

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

September 19, 1984

Time

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

Place

Glendale Room  
Burbank Airport Hilton  
2500 Hollywood Way  
Burbank, CA 91505  
(213) 843-6000

FINAL AGENDA

For meeting of

CALIFORNIA LAW REVISION COMMISSION

Burbank

September 27-29, 1984

September 27 (Thursday)

Suggested Schedule for Future Meetings

November 1984 (previously scheduled)

November 10 (Saturday) - 9:00 a.m. - 5:00 p.m. Los Angeles  
Note. Consideration should be given to meeting an additional day--  
November 9 (10 a.m.-5 p.m.)--if agenda for September meeting not  
substantially completed at September meeting.

December 1984 (previously scheduled)

December 8 (Saturday) - 10:00 a.m. - 4:00 p.m. San Francisco  
Note. Staff suggests this meeting be cancelled.

January 1985

January 17 (Thursday) 7:00 p.m. - 10:00 p.m. Sacramento  
January 18 (Friday) 9:00 a.m. - 5:00 p.m.  
January 19 (Saturday) 9:00 a.m. - 12:00 noon

March 1985

March 14 (Thursday) 7:00 p.m. - 10:00 p.m. Los Angeles  
March 15 (Friday) 9:00 a.m. - 5:00 p.m.  
March 16 (Saturday) 9:00 a.m. - 12:00 noon

May 1985

May 16 (Thursday) 7:00 p.m. - 10:00 p.m. San Francisco  
May 17 (Friday) 9:00 a.m. - 5:00 p.m.  
May 18 (Saturday) 9:00 a.m. - 12:00 noon

1. Minutes of June 21-22, 1984, Meeting (sent 8/29/84)
2. Fiscal Matters  
Memorandum 84-72 (sent 9/17/84)
3. Study F-601 - Division of Joint Tenancy and Tenancy in Common  
Property at Dissolution of Marriage  
Memorandum 84-59 (sent 8/1/84)  
Tentative Recommendation (attached to Memorandum)  
Memorandum 84-81 (enclosed)

4. Study F-521 - Community Property in Joint Tenancy Form  
Memorandum 84-69 (sent 9/6/84)  
Recommendation (attached to Memorandum)  
Memorandum 84-81 (enclosed)
5. Study F-633 - Division of Pensions  
Memorandum 84-60 (sent 9/6/84)  
Draft of Tentative Recommendation (attached to Memorandum)
6. Study F-670 - Attorney's Fees in Family Law Proceedings  
Memorandum 84-62 (sent 9/11/84)
7. Study F-661 - Provision for Support if Support Obligor Dies  
Memorandum 84-73 (sent 8/29/84)
8. Study K-400 - Mediation Privilege  
Memorandum 84-64 (sent 8/29/84)
9. Study D-303 - Creditors' Remedies (Follow-up Legislation)  
Memorandum 84-82 (enclosed)
10. Study L-500 - Durable Powers of Attorney  
Memorandum 84-71 (sent 9/11/84)  
First Supplement to Memorandum 84-71 (sent 8/29/84)  
Second Supplement to Memorandum 84-71 (enclosed)
11. Study H-601 - Recording Severance of Joint Tenancy  
Memorandum 84-76 (sent 9/17/84)  
Draft of Recommendation (attached to Memorandum)
12. Study H-406 - Abandoned Easements  
Memorandum 84-63 (sent 8/9/84)  
Draft of Tentative Recommendation (attached to Memorandum)
13. Study L-629 - Item vs. Aggregate Theory of Community Property  
Memorandum 84-61 (sent 9/6/84)

September 28 (Friday)

14. Study L-605 - Distribution Under a Will or Trust  
Memorandum 84-65 (sent 7/23/84)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 84-65 (sent 8/16/84)  
Second Supplement to Memorandum 84-65 (sent 9/11/84)  
Draft of Tentative Recommendation (attached to Second Supplement)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)
15. Study L-658 - Distribution of Small Estate Without Administration  
Memorandum 84-66 (sent 8/16/84)  
Draft Statute (attached to Memorandum)  
First Supplement to Memorandum 84-66 (sent 8/16/84)

Second Supplement to Memorandum 84-66 (sent 9/6/84)  
Third Supplement to Memorandum 84-66 (enclosed)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

16. Study L-612 - Period of Survival to Take by Intestacy  
Memorandum 84-74 (sent 8/29/84)  
Draft of Tentative Recommendation (attached to Memorandum)
17. Study L-653 - Notice of Will  
Memorandum 84-75 (sent 8/29/84)  
Draft of Tentative Recommendation (attached to Memorandum)
18. Study L-601 - Nonprobate Transfers  
Memorandum 84-77 (sent 9/17/84)
19. Study L-659 - Parent-Child Relationship  
Memorandum 84-79 (sent 9/17/84)
- Special order of 20. Possible New Topic - Court Congestion  
business at )  
1:30 p.m. )  
September 28 )
21. Study L-640 - Trusts

Comments on Staff Materials

Memorandum 84-58 (sent 7/23/84)

Trustee's Powers

Memorandum 84-22 (sent 2/8/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-22 (sent 8/1/84)  
Second Supplement to Memorandum 84-22 (sent 9/6/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Breach of Trust

Memorandum 84-23 (sent 4/10/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-23 (sent 8/1/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Liability of Trust and Trustee to Nonbeneficiaries

Memorandum 84-24 (sent 4/17/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-24 (sent 8/1/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Office of Trustee

Memorandum 84-26 (sent 4/17/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-26 (sent 8/16/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Judicial Administration

Memorandum 84-29 (sent 4/10/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-29 (sent 9/11/84)

Transfer of Trusts To and From California

Memorandum 84-30 (sent 3/21/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-30 (sent 7/23/84)  
Memorandum 84-81 (enclosed)

Revised Uniform Principal and Income Act

Memorandum 84-32 (sent 3/2/84; another copy sent 5/16/84)  
First Supplement to Memorandum 84-32 (sent 7/23/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Presumption of Revocability as to Foreign Trusts

Memorandum 84-34 (sent 6/6/84; another copy sent 7/17/84)  
First Supplement to Memorandum 84-34 (sent 7/23/84)  
Memorandum 84-81 (enclosed)

Oral Trusts

Memorandum 84-25 (sent 6/6/84; another copy sent 7/17/84)  
First Supplement to Memorandum 84-25 (sent 8/1/84)  
Second Supplement to Memorandum 84-25 (sent 8/29/84)  
Third Supplement to Memorandum 84-25 (sent 9/11/84)  
Fourth Supplement to Memorandum 84-25 (sent 9/17/84)  
Fifth Supplement to Memorandum 84-25 (enclosed)  
Memorandum 84-81 (enclosed)

Conduct of Trust Business and Qualification by Foreign Trustees

Memorandum 84-27 (sent 6/1/84; another copy sent 7/17/84)  
First Supplement to Memorandum 84-27 (sent 8/9/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

Validity of Trusts for Indefinite Beneficiaries or Purposes

Memorandum 84-31 (sent 6/4/84; another copy sent 7/17/84)  
Memorandum 84-19 (attached to Memorandum)  
Memorandum 84-81 (enclosed)

September 29 (Saturday)

22. 1984 Legislative Program

Memorandum 84-78 (sent 9/11/84)

23. Topics and Priorities for 1985

Uniform Acts

First Supplement to Memorandum 84-68 (sent 8/16/84)

Uniform Simplification of Land Transfers

Third Supplement to Memorandum 84-68 (sent 9/11/84)

Landlord-Tenant Law

Second Supplement to Memorandum 84-68 (sent 9/11/84)

Penal Code Section 851.8

Fourth Supplement to Memorandum 84-68 (sent 9/11/84)

Generally

Memorandum 84-68 (enclosed)

Special order ) 24. Study L-654 - Ancestral Property Doctrine  
of business )  
at 10:00 a.m. )  
Memorandum 84-70 (sent 8/1/84)  
Memorandum 84-80 (sent 9/17/84)  
Memorandum 84-81 (enclosed)

25. Completion of Work on Agenda Items 1-21

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 27-29, 1984

BURBANK

A meeting of the California Law Revision Commission was held in Burbank on September 27-29, 1984.

Law Revision Commission

Present: David Rosenberg, Chairperson Arthur K. Marshall  
James H. Davis, Vice Chairperson Edwin K. Marzec  
Roger Arnebergh Ann E. Stodden  
Bion M. Gregory (Sept. 28)

Absent: Barry Keene, Member of Senate John B. Emerson  
Alister McAlister, Member of Assembly

Staff Members Present

John H. DeMouilly Nathaniel Sterling  
Robert J. Murphy III (Sept. 27-28) Stan G. Ulrich (Sept. 28-29)

Consultants Present

Susan French, Property and Probate Law (Sept. 28-29)  
Edward C. Halbach, Jr., Property and Probate Law  
Russell Niles, Property and Probate Law (Sept. 28-29)

Other Persons Present

Edward V. Brennan, California Probate Referee Association, San Diego  
Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Sept. 28-29)  
Theodore Cranston, State Bar Estate Planning, Trust and Probate Law Section, San Diego  
William Davis, Brandenburger & Davis, Sacramento (Sept. 29)  
Ronald P. Denitz, Tishman West Management Corp., Los Angeles (Sept. 27)  
Jan C. Gabrielson, State Bar Family Law Section, Los Angeles (Sept. 27)  
Ralph J. Gampell, Director, Administrative Office of the Courts, San Francisco (Sept. 28)  
Beverly Gassner, State Bar Family Law Section, Ontario (Sept. 27)  
Michael Harrington, Los Angeles County Bar Association, Los Angeles (Sept. 29)  
Sandra Kass, Los Angeles County Bar Association, Los Angeles (Sept. 28-29)  
Paulette Leahy, California Bankers Association, San Diego  
James Mattesich, Livingston & Mattesich, Sacramento (Sept. 29)  
Valerie J. Merritt, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles  
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View  
Richard Stack, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles

ADMINISTRATIVE MATTERS

MINUTES OF JUNE 21-22, 1984, MEETING

The Minutes of the June 21-22, 1984, meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The Commission decided that, until further notice, all meetings will be held in Sacramento. The Commission adopted the following schedule for future meetings:

November 1984

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

January 1985

January 17 (Thursday) - 7:00 p.m. - 10:00 p.m.  
January 18 (Friday) - 9:00 a.m. - 5:00 p.m.  
January 19 (Saturday) - 9:00 a.m. - 12:00 noon

March 1985

March 14 (Thursday) - 7:00 p.m. - 10:00 p.m.  
March 15 (Friday) - 9:00 a.m. - 5:00 p.m.  
March 16 (Saturday) - 9:00 a.m. - 12:00 noon

May 1985

May 16 (Thursday) - 7:00 p.m. - 10:00 p.m.  
May 17 (Friday) - 9:00 a.m. - 5:00 p.m.  
May 18 (Saturday) - 9:00 a.m. - 12:00 noon

ELECTION OF OFFICERS

Edwin K. Marzec was elected Chairperson of the Commission. James H. Davis was elected Vice Chairperson of the Commission. The term of the new officers is one year, commencing on December 31, 1984.

FISCAL MATTERS

The Commission considered Memorandum 84-72 and the attached Commission budget recommended by the staff for the 1985-86 fiscal year. The Commission approved the budget as proposed by staff.

LEAD TIME FOR DISTRIBUTION OF MEETING MATERIALS

The Commission decided that staff-prepared meeting materials be sent out so that Commissioners will receive the materials not less than five days prior to the meeting.

ATTENDANCE OF COMMISSIONER EMERSON

The Commission directed the Executive Secretary to prepare a letter for the Chairman's signature to Commissioner John B. Emerson, asking that he attend Commission meetings. If he is unable to attend, he should be asked to submit his resignation.

PROPOSED AMENDMENTS TO THE COMMISSION'S ENABLING STATUTE

The Commission decided to seek to have the Commission's enabling statute amended as follows:

(1) The first sentence of Government Code Section 8288 (formerly Section 10308) should be amended to permit the Commission and staff to advocate the passage of legislation that the Commission has recommended pursuant to legislative authorization.

(2) A new provision should be added to provide that if a Commissioner is absent from three consecutive Commission meetings without being excused by the Chairperson, that Commissioner's office shall be deemed to be vacant.

The staff should bring a draft of proposed legislation to the Commission at the November meeting.

1984 LEGISLATIVE PROGRAM; TOPICS AND PRIORITIES FOR 1985

The Commission considered Memorandum 84-78 and the attached report on the 1984 legislative program, and Memorandum 84-68, the First, Second, Third, Fourth, and Fifth Supplements, and attached materials concerning topics and priorities for 1985. The Commission approved the staff recommendation to include the following measures in the 1985 legislative program:

(1) Conform duration of a living will (directive to physicians) to the duration of a durable power of attorney for health care.

(2) Subject to the results of the interim study of the Senate Judiciary Committee, disposition of marital property.

The Commission approved the following measures for inclusion in the 1985 legislative program without the need for further comment as discussed in more detail and subject to the Commission decisions set out in these Minutes below:

(3) Division of joint tenancy and tenancy in common property at dissolution of marriage.

- (4) Provision for support if support obligor dies.
- (5) Cleanup bill on creditors' remedies.

The Commission tentatively approved the following measures for inclusion in the 1985 legislative program, subject to comments received from interested persons and organizations and subject to the Commission decisions set out in these Minutes below:

- (6) Parent-child relationship for purposes of intestate succession.
- (7) Recording severance of joint tenancy.
- (8) Nonprobate transfer of title to vehicles, undocumented vessels, manufactured homes, mobilehomes, and commercial coaches.
- (9) Durable powers of attorney.
- (10) Distribution under a will or trust (optional representation systems).
- (11) Division of pensions.
- (12) Attorney's fees in family law proceedings.

The staff was uncertain about the likelihood of a consensus on the need for the following measure, but the proposal should be sent out for comment:

- (13) Mediation privilege.

The Commission approved the staff recommendation not to submit a new recommendation relating to aspects of the following measures which were not enacted at the 1984 legislative session:

- (1) Proposal to eliminate requirement that witnesses to a will be "present at the same time."
- (2) Liability of marital property.

The Commission decided not to submit a new recommendation on the following measures as discussed in more detail in these Minutes below:

- (3) Notice of will.
- (4) Period of survival to take by intestacy.
- (5) Community property in joint tenancy form.
- (6) Ancestral property doctrine.

#### TOPICS AND PRIORITIES FOR 1986

The Commission decided to devote its time almost exclusively to completion of a new Probate Code, including a comprehensive new statute on trusts, with a view toward introducing comprehensive legislation at the 1986 legislative session. The Commission asked the staff to investi-

gate whether the Commission's staff and funding might be increased in order to meet this objective. The State Bar agreed to designate subcommittees to work with the staff in particular subject matter areas. The staff should develop a tentative timetable for this project to be presented to the Commission at the November meeting.

The staff was asked to contact Professor James Sumner at the U.C.L.A. School of Law and Professor Janet Wright at the U.C. Davis Law School to determine whether either or both of them would be interested in serving as consultants on the probate study. The Executive Secretary was authorized to make contracts with Professors Sumner and Wright to cover travel expenses, subject to the same limitations applicable to the Commission's consultants generally.

The Commission also approved the following topics which the staff will work on as time permits with a view toward developing legislation for introduction at the 1986 or a later session:

- (1) Passage of title to real property without administration in small estates.
- (2) Abandoned easements.
- (3) Extending the nonprobate transfers legislation to all financial institutions.
- (4) Uniform Premarital Agreements Act.
- (5) Uniform Fraudulent Transfers Act.
- (6) Marital property presumptions and transmutations.

With respect to matters listed above that were considered at the meeting, the Commission asked the Executive Secretary to write to those who made suggestions and explain that, because of limited Commission resources, matters already being given priority, and budget limitations, the Commission cannot address additional topics at this time.

#### POSSIBLE NEW TOPIC - COURT CONGESTION

The Commission considered Memorandum 84-67 and attached exhibits. Dr. Ralph H. Campell, Director of the Administrative Office of the Courts, made an oral presentation to the Commission concerning court congestion. Commissioner Marzec will send to the staff a list of issues bearing on court congestion. The staff should prepare a memorandum for Commission consideration, and for review and comment by the Administrative Office of the Courts, identifying subjects suitable for Commission consideration that might have a favorable impact on court congestion.

STUDY D-303 - CREDITORS' REMEDIES

The Commission considered Memorandum 84-82 relating to creditors' remedies legislation and approved introduction of the technical clean-up bill attached to the memorandum without the need to prepare an explanatory recommendation.

STUDY F-521 - COMMUNITY PROPERTY IN JOINT TENANCY FORM

The Commission considered Memorandum 84-69 and the comments contained in Memorandum 84-81 relating to community property in joint tenancy form. After discussing the problems that could arise under the proposed recommendation on this matter and comparing them with the problems that arise under existing law, the Commission concluded that the recommendation might not be a substantial improvement and decided not to pursue this matter further at this time.

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

The Commission considered Memorandum 84-59 and the comments contained in Memorandum 84-81 relating to division of joint tenancy and tenancy in common property at dissolution of marriage. The matter was referred back to the staff for further research on the issue of division of property in which a third person holds an interest along with husband and wife. In this connection, the staff should investigate whether the scope of this study should be broadened to include Kinsler v. Superior Court, 121 Cal. App.3d 808, 175 Cal. Rptr. 564 (1981).

STUDY F-633 - DIVISION OF PENSIONS

The Commission considered Memorandum 84-60, relating to division of pensions at dissolution of marriage. The Commission decided to distribute the tentative recommendation for comment, subject to technical revisions suggested by the State Bar Family Law Section. The tentative recommendation should include a provision that authorizes the court to require that the pension be divided and separate payments made to each spouse based on the time payment is demanded. The persons to whom the tentative recommendation is distributed should include pension plan administrators. The Executive Secretary was authorized to communicate

with the National Conference of Commissioners on Uniform State Laws concerning the possible development of uniform legislation to govern this area.

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

The Commission considered Memorandum 84-62 relating to awarding attorney's fees in family law proceedings. The Commission decided to distribute the tentative recommendation for comment, after revising draft Section 4370.5(a)(1) to permit the court to take into account "the need for such an award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case."

STUDY H-601 - RECORDING SEVERANCE OF JOINT TENANCY

The Commission considered Memorandum 84-76 and the attached staff draft of a Recommendation Relating to Recording Severance of Joint Tenancy. The Commission approved the staff recommendation to require that a severance of a joint tenancy in real property be recorded before the death of the severing joint tenant in order for it to terminate the right of survivorship, and approved the staff recommendation to make the proposed legislation prospective only. The Commission decided that there should also be recorded an affidavit that notice of the severance has been given to the other joint tenant. A false affidavit would be effective for the purpose of severing the joint tenancy, although punishable for perjury. The notice should be given by ordinary mail or by personal delivery. Recording should be in the county where the real property is located.

STUDY K-400 - MEDIATION PRIVILEGE

The Commission considered Memorandum 84-64, the attached staff draft of new Section 1152.5 to be added to the Evidence Code to provide for a mediation privilege, and Memorandum 84-86 with an attached letter and proposed alternative draft from the Center for the Development of Mediation in Law. The Commission accepted the staff recommendation to add to proposed Section 1152.5 language substantially as follows: "This

section does not limit the admissibility of evidence in a criminal action." The Commission also decided to include language to negate any possible construction that the proposed section might limit the protection found in Section 1152 of the Evidence Code (offer to compromise). With these changes, the Commission approved sending out the proposed section as a tentative recommendation for comment by interested persons.

STUDY L-500 - DURABLE POWERS OF ATTORNEY

The Commission considered Memorandum 84-71 and attached staff draft, the First Supplement and attached letter, the Second Supplement and attached staff draft, and a staff draft of subdivision (e) to be added to Section 702 of the Corporations Code that was handed out at the meeting. The Commission made the following decisions:

- (1) The alternative of using a notary in lieu of two witnesses should be preserved in the durable power of attorney for health care (Civil Code § 2432).
- (2) The term "convincing evidence" as used in the statutory form durable power of attorney for health care (see Civil Code § 2500) should be defined as provided in subdivision (b) of the staff draft of proposed Civil Code Section 2511.
- (3) The term "personally known" should not be defined (see proposed Civil Code Section 2511).
- (4) The warning statement in a printed form of a durable power of attorney for health care sold in this state should also be required in printed forms "otherwise distributed" in this state (see Civil Code § 2433).
- (5) The attorney in fact should be able to consent to the providing of health care over the patient's objection if that is consistent with the desires of the patient as expressed in the power of attorney or otherwise made known or, if not known, if in the best interests of the patient (see Civil Code § 2440). This would not, however, limit the right of the patient to revoke the durable power.
- (6) The warning statement provided for a durable power of attorney should be moved from Civil Code Section 2400 to new Section 2510 as proposed by staff with the revisions proposed in the staff draft of Section 2510.

(7) Forms printed before the operative date of the proposed legislation should be usable after the operative date. Forms printed after the operative date should comply with the new requirements.

(8) The court should retain authority to appoint a conservator and to terminate a durable power of attorney if the statutory showing is made (see Civil Code § 2412).

(9) As proposed in the Second Supplement to Memorandum 84-71, the last sentence should be deleted from subdivision (a) of Civil Code Section 2400 and a new Section 2400.5 should be added to the Civil Code. In lieu of the amendment to Section 702 of the Corporations Code proposed in the Second Supplement, a new subdivision (e) should be added to Section 702 as proposed in the handout distributed at the meeting, to read: "(e) If authorized by the power of attorney by which the attorney in fact was appointed, shares held by or under the control of an attorney in fact may be voted and the corporation may treat all rights incident thereto as exercisable by the attorney in fact, in person or by proxy, without the transfer of the shares into the name of the attorney in fact."

The staff should prepare a tentative recommendation consistent with the foregoing decisions and send it out for comment.

#### STUDY L-601 - NONPROBATE TRANSFERS

The Commission considered Memorandum 84-77 and attached exhibits. The Commission directed the staff to contact the California Bankers Association and representatives of savings and loan associations to request that they work with the Commission to develop a consistent body of law applicable to multiple-party accounts in all types of financial institutions.

#### STUDY L-605 - DISTRIBUTION UNDER A WILL OR TRUST

The Commission considered Memorandum 84-65 and attached staff draft of a Tentative Recommendation Relating to Distribution Under a Will or Trust, the First Supplement and attached materials, the Second Supplement and attached revised staff draft of the Tentative Recommendation, and other written comments attached to Memorandums 84-80, 84-81, and 84-85. The Commission made the following decisions:

(1) The language in proposed Section 250 should be designated as subdivision (a) and a new subdivision (b) should be added to provide in substance as follows:

(b) The mere use of the words "per capita" or confused wording such as "per capita and per stirpes" or "equally and by right of representation" as applied to issue or descendants is not an expression of contrary intention.

(2) Section 253 (per capita) should be limited so it applies only to classes of a single generation, and not to multi-generational classes.

The Commission was concerned about requiring a will or trust to refer to a specific section number in order to pick up the definition. The staff should consider how the substance of the sections could be preserved without requiring reference to specific section numbers. Also, a conforming revision is needed to Section 6147 (anti-lapse) to delete the term "representation."

The staff should revise the draft consistently with the Commission's decisions and send it out as a Tentative Recommendation for comment.

#### STUDY L-612 - PERIOD OF SURVIVAL TO TAKE BY INTESTACY

The Commission considered Memorandum 84-74 and the attached staff draft of a Recommendation Relating to Period of Survival to Take by Intestacy. The Commission decided not to submit this recommendation to the Legislature.

#### STUDY L-640 - TRUSTS

The Commission finished its consideration of Memorandum 84-22 relating to trustee's powers, and considered the First and Second Supplements to Memorandum 84-22, Memorandum 84-23 and the First Supplement thereto relating to breach of trust, and Memorandum 84-25 and the First through Fifth Supplements thereto relating to oral trusts. The Commission made the following decisions:

#### Memorandum 84-22 (Trustee's Powers) and Supplements

Draft § 4434. Acquisition and disposition of property. This section should be revised to empower the trustee to acquire or dispose of property by way of an exchange.

Draft § 4446. Mineral leases. For consistency with draft Section 4444 applicable to leases generally, this section should provide that the mineral lease may extend beyond the term of the trust.

Draft § 4448. Options. This section should provide that an option may be granted or taken that is exercisable beyond the term of the trust.

Draft § 4464. Borrowing money. This section should be revised as follows: "The trustee ~~may~~ has the power to borrow money for any trust purpose to be repaid from trust property ~~or otherwise.~~"

Draft § 4466. Advancing money. This section relating to the trustee's advancing money for the protection of the trust should be deleted because it does not really provide a trustee's power. The question of when a trustee may advance its own funds, for which there may be a right of reimbursement, is dealt with elsewhere in the draft statute.

Draft § 4470. Payment of taxes, trustee's compensation, and other expenses. The power of the trustee to pay compensation of the trustee and of employees and agents should be limited to reasonable compensation.

Draft § 4472. Loans to beneficiary. This section should be revised to read: "The trustee ~~may~~ has the power to make loans out of trust funds to the beneficiary on adequate security and at a ~~fair~~ rate of interest that is fair under the circumstances."

Draft § 4474. Distribution to beneficiaries under legal disability. This section should be revised to permit the trustee to pay money for the benefit of the beneficiary, as well as for the use of the beneficiary. The phrase "either to a legal representative appointed by the court, or if none, to a relative" should be deleted.

Draft § 4476. Nature and value of distributions. This section permitting the trustee to make distributions and adjust resulting differences in valuation should also permit the trustee to make distributions pro rata or non pro rata.

Draft § 4478. Hiring persons. The trustee should be empowered specifically to hire accountants in subdivision (a) of this section. Subdivision (c), which permits hiring agents to perform acts of administration whether or not discretionary, should be deleted. The comment to this section should refer to the trustee's overriding duty to administer the trust and to the liability of the trustee for acts of agents.

Draft § 4482. Execution and delivery of instruments. This section should be revised to read: "The trustee ~~may~~ has the power to execute and deliver all instruments which ~~will~~ are needed to accomplish or facilitate the exercise of the powers vested in the trustee." This section should precede draft Section 4480 empowering the trustee to prosecute or defend actions.

Draft § 4402. Conflict in exercise of power. The Commission considered the problem facing a bank which is acting as trustee and finds a potential conflict of interest through its lending operations, as illustrated in Estate of Pitzer (discussed in the First Supplement to Memorandum 84-22). The Commission did not approve the suggestion of the California Bankers Association that the statute enact the holding in Pitzer because there was some dissatisfaction with the language suggested. The Commission suggested that the staff work with the California Bankers Association to see if an appropriate rule could be drafted.

Marital deduction trusts and general powers. The Commission considered the tax problems raised by the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section as discussed in the Second Supplement to Memorandum 84-22. The Commission decided that a reference to the special marital deduction trust provisions in the successors to Probate Code Sections 1035 and 1138.14 in the comments to draft Sections 4422 (collecting and holding property) and 4474 (distribution to beneficiaries under legal disability) should be sufficient to avoid any conflict.

#### Memorandum 84-23 (Breach of Trust) and Supplement

Remedies for breach of trust (Memo p. 10). The staff draft of a section listing the major remedies for breach of trust was approved in principle. The reference to the payment of damages, surcharging the trustee, or making restitution in subdivision (b)(3) of the draft section should be located in the comment. The staff will split this section into several sections when the next draft is prepared. The comment to the part of this section dealing with the common law should discuss the meaning of "common law".

Measure of damages for breach. The statute should take a broad approach based on Sections 203, 204, and 205 of the Restatement (Second) of Trusts. The statute should also codify the rule that a good faith breach does not make the trustee liable for appreciations damages. Addi-

tional work will need to be done on the proper formulation of the rule in Restatement Section 203 which makes the trustee accountable for any profit, even profit not resulting from a breach, as suggested by Professor Russell Niles.

Attorney's fees. The statute should not provide a liability for attorney's fees incurred by the beneficiary in bringing an action on the breach.

Interest. The staff is to draft a provision on interest based on Restatement Section 207 which gives the court more authority to adjust the interest rate under the circumstances of the case than does existing California law.

Liability for acts of agents (Memo p. 19). The section on liability for acts of agents should read substantially as follows: "The trustee is liable to the beneficiary for acts of an agent which, if committed by the trustee, would be a breach of the trust." This would enact part of Restatement Section 225(2), but without the limiting factors.

Cotrustee liability. A revised version of existing California law on cotrustee liability should be retained. Thus Civil Code Section 2239 would be revised to read: "A trustee is responsible for the wrongful acts of a cotrustee to which he consented, or which, by his negligence, he enabled the latter to commit, ~~but for no others.~~" It may be appropriate in the comment to the section to discuss liability in a situation where a trustee discovers embezzlement by a cotrustee.

Liability of successor trustee. The staff is to draft a statute governing the liability of a successor trustee for the acts of the predecessor that is consistent with the rule on cotrustee liability.

Limitations on proceedings against trustee (First Supplement p. 10). The draft section set out in the supplement was approved. The comment to subdivision (b) should note that a parent of a minor may be a representative to whom an account may be given with the effect of commencing the limitation periods, so long as the parent does not have a conflict of interest.

Exculpation. The substance of Civil Code Section 2258(b) relating to nonliability for following the written instructions of a trustor under a revocable trust should be retained in the draft statute. A rule based on Restatement Section 222 should be provided for exculpation under irrevocable trusts.

Memorandum 84-25 (Oral Trusts) and Supplements

The Commission rejected the suggestion to make unenforceable oral trusts of personal property. The existing law that such trusts may be proven by clear and convincing evidence should be retained. The statute should make clear that an oral trust of personal property may be irrevocable if the trustor's intent is established. It should also be made clear that a reference to the trust "instrument" means the terms of an oral trust as intended by the trustor.

STUDY L-653 - NOTICE OF WILL

The Commission considered Memorandum 84-75 and the attached staff draft of a Recommendation Relating to Notice of Will. The Commission decided not to prepare a new recommendation to submit to the Legislature.

STUDY L-654 - ANCESTRAL PROPERTY DOCTRINE

The Commission considered Memorandums 84-70 and 84-83 and attached materials, and comments contained in attachments to Memorandums 84-80 and 84-81. The Commission decided not to recommend any further changes in the ancestral property doctrine (Probate Code § 6402.5) at this time.

STUDY L-658 - DISTRIBUTION OF SMALL ESTATE WITHOUT ADMINISTRATION

The Commission considered Memorandum 84-65 and attached draft statute, the First, Second, and Third Supplements, Memorandum 84-84, and the comments attached to Memorandums 84-80 and 84-81. The Executive Secretary reported that the California Land Title Association needs more time to study the proposal, and the Commission approved the staff recommendation to defer revision of the Probate Code provisions until the CTLA has had time to respond.

The Commission also approved the staff proposal to split out the portion of the recommendation relating to summary transfer at death of title to a vehicle, undocumented vessel, manufactured home, mobilehome, or commercial coach, and to prepare a separate tentative recommendation dealing with these matters. The tentative recommendation would do the following:

- (1) Provide a uniform series of provisions governing summary transfer of each of these five types of state-registered property.

(2) Remove the existing dollar limit for summary transfer of an undocumented vessel.

(3) Make clear that use of the summary procedure does not preclude administration of the estate, and, if the estate is administered, that the transferred property shall be restored to the estate.

(4) Section 630 of the Probate Code should be revised to exclude all five types of state-registered property, not just the three types now excluded.

(5) The information required to be given in the affidavit should be set out in detail.

The staff should consider whether there should be a 30-day waiting period after death before the summary transfer may be accomplished. The Commission approved the staff proposal to amend the last sentence of Probate Code Section 631 as follows:

But such payment or transfer shall not preclude administration ~~when necessary to enforce payment~~ of the decedent's ~~debts~~ estate.

The staff should prepare a new tentative recommendation and bring it back to the Commission for review at a future meeting.

#### STUDY L-659 - PARENT-CHILD RELATIONSHIP

The Commission considered Memorandum 84-79 and attached exhibits. The Commission decided that proposed new subdivision (c) of Probate Code Section 6408 should be revised to read:

(c) Nothing in this section affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants.

Professor Halbach proposed to revise subdivision (a) of Probate Code Section 6408.5, and to revise proposed new subdivision (d) of that section, as follows:

6408.5. Notwithstanding Section 6408:

(a) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless (1) the natural parent or his or her spouse 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.

. . .

(d) For the purposes of subdivision (b), a person shall not be considered to be an adopted person where the relationship between that person and his or her foster parent or stepparent is given the same effect under paragraph (3) of subdivision (a) of Section 6408 as if it were an adoptive relationship. In such a situation, neither the foster parent or stepparent nor a relative of the foster parent or stepparent shall inherit from or through that person as if there were an adoptive relationship.

In subdivision (a), Professor Halbach's suggestion is that a stepparent adoption should not cut off inheritance from, by, or through the adopted child's natural parent in the case where the natural parent was unable to satisfy the requirement of subdivision (a) that the natural parent and child have lived together as parent child because the natural parent died while the child was in gestation. In subdivision (d), Professor Halbach's suggestion is that a natural parent should not lose the right to inherit from his or her natural child where the parent has declined to consent to the child's adoption by a foster parent or stepparent.

The Commission directed the staff to work with Professor Halbach to agree on language to carry out his suggestions and to bring it back to the Commission at a future meeting.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary