

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 5-6, 1983

BURBANK

A meeting of the California Law Revision Commission was held in Burbank on May 5-6, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	James H. Davis (May 5)
	Debra S. Frank, Vice Chairperson	Bion M. Gregory
	Robert J. Berton	Beatrice P. Lawson
Absent:	Barry Keene, Member of Senate	Roslyn P. Chasan
	Alister McAlister, Member of Assembly	John B. Emerson

Staff Members Present

John H. DeMouilly	Stan G. Ulrich
Nathaniel Sterling	

Consultants Present

Russell Niles, Property and Probate Law
Gerald F. Uelmen, Statutes of Limitation (May 6)

Other Persons Present

Charles Collier, State Bar, Estate Planning, Trust and Probate Law Section, Los Angeles (May 5-6)
Theodore Cranston, State Bar, Estate Planning, Trust and Probate Law Section, San Diego (May 5)
Dan Kremer, California Attorney General, San Diego (May 6)
Mark S. Rapaport, State Bar, Subcommittee on Trust Administration, Los Angeles (May 5)

ADMINISTRATIVE MATTERS

MINUTES OF MARCH 18-19, 1983 MEETING

The Minutes for the March 18-19, 1983 Meeting were approved as submitted.

1983 LEGISLATIVE PROGRAM

The Commission considered Memorandum 83-28 and an oral report made by the staff on the 1983 legislative program. The Commission took the following actions concerning the bills:

AB 25--Wills and Intestate Succession. The Executive Secretary reported that the bill had been amended to delete matters objected to by the State Bar Probate Committee, for the purpose of enactment of the bill this session, with the understanding that the Commission will present the deleted matters in separate legislation next session. The deleted matters included the provision that both witnesses to a will need not be present at the same time, that a notary may witness a will, the scheme for recording a notice of will with the Secretary of State, limited succession by heirs of the decedent, and the provision permitting relatives of a predeceased spouse to claim escheated property.

The Commission approved this approach and directed the Executive Secretary to send a letter to the State Bar preserving in writing the understanding that by making these deletions the Commission is not agreeing that it will not submit legislation next session to restore the deleted matters.

AB 26--Division of Marital Property. The Assistant Executive Secretary reported that the State Bar Family Law Committee now supports AB 26 as amended and that the State Bar is interested in consolidating their bill--AB 1976 (Calderon)--with AB 26. As consolidated, AB 26 would provide that property acquired in joint tenancy form is presumed to be community for purposes of dissolution; if separate property has been contributed to the acquisition of a community asset, whether or not held in joint tenancy form, the contributor is entitled to reimbursement for the separate property contribution at dissolution of marriage; Assemblyman Calderon would become coauthor of the bill.

AB 99--Creditors' Remedies. Provisions will be added to AB 99 to make clear that appeal of a right to attach order does not affect the attachment.

AB 835--Support After Death of Support Obligor. AB 835 was approved as set out in Memorandum 83-30. If an opportunity arises to amend the bill, the words "to make such an order" should be deleted from the language proposed in Civil Code Section 4801(b).

AB 1460--Liability of Marital Property for Debts. The Assistant Executive Secretary reported that he had met with representatives of the Executive Committee of the State Bar Family Law Section to discuss concerns they had with AB 1460. A number of their concerns are technical

drafting concerns where clarifying language is needed, and the staff will attempt to satisfy these concerns. The State Bar is also concerned that the provisions on assignment of debts at dissolution would overrule the Eastis case, permitting an equitable assignment where debts exceed assets; the Commission believes Eastis should be overruled and that a party should not be left with no assets and the lion's share of the debts at dissolution. The State Bar is also concerned with the provision that seeks to preserve existing law as to the liability of a step-parent's earnings for a child support obligation; the Commission acknowledged that the provision is unsatisfactory and plans to introduce clarifying legislation next session. Where a spouse uses community funds to pay a child support obligation, AB 1460 provides for reimbursement of the community to the extent the funds used were disproportionate to the community's obligation. The State Bar believes this reimbursement standard is confusing; the Commission decided to revise the standard to permit reimbursement to the community of half the community funds used, but only to the extent separate property of the support obligor was available but not used.

STUDY F-640 - MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS

The Commission considered Memorandum 82-103 and the First, Second, and Third Supplements thereto, along with the attached staff draft of a tentative recommendation, relating to marital property presumptions and transmutations. The Commission approved the tentative recommendation to distribute for comment after making the following changes:

§ 5110.110. All property acquired during marriage is community

The definition of community property should be revised to provide that real property situated outside the state is included in the definition of community property--"all real property and all personal property wherever situated."

§ 5110.310. Mixed assets

The rule of proportionate community and separate ownership of a mixed asset should apply only to an asset acquired initially with separate funds or a combination of separate and community funds. In the

case of an asset that is initially community, subsequent separate contributions should not establish a proportionate ownership but should be limited to reimbursement of the separate property. A mixed asset should not be subject to partition during marriage.

§ 5110.510. Effect of presumptions

Subdivision (b), setting out the proof necessary to rebut the marital property presumptions, should be revised to provide rebuttal by tracing to the source of the property rather than by "the character of the property as defined by statute."

§ 5110.520. Community property presumption

The community property presumption for property owned during marriage should apply for all purposes other than disposition at death. At death the property should be presumed to be owned in the manner stated in the title; if separate or community title is not indicated, the presumption should be that property in the name of one spouse is separate and property in the name of both is community. These presumptions should be rebuttable by tracing or agreement of the parties.

§ 5110.530. Gifts between spouses

This section should be recast in the following form:

5110.530. The following presumptions apply to property acquired by a spouse during marriage by gift from the other spouse:

(a) Except as provided in subdivision (b), the property is presumed to be community property.

(b) Clothing, wearing apparel, jewelry, and other tangible articles of a personal nature used solely or primarily by the spouse are presumed to be the separate property of the spouse except to the extent they are substantial in value taking into account the circumstances of the marriage.

The reference to proof that "the gift was actually intended as such" was deleted from the Comment.

§ 5110.550. Title presumptions

Subdivision (a) was revised to make clear that the form of title is not "in itself" evidence sufficient to rebut the statutory title presumptions.

§ 5110.599. Property acquired by married woman before January 1, 1975

Paragraph (3) should be revised to read "If acquired by husband . . ." for purposes of parallelism with paragraph (2).

§ 5110.630. Form of transmutation or transfer of ownership

§ 5110.640. Transmutation or transfer of ownership of real property

These two sections should be combined, stating first the writing requirement and second the express declaration requirement. They should be limited to transmutations and should not apply to transfer of ownership.

§ 5110.650. Transmutation or transfer of ownership of personal property

A transmutation of personal property should be in writing signed by the spouse that is adversely affected, except that an oral gift of clothing, wearing apparel, jewelry, and other tangible articles of a personal nature may be made.

§ 5110.930. Determination of character of property

The presumptions should apply retrospectively; the substantive rules governing the character of the property and transmutations should apply only prospectively.

STUDY F-641 - LIMITATIONS ON DISPOSITION OF COMMUNITY PROPERTY

The Commission considered Memorandum 82-104 and the First Supplement thereto, along with the attached staff draft of a tentative recommendation, relating to disposition of community property. The Commission approved the tentative recommendation to distribute for comment after making the following changes:

§ 5125.110. Definitions

The phrase "including the interest of either spouse in the property" was deleted from subdivision (c).

§ 5125.120. Either spouse has management and control

Subdivision (b), relating to property acquired before or after 1975 should be deleted. A reference to the transitional provision should be made in the Comment. The staff should consider adding a general provision that all the management and control rules apply to property acquired before or after the operative date of the new law.

§ 5125.130. Duty of good faith

The introductory phrase, "Notwithstanding any other provision of this chapter", should be moved from the statute to the Comment.

§ 5125.220. Person in whose name title stands must join

The application of subdivision (a) where the spouses' names are on the title in the alternative should be clarified.

§ 5125.230. Gifts

Subdivision (b) should refer to a disposition of "community personal property" rather than a disposition of "the property".

§ 5125.250. Encumbrance of household goods

This section should be clarified to state the intent not to require joinder of the spouses in the creation of a purchase money security interest in household goods.

§ 5125.299. Transitional provisions

Subdivision (b) was revised to read, "A disposition of community property made before January 1, 1985, is governed by the law in effect at the time of the disposition."

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

The Commission considered Memorandum 83-30 and the attached draft of a recommendation relating to the effect of the death of the support obligor. The Commission approved the recommendation for submission to the Legislature. The measure is embodied in Assembly Bill 835, as amended April 26, 1983. If an opportunity arises to amend the bill, the words "to make such an order" should be deleted from the language proposed in Civil Code Section 4801(b).

STUDY H-510 - JOINT TENANCY
(RESOLUTION OF DISPUTES WHERE PROPERTY OCCUPIED
BY ONE OF SEVERAL JOINT TENANTS OR TENANTS IN COMMON)

The Commission considered Memorandum 83-10 and the First Supplement thereto and attached draft of a tentative recommendation, along with a letter from Professor Roger Bernhardt (attached as an Exhibit to these Minutes), relating to the resolution of disputes where property is occupied by one of several joint tenants or tenants in common.

The Commission discussed the concept of requiring the tenant in possession to account to the tenant out of possession for reasonable use value of the property. The Commission concluded that such a concept could be inequitable to the tenant in possession and that it would create substantial problems in terms of valuation and continuing court or arbitration proceedings. Partition appears to be both a satisfactory means of inducing the parties to negotiate an agreement and the appropriate ultimate remedy if the parties are unable to reach a sharing agreement.

The Commission also felt that a demand procedure, such as the one outlined in the draft of the tentative recommendation, could provide an inducement to agreement between the tenants short of filing a partition action. If the tenant out of possession serves a demand for possession and the tenant in possession fails to offer possession, this would be an ouster, and the tenant in possession would be liable for damages thereafter (ordinarily the reasonable rental value of the ousted person's share of the property) under ordinary common law principles. This would also help define the acts that amount to an ouster, which is unclear under existing law.



April 22, 1983

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road
Palo Alto, Ca. 94306

Dear Nat:

I do not have your memorandum 83-10, relating to rental liability for a co-tenant in sole possession, but I have received a copy of Jesse Dukeminier's letter to you. I take a different position.

I agree that, a co-tenant in sole possession, of any income bracket or race, would be distressed to discover that rent was owed for his or her previous exclusive possession. But I do not think that also means he should be entitled to stay there free the rest of his life. If two people owned half interest in the same piece of property, I find nothing unfair in requiring the possessor to pay half the rental value for his exclusive possession, and in entitling the other to receive half the rental value for property which is half his.

Your proposal really concedes this point, but approaches it the wrong way. Why make the nonpossessor demand possession rather than rent? This forces him to move in or bring partition in order to protect his rights, whereas both parties might be better off by a requirement of rent recoverable in an accounting action. If the notice were broadened to include a demand for rent, Dukeminier's concern about belated discovery that rent was already owed would be eliminated.

Yours truly,

Roger Bernhardt
Professor of Law

RB/gm

STUDY L-640 - TRUSTS

The Commission began consideration of Memorandum 83-17 and the First Supplement thereto relating to trust law. The Commission also heard the views of persons at the meeting and written comments of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar (copy attached to these minutes). The Commission took the following actions regarding the staff draft of a new Division 4.5 of the Probate Code:

§ 4002. Appointment of guardian ad litem

The staff should check the meaning of "incapacitated person" in subdivision (a)(2) of this section to make sure that it covers developmentally disabled persons.

§§ 4182, 4183, 4340. Annual statements and summaries

The requirement of furnishing an account of trust assets and income applicable to testamentary trusts existing before July 1, 1977, should be extended to all trusts. An accounting of the value of trust assets should be based on the trustee's reasonable estimate to avoid the need to hire professional accountants or appraisers. The duty to account on an annual basis should be subject to waiver by beneficiaries. The view was expressed that requiring annual accounts is sound practice and avoids the difficulty of preparing an accounting after many years of neglect.

§ 4200. Trust purpose

The Comment to this section should refer to the provisions in the Civil Code delineating the restrictions on proper contract purposes.

§ 4201. Presumption of revocability

The question of making trusts presumptively irrevocable, consistent with the law of most jurisdictions, was discussed. The Commission reaffirmed the existing rule making trusts revocable unless the trust otherwise provides.

§ 4202. Declaration of trust

This section providing that the nature, extend, and purpose of a trust are expressed in the declaration of trust should be deleted.

§ 4204. Exception to doctrine of merger

The draft of Section 4204 set forth in the First Supplement to preserve the substance of AB 638 was approved.

§ 4210. Spendthrift trusts

The staff should draft a procedure permitting creditors to reach the income from a spendthrift trust to the same extent as assets such as retirement benefits and life insurance benefits may be reached under the Enforcement of Judgments Law. This involves making periodic payments subject to enforcement to the same extent as earnings. One consequence of this approach would be to eliminate the station in life test as it has been applied to spendthrift trusts in some cases. The staff should also consider the question of assignability of the beneficiary's interest in a spendthrift trust. Professor Niles also offered his assistance in working on this area and suggested additional issues for the staff to consider.

Further adjustments may need to be made in other provisions in the draft relating to spendthrift trusts. For example, draft Section 4213 which would permit a support creditor to reach income of a spendthrift trust would be superseded by the incorporation of the wage garnishment standard.

§ 4300. General duty of trustee

This section should be combined with draft Section 4301 (trustee's duty of good faith). The word "expeditiously" should be omitted as it relates to the duty to administer the trust.

§ 4302. Exercise of powers in regard to taxes

This section should be deleted since it is intended to facilitate the grant of automatic powers. (See discussion of Section 4400.) There was also significant doubt about how this section would be interpreted.

§ 4304. Trustee's adverse interest

This part of this section referring to removal of the trustee should be deleted. A separate set of provisions should be drafted that govern the remedies against a trustee who fails to perform duties under the trust.

§ 4305. Duty to obey trust

The revision of subdivision (a) of this section set forth in the First Supplement was approved. The larger question of modification and termination of trusts by action of interested persons which is raised by

language of existing law continued in draft Section 4305 should be the subject of separate provisions to be drafted by the staff. Professor Niles offered his assistance in considering modification and termination.

§ 4320. Trustee's standard of care and performance

As suggested in the First Supplement, this section should be revised to reflect the policy determined this year in the Legislature in its consideration of AB 630.

§ 4321. Expert trustee's standard of care

This section providing a higher standard for expert trustees should be retained notwithstanding the revision of the basic standard in Section 4320.

§ 4322. Minimum standard of care

This section should be replaced by a provision to the effect that the standard of care is not affected by whether or not the trustee receives compensation.

§ 4340. Trustee's duty to inform and account to beneficiaries

(See the discussion under Section 4182 above.)

§ 4353. Court review of duties with regard to discretionary powers

This section should be deleted and the general provisions in the draft statute should be checked to see that opportunity for review of trustees' exercise of discretionary powers is provided there.

§ 4390. Definitions applicable to split interest trusts

This section should be revised to eliminate circular definitions. The staff should also check the reference to Section 101 of the Tax Reform Act of 1969 in this section and in draft Section 4395.

§§ 4400, 4420. Powers subject to trust instrument, automatic powers

The proposal to give trustees certain statutory powers automatically unless the trust provides otherwise was rejected. Accordingly, draft Sections 4400 and 4420 should be deleted. Additional changes may have to be made in the drafting of some other sections. The existing scheme of statutory powers that may be incorporated by reference should be retained.

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

HARLEY J. SPITLER, *Chair*
SAN FRANCISCO
H. NEAL WELLS, III, *Vice-Chair*
LOS ANGELES

Advisors

D. KEITH BILTER
SAN FRANCISCO
COLLEEN M. CLAIRE
NEWPORT BEACH
CHARLES A. COLLIER, JR.
LOS ANGELES
WILLIAM S. JOHNSTONE
PASADENA
DAVID C. LEE
OAKLAND
HON. ARTHUR K. MARSHALL (Ret.)
LOS ANGELES
WILLIAM S. McCLANAHAN
LOS ANGELES
MATTHEW S. RAE
LOS ANGELES
JOHN W. SCHOOLING
CHICO
ANN E. STODDEN
LOS ANGELES



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

April 26, 1983

EXECUTIVE COMMITTEE

THEODORE J. CRANSTON, SAN DIEGO
JAMES D. DEVINE, MONTEREY
K. BRUCE FRIEDMAN, SAN FRANCISCO
IRWIN D. GOLDRING, BEVERLY HILLS
JAMES R. GOODWIN, SAN DIEGO
LLOYD W. HOMER, CAMPBELL
KENNETH M. KLUG, FRESNO
JOHN L. McDONNELL, JR., OAKLAND
JAMES C. OPEL, LOS ANGELES
WILLIAM H. FLAGEMAN, JR., OAKLAND
JAMES F. ROGERS, LOS ANGELES
HARLEY J. SPITLER, SAN FRANCISCO
CLARE H. SPRINGS, SAN FRANCISCO
H. NEALS WELLS III, LOS ANGELES
JAMES A. WILLETT, SACRAMENTO

Stan Ulrich
Staff Attorney
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California

Re: Memorandum 83-17

Dear Stan:

We have previously written to you and set forth the views of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California on a number of matters.

Memorandum 83-17 raise some additional issues which we have now discussed.

The Executive Committee unanimously supported retention of the California Rule on Revocability of Trusts, Civil Code §2280. We all felt this was a much better and safer rule than making trust irrevocable unless expressly made revocable. There are relatively few irrevocable trusts drafted. Most trusts are used for estate planning and are revocable in nature.

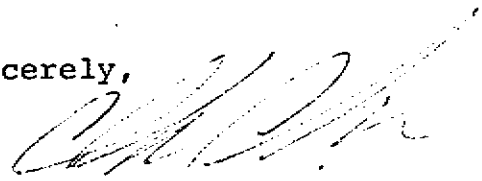
Stan Ulrich
April 26, 1983
Page Two

Eighteen (out of about twenty) members of the Executive Committee support retention of the spendthrift provisions under California law as it now exists. Even the limited exception which is proposed in §4213 was not supported by the Executive Committee.

The Executive Committee strongly opposed automatic inclusion of trustee powers in all trust instruments. Certain powers may be sensitive from a federal estate tax or federal income tax point of view. This would create a trap for the lawyer who was not familiar with all of those possible tax consequences. It was felt better to allow incorporation by reference of those sections which the lawyer felt had no adverse tax consequences.

We believe the other matters raised in Memorandum 83-17 have already been addressed in a prior memorandum addressed to you.

Sincerely,



CHARLES A. COLLIER, JR.

CAC:jd
cc: John DeMouilly
Harley Spitler
Mary Yen
K. Bruce Friedman
Kenneth Klug
Theodore Cranston

§ 4403. Incorporation of powers

This section should be revised to clarify the effect of a trust provision incorporating the powers of Probate Code Section 1120.2, which will be repealed and replaced by draft Sections 4420 et seq.

§ 4426. Deposits in insured accounts

This section may need to be revised to refer to collateralized accounts if AB 630 passes.

§ 4434. Options

The Comment to this section should make clear that a right of refusal is treated as an option in this section.

§ [4441.5]. Loans to beneficiary

A provision should be added to make clear that the trustee may have the power to make loans to a beneficiary on adequate security and at a fair interest rate. It may be best to make this provision a subdivision of draft Section 4425 relating to investments.

§ 4444. Compensation

This section should provide a power to pay compensation to employees and agents of the trust.

§ 4445. Allocation of principal and income

This section should be deleted because it is an unnecessary cross-reference provision.

§ 4446. Distribution to beneficiaries under legal disability

The language relating to the non-liability of a trustee where payments are made to a beneficiary under a legal disability should be deleted. The last sentence of the Comment should also be omitted.

§ 4448. Employing persons

This section should be revised to avoid use of the word "employ" so as to avoid the implication that an employer-employee relationship is created when a person is engaged to assist in trust administration.

§ 4528. Measure of liability for breach of trust

The staff should examine the Restatement rules on damages for breach of trust with a view toward revising this section.

§ 4584. Removal of trustee by court

Subdivision (a) of this section should be revised to make clear that a trustee may be removed for failure to perform the duties under the trust. (See also the discussion above concerning draft Section 4304.)

STUDY M-100 - STATUTE OF LIMITATIONS FOR FELONIES

The Commission considered Memorandum 83-29 and the consultant's background study relating to the statute of limitations for felonies. The Commission commenced its consideration by hearing a presentation of the background study by its consultant, Professor Gerald Uelmen.

Professor Uelmen began by reviewing the existing statutory structure, noting inconsistencies in the structure, and observing that the inconsistencies appear to be the result of the historical development of the statutes and of legislative responses to particular cases that have arisen from time to time. Professor Uelmen pointed out that over the past 30 years the trend in other states as well as in California has been to increase the statutory limitation period, and that the national average is about four years. Professor Uelmen then analyzed the factors that determine the length of the limitation period. These factors, which are discussed in detail in the study, are staleness of evidence, motivation of prosecution, repose, concealment of crimes, time needed for investigation, and the seriousness of the crime. Professor Uelmen also made an effort to relate these factors to specific times and crimes through a survey of prosecutors, defense attorneys, and judges. His findings are that the factors do not appear to be crime specific but are rather evidence specific--their application depends upon the details of a particular case (although some categories of crimes appear to involve some of the factors more frequently than other categories of crime). Professor Uelmen concluded that the most significant variable is the seriousness of the crime and that a statutory limitation period scheme should be based on the seriousness of the crime, with other factors accommodated through tolling or reporting requirements, where appropriate. This is basically the scheme of the Model Penal Code. Professor Uelmen recommended that the punishment for the crime should be the measure of seriousness. Thus crimes punishable by death would have no limitation period, crimes punishable by imprisonment for nine years or more would have a six-year limitation period, and the remaining felonies would have a three-year limitation period.

The Commission complimented Professor Uelmen on an excellent study and opened the matter for discussion by visitors, staff, and Commissioners. There was general agreement that the existing statutory scheme is a mess

that needs some logical organization such as that suggested by Professor Uelmen. A number of persons expressed the opinion that although seriousness seems like a good basis for determining the limitation period, the punishment for a crime is not necessarily an accurate measure of its seriousness. Other factors than seriousness determine the length of punishment, and there has never been a systematic categorization of lengths of punishment by the Legislature, even at the time of enactment of the determinate sentencing law. For this reason the Model Penal Code scheme, basing the limitation period on the punishment for the crime, may be inadequate for California, which has not classified crimes by seriousness.

The Commission felt that a more simplified classification by seriousness could be made, however. A determination that a crime is a felony rather than a misdemeanor is a first-level determination of seriousness. A determination that a felony is punishable by death is a second-level determination of seriousness. In between, numerous other factors affect the penalty for the felony and the penalty is not an adequate basis for determining seriousness. The Commission concluded that the simpler classification of seriousness offers the basis for a simpler statute of limitations scheme. A misdemeanor would have a one-year limitation period, as it does now. A felony punishable by death would have no limitation period. All other felonies would have one limitation period applicable to them, that would be sufficiently long to recognize that some felonies are concealed, some require lengthy investigation, and all are serious, and yet be sufficiently short to recognize that evidence becomes stale and at some point repose is a virtue. The Commission selected a period of six years, which is consistent with both existing California treatment of some felonies and with the treatment in many other jurisdictions. The period would not be tolled or extended for any reason other than pendency of prosecution for the same conduct.

The Commission found a number of virtues in this simplified scheme. It is uniform, predictable, and understandable. It would avoid litigation over whether a particular crime or a particular defendant had been concealed. Although it would increase the limitation period for many crimes, it would impose an outside limit for all crimes.

Minutes
May 5-6, 1983

Finally, the Commission addressed the problem of what acts should satisfy commencement of a prosecution within the limitation period. The Commission concluded that the finding of an indictment, the filing of an information, or the certification of a case to the Superior Court, should constitute commencement of prosecution. In addition, issuance of an arrest warrant should suffice, provided the warrant is executed without unreasonable delay.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary