

June 8, 1984

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

Place

State Capitol, Room 125
Sacramento

Time

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

Important Note: Since other entrances to the State Capitol close at 6 pm, you must enter at the North Annex entrance ("L" Street) on Thursday evening, June 21.

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

June 21-23, 1984

June 21 (Thursday)

1. Minutes of April 27-28, 1984, Meeting (sent 6/1/84)
2. Study L-605 - Probate Law and Procedure (Optional Representation Systems)
Memorandum 84-52 (sent 6/4/84)
3. Study L-800 - Probate Law and Procedure (Foreign Personal Representatives; Ancillary Administration)
Memorandum 84-45 (sent 6/7/84)
4. Study L-630 - Probate Law and Procedure (Supervised Administration-- Real Property Sales)
Memorandum 84-57 (sent 6/6/84)
5. Study L-626 - Wills and Intestate Succession
Amendments to Assembly Bill 2290
Memorandum 84-50 (sent 6/6/84)
Application of 1983 Legislation Where Decedent Died Before January 1, 1985
Memorandum 84-51 (enclosed)
Assembly Bill 2290 (latest version) (Handout at meeting)
6. Administrative Matters
1984 Legislative Program
Memorandum 84-54 (to be sent)
7. Study L-600 Probate Law and Procedure (Completion of Work on New Probate Code)
Memorandum 84-53 (to be sent)

June 22 and 23 (Friday and Saturday)

8. Study F-670 - Attorney's Fees (Draft of Tentative Recommendation)

Memorandum 84-55 (sent 6/1/84)

9. Study F-521 - Community Property in Joint Tenancy Form
(Draft of Recommendation)

Memorandum 84-56 (sent 6/1/84)

10. Study L-640 - Trusts

Trustee's Duties

Memorandum 84-21 (sent 3/2/84; another copy sent 5/16/84)

Trustee's Powers

Memorandum 84-22 (sent 2/8/84; another copy sent 5/16/84)

Breach of Trust

Memorandum 84-23 (sent 4/10/84; another copy sent 5/16/84)

Liability of Trust and Trustee to Nonbeneficiaries

Memorandum 84-24 (sent 4/17/84; another copy sent 5/16/84)

Office of Trustee

Memorandum 84-26 (sent 4/17/84; another copy sent 5/16/84)

Judicial Administration

Memorandum 84-29 (sent 4/10/84; another copy sent 5/16/84)

Transfer of Trusts To and From California

Memorandum 84-30 (sent 3/21/84; another copy sent 5/16/84)

Revised Uniform Principal and Income Act

Memorandum 84-32 (sent 3/2/84; another copy sent 5/16/84)

Presumption of Revocability as to Foreign Trusts

Memorandum 84-34 (sent 6/6/84)

Oral Trusts

Memorandum 84-25 (sent 6/6/84)

Conduct of Trust Business and Qualification by Foreign Trustees

Memorandum 84-27 (sent 6/1/84)

Validity of Trusts for Indefinite Beneficiaries or Purposes

Memorandum 84-31 (sent 6/4/84)

Memorandum 84-19 (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JUNE 21-22, 1984

SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on June 21-22, 1984.

Law Revision Commission

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

Staff Members Present

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

Consultants Present

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

Other Persons Present

Bob Bannen, Los Angeles County Bar Association, Probate Section, Los Angeles
Edward V. Brennan, California Probate Referee Association, San Diego
Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles
James Frank, Sacramento (June 22)
Patricia R. Hersom, Continuing Education of the Bar, Berkeley (June 21)
Paulette Leahy, California Bankers Association, San Diego
James Quillinan, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Mountain View (June 22)
John W. Schooling, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Chico

ADMINISTRATIVE MATTERS

MINUTES OF APRIL 27-28, 1984, MEETING

The minutes of the April 27-28, 1984, meeting as submitted by the staff were approved after the first complete sentence at the top of page 8 was revised as follows: "As presently drawn, Section 3 permits some of the new law to go into immediate effect on January 1, ~~1984~~ 1985 (for example, the repeal of Section 350 concerning proof of a missing will)."

1984 LEGISLATIVE PROGRAM

The Executive Secretary made the following report concerning the
1984 Legislative Program:

1984 LEGISLATIVE PROGRAM
CALIFORNIA LAW REVISION COMMISSION

ENACTED

- 1984 Cal. Stats. Ch. 19 (Assembly Bill 781) - Spousal support including insurance (McAlister)
- 1984 Cal. Stats. Ch. 20 (Assembly Bill 810) - Quiet title and partition judgments (McAlister)
- 1984 Cal. Stats. Ch. 156 (Assembly Bill 2286) - Special appearance in family law proceedings (McAlister)
- Assembly Concurrent Resolution 102 - Authority to study topics (McAlister)

SENT TO GOVERNOR

- Assembly Bill 2278 - Dormant mineral rights (McAlister)
- Assembly Bill 2343 - Rights between cotenants (Moore)
- Assembly Bill 2492 - Uniform Transfers to Minors Act (Sher)
- Assembly Bill 3472 - Liability of earnings of stepparent for child support (Harris)

PASSED SECOND HOUSE; CONCURRENCE IN AMENDMENTS PENDING

- Senate Bill 1365 - Statutory form for power of attorney for health care (Keene)

SENT TO FLOOR IN SECOND HOUSE

- Senate Bill 1367 - Statutory form for general power of attorney (Keene)
- Assembly Bill 2255 - Affidavits of death (McAlister)
- Assembly Bill 2270 - Independent administration; disposition without administration; bonds of personal representatives; objection to appraisal; waiver of accounting (McAlister)
- Assembly Bill 2276 - Severance of joint tenancy (McAlister)
- Assembly Bill 2739 - Award of family home to spouse having child custody (Isenberg)

PASSED FIRST HOUSE

- Senate Bill 1366 - Dismissal for lack of prosecution (Keene)
- Assembly Bill 1460 - Liability of marital property (McAlister)
- Assembly Bill 2272 - Notice of will (McAlister)
- Assembly Bill 2274 - Marital property transmutations (McAlister)
- Assembly Bill 2282 - Garnishment of payments from trust (McAlister)
- Assembly Bill 2290 - Wills and intestate succession (McAlister)
- Assembly Bill 2295 - Creditors' remedies (McAlister)
- Assembly Bill 2764 - Statute of limitations for felonies (Sher)
- Assembly Bill 3000 - Reimbursement for educational expenses (Harris)

D E A D

Senate Bill 1392 - Disposition of community property (Will seek to obtain interim study) (Lockyer)
Assembly Bill 2288 - Simultaneous deaths (Failed to obtain enough votes for approval at prior hearing; reconsideration granted) (McAlister)
Assembly Bill 2294 - Witnessed wills (McAlister)

The Commission considered a letter dated June 12, 1984, from attorney Jerome Sapiro of San Francisco, objecting to Assembly Bills 2270 (independent administration of estates), 2272 (notice of will), 2294 (execution of witnessed wills), and 2282 (garnishment of periodic payments to trust beneficiary). The Commission considered the reply letter to Mr. Sapiro from the Executive Secretary. Mr. Sapiro's letter and the Executive Secretary's reply are attached as Exhibits to these Minutes. The Commission determined not to attempt to amend these bills in response to Mr. Sapiro's objections.

COOPERATION WITH STATUTE PUBLISHERS

The Commission discussed the manner in which the 1983 enactments to the Probate Code were published by the publishers of the codes. It was suggested that the Executive Secretary write to the publishers of the California Codes to indicate that he is willing to the extent his time permits to make suggestions designed to make the next publication of the Probate Code easy to use by lawyers and others.

STUDY F-521 - COMMUNITY PROPERTY IN JOINT TENANCY FORM

The Commission considered Memorandum 84-56 and the attached draft of a recommendation relating to community property in joint tenancy form, together with the relevant portion of a letter from the Probate and Trust Law Section of the Los Angeles County Bar Association which was distributed before the meeting and is made an Exhibit to these Minutes. The Commission approved distribution of the final recommendation for comment before printing, with the following changes:

- (1) The proposal should be limited to property in joint tenancy form solely between husband and wife, without third parties.
- (2) The staff should investigate the procedure for transfer of the interest of the survivor in a vehicle registered under the Vehicle Code upon the death of a coowner. If the procedure appears expeditious, the

recommendation should make clear that it does not affect the procedure. Otherwise, the recommendation should exclude registered vehicles from its application.

STUDY F-670 - FAMILY LAW--ATTORNEY'S FEES

The Commission considered Memorandum 84-55 and a letter from the Family Law Section of the State Bar (a copy of which is made an Exhibit to these Minutes) relating to the award of attorney's fees in family law proceedings. The Commission decided to take up the offer of the State Bar Section to assist in drafting appropriate legislation on the matter, and to request a draft for consideration at the September meeting.

STUDY L-600 - COMPLETION OF WORK ON NEW PROBATE CODE

The Commission discussed generally what would be required to complete work on a new Probate Code. The Executive Secretary suggested that completion of work on the new comprehensive trust statute should be given the highest priority. He suggested that work on the remainder of Division 3 (administration of estates of decedents) not be given a top priority. The priorities to be given to various projects during 1985 will be discussed at the September meeting of the Commission. Two letters, one dated June 6, 1984, and one dated June 12, 1984, from the Estate Planning, Trust and Probate Law Section were briefly outlined at the meeting and are attached as an Exhibit to these Minutes.

STUDY L-605 - OPTIONAL REPRESENTATION SYSTEMS

The Commission considered Memorandum 84-52 and the attached staff draft of a Tentative Recommendation Relating to Optional Representation Systems. The Commission decided that the term "by representation" as used in a will or trust should have the same meaning as "per stirpes" under proposed Section 250, that is, meaning a pure stirpital distribution system. The Commission also decided that a transitional provision should be included in the proposed legislation to limit its application to instruments drafted on or after the operative date of the legislation.

The Commission asked the staff to redraft the proposal in a manner consistent with the Commission's decisions and to bring it back for Commission review at the September meeting. The staff should consider

whether the term "representation" should be deleted from all other provisions, since the term may cause confusion if it has one meaning when used in a will or trust and another meaning when used in the code. See, e.g., Civil Code Section 1389.4; Probate Code Sections 240, 6147, 6402, 6402.5.

STUDY L-626 - AMENDMENTS TO ASSEMBLY BILL 2290

The Commission considered Memorandum 84-50 and attached exhibits, and Memorandum 84-51 and attached exhibits, concerning amendments to Assembly Bill 2290. The Commission made the following decisions:

The Commission decided that new subdivision (d) which would be added to Section 147 by Amendment 36 in the exhibit to Memorandum 84-50, should be revised as follows:

(d) Nothing in this chapter limits any right one spouse otherwise has to revoke a consent or election to disposition of his or her half of the community or quasi-community property under the will of the other spouse.

With this revision, the Commission approved the amendments to AB 2290 proposed by Memorandum 84-50.

The Commission deleted proposed Sections 161 and 649.7 from the transitional provisions to have been codified as set out in Exhibit 3 to Memorandum 84-51.

The Commission deleted one of the six uncodified transitional provisions set out in Exhibit 4 to Memorandum 84-51, and revised another, as follows:

SEC. _____. ~~Sections 328.3 and 328.7, added to the Probate Code by Chapter 842 of the Statutes of 1983, and Section 372.5, added to the Probate Code by Chapter 842 of the Statutes of 1983 and amended by this Act, apply act, applies~~ only to cases where the decedent died on or after January 1, 1985.

~~SBG-////// Notwithstanding the repeal of former Chapter 11 (commencing with Section 660) of Division 3 of the Probate Code by Section 39 of Chapter 842 of the Statutes of 1983, that chapter shall continue to apply to any case where the decedent died before January 1, 1985.~~

With these deletions and revisions, the Commission approved the transitional provisions set out in Exhibits 3 and 4 to Memorandum 84-51.

At the suggestion of a State Bar subcommittee (see letter from Janet L. Wright--copy attached to these Minutes), the Commission decided to make the substance of the following technical revisions to Sections 6408 and 6408.5:

Probate Code § 6408 (technical amendment). Parent-child relationship

6408. (a) ~~If, for the purposes of intestate succession, a~~ A relationship of parent and child must be established to determine is established for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(1) Except as provided in ~~paragraph (e)~~ Section 6408.5, the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between an adopted person and his or her adopting parent or parents.

(3) ~~The relationship between a person and his or her foster parent, and between a person and his or her stepparent,~~ has the same effect as if it were an adoptive relationship if ~~(i)~~ (A) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and ~~(ii)~~ (B) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

~~(3) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless (i) the natural parent and adopted person lived together at any time as parent and child and (ii) the adoption was by the spouse of either of the natural parents of the adopted person or after the death of either of the natural parents.~~

(b) For the purposes of intestate succession purpose of determining whether a person is a "natural parent" as that term is used in Sections 6408 and 6408.5:

(1) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

(2) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established for the purposes of intestate succession by an action under subdivision (c) of Section 7006 of the Civil Code unless either (i) (A) a court order was entered during the father's lifetime declaring paternity or (ii) (B) paternity is established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.

Probate Code § 6408.5 (technical amendment). Inheritance by natural relatives from or through adopted child or child born out of wedlock

6408.5. Notwithstanding Section 6408:

(a) Except The relationship of parent and child does not exist between an adopted person and his or her natural parent unless (1) the natural parent and adopted person lived together at any time as parent and child and (2) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister,) ~~neither a parent nor a relative of a parent~~ inherits from or through a child on the basis of the relationship of parent and child ~~between that parent and child~~ if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

~~(b)~~ (c) If a child is born out of wedlock, neither a parent nor a relative of a parent inherits from or through a child on the basis of the relationship of parent and child between that parent and child unless the parent both (1) acknowledged the child and (2) contributed to the support or the care of the child.

STUDY L-630 - ESTATE SALES OF REAL PROPERTY

The Commission considered Memorandum 84-57 concerning estate sales of real property. The Commission approved the staff recommendation to keep the substance of existing provisions for publication or posting of notice, appraisal, minimum offer, court confirmation of sale, and overbidding, subject to technical revisions and drafting improvements. The staff should consider whether the required minimum for the overbid (Prob. Code § 785) should be reduced in view of recent increases in real property values, and whether there should be standards for subsequent overbids.

STUDY L-640 - TRUSTS

The Commission considered Memorandum 84-21 relating to trustees' duties and began consideration of Memorandum 84-22 relating to trustees' powers. The Commission made the following decisions:

Memorandum 84-21 (Trustees' Duties)

Duties in general. The basic duties of trustees should be listed in the trust statute, perhaps in the form of Restatement (Second) of Trusts Sections 169-185 and 230 as set out in Exhibit 2 to the memorandum. The Commission considered a general statement that the trustee is subject to the duties of the common law, but decided on a list of basic powers because it would be more useful for nonprofessional trustees. The statutory list of duties would not be exclusive.

Investment standard. The standard governing investments provided in Assembly Bill 630, if enacted, should be continued in the comprehensive statute. Assembly Bill 630 permits investments to be judged as part of an overall investment strategy.

Expert standard of care. Draft Section 4321 which provides a duty to use special skills was approved in principle, but the staff should attempt to improve its wording and consider suggestions from interested persons.

Duty to account. The concept of requiring an annual accounting to income beneficiaries was reaffirmed. However, the option of supplying a copy of income tax returns in place of a more detailed accounting, as permitted by draft Section 4341(c), was rejected. The income beneficiaries should be able to waive the annual accounting and the trustor may dispense with the requirement in the trust instrument. Beneficiaries of a revocable inter vivos trust would not be entitled to a mandatory annual accounting. All beneficiaries would have the right to petition for relevant information about the trust and its administration. The contents of the annual accounting should be the same under the comprehensive statute for all trusts, including pre-1977 trusts that are subject to the accounting provisions of Probate Code Section 1120.1a.

Private foundations, charitable trusts, split-interest trusts. Draft Sections 4390-4396 should be redrafted to continue the structure of existing Civil Code Sections 2271-2271.2.

Special rules applicable to charitable trusts should be considered at some later point when the content of the general statute is settled.

Memorandum 84-22 (Trustees' Powers)

Relationship of powers and duties. By statutory language or perhaps by a comment, it should be made clear that the grant of a power to a trustee does not authorize exercise of that power if to do so would violate a duty owed the beneficiaries.

Automatic powers. There should be a set of powers granted automatically to trustees, except as excluded by the trust instrument. As the Commission proceeds through the powers specified in the draft, any particularly sensitive or dangerous powers will be removed from the set of automatic powers and placed in a separate category of powers that may be granted on petition to the court or incorporated by a trust instrument.

Draft § 4422. Collecting and holding property. The comment to this section should note that Probate Code Section 1035(d) provides a limitation on the general power to retain property in a marital deduction trust.

Draft § 4426. Participation in business. This power should be limited to continuing an existing business, and it should be made clear that the trustee does not have power to start up a new business. While the trustee should have the automatic power to change the form of a business, court approval should be required before the trustee may continue operating a business.

Draft § 4428. Acquisition of undivided interest. This section should be deleted, because it is confusing and appears to be a special case of the general power to acquire property. The comment to draft Section 4434 should note that the trustee has the power to acquire for the trust the remaining undivided interest in trust property.

Draft § 4430. Investments. This section should be revised to read as follows: "The trustee may invest and reinvest trust property ~~in accordance with the provisions of the trust or as provided by law.~~" The deleted language is surplus.

Draft § 4432. Deposits in insured accounts. Deposits should be in accounts bearing reasonable interest that are insured or, following Assembly Bill 630, "collateralized."

Draft § 4474. Distribution to beneficiaries under legal disability. This section should be revised to read substantially as follows:

4474. The trustee may pay any sum distributable to a beneficiary under legal disability by paying the sum to the beneficiary or by paying the sum for the use of or for the benefit of the beneficiary either to a legal representative appointed by the court, or if none, to a relative.

The remainder of Memorandum 84-22 remains to be considered.

STUDY L-800 - FOREIGN PERSONAL REPRESENTATIVES;
ANCILLARY ADMINISTRATION

The Commission considered Memorandum 84-45 and attached exhibits, including a staff draft of provisions for collection of California property of nonresident decedents without ancillary administration. The Commission made the following decisions:

§ 658.050. Summary proceedings for small estate

Subdivision (d) of proposed Section 658.050 provides that if a creditor objects to the summary proceeding, the court shall delay the summary proceeding to permit the creditor to petition for ancillary

administration. Subdivision (d) should be revised to permit the court to determine the creditor's claim in the summary proceeding.

§ 658.060. Effect of foreign judgment for or against personal representative

If the foreign judgment is against a personal representative in ancillary administration outside California, the foreign judgment should be binding on a California personal representative who was serving in that capacity at the time of the judgment only if the California personal representative had reasonable notice of the foreign proceedings in which the judgment was entered and an opportunity to defend. The concern was that the ancillary administrator might not defend vigorously if there is little property in the ancillary proceeding.

Placement of Proposed Sections

The proposed sections should go near existing Sections 1040-1043a rather than in Chapter 10 as proposed by staff. This should minimize confusion pending completion of the Probate Code revision and adoption of the new numbering system.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

EXHIBIT 1
LAW OFFICES
JEROME SAPIRO
100 BUSH STREET
SAN FRANCISCO 94104
(415) 362-7807

June 12, 1984

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

Thru: John H. DeMouly, Executive Secretary

Re: Opposition to Proposed Legislation
to Revise the State Probate Code

Dear Mr. DeMouly:

I have been admitted to practice since 1939, and my field of emphasis is probate.

It is requested that this letter be made available to all members of the California Law Revision Commission immediately.

My opposition to proposals of the Commission which presently are in the form of pending legislation is:

1. AB2770 (McAllister) in part seeks to amend the Independent Administration of Estates Act (Probate Code §§591-591.7) to allow sales, transfers and grant of options concerning real property without Court confirmation. Even as an alternative this allows too much free-wheeling. It takes away from the public protection of competitive bidding (which does produce higher sales prices), Court approval, and the fixing of increased bond for the protection of persons interested in the estate. It opens the door to improprieties, even as an alternative procedure. It potentially hurts all persons interested in an estate. It limits the competition of realtors in their participation in probate sales. When the Probate Commissioner position was introduced in San Francisco, the late Timothy I. Fitzpatrick, respected Judge thereof, used to announce the number of lawyer and executor/administrator embezzlements uncovered by the Commissioner. This can recur, only moreso, without the requirement of Court confirmation and supervision, visiting loss upon heirs, legatees and devisees. It is requested that this part of AB2770 be amended by withdrawal of such provision.

2. AB2272 (McAllister) concerns proposal to file notice with the Secretary of State as to the date of execution of a will and its location. It also provides search and certificate procedures. This has been opposed by the State Bar Estate Planning, Trusts & Probate Law Section. It should be withdrawn and rejected. The possible adverse evidentiary effects of failure to give notice of change of will, revocation thereof, or execution of a new will, - or even change of location,- should be obvious. This would be so whether filing were voluntary or mandatory. It would add expense to the State to administer such program and foist additional costs upon our clients, which should be avoided.

3. AB2994 (McAllister) is a reintroduction of a proposal dropped last year concerning execution of wills. Although amended to delete Notary acknowledgement in lieu of two witnesses, it should be opposed and withdrawn. Existing procedures require two disinterested witnesses present at the same time when a will is executed, and give the public protection that is needed. AB2294 would allow witnessing within 30 days of execution and without witnesses being together. The condition of an ill testator is known to vary between morning and night, and there may be substantial variance as to all by relation to time and circumstances.

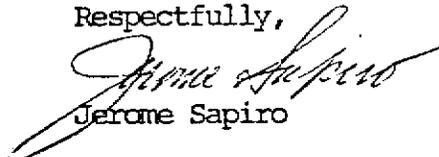
4. AB2282 (McAllister) would permit trust interests of beneficiaries to be garnished in the same manner as wages, with the same exemption applying. Present law requires the exercise of Court discretion in spendthrift trust cases. The difference between the situation when a trust is created by a third person from his or her assets and that involving a debtor's wages should be obvious. In the former case, we are dealing with the assets of a third person, not those created by the debtor. Statutory exemptions may not meet the factual and financial needs and situations, and, are usually behind times in catching up with the status of the economy. I believe it fair to state that spendthrift trusts would not be so frequently used and created by third parties for their improvident or needy relations, if a substantial part of the protection (Court exercise of discretion) is taken away. You should not support such proposal that may adversely affect the creation of such trusts which tend to keep needy and improvident persons off State assistance programs.

It is requested that you collectively and individually reconsider said proposals, and take immediate and appropriate action withdrawing same from pending legislation.

Such legislation should be adequately publicized, which has not occurred. Not only lawyers, but realty brokers, Banks, and the general public should be heard from. However, inadequate public exposure of the proposals through the media has been the case. This is not the way legislation which substantially affects the rights of testators and all persons interested in their estates, as well as proven protective Court procedures, should be proposed or passed.

Thank you for your attention and anticipated consideration of the foregoing.

Respectfully,


Jerome Sapiro

JS:mes

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-2
PALO ALTO, CALIFORNIA 94306
(415) 494-1335



June 14, 1984

Jerome Sapiro
100 Bush Street
San Francisco, CA 94104

Dear Mr. Sapiro:

You wrote expressing your opposition to certain probate law bills recommended by the Law Revision Commission. I am sending your letter to each member of the Commission today.

Your letter states that you believe that not only the views of lawyers, but also realty brokers, banks, and the general public should be considered in determining what legislation should be proposed and enacted. The Commission believes that this is very important. The brief description that follows shows how the Commission seeks to obtain and give consideration to the views of interested persons and organizations.

I enclose the first page of the Minutes of the Commission's last meeting. You will note that the persons listed as being present at the meeting include Edward C. Halbach, Jr., who is an expert in probate and tax law and has lectured extensively for Continuing Education of the Bar. A representative of the California Probate Referees was present. Four members of the Executive Committee of the State Bar Estate Planning, Trust, and Probate Law Section were present. A representative of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association was present. A representative of the California Bankers Association was present. A representative of the State Bar Family Law Section was present. And a private lawyer interested in probate law was present. The extensive written comments from the State Bar Section and Executive Committee of the Los Angeles County Bar Section were considered and were supplemented at the meeting by oral comments of their representatives in attendance at the meeting. We have similar attendance at our other meetings. See the first two pages of the Minutes of the January 1983 meeting (enclosed).

On Monday of this week, I attended a three-hour meeting with a group of bank trust officers to deal with their concerns about the bill relating to garnishment of periodic payments from a trust. The California Bankers Association supported this bill in principle but had concerns about the mechanics of the bill. After the meeting, the trust officers

Mr. Jerome Sapiro

June 14, 1984

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were satisfied with the bill as it will be amended. On Tuesday, I attended a meeting of the State Legislative Committee of the American Association of Retired Persons (with 1.5 million members in California) at their request to bring them up to date on the probate law reform bills which they have studied and support and are closely following. Other interested groups study our recommendations. For example, you object to the extension of independent administration to cover real property sales. After study, the California Association of Realtors supports this proposal and its representative appeared at the hearing on Assembly Bill 2270 to support this proposal.

In addition to the organizations that review the meeting material to be considered at each meeting and send representatives to the meeting, there are other organizations that review the meeting materials. For example, a complete set of the meeting materials for each meeting is sent to one or more representatives of the Beverly Hills Bar Association and the Santa Clara Bar Association.

When the Commission has developed a tentative recommendation, the tentative recommendation is distributed to approximately 250 lawyers, judges, probate referees, and other persons and organizations that have indicated an interest in the probate law study. We request that these persons send us their comments on the tentative recommendation. The Commission reviews the comments we receive and determines whether it will submit a recommendation to the Legislature and, if so, the recommendation it will submit. If the Commission determines to submit a recommendation to the Legislature, the tentative recommendation is revised in light of the comments we received and is published in the form of a pamphlet. The printed pamphlet is distributed to approximately 450 persons and organizations. The proposed legislation is introduced in the Legislature. During the course of the legislative session the proposed legislative measures are often amended extensively in light of additional comments and suggestions.

When major legislation is proposed, it often includes a provision that defers the operative date of the legislation. This allows time for interested persons and organizations to review in detail the legislation as enacted and for the Commission to recommend and secure the enactment of any needed follow up legislation to correct technical deficiencies or to supplement the original enactment. For example, a comprehensive revision of the law relating to enforcement of judgments was enacted in 1982 with a deferred operative date and follow up legislation was enacted in 1983. The revision of the wills and intestate succession law was enacted in 1983 (AB 25) with a one year deferred operative date, and AB 2290 has been introduced to make any needed revisions before the 1983 law becomes operative. In addition, the Commission assumes a responsi-

Mr. Jerome Sapiro

June 14, 1984

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bility of continuing review of experience under laws enacted upon its recommendation. For example, the revision of the guardianship-conservatorship law was enacted in 1979. Follow up legislation was enacted in 1980 (Ch. 89, 246), 1981 (Ch. 9), and 1983 (Ch. 72).

In view of your interest, you may be willing to review and comment on tentative recommendations and might like to receive copies of printed recommendations. If you will complete and return the enclosed form, we will see that you receive what you would like to have.

I also enclose a copy of the most recent Annual Report. At the back of the report, you will find a list of past publications. If you see any you would like to have, please let me know.

Sincerely,

John H. DeMouilly
Executive Secretary

JHD:ea
Encl.

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
James H. Davis, Vice Chairperson
Roger Arnebergh
Bion M. Gregory

Arthur K. Marshall
Edwin K. Marzec
Ann E. Stodden

Absent: Barry Keene, Member of Senate
Alister McAlister, Member of Assembly

John B. Emerson

Staff Members Present

John H. DeMouilly
Robert J. Murphy III

Nathaniel Sterling
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)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 21-22, 1983

SOUTH SAN FRANCISCO

A meeting of the California Law Revision Commission was held in South San Francisco on January 21-22, 1983.

Law Revision Commission

Present: David Rosenberg, Chairperson
Debra S. Frank, Vice Chairperson
Robert J. Berton

Roslyn P. Chasan
Bion M. Gregory
Beatrice P. Lawson

Absent: Alister McAlister, Member of Assembly
James H. Davis

John B. Emerson

Staff Members Present

John H. DeMouilly
Robert J. Murphy III

Nathaniel Sterling
Stan G. Ulrich

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law (January 21)
Russell Niles, Property and Probate Law (January 21)

Other Persons Present

George Alexander, Dean, Santa Clara Law School, Santa Clara
(January 21)
Paul W. Avery, American Association of Retired Persons, California
Legislative Committee, Concord (January 21)
Jack Ayer, State Bar, Debtor-Creditor Subcommittee, Davis (January 21)
Edward Howard Bordin, Health Attorney, Castro Valley (January 21)
Phyllis Cardoza, Probate Committee, Beverly Hills Bar Association,
Los Angeles (January 21)
Charles Collier, State Bar, Estate Planning, Trust and Probate Law
Section, Los Angeles (January 21)
James D. Devine, State Bar, Estate Planning, Trust and Probate Law
Section, Monterey (January 21-22)
Frank Freeland, American Association of Retired Persons, Campbell
(January 21)
Louis F. Gianelli, Practicing Attorney, California Probate Referee
Association, Modesto (January 21)
Paul Goda, S.J., Professor, School of Law, University of Santa Clara,
Santa Clara (January 21-22)
William W. Johnson, Sacramento County Superior Court, Sacramento
(January 21)
Kenneth M. Klug, State Bar, Estate Planning, Trust and Probate Law
Section, Fresno (January 21)
Greg Merrill, American Association of Retired Persons, Washington,
D.C. (January 21)

Barry D. Russ, State Bar, Family Law Section, San Francisco
(January 21)
Harley Spittler, Attorney, San Francisco (January 21)
Gordon W. Treharne, Public Administrator of Los Angeles County
(January 21)
Richard V. Wellman, Joint Editorial Board, Uniform Probate Code,
Athens, Georgia (January 21)

ADMINISTRATIVE MATTERS

MINUTES OF NOVEMBER 1982 MEETING

The Minutes of the November 5-6, 1982, meeting of the Law Revision Commission were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETING

The June meeting in San Francisco was rescheduled as follows:

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

The meeting should be held in downtown San Francisco rather than at the airport.

1983 LEGISLATIVE PROGRAM

The Commission considered Memorandum 83-3 relating to the 1983 legislative program. The Commission adopted as part of its legislative program Assembly Bill 69 (McAlister), making a technical corrective change in the Public Streets, Highways, and Service Easements Vacation Law, previously enacted upon Commission recommendation.

CONSULTANT

The Commission appointed Professor Edward C. Halback, Jr., University of California at Berkeley Law School (Boalt Hall), as a consultant on probate law and procedure. To the extent his time permits, Professor Halback will prepare material that will contain suggested revisions of the rules of construction of wills contained in Assembly Bill 25 and consistent rules to apply to trusts and other instruments. See the discussion infra in these minutes. Because of the limited financial resources available to the Commission, the Commission could not allocate any funds to pay the travel expenses of the consultant in attending Commission meetings.

**Los Angeles County
Bar Association**

EXHIBIT 2

Probate and Trust Law Section

617 South Olive Street
Los Angeles, California 90014
213 627-2727

Mailing address:
P.O. Box 55020
Los Angeles, California 90055

Minutes
June 21-22, 1984



June 8, 1984

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

Dear Commissioners:

On behalf of the members of 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 June 21 through 23, 1984. We would like to draw your attention to the fact that a number of studies which we made comment on in our letter dated April 16, 1984, were not discussed at your meeting of April 27 and 28, 1984. Therefore, these discussions are supplemental to the prior ones and the prior ones should also be considered at your meeting in June.

When we received our report from Valerie J. Merritt, Secretary-Treasurer of our Section, as to the April meeting, we were concerned that matters were discussed on the agenda which had been received so late there was not sufficient time for our committee to comment upon them, but other memoranda which we received in February and commented upon were not discussed. While we can understand the need for discussing memoranda which directly affect pending legislation early in your session, we do not understand why memoranda regarding pending studies which are not yet to the stage of proposed legislation shouldn't be discussed in the order in which they are produced. That way meaningful, thoughtful and complete discussion can be had about memoranda where there was time for sufficient commentary to be gathered from the State Bar, local bars, or even the commissioners themselves.

We note with approval the fact that on the proposed agenda dated May 10, 1984, the two-day discussion on trusts will begin with those topics submitted prior to the April meeting, with new memoranda deferred to the end of the meeting. We believe that that would be the best practice for all agendas. On the other hand, we also note that certain issues of probate law and procedure are scheduled to be discussed at the commencement of the meeting and cover memoranda which were not received by our members, and presumably not by others, until June 5 (as to some) or later (as to others still not received).

Trustee's Duties -- Memorandum 84-21, Study L640

We would like to reiterate all of our suggestions found in our letter to the Commission on April 16, 1984. Furthermore, having seen the commentary to the Commission by the Estate Planning, Trust and Probate Law Section of the State Bar of California (hereafter "State Bar Section"), we would agree that any reference in the Code to "common law" should be deleted and should instead refer to the "case law of California," so as to make it clear that we are not dealing necessarily with the general common law but more particularly with the case law as it has evolved in our own state.

We would like to suggest an additional change to subsection (d) of Section 4341. We believe that a beneficiary should have the right to waive any accounting, not just annual accountings. Therefore, we believe Section (d) should be changed to read:

"The trustee is not required to furnish an accounting (whether annual, at the termination of the trust or upon a change of trustees) or income tax returns to any beneficiary who has waived the right to such accountings in writing. Any waiver of rights under this Section shall specify whether it includes annual accountings, accountings upon change of trustees, accountings upon the termination of a trust or all of the foregoing. A waiver of rights under this section may be withdrawn in writing at any time and has no effect on the beneficiary's right to request information pursuant to Section 4340."

Finally, we suggest that section (f) be added to the statute to indicate that the trust instrument has the power to vary the duties of the trustee, including the duty to account. If it is not done in a new subsection (f), then the lead-in to subparagraph (a) should state "Unless the trust instrument otherwise provides, at least annually"

While many people seem to believe that a copy of the fiduciary income tax returns of the trust is a substitute for an annual accounting, we do not believe it is entirely adequate. There are many items of information to a beneficiary which may not be reflected on income tax returns. These would typically

include income from assets which do not generate taxable income and the value of investments which are not sold or exchanged. They may also include payments of non-deductible expenses or payments to related parties. At the minimum, in addition to the income tax return, a trustee should prepare annually a statement of the assets on hand at the end of the accounting period and some reflection of whether the value of those assets has increased or decreased from its carry value. It may be better still not to allow a fiduciary income tax return to substitute as an account.

We also concur with the comment of the State Bar Section stating that the current language in Civil Code Section 2261(4) should be retained. We suggest that it be added to Section 4303. Located there, it would make it clear that the duty to obey the trust is not absolute. Deviations from the terms of the trust may be authorized by the court in certain circumstances.

Trustee's Powers - Memorandum 84-22, Study L640

Once again we refer you to our letter dated April 16, 1984. We would like to especially reiterate our objections to proposed Section 4478. In addition, subdivision (a) should be modified by omitting "administrative" and substituting for it "his or her".

We do not believe that alteration of Section 4422 is the solution to improperly drafted marital deduction trusts. We believe that marital deduction trusts should be specially dealt with in the drafting of the instrument or in special legislation that allows reformation of marital deduction trusts. If a trust which is not a marital deduction trust received unproductive property, the trustee should be allowed to hold that property if it otherwise appears to be an appropriate investment given the intent of the trustor as expressed in the document or the investment strategy generally.

We have noted the comments of the State Bar Section regarding proposed Section 4426. While we believe that the continuation of participation in the operation of any business enterprise is important when a trustee receives business entities at the inception of a trust, and while we also believe that the ability to change the form or organization of such a business or enterprise is important to the trustee (particularly when the change in form may limit the liability of the trust), we share the concern of the State Bar about allowing trustees to enter new businesses as an automatic power. We believe that the language of Section 4426 should be tightened to make it clear that the

trustee may continue to participate in the operation of any business or other enterprise received by the trustee at the inception of the trust or by transfer from the donor to the trust. We do not believe that the trustee should be allowed to enter into new business holdings without prior court authorization.

We also agree with the State Bar Section that Section 4464 should be amended to read "The trustee may borrow money for any trust purpose to be repaid from trust property or otherwise."

Breach of Trust - Memorandum 84-23; Study L640

This was one of the memoranda received too late for inclusion in our commentary dated April 16, 1984.

One problem with trying to codify the rules in this area is that to be too specific is to be too rigid. As in our comments earlier, we believe that the new statute should not make reference to the "common law," but rather to "California case law."

The language with regard to the statement of remedies is in general fine, except that we have a few technical comments. In subsection (3) of subsection (b) on page 10 of the memo, the beneficiary is filing an action "To compel the trustee to . . . surcharging the trustee." Obviously the trustee does not surcharge the trustee. Only the courts can surcharge a trustee. Grammatically that particular subsection does not make sense. Another comment on language is that subsection (8) refers to a lien or constructive trust "of" trust property. It should be a lien "on" trust property.

With regard to the measure of damages, we believe that California should adopt the language of the Restatement Sections 205 and 204. We believe that it may be a good idea to codify the essence of comment (g) to Restatement Section 205. Perhaps such a codification could read: "Notwithstanding the foregoing, the court may excuse a trustee from damages for a breach of trust in whole or in part where the trustee has acted honestly, in good faith and reasonably and ought fairly to be excused."

Since the codification of rules tends to automatically include the suggestion that perhaps the law is being changed, perhaps the statute should include liability for attorneys' fees incurred by the beneficiary in proceedings involving breach of trust. They are currently allowed if the beneficiary's actions have resulted in common benefit to the beneficiaries as a whole,

a group of them, or the trust estate. The common benefit or common fund theory of attorneys' fees may perhaps advisably be codified. If the trust estate is liable, perhaps also the Court should be authorized to award attorneys' fees to beneficiaires from the trustee.

In general, we approve of the codification of Section 207 of the Restatement. However, we believe that the "such other rate as the court . . . may determine" portion of subsection (1) should be limited so that it is either the legal rate or "the interest actually received by the trustee or which the trustee should have received." Subsection (2) on the compounding of interest is generally sound. Our reasons for concern about subsection (1) are that the legal rates should be a floor to the interest rate and "other rates" should not be higher unless the circumstances are such that the trustee actually did receive higher amounts of interest or should have received higher amounts given the circumstances at the time.

We have concern about codifying Restatement Section 224 regarding the liability of a trustee for breach of trust by a co-trustee. Specifically, we are concerned about subsection (e) of subsection (2). Just how far must a co-trustee go "to compel a co-trustee to redress a breach of trust?" Is the non-breaching trustee obliged to file suit against his co-trustee? Is he supposed to independently determine whether an act by his co-trustee constitutes a breach? Can the non-breaching trustee wait until the court determines that a breach has occurred? We believe that perhaps that particular subsection should be dropped. We are reluctant to see a co-trustee's liability for the acts of his co-trustee increase too greatly in situations where there was no affirmative consent to or participation in the acts later determined to be improper.

The whole issue of the liability of co-trustees for the acts of the other is also tied in to duties of the trustees and the issue of proper delegation. It should be noted that participation or improper delegation or failure to exercise care are all elements for a liability of breach of trust of one trustee being attributed to the other. All of these areas cause special concern in the case where one co-trustee has or appears to have more expertise than the other. For instance, decedent has named his widow and his investment adviser as co-trustees. Decedent probably expected his widow to rely upon the advice of his investment adviser in deciding upon the investments of the trust. May the remaindermen (perhaps children of decedent's prior marriage) sue the widow for improperly delegating investment

decisions to the investment adviser? While it will be up the court to determine whether the widow's delegation to the investment advisor was "improper," we should be careful to keep these types of situations in mind when we are drafting legislation applicable to all. We would not want to unduly limit the court's discretion.

We are not quite sure what rule the staff is proposing for the statute of limitations and discharge by court decree. In the case where an accounting has been made to a court which fully discloses the matter in question, then we believe that the six months period allowed under C.C.P. § 473 is sufficient. A beneficiary with notice of the formal hearing has an adequate chance to request continuances and have the matter fully heard well before any order is entered. Once an order is entered, it should be final within the same six month's period of any other judgment.

If the accounting did not fully disclose the subject in question, the staff appears to propose a time period of one year from the discovery of "the facts" or from the time when the beneficiary should have discovered them. There is then an ambiguous reference to the general statute of limitations but not the four-year statute. We assume that this reference is to the three-year statute of limitations for "fraud." If that is so, there seems to be a conflict between the staff's proposal of one year from discovery of the underlying facts and the general statute of limitations' application of a three-year time period from discovery of the facts. One or the other ought to apply.

We read Civil Code Section 2258 as giving a fairly broad mandate to the trustee to follow all the directions of the trustor, including those which may be contrary to the usual rules of trust law. Furthermore, Section 222 of the Restatement is an appropriate recognition of the fact that a trust instrument can relieve the trustee from liability for certain types of breach of trust. In most situations where the trust instrument explicitly relieves the trustee from liability for certain types of breach of trust, the trustor is dealing with the case where one beneficiary may suffer but others may gain or the trustor has envisioned that all beneficiaries might suffer in the short term so as to create long term benefits. A common example of the former is where the trustor explicitly authorizes the trustee to favor the surviving spouse over remainder beneficiaries, even though that violates usual trust principles of "fairness."

Examples of the latter may include provisions requiring a trustee to hold certain closely held businesses in trust, and exculpating the trustee from paying dividends from those businesses if the trustee determines that the interests of the business require an infusion of capital, because the trustor has determined it is in the long range best interests of the beneficiaries that the business be allowed to grow and prosper and that it will eventually repay those beneficiaries. Similarly, certain kinds of investments in land may be "loss leaders" and the trustee may be directed to retain those investments during the loss period for the ultimate benefit of the beneficiaries later. We would hesitate to state that the exculpation language in the document (which is often a necessary precedent before the trustee will agree to act as trustee of such a trust) should be disregarded. Sometimes beneficiaries do have to suffer in the short term to get long term results. We should be cautious about letting a beneficiary who has "suffered" freely sue a trustee for an "excused breach," when the breach of the usual trust duties was performed at the express direction of the trustor in good faith when the trustor had a legitimate long term goal justifying the exculpation and the "breach."

While it may not be codified anywhere in our laws, I believe that California case law condones exculpation of the trustee by the beneficiaries. If nothing else, if all of the beneficiaries knowingly consent to and condone an act, they don't have standing to sue to question that act at a later date. This is also tied to the issue of waivers of accounting to some degree. If consent is knowing, it ought to be binding. In this regard, we agree that the Indiana Trust Code language is a reasonable statement of what the law ought to be, and probably is in practice.

We see no reason to legislate on the issue of laches.

Liability of Trust and Trustee and Non-Beneficiaries - Memorandum
84-24, Study L640

We are concerned with the words "personally at fault" in both proposed Sections 4521 and 4522. We believe that the essence of both of these sections is better stated in the Restatement Second of Trusts. We prefer the language of Restatement Section 265 to proposed Section 4521 and of Restatement Section 264 to proposed Section 4522. We believe that proposed Sections 4530, 4531 and 4540 are an improvement of existing law.

Once again we suggest that the appropriate treatment of creditors' rights to reach the assets of inter vivos trusts created as estate planning vehicles (will substitutes) be addressed. While we believe that the arguments are strong that a power to revoke is essentially equivalent to a general power of appointment and creditors may reach such a trust under Civil Code Sections 1390.3 through 1390.5, we believe that a statutory change which eliminates distinctions and which clarifies the law would be desirable. We believe that a power to revoke should be treated the same as a general power of appointment. While a power to revoke passes with the decedent, so does the power to presently exercise a general power of appointment. We believe that language essentially similar to Civil Code Section 1390.3(b) or 1390.4 should be adequate to allow creditors of the donor-trustor of a revocable inter vivos trust to reach the deceased trustor's assets in that trust. If such a statute is enacted, and we believe it should be, then we believe there should be an optional procedure for publishing a notice of death in order to give the trustee the option of shortening the statute of limitations for creditors' claims. An advantage to allowing such an option is that it does permit the trustee to promptly distribute trust assets to a beneficiary without fear of later problems in dealing with creditors.

We do not agree with the suggestion of Robert A. Schlesinger that formalities for revocable trusts be the same as those for wills.

Office of Trustee - Memorandum 84-26, Study L-640

We are concerned about the provision for a certificate of trustee under § 4550 as it applies to trusts not subject to court supervision. If there is a court file and if that court file shows the incumbency of the trustee, in situations where it is not necessary to go to the court in order to change trustees, the ability of a clerk to issue a certificate based upon the court file may be an invitation to fraud or, at the very least, inaccuracy. The Certificate procedure seems only to be appropriate in situations where there is continuing court supervision of the trust and so it is likely that the court file will be accurate. If the certificate is limited to situations where it may not be abused, it will be limited to an increasingly small minority of supervised testamentary trusts. Under those circumstances, we should consider removing the section altogether.

We approve the codification of a rule that where three or more co-trustees are acting, then the majority may act to bind them.

We believe that the liability of a resigning trustee not only continues, as stated in § 4571, but the term of continuation should be more explicit. We believe that § 4571 should be altered, so that the liability of the resigning trustee is not released or affected in any manner by the trustee's resignation and continues until the trustee is discharged. At the very least, it should continue until the delivery of all assets to a successor trustee or to beneficiaries of the trust upon distribution and a final accounting has been made or waived by all affected beneficiaries.

Section 4574 does not go far enough. A trustee who resigns or is removed from the office not only has the duty to deliver trust property to the successor trustee, but also continues to be responsible for properly administering the trust property prior to its delivery. This ties in with the deficiencies of Section 4571, where it should be clarified that the trustee continues to have the duty to act as trustee until the trust estate has been delivered to the successor trustee or person appointed by the court to receive the property. The resigning trustee's duties continue until a successor is in a position to assume his, her or its duties.

As discussed at the April meeting, subsection 2(b) of Section 4580 should be amended, so that the second sentence reads, "If the trust provides for more than one trustee, unless otherwise provided by the trust instrument, the court may, in its discretion, increase, reduce or maintain the original number of trustees."

The comments contain references to sections regarding discharge of trustee from liability without giving the appropriate section numbers. These sections are not contained in this memorandum, and we did not find where they were contained. We believe some clear definition of when a trustee is discharged from liability to be desirable.

While we understand the necessity of approaching some of these subjects piecemeal in initial stages of analysis, we have noted that it is often difficult to make the necessary cross-references needed to fully understand the new comprehensive article on trust law that will be found in the Probate Code. As the language of the individual studies is refined, we believe it would be quite helpful to consolidate it into one study which would be comprehensive and would allow greater utilization of cross references in a meaningful way.

Judicial Administration, Memorandum 84-29, Study L 640

We believe there continues to be a gap of the jurisdiction of the Superior Court over trust proceedings where a testamentary trust was established under the will of a California decedent, where judicial supervision of trust administration is not necessary, and where the only trustees are individuals who are not residents of California. Since such trusts do not have a principal place of administration in this state under the terms of proposed section 4600, then there appears not to be jurisdiction over the trustee under section 4603, and the availability of venue under 4602(b) appears to be irrelevant. We believe that when a California decedent establishes a trust under his or her will, the California courts continue to have an interest in the proper administration of that trust. If a trustee or successor trustee removes himself or herself from the State of California, the court should not automatically lose jurisdiction over that trust. Currently, there appears to be a loss of jurisdiction, but we believe that gap ought to be filled. If the trustee wants to remove the California testamentary trust to another jurisdiction, the trustee should be required to avail himself of the proceedings to transfer to another jurisdiction.

We believe that subdivision (a) of Section 4618 is sufficient if the material in brackets is removed.

In general, we commend you for attempting to eliminate, to the extent possible, the distinctions between testamentary trusts not subject to court supervision and inter vivos trusts not subject to court supervision.

Transfer of Trust to and from California - Memorandum 84-30, Study L640.

Please refer to our letter dated April 16, 1984 for comments.

Revised Uniform Principal and Income Act - Memorandum 84-32, Study L640

Once again, we refer you to our letter dated April 16, 1984. Since then, we have reviewed the letter of the State Bar Section dated April 25, 1984 and we would like to join in some of their comments. Specifically, we agree that it would be a good idea to renumber and place at the beginning of the Act Section 4816. On the other hand, we question why there needs to be another definition of "Trustee" in the Principal and Income Act when it is already defined in Section 84 of the Probate Code.

We agree that it may be desirable to reverse the "no carry over" rule for income losses of businesses and farming operations in Section 4809. The reasons given in the letter from the State Bar Section are persuasive. Furthermore, that reversal will accord with most trustors' intent and understanding.

Finally, we would like to change the position taken in our April 16, 1984, letter with regard to Section 4801. While we believed it was 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, apparently some attorneys have reported difficulty in convincing agents of the Internal Revenue Service that such is the case. If problems will be encountered with the I.R.S. by omitting this Section from the law, then we should retain Section 4801.

Community Property in Joint Tenancy Form - Study F-521

Although this particular study is not on the agenda for the June 21-23 meeting, we thought we would make some further comments on the study based upon the report to us of the April meeting.

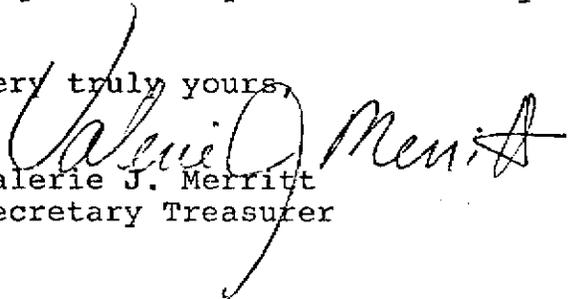
If any such legislation is enacted, and we believe that serious consideration should be given as to whether any of this legislation should be enacted, it should be expressly limited to joint tenancies between husband and wife with no other parties. While joint tenancies between husband and wife and third persons may be the minority, those particular types of joint tenancies create the most difficulties under the proposed legislation. We believe that any attempt to create a conclusive presumption of community property should only apply when the husband and wife are the only parties to the joint tenancy.

If there is any chance that this new rule of law will eliminate the availability of a double step-up in basis under Section 1014(b)(6) of the Internal Revenue Code, it should not be enacted. Currently probate practitioners have ways of getting a determination that property held in joint tenancy title form is in fact community property. The new legal form of community property with survivorship appears to more closely correlate with the common law title of tenancy by the entirety than with the traditional concept of community property. Since tenancies by the entirety are treated like joint tenancy with regard to obtaining a step-up in basis for income tax purposes, it is

California Law Revision Commission
June 8, 1984
Page 12

possible that this new property ownership situation may have similar problems.

Very truly yours,


Valerie J. Merritt
Secretary Treasurer

VJM:rhy/179

cc: Leslie Rasmussen
Bob Bannon

EXHIBIT 3
FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

Minutes
June 21-22, 1984

Chair
CONNOLLY K. OYLER, Encino
Vice-Chair
DIANA RICHMOND, San Francisco
Secretary/Treasurer
STEPHEN A. KALEMKARIAN, Fresno
Advisor
SANDRA G. MUSSER, San Francisco



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

Executive Committee
MARGARET L. ANDERSON, Petaluma
MICHAEL E. BARBER, Sacramento
WARREN C. DEUTSCH, Beverly Hills
THEODORE C. ECKERMAN, Pasadena
JAN C. GABRIELSON, Los Angeles
BEVERLY J. GASSNER, Ontario
MAX A. GOODMAN, Los Angeles
STEPHEN A. KALEMKARIAN, Fresno
MARIA del RIO LOW, Pasadena
IRA H. LURVEY, Los Angeles
BOBBI TILMON MALLORY, Los Angeles
JOHN H. PAULSEN, Auburn
PAMELA E. PIERSON, San Francisco
DIANA RICHMOND, San Francisco

June 15, 1984

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Study F-670, Memorandum 84-55 -- Attorney's Fees
in Family Law Proceedings

Dear Nat:

At the Executive Committee meeting of June 9, 1984, the above draft of tentative recommendation was discussed. The Committee voted with only one opposed that the rule against the wife impairing her capital to pay attorney's fees should be repealed.

The problem was discussed in greater detail and the committee arrived at a concensus on the following points. Many of the revisions to Civil Code §4370 which you proposed may be unnecessary and could lead to litigation to interpret it and put in question the existing body of case law on the statute in its present form.

If the object is to mandate that the court consider the respective incomes of the parties as a major factor in setting attorney's fees, it should say so in so many words. Further, members felt that the legislation should refer to the impairment of capital rule and repeal it specifically, rather than talk around it. Everyone was essentially against the present state of the law, the issue is how to go about changing it. Some committee members felt that the wife could be obstreperous during the proceedings then hide behind the impairment of capital rule when the court takes up the issue of attorney's fees.

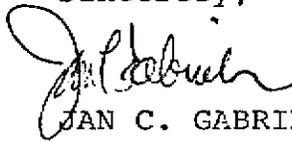
Committee members also suggested the possibility of listing in the statute the factors which the court should consider in setting attorney's fees similar to the provisions of Civil Code §4801 regarding spousal support.

Page 2
June 15, 1984
Nathaniel Sterling, Esq.

The concensus was further that the law relating to attorney's fees should be structured and enforced in such a way as to promote settlement and that that legislative purpose should be set out in the statute in addition to the purpose of giving the spouses equal bargaining power.

If you need any suggestions or help in drafting legislation which would be acceptable to the committee, I would be very happy to help you in any way possible.

Sincerely,



JAN C. GABRIELSON

JCG/nm

EXHIBIT 4
ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

Minutes
June 21-22, 1984

Chair
H. NEAL WELLS III, *Coste Mesa*
Vice-Chair
KENNETH M. KLUG, *Fresno*

Advisors
D. KEITH BILTER, *San Francisco*
COLLEEN M. CLAIRE, *Newport Beach*
CHARLES A. COLLIER, JR., *Los Angeles*
K. BRUCE FRIEDMAN, *San Francisco*
JAMES R. GOODWIN, *San Diego*
DAVID C. LEE, *Hayward*
JOHN L. McDONNELL, JR., *Oakland*
JOHN W. SCHOOLING, *Chico*
HARLEY J. SPITLER, *San Francisco*
ANN E. STODDEN, *Los Angeles*



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200
June 6, 1984

Executive Committee
HERMIONE K. BROWN, *Los Angeles*
THEODORE J. CRANSTON, *La Jolla*
JAMES D. DEVINE, *Monterey*
IRWIN D. GOLDRING, *Beverly Hills*
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John H. DeMouilly, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: AB 25 and AB 2290

Dear John:

On behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar, I have written to you previously on a number of occasions relating to the cleanup legislation, AB 2290, dealing with AB 25. I have also written to you with reference to the ability to complete all of the cleanup work on AB 25 within this legislative session.

There are a number of matters which concern us relating to the effective date of AB 25 and the piecemeal approach to the review and revision of the Probate Code. Some of these have been mentioned in prior letters. The purpose of this letter is to set forth current items for your consideration and for consideration of the Commission. These are as follows:

1. A recent poll of members of the Section supported a deferral of the effective date of AB 25 until the effective date of the Law Revision Commission's revisions of Section 300 - 1313 by a margin of almost 4 to 1. There was also lesser support, but still a clear majority, who would support delay of AB 25's effective date to January 1, 1986.

John H. DeMouilly, Esq.
June 6, 1984
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2. The recent proposals for renumbering the Probate Code (see Memo 84-39) suggest that what is now Division III, dealing with probate administration, as revised, may not have an effective date before January 1, 1988, i.e., three years after the effective date of AB 25. Yet both AB 25 and what is now Division III constitute an integrated system for probate administration. This piecemeal approach has troubled many of us.

3. As you are well aware, the current Probate Codes published by Parker and by West are most confusing because of the renumbering of sections, the restructuring of portions of the Code, etc.

4. The proposal for renumbering the Probate Code, which was set forth in Memo 84-39, while presented to the Commission at its April meeting, was not acted upon by the Commission. Thus, there is no certainty at this point that that system will in fact be adopted by the Commission. The numbering, therefore, of various provisions of AB 25 may not be final.

5. Because of the proposed renumbering of the provisions on probate administration, certain sections will be apparently renumbered twice. For example, what are now Sections 202 - 205 have been redesignated as Section 649, et seq. in AB 25. Yet those sections would be further renumbered as either part of a Division VII or Division VIII. There are many printed forms dealing with these sections. To require them to be reprinted after three years would seem unjustified and impose a significant cost on title companies which print the Section 202(a) affidavits, on publishers of treatises who would have to revise their editions accordingly, etc. Section 160 et seq. of the existing Code have been renumbered by AB 25 as Section 660, et seq. Those also would require renumbering in a new Division VII.

6. Our letters to you of March 16 and March 29, 1984, plus those items which we discussed on April 19 at our meeting, totaled more than 60 specific points for clarification or modification of AB 25. Almost none of those have yet reached bill form. Your letter of May 25, 1984, forwarded for comments some 70 amendments to AB 2290, most of which, of

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course, were highly technical. Those, we understand, are being added to the bill prior to its hearing before the Senate Judiciary Committee in late June. The Commission itself has not acted on some of the proposals. There are a number of items which we discussed which were not covered by your proposed amendments of May 25, and further amendments appear likely. Your letter of May 25 suggested several areas for further Commission consideration, such as the effective date as to repealed sections, such as §350.

7. The definition of "right of representation" in new Section 240 has been the subject of constant discussion and frequent change. Apparently the Commission will add statutory definitions of "per stirpes", "per capita", "per capita per generation", etc. These definitions are not yet ready to be amended into AB 2290, so there would be further amendments that would be apparently contemplated in the next legislative session. Clarification of Civil Code Section 1389.4 is also required.

8. The Commission at its April meeting voted to reconsider the ancestral property doctrine as it relates to personal property. AB 25, of course, contains certain provisions relating to ancestral real property, which fundamentally change California law. Should the Commission at its September meeting vote to sponsor amendments in that area, it would presumably involve the next legislative session and cause confusion as to the nature and extent of the doctrine until further legislation becomes effective.

9. The piecemeal approach to amending the Probate Code will entail a great deal of extra work in revising on more than one occasion textbooks, treatises, local probate policy memoranda, Judicial Council forms, etc. at enormous cost to all concerned. In addition, it involves a great deal of extra time for lawyers to learn about the changes on a piecemeal basis rather than having a comprehensive new statute available at one time.

10. The problem of dealing with the changes included in AB 25, as they affect existing estates, has not yet been fully resolved. As you will recall, there was some difference among staff members at the Commission's April meeting as to the effect of repealed sections, for example.

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11. As you are aware, the Lawyers Club of San Francisco has voted to support deferral of the effective date of AB 25. A conference resolution will be considered by the Conference of Delegates at the State Bar convention which also seeks deferral.

12. As you are aware, much of AB 25 was introduced in the Legislature without the Commission's having sent out its proposals for comment in the form of Tentative Recommendation. Consequently, there has perhaps been more cleanup work and more problems that have developed with AB 25 than might have occurred had the more usual procedure of Tentative Recommendation been followed.

13. Some of the definitions in the early sections of AB 25 were taken from the Uniform Probate Code. As we have discussed, we feel that a number of those sections should be carefully reviewed and perhaps modified. The definition of "interested person" is exceedingly broad and if applicable to probate notice requirement, may represent a significant change in probate administration. If only applicable to Division I, II & IV, as Section 20 indicates, what is its purpose?

14. Certain provisions now found in the Code were simply repealed by AB 25 with no replacement section. You and the staff are currently looking at those sections to determine if any of them should be re-enacted as part of AB 2290. If this is not accomplished in this session, it will cause certain gaps in the law should those provisions be re-enacted next year again causing confusion.

15. Other major code revisions, such as the Corporations Code, Uniform Limited Partnership Act, Conservatorship and Guardianship Law, were enacted as a single package, with a single effective date.

16. Undoubtedly a new Division VII and a new Division VIII will result in a number of conforming changes in Division I, II & VI, changes which may be substantive in some cases.

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17. CEB supplements now in preparation for California Will Drafting, for example, apparently will refer to AB 25 as enacted, without reference to AB 2290. Next year's supplement will pick up AB 2290 changes, etc. Since these supplements generally are one year or more behind, there will be a great deal of misinformation in print, due largely to the piecemeal approach to review of the Probate Code.

18. The Law Revision Commission is charged with organizing and improving California law. Its approach to the Probate Code is causing uncertainty and confusion. The approach does not enhance the bar's opinion of the work of the Law Revision Commission.

19. Because of the years of transition contemplated by the Commission (to January 1, 1988), costs to clients are likely to increase because of uncertainty as to the law and resulting litigation.

20. There is nothing in AB 25 that is so urgent as to preclude a further deferral of the effective date beyond January 1, 1985.

21. The Executive Committee is not asking for repeal of AB 25. The Executive Committee requests the Commission to defer the effective date of AB 25 so that a single Probate Code can become effective at one time. This will save cost and confusion and promote understanding of a cohesive new Probate Code.

22. Perhaps it makes sense to seek a deferral of the effective date of AB 25 and at the same time move up on the Commission's agenda the review of Division III so that, hopefully, the whole Probate Code (exclusive of guardianships and conservatorships) could be completed and necessary legislation enacted with an effective date of, for example, January 1, 1987.

The Executive Committee would appreciate the Commission's giving serious consideration to deferral of the effective date of AB 25.

Sincerely,



Charles A. Collier, Jr.
For The Executive Committee

ESTATE PLANNING, TRUST AND
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THE STATE BAR OF CALIFORNIA

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June 12, 1984

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

Re: Probate Administration

Dear Members of the Commission:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California has been working with the Law Revision Commission and its staff for the past several years in connection with the Commission's review of the Probate Code.

From time to time the Executive Committee has set forth its views with reference to probate administration. In addition, the Executive Committee has polled the members of the Section on two occasions in recent months to ascertain the views of Section members relating to probate administration and possible changes in the Probate Code.

The Executive Committee wishes to bring to the attention of the members of the Law Revision Commission the results of these polls of the Section members, the views of the Executive Committee, and proposals for improving probate administration in California.

PROBATE ADMINISTRATION SURVEY

The Executive Committee sent a questionnaire to all Section members seeking the views of members on the basic elements of probate administration. The survey was designed to include both existing practice and alternative proposals either proposed by the Law Revision Commission or included in the Uniform Probate Code.

More than 1,300 questionnaires were completed and returned by individual members of the Section. In addition, several probate sections of local bar associations used the survey as a basis for a meeting and reported the results of the survey taken at such a meeting. Therefore, these results represent a wide range of views and a good cross-section of probate practitioners throughout the State of California. The survey questions and responses are as follows:

	<u>Approve</u>	<u>Disap- prove</u>
1) WILL		
a) Admit to Probate by court order after notice (existing law)	1,090	122
b) Admit to probate by clerk without prior notice to interested parties (UPC Concept)	232	995
2) PERSONAL REPRESENTATIVE		
a) Appointed by court after noticed hearing (existing law)	1,041	142
b) Appointed by clerk without prior notice (UPC concept)	268	952
3) INVENTORY AND APPRAISEMENT		
a) Appraisal of all non-cash items by probate referee (existing law)	684	428
b) Self-appraisal of all probate assets by personal representative (UPC)	624	611
c) File inventory with court (existing law)	874	248
d) Serve copy of inventory on beneficiaries of estate, but don't file with court (UPC)	442	751
4) REAL PROPERTY SALES		
a) Require court order confirming sale (existing law)	694	426
b) Allow sale without court confirmation under independent administration (LRC proposal)	660	546

	<u>Approve</u>	<u>Disap- prove</u>
5) §630 AFFIDAVIT		
a) Increase dollar amount to \$50,000	756	356
b) Increase dollar amount to \$100,000	400	728
c) No change in existing \$30,000 limit	281	743
6) INDEPENDENT ADMINISTRATION		
a) Make advice of proposed action binding on all who receive advice and don't object within 15 days (LRC proposal)	1,002	240
b) Make advice nonbinding (existing law)	294	753
7) EXECUTOR'S COMMISSIONS		
a) Statutory commissions (existing law)	1,012	192
b) Reasonable fees fixed by court	261	841
c) Reasonable fees determined by personal representative (UPC concept)	231	918
8) ATTORNEYS' FEES		
a) Statutory fees (existing law)	1,022	180
b) Reasonable fees fixed by court	238	868
c) Reasonable fees determined by personal representative (UPC)	271	883
9) BONDS		
a) No bond if all interested parties waive bond for personal representative	1,137	117
b) Court discretion on bond even if all interested parties waive bond	340	766

	<u>Approve</u>	<u>Disap- prove</u>
c) No bond for special administrator if all interested parties waive bond	985	182
10) ACCOUNTINGS		
a) Formal Accounting Settled by Court Order after notice, hearing	708	205
b) Formal Accounting Served on Beneficiaries and filed with Court as matter of record, but not reviewed by Court	386	695
c) Informal Accounting given beneficiaries to become final in 60 days if no objection filed. Not filed with Court unless objections.	495	680
11) FINAL DISTRIBUTION		
a) By court order (existing law)	971	24
b) Informal distribution by personal representative without court order (one UPC alternative)	152	919
c) Informal distribution with closing statement filed with court and served on interested parties showing distribution. No court hearing unless objections filed within 6 months (another UPC alternative).	419	727
12) PROBATE ADMINISTRATION GENERALLY		
a) Retain existing system	811	155
b) Repeal §§300-1242 and replace with Uniform Probate Code	237	774

More recently the Executive Committee sent a second questionnaire relating principally to various Law Revision Commission bills in the Legislature during the current session. However, this second questionnaire did raise

several general issues relating to probate administration. The results on this questionnaire are still coming in and, therefore, the results are incomplete. At the time of this writing, the results on the first two questions, which are pertinent to this letter, are as follows:

	<u>Yes</u>	No
1) SHOULD THE EFFECTIVE DATE (Now 1/1/85) OF AB 25 (Ch 842, 1983 Statutes) WHICH REVISES PROBATE CODE §§1-296.8 BE DELAYED		
a) One year until January 1, 1986?	146	101
b) Until the effective date of the Law Revision Commission revisions of Sections 300-1313 (probate administration)?	234	67
c) No delay beyond January 1, 1985?	58	135
2) SHOULD THE EXISTING PROBATE CODE NUMBERING SYSTEM BE RETAINED INSOFAR AS POSSIBLE BY THE LAW REVISION COMMISSION?	348	35

IMPROVING PROBATE PROCEDURES

The Executive Committee of the Section, by letter of March 18, 1983, addressed to the California Law Revision Commission, set forth a number of proposals for improving probate administration in California. A copy of that letter is attached hereto. The Executive Committee from time to time has also made other specific suggestions to the Commission for improving probate procedures.

AB 2270, a Commission bill, incorporates many of the suggestions of the Executive Committee of the Section and other proposals by the Commission itself for improving probate administration. This bill, which has now passed the Assembly and also the Senate Judiciary Committee, makes a number of improvements in California probate procedure. With minor exceptions, the bill has been supported by the Executive Committee. AB 2270, among other things, would make the following changes in the California Probate Code:

1. It would allow transfer of a deceased spouse's separate property passing outright to the surviving spouse by Will or intestate succession without probate administration (existing §202(a); proposed §649.1, AB 25)(State Bar proposal).

2. It would increase property which can be passed pursuant to an affidavit under Probate Code §630 from \$30,000 to \$60,000. The affidavit could be used even if there was real property with a gross value of \$10,000 or less, but the real property itself would not be transferred by affidavit. (State Bar proposed increasing transfer to \$50,000)

3. Under independent administration (Probate Code §§591, et seq.), advice of proposed action must be given to interested persons. The recipient is given 15 days to seek a temporary restraining order which would require the personal representative to then petition the court for authority to complete the transaction. The bill would make the advice binding on all who receive it and who are not subject to legal incapacity. It would also allow a written objection to be served on the executor or administrator rather than requiring a temporary restraining order. (State Bar proposal to make advice binding; Commission proposal on other changes)

4. Under existing law, real property subject to probate administration can be sold only with court confirmation. The bill would allow, as an optional method, sale of real property or granting of an option as to real property under independent administration upon serving an appropriate advice. (State Bar proposal)

5. Existing law requires that a special administrator "must" furnish bond. This bill would allow the waiver of bond by all interested parties for a special administrator and also allow waiver where the Will waives bond for the executor and the same person is acting as special administrator. (State Bar proposal)

6. This bill would provide a statutory basis for waiver of accounting in a probate estate. Accountings can be waived, but the practice varies from county to county. This statutory provision would standardize the basis for waiver of accountings. (Commission proposal)

7. After repeal of the California inheritance tax there was no statutory provision for objecting to the values established by the probate referee on probate assets. This bill would add provisions allowing objections to the values as shown on an inventory and appraisement. (Proposal of the Commission in conjunction with the California Probate Referees Association).

GENERAL COMMENTS

The following are some comments and observations relating to probate administration in California, which we hope will be of interest to the Commission. These are as follows:

1. The probate administration survey indicates that probate practitioners feel that the existing system, involving some court supervision, works well and should not be replaced with the Uniform Probate Code.

2. The results of the survey strongly support retention of the existing numbering system of the Probate Code in so far as possible.

3. As has been previously pointed out to the Commission, there are more than 15,000 reported cases in California which refer to Sections 300 through 1313, i.e., the sections dealing with probate administration. This is a tremendous body of case law which has interpreted and refined the various Code sections. This body of case law should be retained insofar as possible, i.e., the existing sections in Division III should not be repealed or so rewritten as to destroy the value of the case law which has been developed.

4. Existing sections of the Code dealing with probate administration, it is submitted, should be retained in their existing form wherever possible. Generally when sections are rewritten, there is a change of meaning and the applicability of existing case law becomes questionable.

5. The existing California Probate Code provisions provide a great deal of flexibility in administering an estate. Small estates are handled by an affidavit without any court involvement (Probate Code §630); small estates can also be set aside to the surviving spouse and minor children

with minimal court involvement (Probate Code §640 - \$20,000 limit). Property left outright to a surviving spouse by Will or intestate succession, which is community or quasi-community, can now be transferred by affidavit without court involvement and without dollar limit. AB 2270 would add separate property to such transfers.

6. The Independent Administration of Estates Act, proposed by the State Bar and effective July 1, 1975, will, with the enactment of AB 2270 (removing real estate sales, exchanges or options from mandatory court proceedings) allow the administration of estates, once the Will is admitted to probate, with a minimum of court involvement. In most estates there will only be one further petition filed with the court; namely, a petition for executor's commissions, for attorneys' fees and for final distribution and, if not waived, a first and final account.

7. The repeal of the inheritance tax in 1982 removed the greatest obstacle to efficient probate administration in California. Under prior law, a probate estate could not be closed until the inheritance tax had been fixed by the court and the tax had been paid. In many instances, that took several years to have the tax determinations made. There are still many estates which were opened prior to repeal of the inheritance tax which have not yet been closed because the inheritance tax has not yet been determined by the State Controller's office.

8. The probate administration survey indicates a strong preference among lawyers for retention of the statutory executor's commissions and statutory attorneys' fees.

9. The probate administration survey indicates that attorneys are fairly evenly divided on whether probate referees should be utilized on a mandatory basis for appraisal of noncash assets, disregarding for the moment the provisions of Probate Code Section 605 which allow the court, on a showing of good cause, to waive the appointment of a referee.

10. Probate attorneys are troubled by the piecemeal approach to the Probate Code which the Commission has undertaken. AB 25 rewrites Divisions I through II.B., i.e., Section 1 through Section 296.8. Those sections, as rewritten

by AB 25, are to be effective January 1, 1985. At the Commission meeting in April, staff recommended that the provisions relating to Division III would not become effective until January 1, 1988. Thus, there is a three-year gap between the revision of Divisions I - II.B. and Division III. Undoubtedly, there will be some further revisions of Divisions I - II.B. required as Division III itself is reviewed and revised. This piecemeal approach is difficult for the Bar to deal with; it also will complicate the work of probate textwriters, the revision of Judicial Council forms, etc.; more than one revision may be necessary because of the bifurcated approach to the probate code. For example, Section 202(a) has been renumbered by AB 25 as Section 649.1. Based upon the Commission's proposal to move all provisions for probate administration into a new Division VII starting with Section 7000, and transfers without administration under a new Division VIII starting with Section 8000, what is now Section 202(a) will obviously have to be renumbered a second time if the staff proposal is adopted.

11. While there are undoubtedly a number of technical and clarifying amendments that should be made to various sections dealing with probate administration, it is the view of the Executive Committee that no major changes other than the type of changes made by AB 2270 are required to give California a modern, efficient probate system.

The representatives of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar will be pleased to discuss the contents of this letter and probate administration generally with the Commission whenever convenient to the Commission.

Sincerely,

Executive Committee, Estate
Planning, Trust & Probate
Law Section of the State
Bar of California

By 
Charles A. Collier, Jr.

cc: Executive Committee



SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

June 20, 1984

Charles A. Collier, Jr., Esq.
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Los Angeles, CA 90067

Re: Pre-Death Estate Planning Techniques Subcommittee

Dear Chuck:

As I told you on the telephone yesterday, our subcommittee is in the process of developing a bar newsletter article explaining Probate Code Sections 6408 and 6408.5. Although the consensus of the subcommittee members appears to be that the sections fill a gap in the California inheritance system in a thorough and realistic way, the subcommittee encountered several minor problems as we attempted to delineate the scope of the sections. The enclosed redraft proposal is the result of our attempt to formulate the scope of the provisions as we understand them. We believe and hope that the redraft simply clarifies the intentions of the original drafters.

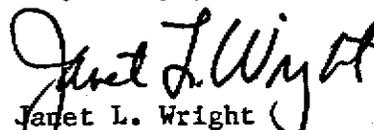
You will notice that most of our suggestions are slight adjustments to improve coherence and/or minor deletions toward simplicity. We also found a few passages to be convoluted, and our redraft represents our attempt to understand and simplify those passages. Our major suggestions are as follows:

1. The only suggestion which we feel might possibly reflect a substantive change relates to the standard of proof of a parent-child relationship between a foster parent or stepparent and a child; as set forth in the official version's Section 6408(a)(2)(i), the relationship is one that has "continued throughout the parties' joint lifetimes." The standard seems vague in that it does not establish whether a child has the burden of showing a continuing relationship or whether an opposing party would have to show a severance of the relationship. We feel that a more specific designation as to the standard of proof would prevent litigation in borderline cases. Since proof of one or more of the parties' renunciation of the relationship would seem to be more readily available than proof that the status quo continued, we recommend that the party opposing the relationship be required to show renunciation.

2. We have restructured the parts of Section 6408 to give a logical breakdown of the various types of parent-child relationships: subsection (a) discusses the blood relationships (i.e., natural parents and their legitimate or illegitimate children); subsection (b) discusses the adoptive relationships; and subsection (c) discusses the functional relationships (i.e., foster or step relationships which are identical to adoptive relationships except in legal status). We have integrated the clauses referring to the Uniform Parentage Act into redraft subsection (a), describing the natural parent relationship, because the Uniform Parentage Act does not pertain to the other kinds of parent-child relationships.
3. We have redrafted Section 6408.5 to contain all exceptions to the rules laid out in Section 6408. Therefore, we inserted the paragraph that was official Section 6408(a)(3) into redraft Section 6408.5 as subsection (a). In addition, we have modified the language of this clause to establish a consistent and nonredundant connection between redraft Section 6408.5 (a) and (b), both of which, we believe, limit the intestate relationship between a non-custodial natural parent and a child who has been adopted by someone else.
4. We have modified the phrase "natural parent" with the word "non-custodial" throughout the text of Section 6408.5. Without a distinction between custodial and noncustodial natural parents, the section would require a showing that a custodial parent (who has never relinquished the child for adoption) has an ongoing relationship with the child, an obviously unnecessary requirement.

As we discussed, since our subcommittee is still in the process of drafting the newsletter article, it is possible that we may encounter further questions about the applicable scope of the provisions. If either you or the Law Revision Commission believe our additional comments would aid in drafting either technical amendments or the official comments, we would be happy to submit them to you. We anticipate having a tentative draft of the article to circulate to the subcommittee members for comment within the next three weeks.

Very truly yours,



Janet L. Wright
Visiting Acting Professor of Law

JLW:sb
Enc.

cc: James D. Devine, Esq.
Kenneth M. Klug, Esq.
Francis J. Collin, Jr., Esq.

PRELIMINARY REDRAFT OF PROBATE CODE
Sections 6408 and 6408.5

6408. A relationship of parent and child is established for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(a) The relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents, except as specified in Section 6408.5. For the purpose of determining whether a person is a "natural parent" as that term is used in this code section:

(1) A natural parent and child relationship is established where the relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

(2) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established for intestate succession by an action under subdivision (c) of Section 7006 of the Civil Code unless either (i) a court order was entered during the father's lifetime declaring paternity or (ii) paternity is established by convincing evidence that the father has openly and notoriously held out the child as his own.

(b) The relationship of parent and child exists between an adopted person and his or her adopting parent or parents.

(c) The relationship between a person and his or her foster parent, or stepparent, has the same effect as if it were an adoptive relationship if (i) the relationship began during the person's minority and convincing evidence is not produced of an open renunciation of the relationship by one or both of the parties during their joint lifetimes and (ii) it is established by convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

6408.5. Notwithstanding Section 6408:

(a) An adopted child does not inherit from or through a non-custodial natural parent on the basis of the relationship of parent and child unless (i) the non-custodial natural parent and adopted person lived together at any time as parent and child and (ii) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

(c) If a child is born out of wedlock, neither a non-custodial parent nor a relative of a non-custodial parent inherits from or through a child on the basis of the relationship of parent and child unless the non-custodial parent both (i) acknowledged the child and (ii) contributed to the support or the care of the child.