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

April 17, 1984

Time

April 27 (Friday) - 9:00 a.m. - 5:00 p.m.
April 28 (Saturday) - 9:00 a.m. - 12:00 noon

Place

State Capitol, Room 125
Sacramento

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

April 27-28, 1984

1. Minutes of January 21, 1984, Meeting (sent 3/2/84)

2. Administrative Matters

Study of Landlord-Tenant Law

Memorandum 84-48 (sent 4/10/84)
First Supplement to Memorandum 84-48 (sent 4/17/84)

Consultant's Contracts

Memorandum 84-33 (sent 4/17/84)

Lease of Office Space

Memorandum 84-49 (sent 4/17/84)

3. Family Law Recommendations to 1984 Session

Study F-640 - Marital Property Presumptions and Transmutations

Memorandum 84-42 (sent 4/17/84)
Recommendation (attached to Memorandum)

Study F-660 - Awarding Temporary Use of Family Home

Memorandum 84-43 (sent 4/17/84)
Assembly Bill 2739 (attached to Memorandum)
Recommendation (attached to Memorandum)

4. Study F-670 - Attorney's Fees (Folb Case)

Memorandum 84-37 (sent 3/2/84)

5. Study F-671 - Quasi-Community Property (Tax Implications)

Memorandum 84-38 (sent 3/2/84)
First Supplement to Memorandum 84-38 (sent 4/10/84)

6. Study F-633 - Division of Pensions

Memorandum 84-9 (sent 1/5/84; another copy sent 2/8/84)
First Supplement to Memorandum 84-9 (sent 4/17/84)

7. Study F-521 - Community Property in Joint Tenancy Form

Memorandum 84-36 (sent 4/17/84)
Tentative Recommendation (attached to Memorandum)

8. Study L-628 - Order Dispensing With Accounts of Guardian or Conservator

Memorandum 84-40 (sent 3/2/84)

9. Study L-657 - Procedure for Objecting to Appraisement of Estate Property

Memorandum 84-35 (sent 3/2/84)

10. Study L- 658 - Transfer of Property of Small Value

Memorandum 84-41 (enclosed)

11. Study L-626 - Wills and Intestate Succession

Memorandum 84-39 (enclosed)

12. Study L-618 - Uniform Transfers to Minors Act

Memorandum 84-20 (sent 3/21/84)
First Supplement to Memorandum 84-20 (sent 4/10/84)

13. Study L-605 - Optional Representation Systems

Memorandum 84-46 (sent 4/10/84)

14. Study L-650 - Witnessed Wills

Memorandum 84-47 (sent 4/10/84)

15. Study L-640 - Trusts

Scope of Study

Memorandum 84-10 (sent 2/8/84)

Formalities for Creating Trusts

Memorandum 84-17 (sent 2/8/84)

Presumption of Revocability

Memorandum 84-18 (sent 2/8/84)

Indefinite Beneficiaries and Purposes

Memorandum 84-19 (sent 2/8/84)

Trustee's Duties

Memorandum 84-21 (sent 3/2/84)

Trustee's Powers

Memorandum 84-22 (sent 2/8/84)

Breach of Trust

Memorandum 84-23 (sent 4/10/84)

Liability of Trust and Trustee to Nonbeneficiaries

Memorandum 84-24 (sent 4/17/84)

Office of Trustee

Memorandum 84-26 (sent 4/17/84)

Foreign Trustees

Memorandum 84-28 (sent 3/2/84)

Judicial Administration

Memorandum 84-29 (sent 4/10/84)

Transfer of Trusts To and From California

Memorandum 84-30 (sent 3/21/84)

Revised Uniform Principal and Income Act

Memorandum 84-32 (sent 3/2/84)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 27-28, 1984

SACRAMENTO

A meeting of the California law Revision Commission was held in Sacramento on April 27-28, 1984.

Law Revision Commission

Present:	David Rosenberg, Chairperson	Arthur K. Marshall
	James H. Davis, Vice Chairperson	Edwin K. Marzec
	Roger Arnebergh	Ann E. Stodden
	Bion M. Gregory	
Absent:	Barry Keene, Member of Senate	John B. Emerson
	Alister McAlister, Member of Assembly	

Staff Members Present

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

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Edward V. Brennan, California Probate Referees, San Diego
Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles
Ted Cranston, State Bar Estate Planning, Trust and Probate Law Section, San Diego
Ken Klug, State Bar Estate Planning, Trust and Probate Law Section, Fresno
Paulette E. Leahy, California Bankers Association Advisor, San Diego
James Mattesich, Livingston & Mattesich, Sacramento (April 27)
Valerie J. Merritt, Probate and Trust Law Section, Los Angeles County Bar, Los Angeles
Pamela E. Pierson, State Bar Family Law Section, San Francisco (April 27)
John Schooling, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Chico (April 28)

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY 21, 1984, MEETING

The minutes of the January 21, 1984, meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETING

The place of the June 21-23 meeting was changed from San Francisco to Sacramento.

The following is the revised schedule for future meetings:

June 1984

June 21 (Thursday)	- 7:00 p.m. - 10:00 p.m.	Sacramento
June 22 (Friday)	- 9:00 a.m. - 5:00 p.m.	
June 23 (Saturday)	- 9:00 a.m. - 12:00 noon	

September 1984

September 27 (Thursday)	- 7:00 p.m. - 10:00 p.m.	Los Angeles
September 28 (Friday)	- 9:00 a.m. - 5:00 p.m.	
September 29 (Saturday)	- 9:00 a.m. - 12:00 noon	

November 1984

November 10 (Saturday)	- 9:00 a.m. - 5:00 p.m.	Los Angeles

December 1984

December 8 (Saturday)	- 10:00 a.m. - 4:00 p.m.	San Francisco

CONSULTANT CONTRACTS

Landlord-Tenant Law Study. The Commission considered Memorandum 84-48 and the First Supplement thereto, relating to the study of landlord and tenant law. The Commission authorized hiring a consultant to prepare a background report on this area, for compensation not exceeding $5,000, the consultant to be selected by a three-person subcommittee appointed by the Chairperson. The hiring of a consultant does not imply that the Commission will give priority to this study; the priority to be given this study will be determined when the background report is delivered. The Chairperson appointed himself and Commissioners Gregory and Marzec as members of the subcommittee. The Executive Secretary was directed to execute on behalf of the Commission the contract with the consultant selected by the subcommittee.

Probate Law Study. The Commission approved contracts with Professor Gail B. Bird and Professor Jesse Dukeminier to cover their travel expenses in attending legislative hearings and meetings with the Commission or

the staff at the request of the Commission through its Executive Secretary. The contracts cover only travel expenses (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 amount of each contract is limited to a maximum amount of $500. The Executive Secretary was directed to execute the contracts on behalf of the Commission.

LEASE OF OFFICE SPACE

The Commission considered Memorandum 84-49 and approved the lease, prepared by the Space Management Division and outlined in the memorandum, for continuation of the occupancy of the space now occupied by the Commission.

DELAY IN COMMENCEMENT OF MEETINGS UNTIL ABSENT MEMBERS ARRIVE

The Commission decided that a Commission meeting should not commence with the Commission acting as a subcommittee if absent members are known to be in the city where the meeting is being held and are known to be planning to attend the meeting.

STUDY F-521 - COMMUNITY PROPERTY IN JOINT TENANCY FORM

The Commission considered Memorandum 84-36, together with the relevant portions of letters from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section and the Executive Committee of the Los Angeles County Bar Association Probate and Trust Law Section which appear as Exhibits to these Minutes, relating to the Commission's tentative recommendation on community property in joint tenancy form. The Commission made the following changes in the recommendation:

(1) The draft language should make clear that the statute applies to property held in joint tenancy "between" rather than "by" married persons.

(2) The community character of property held between married persons in joint tenancy form should be stated as a substantive rule, subject to exceptions, rather than as a presumption affecting the burden of proof.

(3) The property should be treated as community for all purposes, including testamentary disposition; there should be no limitation or restriction in this respect. The recommendation and Comment should emphasize that community property may pass to the surviving spouse without probate and title may be cleared by court confirmation or by affidavit in an appropriate case.

(4) There should be a two-year transitional period during which time either spouse may record a notice that preserves existing law for pre-existing joint tenancies. The notice should be recorded in the county where the property is located, in the case of real property, and either in the county where the property is located or the county in which the spouse resides, in the case of personal property.

The staff should prepare a draft of a final recommendation along these lines for review by the Commission, with the objective of distributing the final recommendation to interested persons (and particularly title companies) before it is printed.

STUDY F-633 - DIVISION OF PENSIONS

The Commission considered Memorandum 84-9 and the First Supplement to Memorandum 84-9, together with the relevant portions of letters from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section and the Executive Committee of the Los Angeles County Bar Association Probate and Trust Law Section which appear as Exhibits to these Minutes, relating to policy issues involved in the division of pensions at dissolution of marriage. After discussion of the merits of the present division and the reservation of jurisdiction approaches to division of pensions, the Commission concluded that the types of pensions and the situations of the parties are so varied that it would be improper to impose a single approach to division. The court should be permitted to exercise its discretion as to the approach it will use in the particular case. If the court elects the reservation of jurisdiction approach, it should have further discretion, at the time a spouse moves to divide the pension, to require division when the pension is matured or when payments out are actually made.

The Commission also considered the terminable interest rule, both in its application to marriage dissolution cases and in its application to cases not involving marriage dissolution. The Commission concluded that abrogation of the terminable interest rule would create a number of problems, including administrative problems for pension plans as well difficulties for the working spouse who may find the pension inadequate even absent splitting it with the heirs of the nonworking spouse. Possible tax problems were also raised. The Commission decided to recommend no change in the law on this matter.

STUDY F-640 - MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS

The Commission considered Memorandum 84-42, reporting the status of the Commission's recommendation on marital property presumptions and transmutations. The Commission noted the status of this recommendation but took no action with respect to it.

STUDY F-660 - AWARDING TEMPORARY USE OF FAMILY HOME

The Commission considered Memorandum 84-43, reporting the status of the Commission's recommendation on awarding temporary use of the family home. The Commission noted the status of this recommendation but took no action with respect to it.

STUDY F-670 - ATTORNEY'S FEES

The Commission considered Memorandum 84-37, along with a letter from Jan Gabrielson distributed at the meeting and attached to these Minutes as an Exhibit, relating to awarding attorney's fees in marital dissolution proceedings. Among other issues discussed by the Commission were the difficulty of an impecunious spouse (often the wife) to obtain representation at dissolution of marriage, the inadequacy of spousal support awards for this purpose, and the relative infrequency of cases involving large amounts of community assets. The Commission directed the staff to prepare a draft of a tentative recommendation that would give the court full discretion to award attorneys fees from any source

that appears appropriate under the facts of the case, whether community or separate, income or principal, in an amount that appears reasonable and equitable. The commentary prepared by the staff should develop the practical application of this standard in the context of existing case law.

STUDY F-671 - QUASI-COMMUNITY PROPERTY

The Commission considered Memorandum 84-38 and the First Supplement thereto, relating to income tax implications of dividing quasi-community property. The Commission decided to continue to monitor the progress of HR 4170, which would solve the quasi-community tax problem. If HR 4170 passes, the staff should bring to the Commission for consideration the old Commission recommendation to give the family law court jurisdiction over joint tenancy and tenancy in common property, since the tax problems with this recommendation will have been resolved. However, if HR 4170 does not pass, the staff should instead bring the quasi-community tax matter back to the Commisson for further review.

STUDY L-618 - UNIFORM TRANSFERS TO MINORS ACT

The Commission considered Memorandum 84-20 and attached exhibits, and the First Supplement to Memorandum 84-20, concerning the Uniform Transfers to Minors Act. The Commission determined that AB 2492 should be revised to provide:

(1) A person making a lifetime gift may provide specifically that the custodianship continue until the minor attains a specified age not in excess of 21 years.

(2) A person making a gift or appointment under a will, trust, or deed or making a nomination (under a life insurance, employee benefit plan, or the like) may provide specifically that the custodianship shall continue until the minor attains a specified age not in excess of 25 years.

The Comment should note that two sets of rules are adopted to take account of tax consequences.

STUDY L-626 - WILLS AND INTESTATE SUCCESSION

The Commission considered Memorandum 84-39 and attached exhibits concerning cleanup of the 1982 wills and intestate succession law, and Memorandum 84-46 and the attached staff draft of provisions concerning optional representation systems. The Commission made the following decisions:

Surviving Spouse's Waiver of Rights

The Commission approved the amendments to the provisions governing the surviving spouse's waiver of rights as set out in Exhibit 4 to Memorandum 84-39. The Commission asked the staff to work with the State Bar to develop language to make clear that these provisions do not preclude unilateral revocation of a spousal waiver and consent to a provision in the will of the other spouse which requires the so-called "widow's election." Mr. Collier agreed to furnish some draft language for this purpose.

Notice in Case of Stepparent Adoption

The Commission decided not to make further revisions to Section 226.12 of the Civil Code as set forth in AB 2290 (last amended in Assembly April 23, 1984).

Definitions of "Child" and "Parent"

The Commission decided to revise Probate Code Sections 26 and 54 as follows:

> 26. "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved ~~and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant~~.
>
> 54. "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question ~~and excludes any person who is only a stepparent, foster parent, or grandparent~~.

The Comment would note that these amendments are nonsubstantive and that the stricken language is deleted to avoid confusion.

Transitional Provisions

The Commission decided to revise Section 3 of the Probate Code as set forth in AB 2290 (last amended in Assembly April 23, 1984) so that all provisions of the new law would apply only where the decedent died

on or after January 1, 1985. As presently drawn, Section 3 permits some of the new law to go into immediate effect on January 1, 1984 (for example, the repeal of Section 350 concerning proof of a missing will). The comment to Section 3 should list the sections which have a special transitional rule that differs from the rule in Section 3 (e.g., Sections 147, 150, 6122, 6226, and 6247).

Representation

The Commission decided to delete the last sentence of Section 240 as it appears in AB 2290 (last amended in Assembly April 23, 1984) ("[t]his section does not apply where a will or trust provides for division per stirpes or by representation") and to replace it with the substance of the following: "If a will or trust executed before January 1, 1985, calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1985."

In connection with its consideration of Memorandum 84-46 (optional representation systems), the Commission decided to delete proposed Section 251 (per capita with per stirpes representation), to make the definitional provisions apply only to wills or trusts executed on or after the date the proposed legislation would become operative, and to add definitions of "per stirpes" and "by right of representation" consistent with the State Bar's view of what those terms mean. The State Bar agreed to give the staff their view of what the terms mean. The staff should prepare a revised draft of optional representation systems for Commission consideration at a future meeting.

References to Old Sections in Existing Instruments

The Commission considered whether a provision should be included in AB 2290 that would provide in substance that, unless the existing instrument indicated a contrary intent, a reference in an existing instrument to a provision of the law as it existed before enactment of AB 25 shall be deemed to be a reference to the corresponding provision of the new law. The Commission did not decide the issue, but asked the staff to discuss this proposal further with the State Bar.

Construction of Will According to Intention of Testator

The Commission decided that Section 6140 should be revised as follows:

> 6140. ~~A will is to be construed according to the intention of the testator.~~ (a) The intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will.
>
> (b) The rules of construction expressed in this article apply unless a contrary intention is indicated by the will.

The phrase "unless a contrary intention is indicated by the will" should be substituted for the comparable phrases in Sections 6142, 6143, 6144, and 6165 that do not include "in the will." The Comment to Section 6140 should indicate that the language used in Section 6140 and the comparable language used in other sections do not affect the rules of existing law that permit the use of extrinsic evidence to determine the intention that is expressed in the language of the will.

Interested Witness

The Commission approved the substance of the staff recommendation to add a new subdivision (c) to Section 6112:

> (c) If a devise made by the will to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

Inheritance By or From Foster Child or Stepchild

The Commission determined that Section 6408 is satisfactory in its present form as enacted by AB 25.

Inclusion of Child Born Out of Wedlock in Class Gift

The Commission approved the policy in Section 6152. The Commission asked the staff to consider any clarifying language that may be suggested by the State Bar.

Antilapse

The Commission approved Section 6147 in the form in which it is now contained in AB 2290 (last amended in Assembly April 23, 1984).

Ancestral Property Doctrine

The Commission considered Section 6402.5 (ancestral property) and whether the section should be repealed or revised. The State Bar had suggested reconsideration of the requirement that the decedent's predeceased spouse have died not more than 15 years before the decedent. The State Bar also suggested that the limitation applying the section to real property but not to personal property should be reviewed. The Commission determined not to make any decision at the present time. The staff was requested to prepare a memorandum for Commission consideration at the September 1984 meeting to develop fully the issues presented by Section 6402.5.

STUDY L-628 - ORDER DISPENSING WITH ACCOUNTS OF GUARDIAN OR CONSERVATOR

The Commission considered Memorandum 84-40 and attached exhibits concerning accounts in guardianship and conservatorship proceedings. The Commission decided that subdivision (b) of Probate Code Section 2628 should be amended as follows:

Probate Code § 2628. Order dispensing with accounting in case of small estate

2628. (a) . . . .

(b) The court may make an order that the guardian or conservator need not present the accounts otherwise required by this article so long as all the following conditions are satisfied:

(1) The estate at the beginning and end of the accounting period for which an account is otherwise required consisted of property, exclusive of the residence of the ward or conservatee, of a total net value of less than ~~two~~ five thousand dollars ~~($2,000)~~ ($5,000).

(2) The income of the estate for each month of the accounting period, exclusive of public benefit payments, was less than ~~one hundred fifty~~ three hundred dollars ~~($150)~~ ($300).

(3) All income of the estate during the accounting period, if not retained, was spent for the benefit of the ward or conservatee.

The Commission determined that this proposed amendment should be included in AB 2270 of the current session.

STUDY L-640 - TRUSTS

The Commission considered Memorandums 84-10, 84-17, 84-18, 84-19, and 84-28, and began consideration of Memorandum 84-26; these memorandums presented policy issues in the area of trust law. The Commission made the following decisions:

Memorandum 84-10 (Scope of Study)

When the draft statute is prepared, it should preserve the law relating to constructive and resulting trusts in some fashion.

Memorandum 84-17 (Formalities for Creating Trusts)

The draft statute governing methods of creating trusts set out on page 2 of the memorandum was approved with subdivision (e) revised to read as follows:

> (e) ~~A~~ An enforceable promise to another person whose rights under the promise are to be held in trust for a third person.

The subject of oral trusts was discussed at some length and the Commission directed the staff to prepare a memorandum for the next meeting dealing with the relation between oral trusts and resulting and constructive trusts, whether an irrevocable oral trust may be created, and other issues involved in eliminating or restricting oral trusts.

As to the intention to create a trust, the Commission approved the following provision: "A trust is created only if the trustor manifests an intention to create a trust."

The following provision was approved relating to trust property: "A trust cannot be created unless there is trust property." The comment to this section should note that it is drawn from Section 74 of the Restatement (Second) of Trusts. Reference to the Restatement would pick up the amplifying provisions in Restatement Sections 75-86 without the need to codify them.

The provision relating to permissible trust purposes should read substantially as follows: "A trust can be created for any purpose that is not illegal or against public policy."

The Texas Trust Code provision relating to consideration was approved, reading as follows:

> Consideration is not required for the creation of a trust. A promise to create a trust in the future in enforceable only if the requirements for an enforceable contract are present.

Memorandum 84-18 (Presumption of Revocability)

The Commission decided to retain the presumption of existing law that a trust is revocable unless it provides expressly that it is irrevocable. The staff was requested to analyze the problems arising in a multi-state context. The suggestion was made that a trust created under the law of a state that presumes irrevocability should be considered irrevocable even after its transfer to California.

Memorandum 84-19 (Indefinite Beneficiaries and Purposes)

The Commission tentatively approved in principle the proposal to recognize the validity of trusts created with indefinite beneficiary designations or for indefinite or benevolent purposes, with the intention of making the law of trusts more nearly consistent with the law of powers. The staff was requested to present a draft statute at the next meeting implementing the proposals set out in the memorandum.

Memorandum 84-28 (Foreign Trustees)

Several Commissioners expressed a preference for a statute that permits foreign corporations to qualify to conduct a trust business in California or grants the power to conduct a trust business on a reciprocal basis, but the Commission deferred any decision until the details of existing law could be determined. The staff is to further research existing law relating to the powers of foreign trustees for the next meeting.

Memorandum 84-26 (Office of Trustee)

The statute should provide in effect that a trustee who resigns remains responsible for administration of the trust property until it is delivered to the successor trustee or other person entitled to receive it. The statute should also recognize that the court can change the number of trustees provided for in the trust instrument, unless the instrument provides otherwise, but this would not limit the power of the court to deviate from the trust if there is reason to do so.

The remainder of Memorandum 84-26 remains to be considered.

STUDY L-650 - WITNESSED WILLS

The Commission considered Memorandum 84-47 concerning witnessed wills. The Commission approved the staff recommendation to keep Section

6110 in its present form as enacted by AB 25. The Commission decided to recommend a new Section 6110.5 to provide substantially as follows:

> 6110.5. Notwithstanding Section 6110, if the witnesses to a will are not present at the same time to witness either the signing of the will or the testator's acknowledgment of the signature or of the will, the will is not invalid for that reason if the proponent of the will establishes both of the following to the satisfaction of the court:
>
> (a) That there was substantial compliance with the requirement that the witnesses be present at the same time to witness either the signing of the will or the testator's acknowledgment of the signature or of the will.
>
> (b) That the testator was of sound mind and free from duress, menace, fraud, and undue influence at the time each witness witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will.

STUDY L-657 - PROCEDURE FOR OBJECTING TO APPRAISEMENT OF ESTATE PROPERTY

The Commission considered Memorandum 84-35 concerning the procedure for objecting to an appraisement of estate property. The Commission decided to recommend the addition of the following new section to the Probate Code:

> Probate Code § 608.5 (added). Objection to appraisement
>
> 608.5. (a) At any time prior to entry of the decree of final distribution of the estate, any interested person may file with the court a written objection to the appraisement by the executor, administrator, or probate referee.
>
> (b) The clerk shall fix a time, not less than 10 days after the filing, for a hearing on the objection.
>
> (c) The person objecting shall give notice of the hearing, together with a copy of the objection, to the persons and in the manner provided in Section 1200.5. If the appraisement was made by the probate referee, the person objecting shall also mail a copy of the objection and of the notice to the probate referee at least 10 days before the time set for the hearing.
>
> (d) The person objecting to the appraisement has the burden of proof.
>
> (e) Upon completion of the hearing, the court may make such orders as it deems appropriate.
>
> Comment. Section 608.5 is new and is drawn from former Sections 14510-14513 of the Revenue and Taxation Code.

The Commission determined that this section should be amended into AB 2270 of the current session. A conforming revision should also be

made to Probate Code Section 1200.5 (special notice) to permit special notice to be requested of an objection to an appraisement.

STUDY L-658 - TRANSFER OF PROPERTY OF SMALL VALUE

The Commission considered Memorandum 84-41 and attached exhibits concerning transfer of property of small value. There was some sentiment on the Commission for using an affidavit to transfer title to real property of small value, like the affidavit procedure for collection of personal property, rather than the procedure for hearing and court order proposed in the draft statute. However, the Commission decided to keep the court order provision because of possible title problems if a mere affidavit were to be used.

The Commission decided that the five-year cutoff for estate proceedings in proposed Sections 632.080 and 632.110 should be shortened to three years. With that revision, the staff draft was approved for distribution for comment in the form of a tentative recommendation.

APPROVED AS SUBMITTED _____

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

_____
Date

_____
Chairperson

_____
Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

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(415) 561-8200

P.O. Box 1461
Fresno, CA 93716
(209) 442-0600

April 25, 1984

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

Dear Mr. DeMoully:

The Executive Committee of the Estate Planning, Trust and Probate Law Section submits the following comments on selected LRC memoranda to be discussed at the April 27-28 meeting of the Law Revision Commission. We will supplement this report as the members of our section are able to complete their studies of additional memoranda.

For your information, the Executive Committee governs a section of approximately 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.

Study F-663 Memorandum 84-9 - Division of Pensions

The Executive Committee generally approves the concept and likes the ability to determine the division in advance but have it take effect when the benefits are paid. There is some question in defined benefit plans as to whether the staff contemplates that the court order will simply determine the respective interests by an arithmetic calculation and thus be easy to enforce.

As to the interest of the non-employee spouse being subject to non-testamentary disposition a question was

raised as to whether the staff contemplates intervivos dispositions by gifts or other lifetime transfers such as to a living trust.

There may also be a problem as to estate tax being payable on the death of a non-employee spouse at a time when her or his interest in the plan is still a receivable, i.e., the estate tax being payable now although benefits are not payable until some time in the future. IRC §2039(d) excludes from the gross estate of the non-employee spouse an interest which "arises solely by reason of such spouse's interest in community income under the community property laws of a State." If California were to extend the interest of a non-employee spouse, the exclusion may be lost. We recommend that the staff thoroughly research the estate and gift tax effect of the proposal. Presumably, pension proceeds paid to transferees of a non-employee spouse's interest would be subject to income tax as income in respect of a decedent, but the staff is encouraged to research the income tax law.

As to the "time rule," the employee spouse's employment in later years after the dissolution could cause the pension to be greater. He or she should not have to share the greater benefits with the non-employee spouse. The staff may wish to consider that there be either a time limit before the rules apply, i.e., in marriages under ____ years or for benefits of less than $_____ the rules would not apply but instead treat the benefits as separate property of the employee in the dissolution.

Re the staff note on page 4 of Exhibit 1 to the memo that the time rule does not distinguish between the time the employee was domiciled in California and the time he or she was domiciled outside California for purposes of identifying quasi-community property: there may be a constitutional problem if the rule applies to benefits earned in a non-community property state, i.e., treating a pension plan that was acquired in a separate property state as community property may result in forcing persons to move out of California before filing for dissolution so the California law changing separate property to community property wouldn't apply.

Staff should also consider whether the right of testamentary disposition by non-employee spouse should be limited to rights confirmed by court in dissolution proceeding. It may be desirable that the non-employee spouse should not have a right of testamentary disposition absent

dissolution of marriage. Giving that right to the non-employee spouse in every case would require every plan to be divided by the probate court whenever the non-employee spouse dies first. Unintentional disposition would occur by married persons who do not contemplate that the non-employee spouse has a right of disposition. While the employee spouse is likely to designate the non-employee spouse as beneficiary of the plan, the non-employee spouse does not normally have the opportunity to make such express designation. The proposal is unclear as to its application, but the intent of both the pension plan (i.e., to support the employee after retirement) and the staff proposal (to provide support for the non-employee spouse) could be best served by creating a right in the non-employee spouse that arises only upon dissolution.

Study F-521 - Community Property in Joint Tenancy Form

In general, the principle is sound and should be supported. There are two matters that might well create some problem. The Civil Code provision which limits testamentary disposition (Code Section 5110.520 on page 6) states that testamentary disposition of a married person's half of the community property is ineffective when it is held in joint tenancy form except by a specific disposition of the property or by a disposition that makes specific reference to community property in joint tenancy form. We can foresee some problems with that language in determining what constitutes a "specific disposition."

We perceive some further problems when subdivision (b) of such section is reviewed. The comments referring to subdivision (b) are not supported by the drafted language. The drafted language says that subdivision (a) (which limits disposition except only by specific reference) is not applicable if there is a written agreement between married persons stating that property is community property without limitation. That is unclear. We first read it to mean that there would be no right of testamentary disposition unless the written agreement specifically stated that the parties had the right to make such disposition. However, upon reflection, it could also be that the section means that an agreement which states that property is community property without limitation is not covered by subdivision (a); that is, the limitation on the right to make disposition. That section ought to be clarified as to what is intended.

The transitional provision contained in the proposed Section 5110.590 could be a problem. There is a one year

corrective period after the operative date. Thereafter, all such joint tenancy properties will be treated as community property even for those that have been in existence for some time. Since this is not the kind of proposal that will generate very much public comment or observation, a great many persons will never have heard of the rule change. That may or may not make much difference since most persons probably think that that is what the law provides, anyway.

Finally, further consideration should be given to the policy of allowing wills to dispose of property only by express reference. AB 2276 attempts to prevent "phantom" severances of joint tenancies. Allowing a will to dispose of property which would otherwise pass to a spouse creates another possibility of a "phantom" severance and encourages a "Heads, I win; tails, you lose" policy by which one spouse can take advantage of the other.

Study L-628 - Accountings by Guardians

We support the proposal. There are adequate protections for wards and conservatees with modest estates, and the potential for abuse with respect to a residence is minimal. The proposal would eliminate a source of expense for the estate least able to pay the expense.

Study L-657 - Objections to Appraisals

The proposal is a reasonable solution to an existing problem. Allowing a beneficiary to object at any time before final distribution allows the orderly administration of the estate to proceed, and for the objection to be raised at the most convenient and crucial time.

Study L-640 - Trusts

Presumption of Revocability - Memorandum 84-18

We are opposed to changing the presumption of revocability. Such a change poses a trap for the unwary. Allowing a trust to be revoked rarely does any damage. Preventing revocation can cause irreparable damage. A decision to preclude revocation should be an affirmative one.

Indefinite Beneficiaries and Purposes - Memorandum 84-19

We support the proposal. The proposal would establish a policy that if the trustor's intent can be ascertained, it should be carried out. The policy issue is much like that of favoring testacy over intestacy.

Trustee's Duties - Memorandum 84-21

We do not like the suggestion that the language of Texas Trust Code, Section 113.051 be adopted, because the language is too general to be of much help. We are also concerned about future arguments being made that Texas law should be considered (or perhaps controlling) in cases involving questions concerning Trustees' duties. We are concerned about the reference in the Texas Trust Code section to the "common law." If the section were adopted, the reference should be to the duties imposed on Trustees by the case law of California rather than the "common law." If something new has to be done, we would be in favor of approving the first two pages of Exhibit 1 to the Memorandum (with the exception noted below). However, we concurred in the general comment (which applies not only to Memorandum 84-21 but also to all amendments in the Trust area which may be under consideration) that unless a substantive change is being made by language it is preferable to leave current sections and current language in place without amendment.

There was one exception to the general approval of the suggested language on pages 1 and 2 of Exhibit 1 to the memorandum. We believe that the last sentence of proposed Section 4304(b) should be changed so that notice is required.

Concerning the "Standard of Care," we do not have any substantive objections to the discussion and proposals in the memorandum but, again, unless changes in language are meant to have substantive significance it is usually better to retain the existing language. We approve of Section 4320(b) on Exhibit 1 which provides that individual investments are to be considered as a part of overall investment strategy.

As to "Trustee's Duty to Inform and Account to Beneficiaries," it should be possible to waive trust accountings in all circumstances, whereas the comment to Section 4341 in Exhibit 1 implies that the accounting required on termination or change of Trustees could not be waived. Whatever requirements as to the providing of accounting and other information are eventually adopted, such requirements should not be inconsistent with or cause unnecessary additions to the information required by Probate Code Section 1120.1a. Further, it should be remembered that those requirements are imposed only on corporate trustees of trusts no longer subject to continued court supervision.

While furnishing a copy of the income tax returns may fulfill a general duty to account, there should be a

specific provision allowing the beneficiary to demand and receive a detailed accounting at least annually. The income tax returns are informative, but not detailed, and may not disclose tax-exempt income or non-deductible expenses.

The current language in Civil Code, Section 2261(4) regarding deviations from the terms of the Trust does not seem to be retained. That provision should be retained.

Trustee's Powers - Memorandum 84-22

We are opposed to the proposal to grant statutory powers to all trustees. We believe Trustors who draft their own trusts are not likely to exclude objectionable powers. Certain specific powers present particular problems. For example, §§4420 and 4430 should be coordinated with the prudent man rule legislation. Section 4422 (power to hold property) could present a tax problem for a marital deduction trust if the trustee receives unproductive property. Section 4426 (which allows entering into a new business) strikes us as an inappropriate automatic power. It is common to exclude such power from trusts involving corporate trustees. Section 4428 seems unnecessary, and may be construed to be a limitation rather than a power. Section 4464 should state that borrowing is for a trust purpose. Section 4478 (hiring persons) is too broad, especially to be an automatic power.

Revised Uniform Principal and Income Act - Memorandum 84-32

The above memorandum reviews the Revised Uniform Principal and Income Act as it has been enacted in California, and suggests possible new variations. It should be remembered that this Act provides for rules of construction regarding principal and income of trusts. Accordingly, we are not commenting upon several of the topics discussed in the memorandum because we believe that the present law is adequate for most general purposes.

The California version of the Act is now set forth in Civil Code Sections 730-730.17, but will be moved appropriately to the Probate Code and renumbered as suggested sections 4800 through 4817.

Also because these are rules of construction, we suggest that Section 4816, (which explicitly states that "Except as specifically provided in the trust instrument or the will or in this part, this part applies to any receipt

or expense ...") should be renumbered and placed at the beginning of the Act.

We would prefer retaining the definition of "trustee" in the definitional section 4802, rather than having it cross-referenced to Probate Code Section 84. This is for convenience sake.

We believe that Section 4803(a)(3) should be changed as per the staff recommendation so that there is consistency in following the prudent investor standard contained in Civil Code Section 2261 and proposed to be changed by AB 630; this can be by cross-reference. We prefer the Nebraska variation of 4803(b), that no inference arises "that the trustee has improperly exercised such discretion from the fact that the trustee has made an allocation contrary" to the Act.

We recommend retention of the California variation of the Act in Section 4805 regarding apportionment of income. California's variation is probably based upon administrative simplicity and does not require day to day allocation of rents, annuities, and interest on bank and savings and loan association accounts.

California retains the "no amortization" of discounted bonds, but the staff has recommended deletion of this rule, apparently trusting to drafters the ease of changing the rule if desired. We would not rely upon draftsmanship, and believe that existing law is better for a general rule of construction.

We would prefer to reverse the "no carry-over" rule for income losses of business and farming operations in Section 4809. In other words, losses should be carried over from one year to the next. There are two primary reasons for reversing the present rule.

First, the typical trust in California is created for estate tax purposes, or to prevent a guardianship for minors. For minors, the income may be accumulated or distributed during minority, but when the trust terminates upon the child attaining a given age, the principal is distributed to the child. In other words, the income beneficiary and the remainderman is the same person. The estate tax trust is generally designed to avoid having the trust principal taxed in the income beneficiary's estate. One spouse places his or her property in trust. The other spouse is the income beneficiary and normally has a right to invade trust principal for health and reasonable support. The goal is to preserve principal (so it will not be taxed in the beneficiary spouse's

estate). The present rule of allocating losses to principal conflicts with that goal, without giving any additional benefit to the income beneficiary who can already invade principal.

The second primary reason for reversing the present rule is based on present commercial considerations. Farmers expect loss years. It is the average over several years which they try to achieve. Allowing losses to be carried over is a realistic recognition of the nature of farming. Furthermore, farmers frequently pre-sell crops; pre-pay rent; carry over crops unsold from one year to the next to obtain better markets; pre-pay expenses for fertilizer or land preparation; and defer payments on crops sold through co-ops or packing houses. All of these can distort income from one year to the next. Only by establishing a rule for carrying over trust losses from one year to the next will the income beneficiary receive the true business income.

We believe the trustee's "absolute discretion" to determine income and principal from natural resources, timber and other property subject to depletion ought to be retained, including the trustee's absolute discretion to determine whether to allocate up to 27 1/2% of gross receipts to principal as a depletion allowance in Section 4810. The staff recommended possibly changing the latter percentage to make it more general, to be consistent with existing federal tax laws. Apparently the 27 1/2 figure was the historically used figure, but it can be changed if necessary in the drafting instrument.

We concur with the staff recommendations and see no reason to treat income receipts from timber different than income from other natural resources; this is in line with the Oregon version of the Act. However, timber on the property at the time the trust is established should be deemed principal. Consideration should be given to developing some means of segregating income from principal without the necessity of an appraisal at the time the trust is established. Perhaps a formula approach based on average harvest age for the type of tree cut could be developed. Allocating all timber to principal with a factor for unproductive property would be reasonable.

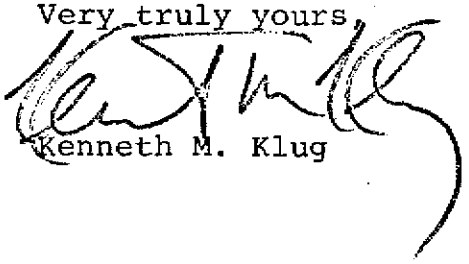
California presently permits 5% of unproductive property to be attributed to delayed income. For a general rule of construction, this still seems satisfactory, although the staff is concerned with the percentage being somewhat low under present economic conditions. We recommend that the Commission bear in mind that farmland has historically

produced a low rate of return. Increasing the percentage of deemed income from unproductive property would have a major impact on trusts which own farm property.

Finally, California's version of Section 4814 permits flexibility in the trustee by providing an absolute discretion to determine principal and income allocation of charges, whereas the Act is specific. We see no reason to change California's version.

As a general comment relating to the Commission's work on the trust law, I should reiterate that we would prefer to retain existing language where no substantive change is contemplated. Where California courts have already decided cases based on existing language, lawyers have drafted documents in reliance on those cases. It would be unfortunate to depart from the existing language (and judicial interpretation) if no change in substance is intended. The people of California should not be required to incur the expense of overhauling their trust documents to fit within new concepts, and lawyers and trustees (especially corporate trustees) should not be forced to initiate contact with all former clients and trustors to warn them of changes which may affect existing trusts.

Very truly yours,



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April 16, 1984

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

Re: April Meeting Agenda

Dear 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 April 27 and 28, 1984. These comments do not reflect Supplements to Memoranda as they were not received in time for sufficient review by the whole committee before this letter was prepared.

As a preface to the general discussion, we note that three of these studies (F-640, F-663, and F-521) deal with special problems of community property. We note with concern a tendency to sanction the creation of special "hybrid" forms of community property for special purposes. Thus, there is concern about confusing lawyers and the public about what the attributes of community property are. Community property vests equal interests in each spouse when it is acquired. Those interests are freely transferrable during life and at death. When reviewing interests in pension plans or joint tenancies, one needs to try to keep the rules as simple and consistent as possible in order to avoid misunderstandings or the creation of other problems.

Study F-640 - Marital Property Presumptions and Transmutations

While we have not seen the recommendation which was supposedly attached to the Memorandum, we have seen Assembly Bill Section 2274 and feel that it needs serious change. When people record a document or put title to an asset into a title form which is either explicitly community property title or separate property of one of the spouses, that title should be given some weight. Those of us who advise persons who own separate property of the importance of keeping record title are appalled at legislation which would entirely negate the effect of title by creating no presumptions whatsoever.

In order to make this clear it may be useful to remember that there are many forms of title. These include:

1. John and Mary Jones (unadorned).

2. John and Mary Jones, husband and wife (presumed community property).

3. John and Mary Jones, husband and wife as community property (presumed community property).

4. John Jones, a married man as his separate property (should be presumed separate property).

5. Mary Jones, a married woman as her separate property (conclusively presumed separate property if acquired prior to January 1, 1975, and should be presumed separate property at later dates).

6. John Jones, a married man (presumed to be community property).

7. Mary Jones, a married woman (should be presumed to be community property).

8. John and Mary Jones, husband and wife as joint tenants (may be presumed to be community property under certain circumstances).

9. John and Mary Jones, husband and wife as tenants in common (such an unusual title holding that the very use of it may imply something other than community property was intended).

In each of these situations one needs to be careful as to what presumptions should apply and for which purposes. In cases where someone makes a specific reference to either community property or sole and separate property, we believe that should create a presumption that the title is correct but not a conclusive presumption. For instance, a naked assertion by one marital partner that his or her property is separate property should be rebuttable by the evidence. Where no indication exists in the title as to the nature of the property, the presumption should be that the title is community property. This would apply in cases of unadorned title. It may also apply in the case of tenancy in common or joint tenancy. However, there are problems to presuming that a joint tenancy is community property for purposes other than dissolution of marriage or a granting of credit during

lifetime. A joint tenancy by its creation of a survivorship feature undercuts the community property attribute of testamentary disposition. It is difficult, if not impossible, to reconcile those two factors. Any change in presumptions will have to deal with how the property will pass at the death of one of the joint tenants. For these reasons, we prefer to have a presumption of community property held in joint tenancy apply only to proceedings for dissolution of marriage for purposes of division of the property.

Study F-671 - Quasi-Community Property (Tax Implications)

Congress is currently considering legislation (H.R. 4170) to amend the Internal Revenue Code to overrule the Davis rule for all states. It exempts all property divisions pursuant to divorce from the taxable sale or exchange rules. It is inadvisable for California to change its legislation at this time. If the proposed Congressional legislation passes, the problem will be solved.

Study F-663 - Division of Pensions

We have reviewed Memorandum 84-9 regarding division of pensions.

This is an area of the law with many problems and few solutions. We would like to emphasize that the law currently has numerous problems, so that any step that solves some of those problems is a step in the right direction even if it does not solve all of the problems.

These problems have not been adequately addressed in the law because the evolution of the recognition of a community property interest is of relatively recent vintage. Furthermore, just at the point when the courts were beginning to address the issues, the California Supreme Court came down with the regretable decision in Waite v. Waite. If a joint tenancy is incompatible with community property, as the courts have consistently held for the better part of this century, then it seems that a terminable interest in a pension right is also incompatible with community property. If it's community property, then the non-employed spouse should have a vested interest in that community property.

Despite the use of the word "vested" above, a non-employed spouse is not entitled to a greater right in the plan than the employed spouse has. In other words, if the employed spouse's right in the pension plan is not yet vested under the

terms of that plan, the non-employed spouse's rights cannot be vested either. Federal law currently provides that the non-employed spouse may not receive any payments from the pension trust until the employed spouse is in "payment status". Once rights are vested and payment is possible, then the issue arises as to how those rights should be enforced. The obvious answer is to join the pension trust as a party to the proceeding. There are already provisions in the Civil Code which allow the joinder of the employer's trust as a party with regard to the division of the pension rights.

The issues of fair division are numerous. If a plan participant does not yet have vested rights in the plan, it is not "fair" to ask that person to take less of another community asset to compensate for plan rights that may never be received. While the reservation of jurisdiction method does seem "fairer," it is inefficient in that it requires proceedings to be reopened possibly many years later, and the nonemployee spouse may have some difficulty in periodically determining the status of the employee spouse. The administrator of the plan should not be required to ascertain the existence of dissolution proceedings, the terms of the judgment and the location of the non-employee spouse before releasing benefits to the employee spouse. To place this burden on the administrator is impractical at best. In most cases, joinder of the plan is available, and it should be up to the parties to take this action if they are concerned about the plan benefits. Whatever is decided, proper enforcement should be the primary obligation of the spouses, not the plan.

A State Bar study group raised the issue of estate taxes payable upon the death of the non-employed spouse prior to the employed spouse. However, under Internal Revenue Code Section 2039(d), there is a specific exemption from estate tax for the community property interest of a non-employed spouse. Since the California Estate Tax is now tied to the Federal Estate Tax, there may not be an estate tax issue at this time. However, if the non-employee spouse has an unfettered power to determine disposition of the assets, it may be treated as a general power of appointment. There are no cases which deal with whether § 2039(d) should take precedence over § 2041.

As a staff member brought up, the problem with a presumption of pension rights being community property interest is the difficulty in allowing the non-employed spouse to exercise what would normally be community property rights over his or her community property interest. Inter vivos disposition by gifts, lifetime transfers (such as to a living trust) or testamentary disposition are all rights that a spouse has to that spouse's

community property. When these community property rights are applied to the community property interests of a non-employed spouse in the employed spouse's pension, it can create problems.

With regard to the attitude of the employed spouse having some of his or her pension pass to those designated by the non-employed spouse, it may raise resentment if the designee is a charity, a second spouse, or remote relations. Presumably it should not be a problem if it goes to the children of both spouses. While there are some who believe that a pension plan is more akin to a welfare plan (intended to support the worker in his or her retirement), it should not be forgotten that a pension plan is a form of additional compensation. It is enforced savings of a portion of one's income. Just as the non-employed spouse has a right to one-half of the bank accounts that result from savings from the community property earnings during marriage, the non-employed spouse also has a right to one-half of the community property portion of a pension plan. Employed spouses often resent the non-employed spouse taking an interest in the bank accounts and so it is no surprise that these same persons can resent the non-employed spouse also taking an interest in the pension plan.

Because this is an absolute right to community property which vests at the time of the earnings, we do not believe that any kind of a time limit or dollar limit is appropriate. If the non-employed spouse is a vested owner by virtue of its being a community property interest, as our courts have stated, then one should not be less of an owner because the interest is small or because the marriage is of short duration. With regard to the latter, the formula time rule penalizes short marriages.

With regard to the administrative problems of this kind of revision, it may be wise to seek detailed comments from those who represent administrators of employee plans. It might also be noted that in all of those administrative plans the problems exist to some degree or another currently. The current uncertain status of so much that is covered by this legislation creates a variety of different solutions to the problem and nightmares for administrators. One advantage to the proposed legislation is that it simplifies the options available and thus might promote greater certainty in administration and greater simplicity for the administrator.

Study F-521 - Community Property in Joint Tenancy Form

The proposed legislation seems to create as many problems as it solves. It would be advisable to keep the existing law of the presumption for purposes of dissolution only. If

a decedent's surviving spouse wishes to treat a joint tenancy as community, there are several effective ways to do so now.

As pointed out in our preface, we are uncomfortable with a proliferation of hybrid types of "community property." If the property is truly community property, the decedent should have the right to dispose of his or her one-half. Requiring a specific devise will, in many cases, make the right of testamentary disposition illusory. If that right exists, any sort of devise, whether residuary or general (i.e., "all of my real property"), should be sufficient. On the other hand, if the property is to be treated as joint tenancy in order to create some right of survivorship in the surviving spouse and to take advantage of an easier method of clearing title, then it should not be subject to testamentary disposition. We wonder whether the proposal would really be better than the present system, which does not seem to be that problematic.

Study L-628 - Order Dispensing with Accounts of Guardian or Conservator.

The proposed change to existing Section 2628 appears to be a welcome addition. We would also suggest raising the dollar limits for excusing an account. An income of $300 per month is not large by today's standards and is usually fully expended each month. Furthermore, perhaps the principal asset amount could be increased to either $4,000 or $5,000.

Study L-657 - Procedure for Objecting to Appraisement of Estate Property.

New Probate Code Section 608.5, providing a procedure for filing objections to the appraisement of probate assets, will fill a gap in the law left by the repeal of the inheritance tax provisions and should draw no objection from the probate bar.

Study L-618 - Uniform Transfers to Minors Act

Most persons for whom we do estate planning would prefer to see the Uniform Gifts to Minors Act (or the new substitute Uniform Transfers to Minors Act) increase the age of termination from 18 to 21 years. However, if for political reasons it is difficult to get the Legislature to approve such a change, then having a provision allowing the donor to designate an extension of time so that the gift terminates at age 21 instead of 18 would be desirable. It is our impression that financial institutions prefer that there be one uniform age as that aids their administration. However, if the extension of time is in

the title of the account, then it will probably be acceptable to financial institutions. The additional complexity of allowing flexibility of date of termination between 18 and 21 is desirable because it accords with the great majority of donors' wishes. We are not certain that a further extension to age 25, especially when one considers the added problems of certain tax issues, is truly desirable. When one further considers that there is already a political issue in getting an extension to age 21, we believe we should only ask for what we are somewhat likely to get.

Study L-640 - Trusts (Scope of Study)

We assume that the decision to codify only essential elements of the law relating to express written trusts in the Probate Code is not a decision to repeal the provisions regarding constructive trusts and resulting trusts which remain in the Civil Code.

Study L-640 - Trusts (Formalities for Creating Trusts)

Subsection (e) of the unnumbered statute "Methods of creating a trust" should be modified to read, "An enforceable promise. . . ."

We concur that trusts should be created by a writing.

We also concur in explicitly adopting the rule, "Consideration is not required for the creation of a trust." We also agree with the deletion of the requirement of trustee acceptance in order to have a valid trust.

Study L-640 - Trusts (Presumption of Revocability)

We strongly believe we should keep the statutory presumption of revocability found in Civil Code Section 2280. California purposely changed from the common law because of horror stories that were numerous. Well-drafted trusts contain explicit statements of revocability or irrevocability, as the case may be. However, we can't count on all trusts being well-drafted nor can we count on all trustors to carefully read the instrument. The evidence to the contrary is overwhelming. Many trusts are drafted by trustors themselves, perhaps utilizing form books that do not address the issues raised by California law. We should preserve the ability of such trustors to correct their mistakes. Since most trusts currently drafted are revocable trusts, a presumption that favors the majority is not unreasonable. The California rule was enacted as consumer protection and should be retained as such.

The staff has pointed out a problem of application of the California rule in a multi-state context which should be addressed. The appropriate solution to the problem is not to change California's general rule, but to create a separate rule for a trust created outside California which becomes subject to California law due to its administration here. The rule could simply state that whether the trust is presumed revocable or irrevocable shall be governed by the law of the state in which the trust was created, unless otherwise provided in the trust instrument.

Study L-640 - Trusts (Indefinite Beneficiaries and Purposes)

The current rules on indefinite beneficiaries and indefinite purposes are a rare triumph of rigidity and technicality over the usual policy of assuring that the testator/trustor's wishes are fulfilled. To hold that a power which would be valid if expressed as a power becomes invalid merely because the word "trust" appears is ludicrous. While there are situations in which the testator/trustor's intent cannot be ascertained, in many others, the intent is perfectly clear, even if some of the details are not specified. If the testator/trustor trusts the executor/trustee to select beneficiaries or trust purposes, why should the courts refuse to permit the executor/trustee to exercise this discretion?

We support the codification of the rule which would validate a trust if (1) a definite beneficiary or beneficiary class is designated, (2) a class is sufficiently described so that it can reasonably be determined that a person is within it, and (3) the trust gives the trustee or another person the power to select the beneficiaries.

We also support validating trusts for "indefinite purposes" to carry out the intent of the trustor through codification of Sections 123 and 398 of the Restatement (Second) of Trusts.

Study L-640 - Trusts (Trustee's Duties)

In general, the proposed legislation is an improvement on the current law in the sense that it consolidates many provisions found in differing locations and puts them in a logical order in one location. One of the trustee's duties found in the Restatement (Second) of Trusts which we did not notice in the proposed legislation is the duty not to delegate to others the doing of acts which the trustee can reasonably be required to personally perform. It may be that this is more appropriately

discussed under the exercise of discretionary power, a duty commonly believed to be non-delegable. However, it should be included somewhere. Other duties that perhaps should be listed are the duties (1) to keep trust properties segregated, (2) to make trust property productive, (3) to deal impartially with beneficiaries where there are multiple beneficiaries of one trust, and (4) duties of co-trustees with respect to their joint administration of the trust.

There are some problems to Section 4321 which establishes different standards of care for different trustees. To date, only minimal guidance has been given to the court in determining which trustees should be held to a higher standard and how much higher the standard for each should be. It is not so much a problem for corporate fiduciaries, to whom this rule is generally applied anyway. But what about individuals who may have some "greater skill"? What standard should be applied to an attorney acting as fiduciary? What about an attorney who is not a trust specialist? What about an accountant? Is he to be held to a higher standard? How much higher? Is there to be a higher standard for a businessman than a housewife? What if the trustor thought that the trustee had "special skills," but the trustor misperceived the existence of those skills?

Study L-640 - Trusts (Trustees' Powers)

We support an automatic power statute on the grounds that it gives needed flexibility to trustees in administering trusts and reduces the costs to trusts, trust beneficiaries and the general public by eliminating the need for many petitions to the courts for needed additional powers. For these reasons, we also support application of this rule to trusts already in existence.

The staff is concerned about "the parade of horribles that might otherwise issue from the uncontrolled exercise of trustees' powers." We are talking about an automatic grant of powers; we are not talking about the controlled or uncontrolled exercise of those powers. Trustees' powers would be subject to the same controls as presently exist, regardless of whether those powers are conferred in the trust instrument, by the court upon petition, or by automatic statutory grant. Remedies for abuse of discretion or misuse of power are not lacking.

With regard to the specific powers, Professor Haskell's concerns over proposed Sections 4422 and 4432 appear to be misplaced. He seems to feel that a bank serving as trustee should not be able to retain bank stock in a trust or to keep trust funds on deposit in its own bank. It would be rare that a

corporate trustee would purchase its own shares. What an invitation to a surcharge if there is any loss at all! Thus, we are talking only of retaining inception assets, and that is precisely what most trustors desire. Corporate trustees have had a great deal of difficulty in explaining to trustors and beneficiaries why at least a portion of a large block of their own stock (which may be a blue chip holding) should be sold and the proceeds used to diversify the portfolio.

We see little problem with permitting a corporate trustee to keep funds on deposit in its own bank. It is more convenient, efficient and economical, particularly with internal computer systems which permit unlimited transactions and instant access to funds. Of course, the rates must be competitive. For Bank of America to use Bank of America when Crocker is paying significantly higher is again an invitation to a surcharge action. If the rates are comparable, however, it hardly makes sense to require that a Bank of America trust officer walk the three blocks to Crocker and wait in line each time a deposit or withdrawal is necessary. Neither should Professor Haskell like the idea of handling all transactions by mail, with the attendant loss of use of funds. We doubt that major corporate fiduciaries are going to risk a surcharge action, with the unfavorable publicity which might result, just to make a few dollars off a deposit account. Further, use of deposit accounts by major corporate fiduciaires is not all that common these days anyway. Most use some kind of Cash Fund, a commingled fund permitting unlimited daily deposits and withdrawals and paying more than money market accounts. Beneficiaries seem quite happy with this vehicle.

We suggest more detail be added to proposed Section 4474 so that payments can be for the "benefit of" a disabled beneficiary as well as "use of." Also payments to a non-relative as Custodian under the Uniform Gifts (or Transfers) to Minors Act should be included.

We object to portions of proposed Section 4478. It has long been the general rule that trustees may delegate administrative duties but not discretionary duties. This is especially true with regard to discretions which are "sole, absolute or uncontrolled." We believe that rule should be continued and subsection (c) removed. Furthermore, we are somewhat concerned with how subsection (b) relates to the trustees' general duties of care. Perhaps careful investigation of the agents prior to hiring should entitle the trustee to rely on their advice once they are hired. On the other hand, there should be some periodic

assessment of performance. Just how these two concerns interrelate and how much to try to regulate by statute is a concern of our committee.

We concur that there is no need to enact UTPA Section 3(b).

Study L-640 - Foreign Trustees.

As anyone who has tried to draft a trust using one corporate trustee and having assets which consist of real property in more than one state has discovered, the difficulties are real. Even though real property held by trusts is considered to be a personal property interest in many states, in those states where it is not, the necessity for a local trustee becomes apparent. A reciprocity scheme would be advantageous to expand the role of the California corporate trustees out of the state. Given the standing of California financial institutions in the nation as a whole, we think it's more likely that a reciprocity scheme would benefit California institutions than that it would benefit foreign corporate trustees. At the same time, such a scheme would benefit many donors and testators when designing trusts. Furthermore, such a provision may actually facilitate the changing of situs of trusts from one state to another and the transfer of jurisdiction for supervision of those trusts. Anything that would make that process easier would be appreciated by local beneficiaries of trusts established by a person in a generation one or two generations removed who may have lived in another state.

Despite our preference for reciprocity, it seems that most any of these options are acceptable. Whatever is done, we suggest more analysis. While it is true that some states permit some foreign corporations to act, our research has revealed no state which permits all foreign fiduciairies to serve as trustee. While there are a few states which will permit a national bank with its principal office in California to take a few limited actions with regard to assets located in those states, we have found no state which will allow such a bank to truly serve as trustee.

The whole question of interstate banking is receiving a great deal of scrutiny from the banking industry. Different segments of a bank may prefer different alternatives. For example, the trust departments of some banks favor limited

reciprocity with some other states, while the commercial departments of the same banks may oppose any expansion of the powers of an out-of-state bank. Others may favor permitting an out-of-state fiduciary to take limited actions as long as it does not regularly conduct business here.

We should be reluctant to make any sudden changes to the present system. While there are trusts with out-of-state real property, title to which cannot be held by a California corporate fiduciary, there are several ways to handle the situation, including the appointment of an ancillary trustee in the other state. This procedure is neither so cumbersome nor so expensive that it warrants an abrupt shift in approach, particularly since there does not yet appear to be any consensus with regard to a desirable alternative. Further study and some input from the banking industry might be helpful.

Study L-640 - Transfer of Trust To or From California

These provisions appear to be sound changes. However, we question the retention in proposed Section 4653(h) of the requirement that the petition state "whether there is any pending civil action in this state against the trustee." This requirement should be limited to natural persons, as the staff has recommended with regard to the requirement in proposed Section 4653(d) that the petition give the age of the trustee "if the trustee is a natural person." We are not aware of any corporate fiduciary in California that does not have civil actions pending against it, and the fact that there are such actions is certainly not news to the judge who may hear a petition to transfer a trust.

Study L-640 - Revised Uniform Principal and Income Act

First, we agree with the staff that Section 4801 should be omitted. It should be clear at this point in time that principal and income as defined for probate and trust accounting purposes does not relate to the calculation of income for tax purposes, and we can think of no other reason for such a section being in the law.

Moving these provisions to the Probate Code from the Civil Code appears to be desirable. It also appears to be desirable that if the prudent man standard is removed from the ordinary trust provisions regarding trustees, it should also be removed from the principal and income act.

We hope to be able to give additional written input to the process prior to your meeting.

Very truly yours,

Valerie J. Merritt

VJM:rhy/170

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April 11, 1984

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road
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Re: Study F-670, Memorandum 84-37: Award of Attorneys' Fees at Dissolution

Dear Nat:

I have read your study on attorneys' fees and I strongly agree that this is an area of the law which needs revision to correct serious inequities.

Since there is not yet a tentative recommendation out for comment, I have not brought the matter before the Executive Committee for discussion, although I will if you think it would be helpful. I am giving you my own unofficial thoughts on the nature of the problem and what might be done about it.

It is obviously unfair that the paying spouse can be made to invade his capital to pay fees for both sides while the other cannot. I suspect that the early cases were trying to say that relative earning power and income should be the main factor. The language that came out was then picked up and followed uncritically by later cases, resulting in a very bad rule.

Some lawyers (including Hugh Thompson) believe that the rule is unconstitutional since the cases talk about "husband" and "wife", thereby denying equal protection. However, I think any court would read them as meaning "paying spouse" and "receiving spouse" since that is the obvious import of the cases. A court ruling on constitutionality would then have to determine if the latter two labels make a rational distinction.

The offensive rule could be dealt with quite simply. Just amend CC 4370 to give the court full discretion to award fees from any source which may be appropriate under the facts of the case -- from separate or community of either party, from income or principal.

There are other serious problems in this area which need to be addressed. I am constantly on both sides of the problem and I find that the results are unsatisfactory either way.

From the point of view of the wife, it is difficult to get an award sufficient to provide adequate representation. Carol Bruch commented at a Commission meeting a while back that many lawyers do not like to represent women because it is so hard to get paid. She is right.

Husband's counsel will often be reasonable on all other issues and then stonewall on attorneys' fees. I am then faced with the prospect of going to hearing for fees alone, knowing that the cost of the hearing may well exceed the amount of the award. I hesitate to advise my client to settle because under the Avnet-Bernheimer-Jafeman-Hopkins-Folb-Jacobs line of cases, she may give up a substantial right and get nothing in return.

At the other extreme is the wife who takes unreasonable positions and insists on litigating everything, in part because she does not believe she will have to pay the cost. Courts should have the mandate and power to exercise more control over the reasonableness and adequacy of fees. I know of no other way to ensure that fee orders are adequate but reasonable.

In summary, the wife must be able to finance an effective fight against a stubborn and stingy husband. At the same time, he should not have to finance an assault against himself which is based on vindictiveness and greed.

Courts can and do consider the reasonableness of claimed fees, but the way this is handled varies widely. Some judges consider settlement overtures and the conduct of the parties and counsel in setting fees. Others will not listen. The strange case of Marriage of Cueva holds that a judge may consider his observations of the proceedings and review of the file in setting fees then holds that a total refusal to respond to discovery requests is not a basis for fees! A very real threat of being held accountable will encourage the exchange of information and encourage settlement.

Putting so much within the discretion of the trial court has its risks too, but it is not possible to make rules to cover every combination of facts including the behavior of both parties and counsel.

It should also be possible for the court to order that fees for both parties be paid from community property. The Wong case appears to hold that this cannot be done at present. Because of the threat that the husband's separate property or share of the community may be subjected to the wife's fees, settlements sometimes include payment of wife's fees from community property. Because a court could not order it, payment of the husband's fees is

rarely part of a settlement. Even without settlement, husband's attorney must take his chances on collecting from his client without the help of the Family Law Court.

The haphazard way the law has developed in this whole area and the lack of realistic and uniform standards makes attorneys' fees an area ripe for your consideration.

Best regards.

Sincerely,

JAN C. GABRIELSON

JCG/nm