the Committee and the Section as a whole.

Our committee's general philosophy was that the California Probate Code as it now exists has served the people of the State well. Most importantly it has provided protection to decedent's estates and to the beneficiaries of those estates. In light of the recent complete change in the Guardianship and Conservatorship provisions to strengthen control and court supervision as a result of abuse of the previously more liberal statutes, in seems somewhat ludicrous to adopt the position that the probate code needs to be liberalized so that little or no court supervision would be required. It is also fair to point out that only a few states have adopted the Uniform Probate Code, and none of these, as far as we are aware, has the complex financial, geographic, and demographic mix of California.

We will be following Division III in sequence from Section 300 to Section 1242 in our discussion.

1. FORMAL OPENING.

Having reviewed provisions of the Uniform Probate Code, which allow both formal and informal probate, and at least some sort of formal opening in all but very small estates, the conclusion of the Committee is that there should be a formal opening of all probate estates in substantially the same form as

currently contained in Division III and embodied in Sections 300 to 526 of the Probate Code. The Committee thought that the formalistic notice requirements to all non-heirs, beneficiaries, creditors, and the like, was the only way to offer sufficient protection to all those people interested in the estate. We thought that the formal opening would certainly promote the desirable result of fiduciary responsibility as opposed to fiduciary malfeasance and would offer the greatest amount of client protection, etc.

We would adopt the formal notice as provided in Section 333, but would delete the provisions concerning publications in the city of residence. The unanimous concensus of the Subcommittee and of various probate judges to whom we talked, was that the provisions for publication in a newspaper of general circulation in the city where the decedent resided has proven to be most cumbersome and difficult to administer. The previous provisions of Section 333 allowing for publication in a newspaper of general circulation in the County were workable and provided certainly as much notice as the current provisions, and therefore should be readopted.

We also thought that the distinction between executor, personal representative, administrator-with-will-annexed and administrator should be done away with and the one term "executor of the estate" be adopted as a uniform designation for the personal representative. Knowing the specific manner in which the executor is acting is only a techinical concern to the court and to attorneys. There certainly is great confusion in the public as to the meaning of an administrator-with-will-annexed as opposed to an executor. We do not believe it is in the interest of either the public or anyone else to continue with the curious old fashion definitions of the various ways in which a personal representative acts.

All the provisions regarding who has priority for serving as administrator of the estates, revocation of letters, forms, substitutions, etc. should be kept in their current form.

2. BONDS.

The Subcommittee also discussed the situation with oaths and bonds and concluded with the various ways in which a personal representative can opt out of the bond requirement, that the current bond provisions do offer substantial protection and should be maintained as is.

3. INDEPENDENT ADMINISTRATION.

The main focus of our Subcommittee was to look at the problems of Independent Administration. We did come to the conclusion that a formal opening and formal closing should be required, but are of the opinion that a more relaxed independent administration procedure should be available.

The current procedures allowing for the personal representative to opt for independent administration, for interested persons to object to independent administration, or for the testator to disallow independent administration should be maintained. This would mean that all of the existing provisions regarding powers and duties, etc., would remain as is and only be resorted to in the situation where there was a requirement to use them under independent administration.

We felt that the provisions of the Uniform Probate Code which in essence allow for no supervision of administration would prove to be most difficult. We felt that many people would be unwilling to act as personal representatives because of the tremendous opportunity for fiduciary malfeasance, not to say for attorney malpractice. No supervision whatsoever after some sort of formal opening would offer little or no protection to anyone. We have also discussed with Bank of America Trust Department and Crocker National Bank their feelings about lack of supervision during administration. They were unanimous in supporting our postion concerning the role of the probate court in decedent's estates. They both felt that they would follow the strictest route under all circumstances, due to the unclear nature of their liability under the Uniform Probate Code.

Regarding the actual independent administration procedures, we would propose an expanded independent administration. We would take the current advice procedure, which can be challenged at a later date, and make the action taken subsequent to advice final at that time. We would support the adoption of an advice form, which when mailed would set forth the procedures for the injunction and the consequences of the failure to request the automatic injunction. The provisions of 591.3 regarding those actions requiring advice we would maintain, along with the independent actions available under 591.6. The provisions for sale or exchange of real estate, allowance of executors and administrators, commissions, settlement of accountings, preliminary and final distributions and discharge and granting options to real estate under 591.2, would be maintained. We gave serious thought to the possibility of taking all of the 591.2 actions requiring court supervision and placing them under the advice type procedure. We felt that there would be insurmountable problems with title companies and transfer agents in that they would routinely require court orders to insure title or to transfer securities. Unless there was some other type of enabling legislation that would mandate the title companies and transfer agents to follow the Probate Code procedures of the State of California, I believe these types of proceeding, if allowed to be more or less independent, would never be used. We also gave serious consideration to the situation of investing moneys of the estate in other than insured savings and loans. We were somewhat split on allowing the independent administrator to invest moneys in money market funds and the like as opposed to the current requirement of giving advice if not in insured accounts.

With the problems in the major events in estates, such as

the sale of real property, final accountings, settlements and granting of options, etc., there was a great deal of concern in the committee that these steps are the most important steps in an administration and more often than not a sale of real estate may be the entire estate being probated. These steps still should continue to require court supervision in order to fully protect all invloved. The recent experiences in which the confirmations of sale of real property through probate became quite lively and considerable overbidding took place are a good example of the benefit of these types of procedures.

4. SUMMARY ADMINISTRATION.

We discussed the provisions of Probate Code Sections 630 and 640 regarding summary administration. There was discussion of increasing the threshold amounts available for summary administration, but the exclusion of joint tenancy assets in the calculation of these amounts led us to the conclusion that these sections are quite adequate for today's situation.

5. SET ASIDE PROCEDURES (PC 650).

We also reviewed the provisions of Probate Code Section of 650, et seq., concerning confirmation of community property. We were unanimous that the requirement of the service of the copy of the petition and the Will on all heirs can be a source of an embarrassment to the surviving spouse, certainly is not necessary and should be removed.

We would also suggest that with the repeal of California inheritance tax that the appraisal procedures under Probate Code 650, et seq., be optional. This would allow small estates to opt out of apprisal costs if stepped-up basis was not important and still allow for apprisal where it was important.

We all were of the opinion that the procedures for reasonable fee determination should be a little more standardized. There is quite a bit discrepancy here in the Bay Area as to how the courts calculate the fees.

Also under Section 650, we thought that the 20 day time limit, for service of the notices, should be amended to 10 days along with all other provisions of the Code. This one peculiarity quite often causes practitioners problems.

6. CLAIM STATUTES.

It is the position of the committee that the current claim procedures were adequate but should have a few small changes. Namely that the form for filing of a claim in a probate should not be quite as magical as it is currently. The person filing a claim as long as it meets the basic requirements of setting forth the amount, nature of the claim and either filed with the court or presented to the personal representative timely, should suffice. The current requirement of using the Judicial

Council form can be quite cumbersome to claimants who are unfamiliar with the procedures.

In a situation of a formal rejection of a claim, the Committee was unanimous in its position that a recitation of the statute of limitation sections of the Probate Code should be included on the rejection form. There should be a standard form developed also. Many practitioners and I am sure all lay people are not aware of the very short statutes of limitations that flow from a rejection of a creditor's claim in a probate proceeding. This should be brought to the public's attention.

7. FAMILY SUPPORT

In reviewing Chapter 11 in light of the recent substantial changes in these sections and the political nature of these sections, it was decided to let them stay as is.

8. SALES OF REAL PROPERTY - CHAPTER 13

I discussing the sales of real property, it was thought that the provisions for commissions on overbid are quite confusing and that language should be improved. It is suggested that the Santa Clara County Probate Policy language be used as a mean of setting forth clearly and succinctly the manner in which commissions on overbids are calculated.

9. DEBTS OF DECEDENT.

In reviewing Section 950, we all are aware that Section 950 does not conform to reality. First order of payment should be debts having preference by the laws of the United States or the State of California and then maintain the statute's current sequence.

10. PAYMENT OF FEDERAL ESTATE TAX & PERSONAL PROPERTY TAX.

In reviewing Section 974, we could see no logical to reason to maintain Section 974 and recommend that it be deleted. Likewise with Section 1024, this should be deleted also. This requirement of payment of personal property taxes has been a constant source of irritation to all practitioners.

11. NOTICE OF DEATH IN INTER VIVOS TRUST SITUTATIONS.

One last point, is the problem of what to do in the situation of a living trust with no probatable assets with the debts of the trustor. There is no procedure to cut off these claims in the current statutory scheme. One suggestions is to alllow for a publication of Notice of Death in the Trust setting with the same requirements and results as in a Probate. This is one area that the Trust subcommittee may want to take up.

In summation, are committee would not recommend the adoption of the Uniform Probate Code under any circumstances. It does not

afford the public adequate protection and probably would not be utilized any way. We feel that our recommendations address the problems with the current probate code and also are much more workable.

Very Truly yours,

James V. Quillinan
Attorney at Law

JVQ/hl
cc: Fred J. Robinson, Bank of America
Harry W. Cox, Crocker National Bank
Michael P. Miller
Mark Franich
Carla Holt
Averill Q. Mix