Note. Changes may be made in this agenda. For meeting information, please call John H. DeMoully (415) 494-1335

October 26, 1983

Time

November 4 (Friday) - 7:00 p.m. - 10:00 p.m.
November 5 (Saturday) - 9:00 a.m. - 4:00 p.m.

Place

State Bar Building
555 Franklin Street
San Francisco 94102
(415) 561-8362

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

November 4 and 5, 1983

November 4 (Friday evening)

1. Minutes of September 22-24, 1983, Meeting (sent 10/19/83)

2. Administrative Matters

Schedule for Future Meetings

Memorandum 83-87 (sent 10/10/83)

Election of Officers

Memorandum 83-88 (sent 10/10/83)

1983 Legislative Program

Memorandum 83-89 (sent 10/10/83)

Consultant Contract

Memorandum 83-98 (sent 10/10/83)

Annual Report

Memorandum 83-90 (to be sent)
Draft of Annual Report (attached to Memorandum)

Comments on Probate Law Recommendations

Memorandum 83-101 (sent 10/19/83)

3. Study L-704 - Durable Power of Attorney (Statutory Forms)

Memorandum 83-99 (sent 10/10/83)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 83-99 (sent 10/19/83)
Memorandum 83-103 (sent 10/19/83)

4. Study L-626 - Wills and Intestate Succession (Technical and Substantive Revisions)

Memorandum 83-64 (sent 9/15/83)
Assembly Bill 25 - 1983 Cal. Stats. ch. 842 (attached to Memorandum)

Memorandum 83-91 (enclosed)
First Supplement to Memorandum 83-91 (enclosed)
Second Supplement to Memorandum 83-91 (enclosed)
Third Supplement to Memorandum 83-91 (to be sent)

5. Study L-650 - Execution of Witnessed Will

Memorandum 83-100 (sent 10/19/83)
Recommendation (attached to memorandum)
First Supplement to Memorandum 83-100 (sent 10/19/83)

6. Study L-640 - Construction and Interpretation of Trusts

Memorandum 83-104 (enclosed)

7. Study L-651 - Recording Affidavit of Death

Memorandum 83-92 (enclosed)
Tentative Recommendation (attached to Memorandum)

Special order of business at 9:00 p.m.

8. Study D-302 - Creditors' Remedies

Memorandum 83-95 (enclosed)
First Supplement to Memorandum 83-95 (sent 10/19/83)

9. Study K-300 - Psychotherapist-Patient Privilege

Memorandum 83-97 (sent 10/10/83)

November 5 (Saturday)

Special order of business at 9:00 a.m. - 9:45 a.m.

10. Study J-700 - Mediation

Memorandum 83-93 (sent 10/19/83)
First Supplement to Memorandum 83-93 (sent 10/19/83)

11. Study F-650 - Liability of Stepparent for Child Support

Memorandum 83-67 (sent 8/9/83)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 83-67 (sent 8/15/83)

12. Study F-660 - Awarding Temporary Use of Family Home

Memorandum 83-96 (enclosed)
Revised Tentative Recommendation (attached to Memorandum)

13. Study H-520 - Joint Tenancy and Community Property

Memorandum 83-105 (to be sent)

Special order of business at 11:00 a.m.

14. Study L-653 - Notice of Will

Presentation by Clifford Cate, Vital Statistics, Inc.
Memorandum 83-102 (sent 10/19/83)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 83-102 (enclosed)

15. Study F-631 - Marital Property Agreements

Memorandum 83-71 (sent 9/6/83)
Draft of Statute (attached to Memorandum)

16. Study F-642 - Combined Separate and Community Property

Memorandum 83-68 (sent 8/23/83)

17. Study F-633 - Division of Pensions

Memorandum 83-83 (sent 9/6/83)

18. Continuation of consideration of Agenda items scheduled for November 4 if consideration not completed on November 4.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 4-5, 1983

SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on November 4-5, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	James H. Davis
	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. DeMoully	Nathaniel Sterling
Robert J. Murphy III	Stan G. Ulrich

Consultants Present

Gail B. Bird, Property and Probate Law (November 4)
Edward C. Halbach, Jr., Property and Probate Law (November 4)
Russell Niles, Property and Probate Law (November 5)
Stefan A. Riesenfeld, Creditors' Remedies (November 4)

Other Persons Present

Roger Bernhardt, Golden Gate Law School, San Francisco (November 5)
Douglas Bird, Private Attorney, San Francisco (November 4)
Edward H. Bordin, Alameda County Bar Association, Castro Valley (November 4)
Alfred E. Cate, Jr., Vital Statistics, Inc., La Canada (November 5)
Clifford C. Cate, Vital Statistics, Inc., Glendale (November 5)
Gary Friedman, Director of the Center for the Development of Mediation in Law, Mill Valley (November 5)
Kenneth Klug, State Bar, Estate Planning, Trust and Probate Law Section, Fresno (November 4-5)
Gary Mitchell, Vital Statistics, Inc., Dana Point (November 5)
Albert Muir, California Probate Referee Association, Albany (November 5)
Gerald L. Scott, California Probate Referee, San Jose (November 4)
Lloyd Tevis, Professor, Loyola Law School, Los Angeles (November 4)
Carol Weisner, Bank of America, San Francisco (November 4)

ADMINISTRATIVE MATTERS

MINUTES OF SEPTEMBER 22-24, 1983, MEETING

The Minutes of the September 22-24, 1983, Meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The following schedule was adopted for future meetings.

January 1984		
January 5 (Thursday)	7:00 p.m. - 10:00 p.m.	Sacramento
January 6 (Friday)	9:00 a.m. - 5:00 p.m.	
January 7 (Saturday)	9:00 a.m. - 12:00 noon	
March 1984		
March 2 (Friday)	7:00 p.m. - 10:00 p.m.	Los Angeles
March 3 (Saturday)	9:00 a.m. - 12:00 noon	
May 1984		
May 3 (Thursday)	7:00 p.m. - 10:00 p.m.	San Francisco
May 4 (Friday)	9:00 a.m. - 5:00 p.m.	
May 5 (Saturday)	9:00 a.m. - 12:00 noon	
June 1984		
June 21 (Thursday)	7:00 p.m. - 10:00 p.m.	San Francisco
June 22 (Friday)	9:00 a.m. - 5:00 p.m.	
June 23 (Saturday)	9:00 a.m. - 12:00 noon	
September 1984		
September 20 (Thursday)	7:00 p.m. - 10:00 p.m.	Los Angeles
September 21 (Friday)	9:00 a.m. - 5:00 p.m.	
September 22 (Saturday)	9:00 a.m. - 12:00 noon	
November 1984		
November 2 (Friday)	7:00 p.m. - 10:00 p.m.	Los Angeles
November 3 (Saturday)	9:00 a.m. - 12:00 noon	
December 1984 (if necessary)		
December 8 (Saturday)	10:00 a.m. - 4:00 p.m.	San Francisco

ELECTION OF OFFICERS

Debra S. Frank was elected Chairperson of the Commission. David Rosenberg was elected Vice Chairperson of the Commission. The term of the new officers is one year, commencing on December 31, 1983.

1983 LEGISLATIVE PROGRAM

The Commission noted Memorandum 83-89 which made the following report on the 1983 legislative program.

Enacted

1983 Stats. ch. 6 (Assembly Bill 29) - Emancipated Minors (Probate Study)
1983 Stats. ch. 17 (Assembly Bill 28) - Disclaimers (Probate Study)
1983 Stats. ch. 18 (Assembly Bill 31) - Bonds and Undertakings
1983 Stats. ch. 52 (Assembly Bill 69) - Vacation of Streets, Highways, and Public Service Easements
1983 Stats. ch. 72 (Assembly Bill 27) - Limited Conservatorships (Probate Study)
1983 Stats. ch. 92 (Assembly Bill 53) - Nonprobate Transfers (Probate Study)
1983 Stats. ch. 107 (Assembly Bill 30) - Claims Against Public Entities
1983 Stats. ch. 155 (Assembly Bill 99) - Creditors' Remedies
1983 Stats. ch. 201 (Assembly Bill 24) - Missing Persons (Probate Study)
1983 Stats. ch. 342 (Assembly Bill 26) - Division of Marital Property
1983 Stats. ch. 842 (Assembly Bill 25) - Wills and Intestate Succession and Related Matters (Probate Study) (The provisions of AB 68--conforming revisions--were incorporated into AB 25 as passed by the Legislature)
1983 Stats. ch. 1204 (Senate Bill 762) - Durable Power of Attorney for Health Care (Probate Study)
1983 Stats. res. ch. 40 (ACR No. 2) - Authority to Study Topics

Two-Year Bill

Assembly Bill 1460 - Liability of Marital Property for Debts

Dead

Assembly Bill 835 - Support After Death of Support Obligor

BUDGET FOR 1984-85

The Executive Secretary reported that in response to a request by the Commission the Department of Finance had agreed to add $10,000 for background research to the budget for 1984-85. The Commission approved the substance of the following statement advising how the additional funds would be expended: "The additional money will fund studies to simplify and minimize the cost of probate and to improve family law, such as, for example, studies concerning the need for appraisal of a decedent's estate by a probate referee and alternative methods of fixing attorney's and executor's fees in probate proceedings."

ANNUAL REPORT

The Commission considered Memorandum 83-90 and the attached draft of the Annual Report. The draft was approved for printing with the qualification that it is to be revised to reflect the decisions made at the November meeting concerning the recommendations the Commission will submit to the 1984 session.

CONSULTANT CONTRACTS

Contract with Professor Paul E. Basye. The Commission considered Memorandum 83-98. The Commission approved a contract with Professor

Paul E. Basye, the contract to provide reimbursement for travel expenses in attending Commission meetings and legislative hearings and meetings with the Commission's staff, with a provision that lodging expenses will be reimbursed up to a maximum of $60 when supported by a receipt and $35 in the absence of any supporting receipt. The contract is to be in the amount of $500 and to expire on June 30, 1986. The Executive Secretary was directed to execute the contract on behalf of the Commission.

Contract with Professor Gail B. Bird. The Commission approved and directed the Executive Secretary to execute on behalf of the Commission a contract with Professor Gail B. Bird to prepare a legal analysis in the form of a law review article concerning modification and termination of trusts. The amount of the contract is to be $2,000, and the contract is to be in the usual form of Law Revision Commission contracts. A draft of the law review article is to be submitted to the Commission by July 1, 1985. No travel expenses are covered by the contract.

Contract with Professor Susan F. French. The Commission approved and directed the Executive Secretary to execute on behalf of the Commission a contract with Professor Susan F. French to prepare a legal analysis in the form of a law review article concerning statutory provisions for the uniform construction and interpretation of transfers and interests created by deed, will, trust, power of appointment, or other instrument. The amount of the contract is to be $2,500, and the contract is to be in the usual form of Law Revision Commission contracts. No travel expenses are covered by the contract. A draft of the law review article is to be submitted to the Commission by January 1, 1986.

STUDY D-302 - CREDITORS' REMEDIES

The Commission considered Memorandum 83-95 and the First Supplement thereto. The Commission approved the draft Recommendation Relating to Creditors' Remedies for printing and for submission to the Legislature, with the following revisions:

Code Civ. Proc. § 697.590. Priorities between judgment lien and security interest

The Commission did not approve the proposal to adopt the first-to-file rule for the determination of priorities between judgment liens on personal property and security interests. This decision was made after

considering the remarks of Professor Lloyd Tevis, Professor Stefan Riesenfeld, and Ms. Carol Weisner who attended the meeting, and the views of Mr. Eldon Parr expressed in materials distributed at the meeting (copy attached as Exhibit 1 to these Minutes). Failure of the proposed revision of Section 697.590 also makes the revision of Commercial Code Section 9301 unnecessary.

Code Civ. Proc. § 515.020. Defendent's undertaking to release in claim and delivery

The proposal to revise the claim and delivery statute to require the defendant to furnish an undertaking in an amount not less than twice the value of the plaintiff's interest in the property in order to release the property was not approved. The proposed revisions would have had the effect of increasing the number of court hearings to review the amount of undertakings.

Code Civ. Proc. §§ 697.340, 700.170, 708.510, 709.530. Remedies against rents

The Commission considered the question of the appropriate remedies against rental payments the debtor is likely to receive. The remedy of rent garnishment was preserved since it is not known how well it may operate in practice. The subject may be reopened if specific problems come to the Commission's attention.

STUDY F-631 - MARITAL PROPERTY AGREEMENTS

The Commission directed the staff to prepare new material on marital property agreements. The material should be directed toward the Uniform Marital Property Act rather than toward the provisions of Assembly Bill 25 relating to waiver of rights by a surviving spouse. The Commission wants to examine the provisions of the Uniform Marital Property Act relating to marital property agreements and the staff prepared material should raise policy issues by reference to the Uniform Act and the staff should direct its suggestions to revisions of the provisions of the Uniform Act.

STUDY F-633 - DIVISION OF PENSIONS

The Commission considered Memorandum 83-83 and the attached material provided by Judge Harvey suggesting a new approach to the division in case of a marriage dissolution of interests in a pension. The staff was directed to prepare a tentative recommendation along the lines suggested by Judge Harvey. The tentative recommendation will be considered by the Commission with a view to sending it out for comment if the tentative recommendation appears to be a reasonable solution to the problem of division of pensions.

STUDY F-650 - LIABILITY OF STEPPARENT FOR CHILD SUPPORT

The Commission considered Memorandum 83-67 and the First Supplement thereto, containing comments received on the tentative recommendation relating to the liability of a stepparent for child support. The Commission approved the recommendation for printing and for submission to the Legislature, with the following changes:

(1) The legislation should make clear that the earnings of both stepparents, custodial as well as non-custodial, may be taken into account by the court in reviewing the amount of a child support order.

(2) If community assets are used to pay a support obligation at the time separate income of the support obligor is available but is not used, the community should have a right of reimbursement in the full amount of the community property used, not exceeding the separate income.

STUDY F-660 - AWARDING TEMPORARY USE OF FAMILY HOME

The Commission considered Memorandum 83-96, together with a letter from Timi Krissman distributed at the meeting (attached to these minutes as Exhibit 2), containing comments on the revised tentative recommendation relating to awarding temporary use of the family home. The Commission decided to submit a recommendation to the Legislature limited to overruling the Escamilla case. The reasons given for this action were (1) there is a conflict in Court of Appeal decisions on this point that should be resolved, (2) the rule in Escamilla unduly restricts the

flexibility and discretion of the court in fashioning an appropriate order, (3) the Escamilla rule interferes with normal personal emotions and furthers domestic strife, (4) the purpose of an award of temporary use of the family home is protection of the family unit, but the situation of Escamilla marks a change in the family unit, and (5) the situation of Escamilla is such a change in circumstances to warrant court reconsideration or modification of the original order. The staff was directed to prepare a recommendation to accomplish this, but not to print the recommendation until the Commissioners have received a draft and had an opportunity to submit changes.

STUDY H-510 - JOINT TENANCY AND COMMUNITY PROPERTY

The Commission considered Memorandum 83-105, together with the relevant portion of a letter from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar (delivered at the meeting and attached to these Minutes as an Exhibit 3), relating to the recommendation on joint tenancy and community property. The Commission decided to limit its joint tenancy proposals to the 1984 Legislature to the recommendation permitting unilateral severance and requiring recordation of the severance.

The Commission deferred promulgation of the remaining proposals for further consideration of two matters:

(1) Liability of joint tenancy property for debts. The Commission will consider the possibility of making joint tenancy property subject to both secured and unsecured debts of the decedent.

(2) Community property with right of survivorship. The Commission will review the current proposals in light of the concern that the new form of property tenure might receive adverse tax treatment and the concern that the ability to set up an exemption equivalent trust by will would be impaired. One possible approach to be considered will be to provide that property of married persons in joint tenancy form will be presumed community for all purposes except that testamentary disposition is limited to the surviving spouse or a trust for the benefit of the surviving spouse. Another possible approach is to keep existing law, with its uncertainty, as being generally sufficiently flexible to enable the survivors to treat the property as seems best for them.

STUDY J-700 - MEDIATION

The Commission considered Memorandum 83-93 and the First Supplement to Memorandum 83-93. Gary J. Friedman, Director of the Center for the Development of Mediation in Law, appeared at the request of the Commission to describe the mediation process and to identify aspects of the process that present problems. He indicated that there is concern where an attorney serves as a mediator since he is serving as a mediator to both parties and this might appear to create a conflict of interest. Where a lawyer serves as a mediator in association with a therapist of one type or another, a problem arises as to the splitting of fees. It was suggested that both of these problems are matters of ethics that are appropriate for resolution by the State Bar.

A significant problem is the extent to which communications to the mediator are subject to privilege. To some extent the communications may be protected as a part of settlement negotiations. The Commission determined that this is an aspect of the law that needs study. The staff was directed to prepare a draft of a tentative recommendation to provide a privilege for the mediation process if it is commenced after a legal action has been filed. Mr. Friedman noted that Australia has a privilege for mediation proceedings.

STUDY K-300 - PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Commission considered Memorandum 83-97 and the attached letter from Arthur M. Bordin suggesting that the Commission give further study to revisions of the psychotherapist-patient privilege.

The Commission decided not to give this subject further consideration at this time. The Commission directed the Executive Secretary to advise Dr. Bordin of this decision and to suggest that he and other persons interested in reforming the law in this area can use the Commission's 1970 recommendation as a starting point and make such revisions in that recommendation as they determine necessary or desirable.

The Commission is now giving priority to two very important major studies: drafting of a new Probate Code and revision of family law. In addition, the past experience in seeking to improve the psychotherapist-patient privilege indicates that an effort to reform the law in this area is not likely to be enacted by the Legislature and to be approved by the Governor.

STUDY L-618 - UNIFORM TRANSFERS TO MINORS ACT

In connection with its consideration of Memorandum 83-64, the Commission asked the staff to draft legislation proposing enactment of the new Uniform Transfers to Minors Act, to replace the California Uniform Gifts to Minors Act (Civil Code §§ 1154-1165). Assemblyman Byron Sher would be the likely author of such a bill. The staff should review the Probate Code provisions to see which ones will need conforming revisions (see especially Sections 3300-3612, 6245(b)(2)(C), 6246(b)(2)(C), 6340-6349).

STUDY L-626 - WILLS AND INTESTATE SUCCESSION

The Commission considered Memorandums 83-64, 83-91, the First, Second, and Third Supplements to Memorandum 83-91, and attached exhibits with comments on the Commission's newly-enacted wills and intestate succession legislation. The Commission made the following decisions:

GENERAL PROVISIONS

Definition of "Predeceased Spouse"

The Commission asked the staff to draft a definition of the term "predeceased spouse" for the Commission's review. The term is now used in Sections 6402 and 6402.5. The definition or the Comment should address the situation where there is more than one predeceased spouse of the decedent, and deal with the problem of a divorce or annulment in another state which is not recognized in California. Cf. Section 78 ("surviving spouse" defined).

Recapture of Quasi-Community Property

Professor Halbach was strongly of the view that the special exclusion from recapture of quasi-community property for life insurance, accident insurance, joint annuities, and pensions (see Section 102) is unjust and indefensible. The Commission did not address this issue. The staff should discuss it further with Professor Halbach and bring it back to the Commission for resolution at a future meeting. The staff should also consider what the abatement rules should be when the surviving spouse claims a half interest in community or quasi-community property against the decedent's will.

Surviving Spouse's Waiver of Rights

The Commission decided to revise subdivision (b) of Section 146 to read as follows:

> (b) ~~A~~ Unless the waiver specifically otherwise provides, a waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse.

Division by Representation

The Commission approved the staff recommendation to keep the representation scheme contained in AB 25 as enacted (Section 240, drawn from Uniform Probate Code Section 2-106), and not to revise the section to substitute the scheme of per capita at each generation advocated by Professor Lawrence Waggoner.

The Commission approved Professor Edward Halbach's suggestion (see Second Supplement to Memorandum 83-91) to include a section defining "per capita at each generation" in the manner suggested by Professor Waggoner so that one drafting a will could pick up the definition by a simple reference to "per capita at each generation." The staff should also give thought to the problem of a potential beneficiary using a disclaimer to affect the shares of other beneficiaries. Cf. Section 240(b)(1).

WILLS

Presumption Against Devise to Subscribing Witness

The Commission approved substance of the proposed revision to subdivision (b) of Section 6112 as follows:

> (b) A will or any provision thereof is not invalid because the will is signed by an interested witness. The fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence , unless there are at least two other disinterested subscribing witnesses to the will.

The Commission approved the proposed revision to Section 372.5 as follows:

> 372.5. Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will, contest a provision of the will which benefits a witness to the will ~~if that witness is needed to establish the validity of the will~~.

Informal Writing Disposing of Tangible Personal Property

The Commission reaffirmed its earlier decision not to recommend a section like Section 2-513 of the Uniform Probate Code to permit the will to incorporate a separate list disposing of items of tangible personal property.

Rules of Construction of Wills

Constructional preference for contingent remainders. The Commission decided to keep new Section 6146 (constructional preference for contingent remainders) in its present form. The Commission accepted Professor Halbach's view that the potential perpetuities problem under Section 6146 (see First Supplement to Memorandum 83-91) is adequately dealt with by the constructional provisions of Civil Code Section 715.5. The Commission also decided that Section 6147 (anti-lapse statute) should be broadened with respect to contingent remainders to eliminate the requirement that the predeceased devisee be "kindred" of the testator, on the theory that remainder beneficiaries are usually those with the closest relationship to the testator, whether actually related or not. Thus the anti-lapse statute would apply to any predeceased devisee of a contingent remainder, whether the devisee is related to the testator or not.

The staff should consider Professor Halbach's suggestion that, with respect to present interests, it might be desirable to eliminate the kindred requirement in all cases except where the gift is a specific dollar amount or a specific item of property. Arguably, it is this latter case where the testator desires to benefit the devisee individually, and not to benefit family members of a deceased devisee.

The staff should consider whether the class of substitute takers (presently "issue" of the predeceased devisee) should be expanded in the case of a contingent remainder. Professor Halbach suggested three possibilities:

(1) Provide that the substitute takers are the heirs at law of the predeceased devisee.

(2) Provide that the substitute takers are the issue of the predeceased devisee, but if there are no surviving issue, then to the heirs at law of the precedeceased devisee.

(3) Provide that the substitute takers are the issue of the predeceased devisee, but if there are no surviving issue, then to other members of the class in the case of a class gift. If the gift is not a

class gift or if there are no surviving members of the class, then to the heirs at law of the predeceased devisee.

Professor Halbach thought that the anti-lapse statute should be made to apply to beneficiaries of inter vivos and testamentary trusts.

The staff should consult with Professor Halbach in drafting a revised Section 6147, and should bring a revised section back for Commission review.

Professor Susan French will prepare a study with the objective of developing uniform rules of construction for deeds, trusts, and other instruments, as well as wills.

Inclusion of stepchildren and foster children in terms of class gift. The Commission approved the following change to subdivision (a) of Section 6152:

> 6152. Unless otherwise provided in the will:
> (a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.
> . . . .

Use of testator's oral declarations to construe a will. The Commission approved the staff recommendation not to try to draft an affirmative statement of when the testator's oral declarations may be used to construe a will.

California Statutory Will

The Commission approved changing the "California Statutory Will" to the "California Statutory Form Will." The Commission also approved the following changes to the California Statutory Will Act:

> Probate Code § 6205. Descendants
>
> 6205. "Descendants" means children, grandchildren, and their lineal descendants of all ~~degrees~~ generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent in Sections 26 and 54.
>
> Comment. Section 6205 is amended to conform the definition of "descendants" to the definition of "issue" under general law. See Section 50 ("issue" defined). Thus, for example, general law will apply in determining the extent to which the term includes adoptees and children born out of wedlock. See Sections 26, 54, 6408. See also Section 6248 (except as specifically provided, general law applies).

Probate Code § 6206. Plural may include singular

6206. ~~(a) A class designation of "descendants" or "children" includes (1) persons legally adopted into the class during minority and (2) persons naturally born into the class (in or out of wedlock).~~

~~(b)~~ A reference to "descendants" in the plural includes a single descendant where the context so requires.

Comment. Section 6206 is amended to delete the special rule of construction for a class gift to "descendants" or "children." As revised, the general rule of construction in Section 6152 will apply. See Section 6248 (except as specifically provided, general law applies).

Probate Code § 6209. Manner of distribution to "descendants"

6209. Whenever a distribution under a California statutory form will is to be made to a person's descendants, the property shall be divided ~~into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner~~ in the manner provided in Section 240 .

Comment. Section 6209 is amended to pick up by cross-reference the general rule of representation in Section 240. Since the former rule of representation in Section 6209 was consistent with Section 240, this change is not substantive.

Probate Code § 6248. Application of general law

6248. Except as specifically provided in this chapter, ~~nothing in this chapter changes the substantive~~ the general law of California applies to a California statutory form will.

Comment. Section 6248 is amended to make clear that, except as provided in this chapter, general law applies to a California statutory form will.

Uniform Testamentary Additions to Trusts Act

The Commission approved the proposal to revise the third and fourth sentences of Section 6300 as follows:

> Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator (regardless of whether made before or after the execution of the testator's will) ~~and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.~~ A . Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the gift to lapse.

The Commission decided to deal with the problem identified by attorney Valerie Merritt by revising the last sentence of Section 6300 as set out above. Attorney Merritt suggested a section that would have permitted the court to find that the lapse of a gift to trust was contrary to the intent of the testator and to order distribution of the estate as if the trust terms at the time of execution of the will were incorporated by reference in the will.

Notice in Divorce Cases Concerning Effect of Divorce on Wills

The Commission decided to amend Section 4352 of the Civil Code as proposed in AB 25. This section relates to notice to parties in a divorce proceeding with respect to the effect of the divorce on their wills. The amendment in AB 25 was enacted, but was chaptered out by a later enactment that did not contain the language recommended by the Commission.

INTESTATE SUCCESSION

Intestate Share of Surviving Spouse

The Commission reaffirmed its previous decision not to recommend that the surviving spouse's share of the decedent's separate property be increased. The Commission approved the proposed technical change to Section 6401(c)(2)(B) as follows:

> Where the decedent leaves no issue but leaves ~~the~~ a parent or parents or their issue or the issue of either of them.

Intestate Share of Heirs Other Than Surviving Spouse

Inheritance by parent or grandparent. The Commission decided not to revise Section 6402 to provide that half the intestate estate goes to issue of a predeceased parent where the other parent is still living, and decided not to provide a similar scheme in the case of grandparents.

Inheritance by remote relatives. The Commission decided to recommend that unlimited inheritance be eliminated in California. Inheritance should be limited to great-grandparents of the decedent and the issue of great-grandparents.

Inheritance by relatives of predeceased spouse. The Commission reaffirmed its earlier decision not to revise Section 6402.5 (ancestral property doctrine where portion of estate is attributable to decedent's predeceased spouse). The section represents a compromise between two divergent viewpoints.

Simultaneous Deaths and Intestate Succession

The Commission approved the staff proposal to strike from the second sentence of Section 6403 (as proposed to be amended by the Commission's Recommendation Relating to Simultaneous Deaths) the language "failed to survive the decedent for the required period" and to substitute the language "predeceased the decedent." The Commission rejected the proposal to delete the first sentence of Section 6403.

One-Way Inheritance

The staff should consider whether the objective of the proposed language for subdivision (b) of Section 6408.5 could be better accomplished with language disqualifying an abandoning parent from inheriting from a child born out of wedlock. Cf. Civil Code § 206.5 (petition by child to be relieved of duty to support abandoning parent). The staff should bring a revised section back for Commission review.

Dower and Curtesy Not Recognized

The Commission approved the staff recommendation to revise Section 6412 as follows:

> 6412. ~~The~~ Except to the extent provided in Section 120, the estates of dower and curtesy are not recognized.

FAMILY PROTECTION

Abatement After Payment of Share of Omitted Spouse or Child

The Commission approved the staff recommendation to revise Sections 6562 and 6573 to provide a proportional abatement rule drawn from former Section 91. However, the draft set forth in Memorandum 83-91 should be revised to make clear that the valuation date for determining proportionality is the date of the testator's death.

The question of whether the general abatement rule in Section 750 should be similarly revised was deferred until we reach it in the context of our study of administration of estates.

ADMINISTRATION OF ESTATES

Challenge to Gift to Witness Despite No-Contest Clause

The Commission revised Section 372.5 as recommended by staff. See discussion under "Presumption Against Devise to Subscribing Witness" supra.

Administration of Community and Quasi-Community Property; Legacies and Interest

Professor Halbach thought the drafting could be improved in Sections 649.2 and 660-664. The Commission approved the staff proposal to study these sections and to try to improve them in connection with the study of administration of estates.

General Abatement Rule

The Commission deferred study of Section 750. See discussion under "Abatement After Payment of Share of Omitted Spouse or Child" supra.

Sale of Community Property in Probate Administration

The Commission approved the staff recommendation not to tamper with Section 754 of the Probate Code (sale of estate property).

Provision for Minors in Decree of Final Distribution

Attorney Valerie Merritt had written to the staff to suggest a section which would require the decree of final distribution to contain provisions anticipating the possibility that after-discovered assets may be payable to minors, as follows:

> Probate Code § 1027.5 (added). Decree to provide for property to or for benefit of minor
>
> 1027.5. If decedent had a minor child or children at the time of his or her death, and if the decedent's estate is not distributable to the children or a guardian on their behalf, the decree for final distribution shall include either (1) a provision appointing the surviving parent of the children as guardian of the estate of any minor children empowered to accept any after-discovered assets payable to the children upon posting of an appropriate bond in the minimum amount then required by law or (2) a provision directing that any after-discovered assets payable to the minor children shall be paid to the trustee of a trust established for their benefit under the terms of the decedent's will. Decedent may, by the terms of his or her will, require the appointment of someone other than the surviving parent as guardian of the estate of his or her minor children, if the surviving parent was not the decedent's spouse at the date of death.

The Commission approved the staff recommendation to defer consideration of this proposal until we reach that portion of our study of administration of estates.

STUDY L-650 - EXECUTION OF WITNESSED WILL

The Commission considered Memorandum 83-100, the attached Recommendation Relating to Execution of Witnessed Wills, the First, Second, and Third Supplements to Memorandum 83-100, and attached materials. The Commission reaffirmed its earlier rejection of the substantial compliance doctrine as it applies to the execution of witnessed wills. The Commission decided to recommend a statute similar to the New York statute (N.Y. Est. Powers & Trusts Law § 3-2.1) requiring completion of attestation formalities within 30-days following the testator's signing of the will. Care should be taken in drafting this provision to avoid the ambiguity of the New York statute as to when the 30-day period commences to run. Failure to comply with the 30-day requirement would invalidate the will, not merely shift the burden from the contestant to the proponent to show the testator was of sound mind and free from duress.

STUDY L-651 - RECORDING AFFIDAVIT OF DEATH

The Commission considered Memorandum 83-92 and the First Supplement thereto, together with the relevant portion of a letter from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar (delivered at the meeting and attached to these Minutes as Exhibit 3), containing comments on the Commission's tentative recommendation relating to recording an affidavit of death. The Commission revised the recommendation in the manner proposed in the memoranda (primarily, that a certificate of death accompany the affidavit) and added the requirement that the affidavit of death must describe the real property affected. As so revised, the recommendation was approved for printing and submission to the Legislature.

STUDY L-653 - NOTICE OF WILL

The Commission considered Memorandum 83-102 and the First Supplement thereto concerning the Recommendation Relating to Notice of Will. The Commission heard remarks of Mr. Clifford C. Cate of Vital Statistics, Inc., in opposition to the recommendation. (A copy of material

distributed by Mr. Cate at the meeting is attached as Exhibit 4 to these Minutes). The Commission did not alter its plans to introduce this recommendation in the 1984 legislative session. The Commission did decide to add a provision to the recommendation to deal with the potential malpractice liability problem; this provision will read substantially as follows:

§ 6368. Protection of attorney from liability

6368. An attorney is not subject to liability or professional disciplinary action based on failure of the attorney to advise a client to file or not to file any notice that may be filed under this chapter, whether or not the client previously has filed a notice under this chapter.

Comment. Section 6368 is included to ensure that the filing of notices under this chapter is voluntary and that notices will not be filed merely because the attorney for the person making the will fears that the attorney may be liable for failure to advise the client, for example, to file a notice of will, to file a new notice of will to correct information contained in a previously filed notice, or to file a notice of revocation where a notice of will was previously filed. See Sections 6360 and 6361 and the Comments to those sections.

The Commission noted the support of the Estate Planning Committee of the Santa Clara County Bar Association, which voted 80 percent in favor of this recommendation at a recent meeting, as reported in Memorandum 83-101.

STUDY L-704 - DURABLE POWER OF ATTORNEY (STATUTORY FORMS)

Durable Power of Attorney for Health Care

The Commission considered the following materials:

(1) Memorandum 83-99, the draft statute attached to that memorandum, and the First Supplement to Memorandum 83-99.

(2) A letter dated October 31, 1983, from the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association. The letter, attached as Exhibit 5 to these Minutes, found the form for durable power of attorney for health care to be desirable and in good order and made several suggestions for improvement of the form.

(3) A letter from Musick, Peeler & Garrett, stating that they feel that the revised form is excellent and appears to be well on its way to final draft. This letter is attached as Exhibit 6 to these Minutes.

(4) A letter delivered to the Commission at the meeting from the Estate Planning, Trust and Probate Law Section of the State Bar. This letter, attached as Exhibit 3 to these Minutes, opposed the statutory form for both the durable power of attorney for health care and the form for the durable general power of attorney.

Amendments to Sections 2421 and 2433. The Commission approved amendments to subdivision (a)(2) of Section 2421 and subdivision (c)(2) of Section 2433 to provide a single form of certificate of the attorney. The same form of certificate should be used in subdivision (b) of Section 2501 of the draft statute attached to Memorandum 83-99. The substance of the following was approved for the form of the certificate:

> I am a lawyer authorized to practice law in the state where this durable power of attorney was executed, and the principal was my client at the time this durable power of attorney was executed. I have advised my client concerning his or her rights in connection with this durable power of attorney and the applicable law and the consequences of signing or not signing this durable power of attorney, and my client, after being so advised, has executed this durable power of attorney.

Amendments to Sections 7188 and 7189.5 of the Health and Safety Code. The amendments to these section were approved in the form set out in Exhibit 1 of Memorandum 83-99. A proposal by a right-to-life representative that the period of duration of a directive to physicians be seven years only if the directive is executed at the same time as a durable power of attorney for health care was discussed. The Commission concluded that the suggestion was unworkable, since the duration is stated in the form and a standard form could not be used if the period of duration was to be different, depending upon the circumstances at the time the directive was executed.

Amendment to Section 2437 of the Civil Code. The amendment to this section was approved in the form set out in Exhibit 2 of Memorandum 83-99. A right-to-life representative had suggested that the physician should be protected only if the physician specifically asked whether the power of attorney was still in effect and had not been revoked. The Commission decided not to change the language set out in Exhibit 2,

which was drawn from the directive to physicians statute, because it feared that the additional requirement would be a trap for a physician who might fail to ask the question even though he or she was relying in good faith on the power of attorney. In addition, under Civil Code Section 2442 an agent who withholds knowledge of the revocation from the health care provider is guilty of unlawful homicide where the death of the principal is hastened as a result of the failure to disclose the revocation.

Statutory Form (set out in First Supplement to Memorandum 83-99). The changes marked on Exhibit 2 to the First Supplement to Memorandum 83-99 were approved with additional revisions indicated below:

(1) Space should be provided for only two witnesses. The instructions in the form should be revised to conform to this change.

(2) The Commission determined not to include specific statements concerning desires in the form. The form gives the agent power to make health care decisions in accord with the known desires of the principal or, if they are unknown, in accord with what the agent believes is in the best interests of the principal. This will be adequate in the ordinary case, and the form permits the principal to include a specific statement of desires if the principal so desires.

(3) The form is to be designated "Statutory Form Durable Power of Attorney for Health Care," the word "Short" being omitted.

(4) The following changes were made in the warning statement:

(a) The numbers for the paragraphs of the warning should be omitted to avoid confusion with the numbered paragraphs of the form itself.

(b) In the paragraph designated as "2." in the warning, "NOT GIVING TREATMENT" was substituted for "WITHHOLDING."

(c) In the paragraph designated as "3." in the warning, the phrase "AT THE TIME" was inserted following the word "OBJECTION" and following the word "OBJECT."

(d) In the paragraph designated as "4." in the warning, the following was substituted for the last sentence:

> YOU MAY STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL, (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY CONTRARY TO YOUR BEST INTEREST.

(e) The paragraph designated as "10." in the warning, which was proposed to be deleted, was restored.

(f) The following additional material was added at the end of the warning statement:

> YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF ANY EMERGENCY THAT REQUIRES A DECISION CONCERNING YOUR HEALTH. EITHER KEEP THIS DOCUMENT WHERE IT IS IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATIVE AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN EXECUTED COPY OF THIS DOCUMENT.
>
> DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE LANTERMAN-PETRIS-SHORT ACT AND YOU WANT TO APPOINT YOUR CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR ATTORNEY.

(5) The Commission discussed at some length a suggestion of the right-to-life representative that the last sentence of paragraph 3 of the form be revised. The Commission decided to keep the existing language because it felt that the person executing the document would want the agent to do what the agent believed was in the best interests of the principal where the principal's desires are unknown. However, in response to a suggestion from the right-to-life representative a statement was added to the Warning Statement indicating when a court will terminate the agent's authority (see revision (4)(d) above). This addition makes clear that the authority of the agent is not unlimited; a court can set aside any decision of the agent that is clearly contrary to the best interests of the patient by terminating the agent's authority.

(6) The paragraphs of the form for "STATEMENT OF DESIRES" and "SPECIAL PROVISIONS AND LIMITATIONS" are to be combined in one paragraph and the instructions for the two paragraphs are to be combined. Conforming revisions are to be made in other portions of the form. This change was made in response to suggestions from the right-to-life representative and the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, both of which found that the division of this material into two separate paragraphs made the form more complex and confusing.

(7) A suggestion that the paragraph for "Statement of Desires" be divided into two parts to provide space for a statement concerning "life-prolonging treatment" and a space for a statement concerning "other health care matters" was considered. The Commission decided not

to separate the space in this way, but a statement should be included in the instructions to this paragraph of the form that "You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services, and procedures."

(8) In the paragraph for nomination of conservator, the instructions should be made more complete.

(9) There should be a space for the date under the signature of each witness.

(10) The form should include a portion for the statement of patient advocate or ombudsman with appropriate instructions. The "Special Requirements" portion at the end of the form was deleted.

Section 2501 of proposed statute. The certificate provided for in subdivision (b) of Section 2501 should be phrased so that it is consistent with the certificates provided for in Sections 2421 and 2433 as proposed to be amended.

Section 2502 of proposed statute. A statement should be added to the Comment to this section stating in substance: "To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 2501 and Section 2502."

Section 2503 of proposed statute. The Commission approved the concept of this section despite a suggestion that the statutory form should be required to include everything in the form and nothing could be omitted. This suggestion would require a provision in the form for alternative agents or nomination of conservator even though the principal does not desires to name alternative agents or to nominate a conservator. Also, the statutory from can be used by an attorney in drafting a power of attorney for health care; if the client does not want to limit the statutory duration, Section 2503 permits omission of this portion of the statutory form which would not be completed anyway in this case. It was noted that the Los Angeles County Bar Association Probate and Trust Law Section Executive Committee specifically approved the flexible concept of the form that is created by Section 2503. Subdivision (c) of Section 2503 was reviewed and again approved.

Section 2504 of proposed statute. The word "select" was substituted for "employ" in this section.

Statutory Short Form for Power of Attorney

The Commission noted the objection of the Executive Committee of the Estate Planning, Trust and Probate Law Section to the concept of a short form for a power of attorney relating to matters other than health care. See Exhibit 3 attached to these Minutes.

The Commission considered Memorandum 83-103 containing a suggested additional section to be added to the proposed statute. The section would require that the text of the relevant statutory provisions be provided to a person who purchases the form. The Commission determined not to add the suggested section to the proposed statute.

STUDY L-810 - INDEPENDENT ADMINISTRATION OF ESTATES ACT

The Commission noted the support of the Estate Planning Committee of the Santa Clara County Bar Association by a two to one margin in favor of the proposed amendments to the Independent Administration of Estates Act as reported in Memorandum 83-101.

In connection with its consideration of the Second Supplement to Memorandum 83-91, the Commission made the following decisions concerning the Independent Administration of Estates Act:

Formal Closing

The Commission reaffirmed its previous decision to keep court supervision of final distribution and discharge under Section 591.2.

Contents of Advice of Proposed Action

The Commission revised the second sentence of Section 591.4 as follows:

> The advice of proposed action shall state the name and mailing address of the executor or administrator , the person and telephone number to call to get additional information, and the action proposed to be taken, with a ~~reasonable~~ reasonably specific description of such action, and the date on or after which the proposed action is to be taken.

APPROVED AS SUBMITTED _____

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

_____
Date

_____
Chairperson

_____
Executive Secretary

BANK OF AMERICA

SOUTHERN CALIFORNIA HEADQUARTERS

November 2, 1983

RICK SCHWARTZ
Senior Counsel
(213) 228-2522

John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

RE: Priorities Between Judgment Lien on Personal Property and Security Interests

Dear John:

I will be unable to attend the meeting on November 4th since I am giving a seminar on the Enforcement of Judgments Law here in Los Angeles from 8:30 until 12:00 noon on Saturday November 5th.

However, I enclose herewith a copy of Eldon Parr's detailed letter of October 19, 1982 to me which discusses the policy and practical issues which cry out for adoption of the recommedation of the staff of a first-to-file rule at the meeting on November 4th.

If you have any questions, please feel free to contact Eldon Parr directly. Mr. Parr can be reached in San Francisco at 622-2850.

Very truly yours,

Rick Schwartz
Senior Counsel

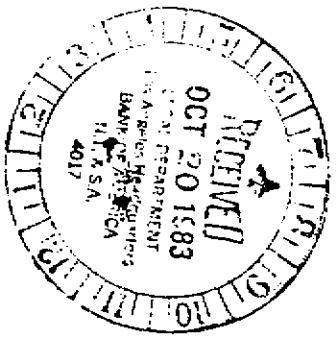
RS:pa

cc: Eldon C. Parr
Vice President and Senior Counsel
Legal Department #3017

FROM Legal Department #3017
World Headquarters Building

BANK OF AMERICA

TO Rick Schwartz
Senior Counsel
Legal Department #4017
Southern California Headquarters



DATE October 19, 1983

SUBJECT Judgment Lien on Personal Property--Priorities (CCP §697.590)

I think it is important for all persons who extend credit, relying in whole or in part on security interests in personal property ("lenders"), to support amendments which will lower the priority of judgment liens on personal property to the same level as the priority of security interests. Unless the priority of judgment liens on personal property obtained merely by filing a notice with the Secretary of State can be reliably determined on the basis of the order of filing such notices and financing statements, credit extention procedures, as I understand them to exist, will have to be modified and those modifications will necessarily result in more delays and more expense in extending credit than has been the case in the past.

It is true that "lien creditors" (§9301(3)) have had priority over unperfected security interests since the Code was enacted in 1963, but, at that time, the only lien creditors were creditors who acquired a lien "by attachment, levy or the like". Before the enactment of the Enforcement of Judgments law, assignees

for the benefit of creditors, trustees in bankruptcy and receivers in equity had been added to the categories of lien creditors. In general, those additions to the definition of lien creditors did not change priorities. It is my belief that most/many lenders have followed the practice of filing financing statements and requesting a search at the same time with a view of determining (on the basis of the order of filing) what priority a security interest granted to them would have. At the time of such filing, the security agreement may or may not have been taken, and value may or may not have been given, and the debtor may or may not have had rights in the collateral. Such lenders have taken the risk that a creditor might have or acquire a lien on the property which would have priority over the lender's security interest (§9301) if acquired before all three requirements for attachment (§9203(1)) were satisfied. The search would not disclose lien creditors (nor would any subsequent search); discovery of lien creditors was and, except for judgment liens obtained by filing, continues to be dependent on other sources of information. However, the kinds of liens that a creditor could acquire before the Enforcement of Judgments law were not likely to go undiscovered by lenders, nor is the probability of such liens existing nearly as great as the probability of judgment liens on personal property acquired by filing a notice is likely to become with the passage of time.

Judgment liens on personal property acquired by filing a notice before a financing statement is filed are not a problem because the search should disclose them, but those which are acquired after the financing statement is filed and before all three requirements for attachment of the security interest are satisfied are a problem. In such cases, lenders have no means of discovering them unless a new search is instituted after the security interest attaches, and that search may prove to be too late. It is the perceived increase in volume of lien creditors and lien amounts resulting from judgment liens on personal property acquired by simply filing a notice that will require new procedures unless the priority is adjusted. It is the similarity of the new lien to security interests and dissimilarity to liens obtained by attachment, levy or the like that makes security interest priority appropriate for the new judgment lien.

It may be appropriate to query whether a lender, under existing priorities, can avoid the risk of losing priority to judgment liens obtained by filing. A security interest does not attach until "value" is given (and is, therefore, not perfected). If giving "value" means making the loan, there is no practical way a lender can meet the "value" given requirement for a perfected security interest without some opportunity for a judgment lien creditor to obtain priority. If the loan is made before filing and search, the search may discover a filed

judgment lien notice; if the lender files and searches before lending, a notice of judgment lien may be filed after the search and before the loan is made. If, on the other hand, the intention to make a loan, meets the "value" given requirement, then the risk can be avoided as to any property in which the debtor has rights by taking the security agreement before having the search made.

I will be on vacation October 30 through November 18.

Eldon

Eldon C. Parr
Vice President and
Senior Counsel

ECP:mem

cc: John Lapinski, Chairman
State Debtor Creditor Relations & Bankruptcy Committee
Biele Stuehrman & Lapinski
350 South Figueroa Street, Suite 570
Los Angeles, CA 90071

Professor Lloyd Tevis
1441 West Olympic Boulevard
Los Angeles, CA 90015

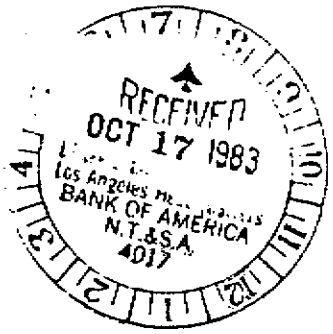
K. M. Cologne, #4017

F. Hoffman, #3017
T. Montgomery, #3017
Carol Weisner, #3017

FROM Legal Department #3017
World Headquarters Building

BANK OF AMERICA

TO Rick Schwartz
Senior Counsel
Legal Department--South #4017



DATE October 13, 1983

SUBJECT Judgment Lien on Personal Property

I have just reviewed the materials attached to Memorandum 83-53 relating to Study D-302--Creditors' Remedies (Priorities Between Judgment Lien on Personal Property and Security Interest).

While the proposed drafts seem to reach the desired result, it seems to me there is a certain mixing of "apples and oranges", at least on a theoretical level. On the one hand, the judgment lien arises simply by filing; no security agreemement is involved; taking possession is not involved. On the other hand, there can be no security interest without a security agreement and the security interest may be perfected by filing or possession with respect to many kinds of property, only by one or the other as to some kinds of property, and, in some instances, notice serves as a substitute for possession.

Under the draft, conflicting interests rank according to priority in time of filing or perfection and priority dates from the time of filing or perfection, whichever occurs first. Although "filing" is defined respecting both judgment liens and security interests, "perfection" is defined only respecting security interests. How can conflicting interests be ranked according

to priority of filing or perfection if priority of one class of interests dates from the earlier of filing or perfection and priority of the other dates only from filing and does not encompass any concept of perfection? The judgment lien should not be considered "perfected" merely upon filing. If it is, it will always have priority as to after-acquired property.

It would seem that the desired priority of a judgment lien on personal property acquired by filing could be most clearly defined and measured by reference to the existing priorities structure provided for security interests. Why not:

> "The priority of a judgment lien on personal property obtained by filing a notice of judgment lien in the office of the Secretary of State shall be the same as the priority of a security interest would be if it were obtained under a security agreement covering the same property and were perfected by filing a financing statement at the time the notice of judgment lien is in fact filed."

Eldon

Eldon C. Parr
Vice President and
Senior Counsel

ECP:mem

cc: Fred C. Hoffman
Anthony T. Miller
Carol C. Weisner

EXHIBIT 2

Oct. 20, 1983

To Whom it May Concern,

I had written to the Commission before regarding enacting the Duke ruling as law. I feel very strongly that the custodial parent and children should remain in the family home if the non-custodial parent is able to live well also. The stability of our children is essential to the morals of our country. We are destroying the moral fiber by the outcome and affects of children from divorced parents. Please consider this amendment. It is important!

Sincerly
Timi Krissman

Timi Loomas Krissman
902 No. Whittier Drive, Bev Hills, California 90210

MARINA DEL REY, CA
PM
24 OCT
1983

California Law Revision Comm.
4000 Middlefield Rd.
Rm. D-2
Palo Alto, Calif.
94306

EXHIBIT 3 Minutes November 4-5, 1983

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

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SAN FRANCISCO 94102-4498
TELEPHONE 561-8200
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P. O. Box 1461
Fresno, CA 93716
(209) 442-0600

November 4, 1983

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

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar has considered a number of items on the agenda for the Law Revision Commission's meeting of November 4 and 5, 1983. The following is a summary of the Section's positions:

Study L-704 - Statutory forms of Durable General Power of Attorney and Durable Power of Attorney for Health Care Decisions.

The Estate Planning, Trust and Probate Law Section is opposed to statutory forms for either durable power. The reasons for opposition are as follows.

1. The Estate Planning, Trust and Probate Law Section broke new ground when it sponsored the statutory will. It will take some time before its utility is proven and possible unforeseen pitfalls in its usage are ascertained and corrected. Until this experience is garnered, extension of the concept of statutory documents to other areas is premature.

2. The statutory will is a relatively simple form, and does not allow for much judgmental deviation by the testator. It is limited to a narrow use, involving only the testator's immediate family. On the other hand, the durable general power of attorney and the durable power for health care decisions are complex, personal documents, designed to have broad application. In particular, the durable power for health care goes to the very essence of the principal's beliefs and attitudes about life, death, religion and other very intimate topics. Decisions to execute a durable power should not be made lightly. The availability of a statutory form makes it too easy for the principal to grant authority to an agent without having thought through the difficult decisions.

3. With respect to the proposed short form durable power of attorney for health care, the portion dealing with "statement of desires" is too broad. Allowing the principal to set forth his or her desires in prose may well result in conflicting statements which might invalidate the entire durable power.

4. There are continuing education seminars presently being conducted for professionals (physicians, hospital personnel, and attorneys) discussing the considerations involved in executing a durable power of attorney for health care decisions, and to educate attorneys as to the forms. The Estate Planning, Trust and Probate Law Section is working with the California Hospital Association and the California Medical Association to develop non-statutory forms with explanations which can be tested in depth by health care providers and the public. As experience develops, the forms will become considerably more comprehensive and superior to the present forms available, including the proposed statutory form. It would be a mistake to lock into the statute a form of durable power which may become obsolete as we obtain more experience in dealing with these powers.

5. From a political standpoint, it is to be anticipated that there will be substantial opposition in the legislature to the statutory forms. It will undoubtedly be the position of pro-life

groups that enactment of a statutory form will present a very real danger to persons executing the form. (Such a position will be supported by testimony of representatives of the Estate Planning, Trust and Probate Law Section.) This may encourage groups to initiate repeal of the entire concept of the durable power for health care decisions, itself. We are concerned that there is a very real possibility that if this matter is brought to the legislature again, SB 762, itself, might wind up being repealed. It is the opinion of this Section that we should wait to see the effect of SB 762 before moving on with statutory forms.

6. One of the beauties of the statutory forms is their simplicity. We should resist the temptation to tinker with them, or we will create a plethora of different forms, depending upon the date of execution. Enactment of a statutory form at this time which may require changes later would defeat the benefit of statutory forms.

Study L-626 - Proposed revisions to AB 25.

Memoranda 83-64 and 83-91 propose some technical and substantive revisions. The memoranda, themselves, have not yet been fully reviewed by our Section, and we cannot present a comprehensive report of our position. There are several concepts in the proposed memoranda with which the Section has long maintained substantial opposition, and there are some changes which the Section supports, pending review of the technical considerations. In view of the substantial number of issues presented by these memoranda, the Section requests that further consideration be deferred until the Law Revision Commission's January meeting.

Study L-650 - Execution of Witnessed Wills.

The Section maintains its unanimous opposition to the proposals that acknowledgment of the will before a Notary Public be deemed sufficient execution, and that the requirement of two witnesses present at the same time be relaxed. Courts do not usually throw out wills for technical defects in uncontested matters. Has the staff found any California cases where a will was thrown out absent a contested proceeding? Indeed, strict rules for execution may prevent doubtful wills from even being offered for probate, thereby eliminating

litigation. The Section believes that relaxing the requirements for executing wills will open the door to litigation by increasing the chance of gain by persons who would take advantage of the relaxed requirements. We foresee that defective wills will be offered for probate, that there will be a greater opportunity for fraud, and that there will be an increased amount of probate litigation. As the burden on the courts is increased, the number of judges required to handle probate matters will need to be increased. In short, relaxing the formalities with which wills can be executed will be costly both to estates in terms of litigation expense and to the State of California in terms of increased court time. Unless the proposal is accompanied by a proposal to increase the number of judges, increased litigation will limit access to the Courts by estates not involved in litigation, thereby increasing costs and delays to all estates. Our Section continues to oppose the proposal, and will continue to do so if a bill is introduced in the legislature.

Study L-640 - Construction and Interpretation of Trust.

The Section concurs that similar rules of construction and interpretation should apply to living trusts as apply to testamentary trusts, and believes that the matter needs more study.

Study L-651 - Recording Affidavit of Death.

The Section approves in principle the concept of providing statutory authority for recording affidavits of death. We believe that a certified copy of the death certificate or a certified copy of the court order establishing death should be recorded in each case. Allowing the recording of an affidavit by someone having personal knowledge of the death without being accompanied by a certified copy of the death certificate does not sufficiently protect joint tenants. Requiring that a certified copy of the death certificate be recorded is not an onerous burden. In addition, we recommend that the affidavit of death to which a certified copy of the death certificate is attached contain a particular description of the real property affected by death. This requirement is contained in the provisions dealing with recording of court orders, and was probably left out of the provisions dealing with affidavits through oversight.

Study L-653 - Notice of Will.

The Estate Planning, Probate and Trust Law Section is unanimously opposed to the concept of a will registry. The reasons for opposition include the following:

1. The cost is unjustified. Most testators will not spend $10.00 in order to register their wills, because most testators provide adequate security for their wills. Indeed, the persons who are the least likely to provide adequate security for their wills are those very persons who would not pay the $10.00 to register them. An additional cost which has not been considered is the cost to the attorney who completes the registration form. That cost will be passed on to the client.

2. Even if the will is initially registered, there is not likely to be 100 percent follow-up when the location of the will is changed. For example, the attorney might encourage the testator to register the will at the time the will is executed. When the attorney delivers the will to the testator, and the testator changes the location, the will is not likely to be reregistered. In Memorandum 83-102, the staff notes that thousands of statutory wills are executed without the aid of an attorney. It is not likely that those wills will be registered.

3. The requirement that a certificate from the Secretary of State be filed in every probate will increase the cost of every probate. At a minimum, that cost will be $10.00 paid by every estate. Once enacted, how long will it be before the fee is increased to $25.00 or $50.00 as the Secretary of State passes along its increased costs? There is also the hidden cost in the attorney's office in processing the search application. Is there any question that those costs will be passed along in increased legal fees? Because the clearance from the Secretary of State's office will require that a certified copy of the death certificate be furnished, many probates will be delayed. Sometimes it takes six weeks or more before a death certificate is issued, especially if an autopsy is required. Delaying every probate proceeding while a search is being made at the Secretary of State's office is unjustified. (Those persons who deal with UCC

searches are not confident that the Secretary of State can rapidly file or search its records. Delays of two to four weeks in the Secretary of State's office with respect to UCC filings and searches are common. There is little doubt that those delays would be similar in will searches.)

4. Delays in the Secretary of State's office for searches will further be compounded by similarity (or lack of similarity) of names. Anyone who has ever run a DMV search knows that even as to uncommon names there is confusion. The confusion will lead to chaos when a search is done for persons with common names: John Johnson, Richard Smith, or Juan Garcia. Further confusion is undoubtedly going to occur when the testator signs the will (and registers it) with initials, or with nicknames: J. M. Brown, Bud Miller, Tom Davis. The searches would become a nightmare for every probate practitioner and estate beneficiary. It is unfair to saddle the great majority of California estates with a procedure which, at best, will benefit only the estates of a few careless people. (We note the irony of the proposal in view of other LRC proposals which would reduce some of the protections to beneficiaries in an effort to streamline estate administration.)

5. Testators are aware of the importance of wills. The State should not guard against problems caused by testators who choose to leave their wills in places where they cannot be readily located. There have been no statistics on the number of lost wills or the amount of inconvenience caused by them. It is likely that in a great number of those cases where wills cannot be located, the wills were actually destroyed with intent to revoke. A will registry will not guard against destruction.

6. The proposal would require that the registration information remain confidential with the Secretary of State, and be released only after proof of death. There can be no guarantee of privacy. Considering how much trouble the Pentagon has in keeping top secret information confidential, it is unlikely that the Secretary of State's records would remain confidential. Indeed, it is very likely that

information will inadvertently be disclosed as to wills of persons with similar names.

7. The benefits of a will registry system are questionable. The disadvantages of a will registry system are without question. No other state has a will registry system. The Executive Committee of this Section remains unanimously opposed to the registration concept.

Study F-631 - Marital Property Agreement.

The Section is undertaking further study of these concepts, insofar as they include a proposal to allow a marital agreement to control disposition of property on death without probate. Specifically, the question of creditors' rights to reach the property, the question of taxes, and the question of clearing title to the property need to be addressed. As soon as we have had the opportunity to study these matters, we will share our comments with you.

Study F-633 - Division of Pensions.

Again, the Section is undertaking research of this area. Specifically, there are income and death tax consequences of allowing a non-employee spouse to have testamentary disposition over the employee spouse's pension rights, and these need to be considered. The right of creditors to reach the deceased non-employee's share of pension rights needs to be considered.

Study H-510 - Joint Tenancy and Community Property.

1. The Section is in favor of a statutory clarification of the right to unilaterally sever joint tenancies. We concur that a uniform rule should be applicable throughout the State.

2. The Section is opposed to the concept of allowing a secured debt against one joint tenant's interest to survive the death of that joint tenant. A creditor who lends credit on the security of a joint tenant's interest without concurrence of all of the joint tenants knowingly does so at his peril, and should be in no better position than an unsecured creditor. We do not perceive that the proposed rule is any more fair than the rule of the present law. There does not appear to be any

problem with the present law, and change appears unnecessary.

3. The Section is opposed to the concept of creating a new form of property, community property with right of survivorship. Confusion among laymen as to the differences between community property and joint tenancy is rampant. That confusion will turn to chaos if a new form of ownership is introduced. There does not appear to be any benefit to holding property in the form of community property with right of survivorship, and, indeed, holding property in that manner may prove to be a detriment. Nevada is apparently having second thoughts about the new form of property. This proposal is seen by us as one which will create substantial problems, without any offsetting benefits, and we are opposed to the concept.

Study L-612 - Nearly Simultaneous Deaths.

1. The Section is opposed to the 120 hour survival rule. If the rule is made applicable generally, the proposal will amount to a retroactive statutory change of the intent of testators, insureds, settlors of trusts, etc. All of such persons could have provided in the documents they signed that a 120 hour rule should apply. Since they have chosen, instead, to utilize a rule of straight survivorship, it is inappropriate for the State of California to retroactively second-guess their intent.

2. Rules of construction are appropriate where there are ambiguities. There are no ambiguities in documents where straight survivorship is indicated. The proposal does not establish a rule of construction, but rather a rule of policy by which those who favor the rule allege that they know what is better for people than the people do themselves. The proposal would constitute officious intermeddling by the State of the very worst nature.

3. If the 120 hour rule were imposed prospectively, there would be two sets of laws. One set would apply to survival provisions and deeds executed before the effective date, and one would apply to survival provisions and deeds executed

after the effective date. Conflicting rules which turn on the dates of instruments create traps for the unwary and increase the costs of legal services to everyone. There does not appear to be any need for such a rule, so those traps should be avoided. If the 120 hour rule is conceived to be beneficial, then perhaps an education drive should be launched to advise testators and joint tenants (and their legal advisors) as to the benefits, so they can consciously chose a 120 hour survivor rule. In my experience, testators prefer a straight survival rule rather than a 120 hour rule if left to their own choices.

4. The 120 hour survival rule will increase the costs of transmission of property by requiring double probates in situations where nearly simultaneous deaths occur, and where property would otherwise pass by joint tenancy survivorship.

Many of the above concepts were originally proposed as a part of Assembly Bill 25, and were withdrawn from that bill as a result of opposition by this Section. It was the understanding of the Estate Planning, Trust and Probate Law Section that many of the matters to which it objected and which were withdrawn from that bill were compromises consciously made by the Law Revision Commission to obtain the support of the Estate Planning, Trust and Probate Law Section for AB 25. In response to the Commission's compromises, this Section also compromised and gave its support to some portions of AB 25 with which our Section had concerns. It is still our opinion that ideas which were considered bad last year are still bad this year.

The Estate Planning, Trust and Probate Law Section is composed of some 4,000 lawyers from throughout California. The Executive Committee and its advisors consist of judges and lawyers from widely dispersed geographical areas of California, who represent clients of diverse cultural, ethnic and economic backgrounds, and who are associated with large firms and small, and public practices and private. Our Section has had a long history of attempting to streamline the probate process and to reduce costs of administration, while at the same time retaining protection for the rights of the beneficiaries. We remain faithful to that long tradition, and will vigorously oppose any proposed legislation which

will cause increased costs and delays of probate, or which will adversely affect the rights of beneficiaries.

Very truly yours,

Kenneth M. Klug

EXHIBIT 4

COMMENTARY OF CLIFFORD C. CATE

(VITAL STATISTICS, INC.)

on the

LAW REVISION COMMISSION'S

REGISTRATION OF WILLS IN CALIFORNIA

I. OPENING COMMENTS:
   A. Appreciation.
   B. Personal Background.

II. VITAL STATISTICS, INC. ("VSI", sometimes hereafter).
   A. A service business: Arose out of a need.
   B. Development of the VSI Concept.
      1. Data Processing Concerns
         a. DATA INPUT CLERKS. A MAJOR CONCERN.
         b. Mr. Gary Mitchell, a qualified computer expert.
      2. VSI introduced to the California State Bar.
      3. A copy of the current VSI's ad.
      4. The delay in preparation of written contract with Department of Health Services.
   C. VSI opposes the Will Registration Program.
      1. THE PROPOSED LEGISLATION IS BAD LAW. IT WILL BE WASTEFUL AND NONPRODUCTIVE. IT CANNOT REALISTICALLY ACHIEVE GOALS INTENDED.
      2. Although purported to be a voluntary program, IT WILL NOT BE SO IN EFFECT.
      3. The program is COSTLY. No funds will be left for VSI SERVICES.

III. THE PROPOSED WILL REGISTRATION PROGRAM.
   A. Provides for "voluntary" registration.
      1. Notice of will, information on testator, STRICT confidence, and a $10 fee.
      2. If testator changes name -- $10.
      3. If location of the will changed -- $10.
      4. If testator writes codicil or a new will -- $10.
      5. If the testator revokes his will -- $10.
      6. After death, Secretary of State issues certificate of notice or no notice on file for a $4 death certificate and a $10 fee . . . MAYBE.
      7. After 1989 filing certificates compulsory before administration proceedings.
   B. The British Columbia Experience.

IV. Compare VSI Programs:
- A. VSI's "Probate Alert" Program.
- B. VSI's Will Registration Program.
- C. VSI's "WILL FILE UPDATE" Program.

V. IMPORTANT FEATURES OF A WILL DISCOVERY PROGRAM:
- A. Prompt discovery of the last will.
- B. Confidentiality of will lists, until death.
- C. An affordable program.
- D. Condusive to locating, establishing and administering the will.
- E. To reduce or eliminate fraud.
- F. Comprehensive searches; not limited within boundaries.
- G. To expedite - not delay - administrations.

VI. RESPONSE TO COMMISSION'S CONCERNS:
- A. "No assurance of continued private existence":
  1. Dissolution of public vs. private activity.
  2. Faith in free enterprise system.
  3. This activity does not require domination by the State.
  4. VSI is not going out of business.
- B. The individual registrant can be served by VSI.

VII. INHERENT DEFECTS IN THE WILL REGISTRATION PROPOSAL:
- A. It invites fraud:
- B. Inadequate quality control. Prone to errors.
- C. Delays are inherent.
- D. Confidential breaches will occur.
- E. The cost is prohibitive.
- F. Implication of malpractice for non-use: an illusion of acceptance.
- G. NOT COMPREHENSIVE: It stops at state lines.
- H. No incentive for follow through.
- I. Often will fail to notice real proponents of will.
- J. It will stifle legitimate programs.
- K. Will create havoc in probate administrations.

VIII. VSI PROBATE ALERT ADVANTAGES:
- A. Speed.
- B. Confidentiality.
- C. Affordable.
- D. Advocacy -- Notices real parties in interest.
- E. Accuracy.
- F. Discourages fraud.
- G. Comprehensive coverage all deaths.
- H. Coverage extends beyond state lines.
- I. It is free enterprise - subject to competitive limitations.

X. CONCLUSION:

A. The BASIC DIFFERENCE is a POSITIVE vs. a NEGATIVE theory of approach:
   1. The Proposed Legislation is a NEGATIVE approach. In the final analysis it says: "YOU CANNOT ADMINISTER THAT ESTATE BECAUSE ANOTHER WILL EXISTS SOMEWHERE."
   2. The VSI "PROBATE ALERT", is a POSITIVE approach. In the final analysis, it says: "JOHN DOE DIED, YOU WROTE HIS LAST WILL, FOLLOW UP ON THIS MATTER AND CAUSE HIS ESTATE TO BE ADMINISTERED, IF NECESSARY."

B. The need for a program designed to efficiently locate and administer a decedent's last will is <u>real</u>. The Proposed Legislation will <u>NOT</u> satisfy that end; VSI's Probate Alert <u>WILL</u> satisfy that end.

C. The entry of the State of California into this field, no matter how bad the legislation, may destroy the VSI's business venture: A material loss to all people of this State.

Los Angeles County Bar Association

Probate and Trust Law Section

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October 31, 1983

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

Commissioners:

On behalf of the members of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, we submit our comments on various studies which are scheduled for discussion at your meeting on November 4 and 5, 1983.

L-704 - Durable Power of Attorney for Health Care (Statutory Form)

We have reviewed the draft statute relating to the statutory short form Durable Power of Attorney for Health Care. We find this form to be desirable and in good order. Since the form requires its own set of warnings under Section 2500, it appears that Section 2433 is now redundant. It is hard to conceive of a printed form which will exist that will not conform to the statutory short form Durable Power of Attorney, especially when the requirements for conformance are so flexibly stated in § 2503.

We also concur with the proposed change to the format of the "Directive to Physicians" contained in the California Natural Death Act in the Health and Safety Code. However, due to the extremely limited application of the California Natural Death Act, it has not been of much practical effect in California. We predict that the new Durable Power of Attorney for Health Care will almost entirely supplant the California Natural Death Act.

We recently received the First Supplement to Memorandum 83-99. We prefer the language for the "Statement of Desires" section suggested by Mr. Forbes of Musick, Peeler & Garrett. However, if the inclusion of such language will substantially interfere with the passage of this legislation, we would agree that it is preferable to pass the legislation as currently drafted.

We also anticipate some confusion between the "Statement of Desires" and the "Special Provisions and Limitations." Most of the principal's "desires" can be listed in either category, i.e., a direction to consult with the principal's family before terminating life support systems. Hopefully, as long as the principal's "desires" are clearly expressed somewhere in the document, the precise location will be irrelevant.

The nomination of conservator may be rather confusing to the principal, since it states that the conservator will be responsible for the physical care of the principal, "which may include making health care decisions." If the conservator is making health care decisions, then what is the agent under this document doing? Perhaps there should be added language along the lines of "You may but are not required to nominate as your conservator the same person you named in Paragraph 1 as your health care agent."

We question the placement of the "Special Requirements" section, dealing with patients in nursing facilities and LPS conservatees, after the witness signatures, where it can easily be overlooked. Why not include it in the body of the document? Instead of "Principal is . . .," why not keep it in the first person as is the rest of the instrument? We are not certain that directing a principal who checks one of the boxes to "attach the required declaration of certificate" is sufficient without some explanation of what declaration or certificate is required. Perhaps there should be a statement such as "Consult the patient advocate at your nursing home or your conservator to obtain the required declaration or certificate."

Finally, we think it might prove to be helpful if the witness statements were dated, particularly since the principal need not sign in the presence of the witnesses but may merely acknowledge his or her signature at some later date. We assume from Civil Code Section 2502 that a durable power may be witnessed outside of California but if signed or acknowledged before a notary public, only a California notary may be used. Is there any particular reason why a foreign notary is unacceptable?

L-626 - Wills and Intestate Succession

We do not agree that Probate Code § 240 needs revision. Many of our members were somewhat surprised to find that the Law Revision Commission believes that the change to per capita distribution more closely corresponds to "popular preference". We have seen no evidence of such popular preference. To the contrary, virtually all the wills prepared by members of our section or reviewed by us have used per stirpes distribution. Most clients prefer per stirpes or are even possibly indifferent on this question, since frequently it is applied to

remote generations. Since virtually all estate planning documents currently use per stirpes distribution, it would be confusing to shift the rules for intestate succession to a per capita format.

There is no advantage at this time to changing the name of the California Statutory Will to the California Short Form Will. Normally, a reference to a short form will is used when there are two documents, a "short form" and a "long form." The term "Statutory Will" is more descriptive of the will at this time. If, in the future, California adopts the proposed Uniform Statutory Will, it may alter the present California Statutory Will. It seems best to provide for the possibility of change at a time when a change is likely and can be considered as a whole. Since we recommend that Section 240 not be changed, we do not see any need for changing the correlating provision for the California Statutory Will, Section 6209.

Section 6402 as originally submitted to the Legislature in A.B. 25 had other defects than merely reducing the number of remote relatives. Some of these defects were removed as it was revised in the legislature. We agree with the recommendation that Probate Code § 6402 be revised to eliminate extremely remote relatives as "heirs". While we think the actual situations in which relatives more remote than descendants of grandparents would be extremely rare, we recognize they do occasionally exist. Given the increased longevity of our population and the decreased average size of the family, it is not uncommon today to find a limited number of descendants of great- grandparents who all know each other through family meetings. If you would limit current § 6402(f) from "next-of-kin" to surviving great-grandparents and their issue, it would allow a cutoff, but not a cutoff that is unduly close in light of today's population patterns.

However, many people would prefer <u>any</u> relative, no matter how remote, to escheat to the State of California. If a limitation to next-of-kin is enacted, such a limitation might promote the wider use of wills under which the succession of property is a result of conscious choice rather than the accident of fate.

We believe that § 754 should not be revised. The new language is extremely confusing. It could wreak havoc in situations where both halves of the community property are probated, a situation which may be mandated by a mandatory widow's election or which may be chosen by a spouse who finds it a much simpler means of clearing title to all community property. Professor Reppy obviously does not have an active probate practice. In situations where strict application of the item theory would create difficulties in estate administration, it is common for personal representatives and their attorneys to

recommend that the surviving spouse elect to probate both halves of the community property. When both halves of the community property are probated, the executor has the discretion to sell all of a community property asset. In actual practice, despite the item theory, when only one-half of the community property is probated, fungible items are not listed as "an undivided 50% interest in" on the inventory of the estate. Instead, the shares of stock are divided during the inventory process in the same manner as cash. Only assets which are not fungible are inventoried on the "item theory." Thus, as a practical matter, the problem noted by Professor Reppy is not all that common. It seems much better to continue the current flexibility in the law, rather than to create a new system which will inhibit flexibility of the personal representative and the surviving spouse to solve actual problems as they actually occur.

L-650 - Execution of Witnessed Will

Memorandum 83-100 suggests a "middle ground solution" to the continuing controversy, which we believe we could support. While most Section members are for the "middle ground solution," there is continuing broad support for the existing rules. It is interesting to note that the State has greatly tightened the technicalities governing notaries, but is willing to relax the technicalities governing Will execution. At least the signers of most notarized documents are available to testify when a dispute arises, but the same is not true for those who sign Wills. If anything, the technicalities should be greater.

We are extremely reluctant to eliminate or even reduce significantly the procedural requirements which are not merely a roadblock in the testator's path but are intended to and do offer a measure of protection to the testator. Wills should be executed with a bit of formality and fanfare, and the simultaneous presence requirement is not all the burdensome. Further, we have seen too many cases where someone put a piece of paper in front of an elderly person and said "Sign here." On checking with the signer, we have often found that he or she was totally unaware of its content, extent or possible results. While requiring two witnesses will not eliminate this situation, it may reduce its occurrence. Having two witnesses present and ready to sign may cause the elderly person to be just a bit more cautious about signing an unread document.

We disagree with the staff's conclusion that it is "more likely" that a notary public "will be available after the testator's death to testify in the probate proceeding." While there is a "public record of the person's whereabouts" while he or she is serving as a notary, it will not be all that easy to locate that person after he or she ceases to be a notary. The problems we encounter in trying to locate subscribing witnesses are that those who were contemporaries of the tesator had often

predeceased him or her or were in no condition to execute any kind of affidavit and those who had been employees of the testator's attorney had long since left that employment, were no longer at the last known address and could not be located under the name used at the time the will was executed. We suspect that a similar result will occur with the the accounts representative at the testator's bank or the real estate saleswoman at the brokerage office who acts as a notary.

Further, a notary, who never saw the testator until he wandered in off the street and asked to have something notarized, won't be much help if a question arises with regard to the testator's capacity. We would much prefer to have someone who has known the testator for more than five minutes act as a witness and hopefully still be around when a disgruntled beneficiary starts muttering about a will contest.

Nevertheless, there is something authoritative and ceremonial about having a notary place his or her seal on a document, and we suppose that if they can notarize just about everything else, they might as well notarize wills. In addition, there are probably some testators who would feel more comfortable having a stranger notarize the will, rather than having to ask friends to witness it. We still have a little trouble with the provision that notarization must be by a California notary, having had too many clients with a tendency to take with them on their vacations documents sent to them weeks earlier. Finally getting around to reviewing the documents, they then trot blithely down to the local notary in Scottsdale or Lahaina and sign merrily away. However, we suppose that many wills and codicils notarized elsewhere will be covered by the provision validating documents properly executed under the laws of the state in which they were executed, and we would certainly hate to have to track down a notary in another state thirty or forty years later when the testator dies.

L-640 - Trusts (Construction and Interpretation)

We concur that rules governing lapsed dispositions and dispositions to a class should be provided that govern both testamentary and inter vivos trusts. It would be ideal if all donative transfers were governed by the same rules of construction, thus promoting uniformity and avoiding unintended results. The rules for powers of appointment should also be conformed with the general rules.

L-651 - Recording Affidavit of Death

We have previously responded under separate cover to a request for comments on this particular study.

L-653 - Notice of Will

We agree that a public system for registering wills is preferable to a private registry. In addition to the reasons you gave, there is the likelihood all wills will be registered in the same place, so heirs need not contact a variety of private concerns.

F-631 - Marital Property Agreements

These comments are based solely on Memorandum 83-71, as Memorandum 83-94 had not yet been received at the time the comments were formulated.

Memorandum 83-71 promotes some changes in the law which show a giant step forward from existing statutory provisions contained in A.B. 25 and in the current Civil Code. One of our concerns with A.B. 25 was that it seemed a piecemeal approach to the problem (because it did not coordinate the Civil Code and the Probate Code provisions), and it deviated significantly from provisions being developed in the Uniform Premarital Agreements Act and the Uniform Marital Property Act. However, while conformity with the Uniform Act is usually a laudable goal, there are some aspects of the Uniform Act incorporated in the draft legislation which we must question.

Subsection (f) of Civil Code § 5140.030 states that a Marital Property Agreement may make provision that, upon the death of either spouse, any of their property will pass without probate to a designated person, trust, or other entity by non-testamentary disposition. It is intended that this provision will allow property to pass at death under the contract without probate administration. One of our concerns is that marital property agreements are usually not revised as frequently as estate plans. Allowing them to contain such provisions may encourage poor estate planning with inadequate review.

Another concern is that we're not sure how these provisions are supposed to correlate with A.B. 25's Probate Code § 150 regarding contracts to make wills or the other provisions of the Probate Code regarding assets subject to probate administration. Assuming such a contract affects assets that would otherwise be subject to probate administration, this appears to be equivalent to a contract to make a will. It also has many of the defects of a joint will. California law currently says a joint will may be revoked. New § 150(b) says a joint will is not a contract not to revoke a will. Both statutes further the policy of allowing each spouse unlimited power to dispose of his or her own property. This proposed § 5140.040(f) subverts that policy by creating a right to contract that may limit either spouse's ability to make or revoke his or her own will affecting his or her own property.

Consider the second marriage where wife has children by a prior marriage and husband and wife agree to leave all to each other and then to wife's children. Over time, husband develops an active dislike for wife's son. Should this contract force him to leave his property to the son? Once executed, how can he avoid that result without wife's consent?

Another situation is where husband and wife have two children and an agreement to leave all to each other and then the children. Husband dies an untimely death. Wife remarries and has a third child. The contract forbids her from leaving any of her property from her first marriage to her third child. Is this desirable public policy?

Experienced estate planners don't use joint wills. They have too many inherent problems. I'm sure experienced drafters of marital property agreements won't use them to pass property under proposed Section 5140.030(f). The existence of the provision will just invite inexperienced practitioners or lay people to create contractual provisions that will cause the parties all sorts of problems the drafters did not have the experience to foresee.

While apparently a statute like § 5140.030(f) has been in effect in the State of Washington since 1881, we are perplexed as to how it actually operates to transfer title. While trusts are generally recognized documents and the necessity of holding title in the name of trustee invites inquiry as to the authority granted the trustee or the terms of the trust, no such restrictions are present or necessary in a marital property agreement. There is no requirement that it be recorded to pass title to property other than real property. We wonder whether stock and bond transfer agents will recognize the validity of such a marital agreement in order to transfer listed securities. We wonder whether a civil action will be necessary to clear title to possession in any event. If such a civil action is necessary, probate courts are quicker in most counties in California than civil courts. It is more desirable to promote title clearance by use of the probate court than by resort to civil action.

As an illustration of the kind of situation we are concerned about, consider the husband and wife who enter the marital property agreement and provide that one-half of all of their community property stocks will pass to their children upon the death of either of them. Over a period of years, the wife manages the stock portfolio in her own name with a major brokerage house. The husband dies. Even if the wife wants to comply with the agreement and turn over half of the stock to their children, will the brokerage house want proof that the stock is a community property asset? Will the brokerage house be satisfied with the presumption of the Civil Code that property held

by either spouse is community? Will a transfer agent require a probate or at least the equivalent of a Probate Code § 650 proceeding in order to pass title?

Further, problems arise when the wife does not want to turn over the stock to her children. There currently appears to be no mechanism for disclosure of this contract. The only parties who know of the existence of the contract are husband and wife and perhaps some attorneys who assisted in drafting the contract many years previous. Who is in a position to force the wife to disclose the contract to the children? If it is not recorded, there is no automatic mechanism, as there is with a trust, for alerting third parties to the existence of a document that affects the title. If the contract is discovered, any suit for enforcement must be brought in our civil courts. Once again, in California, probate is quicker. It seems undesirable to introduce this type of arrangement into California, unless we can answer these questions ahead of time.

We'd like to discuss proposed Civil Code §§ 5140.040, 5140.090, 5140.100 and Probate Code §§ 143 and 144 as they relate to enforcement of a marital property agreement affecting spousal support. Basically, there are only two means of overturning a provision for spousal support in a marital property agreement under the proposed law. One of those would be if the spouse seeking support would otherwise be on the public welfare roles. The second is if the agreement was drafted without each party having independent counsel and is unconscionable at the time of enforcement. If the agreement is unconscionable at the time of enforcement, but was drafted with the active participation of independent counsel for both parties, the proposed statute would require enforcement of the agreement. We are inviting the situation of the hard case that will create bad law, if we enact this legislation.

In the case of Newman v. Newman, 653 P.2d. 728 (Colorado 1982), the court held that a spousal support provision in an antenuptial agreement would be enforced, unless enforcement deprived the spouse of spousal support he or she couldn't otherwise secure. The court held that such an agreement could not be enforced if unconscionable at the date of enforcement. We believe that most people would concur in that rule, even if both parties were represented by counsel at the time of drafting. To give you some examples of the hard cases that will undoubtedly promote bad law as courts try to get around the provisions of these statutes, we list three below:

(a) Husband and wife enter into an antenuptial agreement in 1950. The antenuptial agreement provides the husband will pay wife $500.00 per month as spousal support in the event of dissolution of marriage by divorce or death. There is no formula for adjusting this amount due to inflation or

length of marriage. Wife has no separate property and the couple generate no community property because husband was independently wealthy. The couple live on income from his passive investments and a trust created for him by his grandfather. Husband and wife separate in 1984. It is clear that $500.00 per month spousal support is inadequate to support wife, but is probably sufficient to keep her off welfare. We believe that no California court would enforce that agreement. A judge would find a way to get around it. While the proposed legislation does not specifically apply to marital property agreements executed before its date of execution, if you shift the dates and move them forward 30 years, you still have the same situation. At the time that contract was executed, it was probably reasonable to assume that $500.00 per month was an adequate amount of support. It was not unconscionable at the time the contract was entered, but it became unconscionable at the time of enforcement.

(b) Husband and wife enter into a marital property agreement which calls for spousal support in an amount which does take into account changes in inflation. Husband supports wife during the term of the marriage. Wife develops multiple sclerosis. The costs of caring for wife soar astronomically. Husband and wife separate because the strain of the illness has destroyed their marriage. While the contract was reasonable when entered into and would have remained reasonable except for the changed circumstances of wife's illness, its enforcement may be considered unconscionable by a court at the time of the separation.

(c) Husband and wife enter into a marital property agreement. At the time of their entering into the agreement, the family residence is the separate property of husband, but all other property will clearly be derived from the earnings of husband. Husband earns substantial sums of money, creating community income which is all subsequently spent to maintain their standard of living. The spousal support clause in the marital property agreement contains a formula adjustment of the amount to be paid to wife in the event of dissolution to account for changes due to inflation. The contract was fair when entered and appears to be fair until husband develops multiple sclerosis. Husband is no longer able to work and the family's income declines dramatically. The small amount of community savings is fast dwindling. The effect of the illness on the family is such that the wife decides to divorce and seeks enforcement of the spousal support agreement in the marital property agreement. Husband is not able to generate enough income to pay the spousal support. The agreement is unconscionable at the time of enforcement. Is the court likely to enforce it? Is the court likely to force husband to sell his house, his only remaining asset, in order to pay wife, when husband's needs are greater? While, in theory, the contract is enforceable

because it is not impossible of enforcement so long as husband has this separate property house, we suspect that most courts will not enforce that agreement because of the changed circumstances and the husband's greater need of the money.

An easy way to provide a legislative solution that will affect each of these situations and keep the courts from making bad law in attempting to get around these statutes is to provide in the statutes that no marital property agreement will be enforced with regard to spousal support if circumstances have so changed since the date of entering the agreement that enforcement becomes unconscionable at the time enforcement is sought.

A second alternative to the current provisions regarding enforcement of spousal support might be a provision that requires all spousal support agreements to be reviewed and renewed every few years, or they will lose their enforceability. Thus periodically, for instance every seven years, husband and wife will either have to agree on a new provision regarding spousal support or expressly affirm the existing provision. While this doesn't entirely take care of the situation of the incapacitating illness to either the payor or payee spouse, it does at least protect the parties against the problems of changed circumstances due to economic changes.

F-642 - Combined Separate and Community Property

We concur that Civil Code § 5110.650 is a desirable addition.

In general we commend your restraint in suggesting that legislation may not improve this area, but might create unforeseen problems in special circumstances. One aspect of the delineation of combined separate and community property not discussed in your memo, which is a further argument for relying on case law, is the enactment of revised presumptions affecting the status of property as community or separate. It seems desirable to wait awhile and see how the new codification of presumptions is applied in the courts before further defining the rules for delineating separate and community property.

I believe that there are certain situations which have developed to the point where perhaps legislation would be in order. One of those situations is that of apportioning the separate and community interests in pensions. In general, with regard to both defined contribution and defined benefit plans, proration on the basis of time produces a fair result. Now might be an appropriate time to codify that scheme so as to promote uniformity in application. The formula could be clearly set forth in the statute, even though the decision as to whether to use the formula to value assets at the time of dissolution or

to use the formula to determine the amounts that will be paid once the retirement benefits commence, can be left to the discretion of the trial court.

Very truly yours,

Valerie J. Merritt

Valerie J. Merritt
Secretary-Treasurer

EXHIBIT 6

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October 28, 1983

John H. DeMoully
Executive Secretary
California Law Revision Commission
400 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. DeMoully:

We appreciate your sending us a copy of your revised form for the durable power of attorney for health care. We feel the revised form is excellent, and appears to be well on its way to final draft.

We agree that the durable power of attorney will be easier to revoke if duplicate originals are not made. Additionally, it is our opinion that the recommendation to the principal should include a reminder to keep this document in a place where it can be retrieved by the patient or a family member when needed. In light of this, we have changed our recommendation regarding copies to state "Upon completion, you should give an executed copy of this form to your designated agent, and to your alternative agents. You should retain the original document for yourself so that it can be made available to your health care provider."

We also recognize that it may not be necessary to include the entire special provision language regarding a conservatee. However, we believe it would be very advantageous to include the special provision regarding patients in skilled nursing facilities as part of the statutory form. A major purpose in the form is to allow those who do not have access to legal counsel an opportunity to express their desires. By deleting the details of the special requirements for patients at skilled nursing facilities we are requiring that the patient advocate read and have access to the applicable code sections, and thereby may be denying these patients an opportunity to use this form. Thus, in our opinion the special requirements regarding a skilled nursing facility should be retained in the

durable power of attorney short form.

We are pleased to have been able to review this document, and we hope our comments will be helpful to you. If we can be of further assistance to you please contact us.

Very truly yours,

Charles F. Forbes
for MUSICK, PEELER & GARRETT

CFF:kw
cc: Keith Walley