

9/18/84

Memorandum 84-68

Subject: Topics and Priorities for 1985

It has been the custom of the Commission each year at its September meeting to establish priorities for various topics during the next year and to determine whether the Commission is to request authority to study any new topics.

POSSIBLE RECOMMENDATIONS FOR THE 1985 LEGISLATIVE SESSION

(1) Living Wills. The Commission has approved and printed a recommendation to conform the duration of a living will (directive to physicians) to the duration of the durable power of attorney. However, Senator Keene concluded that it would not be desirable to introduce legislation to effectuate this recommendation in 1984. This was because he was carrying the potentially controversial statutory form durable power of attorney for health care proposal in 1984. The statutory form proposal was enacted in 1984. Accordingly, the recommended living wills legislation should be included in the 1985 legislative program. The recommendation is the result of a suggestion from the State Bar Estate Planning, Trust and Probate Law Section.

(2) Disposition of Marital Property. Legislation to effectuate this recommendation was introduced at the 1984 legislative session by Senator Lockyer (Senate Bill 1392). However, because of concern expressed by some women's groups, Senator Lockyer decided to request that an interim hearing be held on the proposal so that the objections to the proposal could be identified and dealt with before the proposal is considered for enactment in 1985. The Senate Judiciary Committee plans to hold an interim hearing on this proposal in October 1984. We assume that the proposal will be found to be acceptable and this recommendation should be included in the 1985 legislative program.

(3) Notice of Will. This recommendation is discussed in Memorandum 84-75 (prepared for September meeting). If the Commission determines to submit the same proposal to the 1985 session, we do not believe that it needs again to be distributed for comment. If the Commission decides to submit a recommendation to establish a system for filing wills with the court, we believe that it should be distributed to interested persons

and organizations for review and comment and that it could not be submitted to the 1985 session.

(4) Period of Survival to Take by Intestacy. This recommendation is discussed in Memorandum 84-74 (prepared for September meeting). We do not believe that this recommendation needs to be sent out for review and comment; the recommendation is a more modest version of an earlier recommendation that has been distributed for review and comment.

(5) Parent-Child Relationship. This proposal is discussed in Memorandum 84-79 (prepared for September meeting). We believe that this is an important clarification that would meet the approval of all interested persons and organizations. We recommend that this proposal be included in our 1985 legislative program. This bill also could be used as a bill that could include other substantive and technical revisions of the 1983 statute relating to wills and intestate succession.

(6) Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage. This recommendation is discussed in Memorandum 84-59 (prepared for September meeting). We already have distributed a similar recommendation for review and comment. We decided not to push the former recommendation because concerns were expressed about the tax implications of the recommended legislation. These concerns have been eliminated by recent revisions in federal tax law, and this recommendation could be submitted in 1985 without the need for again distributing it to interested persons and organizations for review and comment.

(7) Recording Severance of Joint Tenancy. This recommendation is discussed in Memorandum 84-76 (prepared for September meeting). The recommendation is a part of one previously distributed for review and comment. We could submit this recommendation in 1985 without the need to review comments on it. However, we would send the recommendation out to interested persons and organizations for review and comment, primarily so we can identify the persons and organizations that are in support or opposition to the proposal before the bill is heard by the first legislative committee.

(8) Nonprobate Transfer of Registration to Motor Vehicles, Vessels, Mobilehomes and the Like. Memorandum 84-66 (prepared for September meeting) suggests revisions in various sections of the Vehicle Code and Health and Safety Code to provide uniform provisions for transfer without probate of the registration of ownership or title to a vehicle, vessel, or manufactured home, mobilehome, or commercial coach. The primary

change made by the revisions is to permit a transfer where the closely related relative succeeds to the deceased owner's interest under the owner's will. Existing law appears to cover only the case where the person who takes is the heir of the decedent. The staff recommends that we split out these provisions and make them a separate recommendation to be submitted to the 1985 legislative session. We do not believe that we need to send out the recommendation for review and comment before we approve it for submission in 1985. We would send the recommendation out to interested persons and organizations for review and comment so we would identify the persons and organizations that support the proposal. The Department of Motor Vehicles has approved the proposed legislation. We have not yet heard from the Department of Housing and Community Development. These are the two agencies that administer the registration provisions.

(9) Durable Powers of Attorney. This matter is covered by Memorandum 84-71 and the Second Supplement to Memorandum 84-81 (prepared for the September meeting). The staff believes that we should propose a recommendation to the 1985 legislative session to make any needed substantive and technical revisions in the various durable power of attorney statutes. We propose that we have the recommended legislation introduced in December and that a draft of a recommendation be considered at the next meeting for approval.

(10) Distribution Under a Will or Trust. This recommendation is discussed in Memorandum 84-65 and the first and second supplements to that memorandum. We believe that this recommendation should be submitted to the 1985 legislative session. We have comments from the State Bar, the California Bankers Association, and at least one of our consultants. The recommendation proposes enactment of provisions to provide optional distribution systems that can be adopted in a will or trust. We believe that it would be safe to submit this recommendation in 1985 without the need to review additional comments. However, we would send out the recommendation to interested persons and organizations, and any needed revisions could be made in the bill introduced to effectuate this recommendation.

(11) Provision for Support if Support Obligor Dies. This is a followup on an earlier recommendation and proposes enactment of the substance of the earlier recommendation. See Memorandum 84-73 (prepared for September meeting). The earlier recommendation was distributed to

interested persons for review and comment. We recommend that this recommendation be submitted to the 1985 legislative session. Since we have already received and reviewed comments, the staff does not believe that it is necessary to do this again before submitting the recommendation to the 1985 legislative session. The earlier recommendation was limited because the original recommendation failed to obtain approval of the Senate Judiciary Committee because of a short quorum.

(12) Community Property in Joint Tenancy Form. This recommendation is discussed in Memorandum 84-69 (prepared for September meeting). If the Commission can develop a satisfactory recommendation on this matter in time for submission to the 1985 legislative session, this item could be included in the 1985 legislative program.

(13) Division of Pensions. A relatively modest proposal to deal with some aspects of division of pensions on marriage dissolution is discussed in Memorandum 84-60 (prepared for September meeting). If this proposal, which was previously approved by the Commission, meets the approval of the State Bar Family Law Section, the staff believes that it could be included in the 1985 legislative program. We could distribute the recommendation to interested persons and organizations for review and comment and make any necessary revisions in the bill introduced to effectuate our recommendation.

(14) Attorney's Fees in Family Law Proceedings. This matter is discussed in Memorandum 84-62 (prepared for September meeting). The source of the proposal to be considered by the Commission at the September meeting is the Family Law Section of the State Bar. If the substance of the proposal meets with Commission approval, legislation could be included in our 1985 legislative program. We could draft up a recommendation and send it out to interested persons for review and comment, and any necessary revisions could be made in the bill introduced to effectuate our recommendation.

(15) Mediation Privilege. This matter is discussed in Memorandum 84-64 (prepared for September meeting). If the staff draft of legislation meets with Commission approval, we could draft up a recommendation and send it out to interested persons for review and comment, and any necessary revisions could be made in the bill introduced to effectuate our recommendation. However, we would be reluctant to introduce the legislation without first having reviewed comments unless the recommendation is revised to provide that the new "privilege" does not limit the admissi-

bility of evidence in a criminal action. If such an exception were added, this recommendation might be made a part of our 1985 legislative program. However, the Commission may wish to send a recommendation out to interested persons and organizations for review and comment before determining whether to submit a recommendation to the Legislature.

(16) Cleanup Bill on Creditors' Remedies. There are a few technical corrections needed in the legislation relating to creditors' remedies. Some substantive changes may also be needed. This matter is discussed in Memorandum 84-81 (prepared for September meeting). The staff recommends that we recommend a bill to the 1985 session to make the technical revisions suggested in Memorandum 84-81. We see no need to obtain comments on these technical revisions. We can add any additional revisions the Commission later decides to make to that bill.

POSSIBLE RECOMMENDATIONS FOR THE 1986 LEGISLATIVE SESSION

(1) New Comprehensive Trust Statute. A major Commission study that has been under active consideration looks toward the development of a comprehensive trust statute. Unfortunately, the Commission has been unable to devote much time during 1984 to this study because other matters have been given priority. However, the staff recommends that this study be given the top priority during 1985 with the view to developing a comprehensive recommendation for submission to the 1986 legislative session.

We have in mind the following tentative schedule for work on this recommendation:

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| November 1984 Meeting (if one is held) | - | Completion of review of memoranda prepared for the September meeting and completion of review of additional material on trusts prepared for November meeting. |
| January 1985 Meeting | - | Review of draft of tentative recommendation covering all aspects of trusts except modification and termination and spendthrift trusts. (We would consider modification and termination and spendthrift trusts as soon as we receive background studies from our consultants). |
| March 1985 Meeting | - | Approval of tentative recommendation on trusts for distribution to interested persons and organizations for review and comment. |

- July 1985 Meeting - Review of comments of interested persons and organizations.
- September 1985 Meeting - Approval of Recommendation for printing and submission to 1986 legislative session.

If we cannot deal with the matters of modification and termination and spendthrift trusts in the legislation to be submitted in 1986, we would nevertheless submit the statute dealing with all other aspects that are to be covered in the statute. If we do this, we would keep the existing law on modification and termination and spendthrift trusts in the proposed statute. We would submit recommendations on the omitted matters to a later legislative session when the Commission has considered the background studies prepared by its consultants and developed recommendations dealing with the omitted matters.

(2) Abandoned Easements. This recommendation is discussed in Memorandum 84-63 (prepared for September meeting). This is an important recommendation and deals with real property matters. Interested persons and organizations must be given an opportunity to review and comment on the recommendation before the Commission determines the recommendation, if any, it will submit to the Legislature. We anticipate that the comments will contain useful suggestions and we do not want to rush this recommendation. We should easily complete work on it in time to submit our recommendation (if any) to the 1986 legislative session.

(3) Distribution of Small Estate Without Administration. This recommendation is discussed in Memorandum 84-66, the first, second, and third supplements to that memorandum, and in Memorandum 84-80 (all prepared for September meeting). The staff has recommended above that the provisions relating to vehicles, vessels, mobilehomes and the like be put in a separate recommendation to be submitted to the 1985 Legislature. There may be some other portions of the proposed legislation that could be the subject of a separate recommendation. But the basic recommendation dealing with providing marketable title to real property of a decedent without administration should, we believe, be reviewed by interested persons and organizations before the Commission decides the recommendation it will submit to the 1986 legislative session. This is an important matter and should be given priority with a view to submitting a recommendation to the 1986 legislative session.

(4) Nonprobate Transfers. This matter is discussed in Memorandum 84-77 (prepared for September meeting). The staff believes that a high priority should be given to providing a uniform body of law covering all deposit accounts without regard to the type of financial institution holding the account. We believe that this matter will not require much Commission time, but we expect that a substantial amount of staff time could be required in order to work out acceptable legislation.

(5) Ancestral Property Doctrine. This matter is discussed in Memorandum 84-70 and Memorandum 84-80 (prepared for September meeting). If the Commission decides to repeal or revise the provision that relates to ancestral property, the tentative recommendation should be widely distributed to interested persons and organizations for review and comment. Although there is much support for a complete repeal, there are others who urge the retention, clarification, or expansion of the existing provision. If the Commission decides to recommend the repeal of the existing provision, it could be included as one of the recommendations to be submitted to the 1986 legislative session. If the Commission decides to revise the existing provision and to deal with the many problems that are created by the existing provision, we expect that it will be several years before a recommendation can be submitted to the Legislature unless this matter is given a top priority. We may need an expert consultant to assist in the study.

(6) Uniform Premarital Agreement Act. The Commission has directed that this Uniform Act be distributed to interested persons for review and comment. See First Supplement to Memorandum 84-68 (prepared for September meeting). We have been awaiting approval from Commissioner Gregory of the draft of the tentative recommendation we will distribute for review and comment. We will distribute the draft as soon as we receive his approval. We expect that we will receive many suggested revisions in the Uniform Act. These will need to be considered and dealt with by the Commission. We expect that it will take some time to work out a draft that is generally acceptable. However, the staff considers this matter to be one of great importance. A statute like the Uniform Act is greatly needed. We recommend that the Commission give this matter a top priority with a view to submitting a recommendation to the 1986 legislative session.

(7) Uniform Fraudulent Transfer Act. There is a great need for a modern fraudulent transfer act. See First Supplement to Memorandum 84-68 (prepared for September meeting). We understand that there is some controversy concerning this Uniform Act. However, we believe that the Commission can distribute the Uniform Act and review and deal with the comments we receive in time to permit submission of a recommendation to the 1986 legislative session. We will give this matter some priority so this objective can be accomplished. The State Bar Business Law Section is interested in this act and will review the Commission's recommendation as soon as it becomes available.

OTHER MATTERS UNDER ACTIVE STUDY

The Commission has been devoting its attention primarily to the study of probate law and family law.

Probate Law Study. We would give the probate law study a high priority with a view to submitting our recommendation for a new Probate Code to the 1989 legislative session, the new code to be operative on January 1, 1991. A tentative schedule for this project is set out as Exhibit 1 attached.

There are two aspects of this study on which work cannot be delayed:

(1) The manner in which fees for attorneys are fixed in probate proceedings. Should there be a schedule or should fees be fixed on the basis of the reasonable value of the time actually devoted? If there is to be a schedule, should it be revised in view of the fact that the estate tax is no longer a significant matter in middle class estates and the repeal of the California inheritance tax reduces the amount of work required in the largest estates? The staff is attempting to secure background material on this matter. We also would welcome the suggestions of the State Bar Section. It is noted that the State Bar Section took a survey of its members and they voted approximately 10 to 1 to retain the existing system. On the other hand, those who persuaded the Legislature to direct the Commission to study probate law were most concerned with the manner of fixing attorney's fees. A thorough study and persuasive recommendation is essential on this matter, even if the Commission recommends no change in existing law. The staff would give this matter priority when background information becomes available.

(2) Whether appraisal by a probate referee should be mandatory or optional. Should the personal representative be permitted to appraise estate assets and not use a probate referee if the personal representative so elects, with the right of any person interested in the estate to demand appraisal by a probate referee? This is a major policy question concerning which the Legislature looks to the Commission for study and a recommendation. The matter needs to be given a high priority; the Legislature has deferred action on the matter pending a Commission study and recommendation. The question

is: What is the best way to proceed with the study? Should we retain a consultant? The Department of Finance increased our 1984-85 budget to permit us to obtain a consultant on this study. But we will not have those funds because of the adoption of Proposition 24. The State Bar Section survey indicated that lawyers are about evenly divided on whether the probate referee appraisal should be mandatory or optional. The Commission should decide how we can develop a recommendation on this matter for the 1986 legislative session.

The Commission will need to review the experience under the probate bills enacted in 1983-84 and propose any needed clarifying or technical revisions.

The Commission also needs to work on the provisions relating to administration of the estate of a decedent--Division 3 of the Probate Code. We plan to devote a substantial portion of the time of one staff member to this project. We must continue to work on the revision of the Probate Code if we are to produce a new Probate Code to submit to the 1989 legislative session.

Family Law Study. The staff does not believe that we can work on two major studies at the same time. We would give the Probate Code revision study priority over the family law study. There are, however, two areas of family law that need to be dealt with:

(1) Presumptions as to character of property. The Commission submitted a recommendation to the 1984 session relating to presumptions as to the character of marital property. This aspect of the recommendation was not enacted because concerns were expressed by various persons and organizations and because the staff concluded that the matter needed further study before legislation was enacted. In addition, the Commission secured the enactment of legislation (AB 26 - 1983) creating a presumption when married persons acquire property in joint tenancy and prescribing a rule for recovery of separate property contributions when a marriage is dissolved. The Commission recommended legislation was revised while it was in the Legislature to adopt proposals of the State Bar. The experience under this legislation needs to be reviewed and the earlier recommendation on presumptions as to the character of marital property also needs to be reviewed.

(2) Division of pensions upon marriage dissolution. Recently enacted federal legislation makes clear that states have the right to prescribe rules governing the division of pension rights upon marriage dissolution. However, the staff believes that this is an area where a uniform act is needed; otherwise, the pension fund must deal with a variety of different rules if the fund operates in more than one state. The new Uniform Marital Property Act does not deal adequately with the problems; instead that Uniform Act left many of the problems to state law. We plan to write to the National Conference of Commissioners on Uniform State Laws to suggest that the Conference draft the needed uniform act.

NEW TOPICS

It is apparent that the Commission has authority to study many topics that it cannot consider during 1984-86. The topics the Commission is authorized to study are listed in the concurrent resolution attached to Memorandum 84-67. Many of the topics listed are topics on which a recommendation has been submitted covering one or more aspects of the topic. The topic is continued in the resolution merely to authorize the Commission to submit any needed corrective or supplemental legislation. The Commission assumes a responsibility to review the experience under the statutes enacted upon its recommendation and to submit any necessary corrective legislation. Frequently, a lawyer or judge will write to the Commission to suggest that a provision enacted upon Commission recommendation be clarified or revised.

In some cases, the Commission has decided to review experience under a statute enacted upon its recommendation and has retained a consultant to prepare a background study. For example, the Commission decided to review the provisions of the Evidence Code in light of the enactment of the federal rules of evidence. The federal rules are drawn in large part from the earlier enacted California Evidence Code. In preparing the federal rules, some of the California Evidence Code provisions were revised in substance or clarified in preparing the comparable provision of the federal rules. The study was prepared to identify possible revisions in the California Evidence Code to take advantage of the improvement made when those provisions were revised and clarified for incorporation into the federal rules. The study was delivered by the consultant in January 1976. The Commission has never had time to consider the study because priority was given to other topics. If this topic were to be considered, the study would be very useful, but it also might be of value to review the experience under the Evidence Code which was enacted almost 20 years ago. Also, it is unclear the extent to which Evidence Code provisions apply in criminal actions. See Cal. Const. Art. 1, § 28. The staff does not believe that the Commission can find time to consider this topic during the next few years in light of the other topics that must be given priority.

Other topics listed in the concurrent resolution have been authorized for study but have never been placed in the active consideration category for one reason or another. If a member of the Commission wishes additional information on any topic listed on the agenda, we will attempt to supply the information at the meeting.

As to possible new topics, see Memorandum 84-67 (court congestion) (prepared for September meeting). As to topics authorized for study that might be given priority, see the following materials prepared for the September meeting:

First Supplement to Memorandum 84-68 (Uniform Statutory Wills Act)
Second Supplement to Memorandum 84-68 (Landlord-tenant law)
Third Supplement to Memorandum 84-68 (Uniform Simplification of Land Transfers Act)

If the Commission is interested in seeking to add a new topic to our agenda, we would need to obtain statutory authority to study the topic. When such authority is obtained, we would need to consider whether we will need an expert consultant to prepare a background study and, if so, whether there are funds to pay the consultant. We will also need to determine whether we need an expert consultant on the major topics already authorized for study that are suggested for active study. At the present time, the financial condition of the Commission is uncertain. When the financial condition becomes more certain, it may be possible to consider retaining expert consultants to prepare background studies.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

TENTATIVE SCHEDULE FOR NEW PROBATE CODE

(New Code to be recommended for enactment by Legislature at the 1989 legislative session; new code to be operative on January 1, 1991)

DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

Part 1. Preliminary Provisions (§§ 1-12) (Enacted 1983 - Operative January 1, 1985)

Part 2. Words and Phrases Defined (§§ 20-88) (Enacted 1983 - Operative January 1, 1985)

DIVISION 2. GENERAL PROVISIONS

Parts 1-3. (§§100-160) (Enacted 1983 - Operative January 1, 1985)

Part 4. Establishing Fact of Death (§§ 200-212) (Enacted 1984 - 1984 Cal. Stats. Ch. 527 - AB 2255 - Operative January 1, 1985)

Parts 5-6. (§§ 220-240) (Enacted 1983 - Operative January 1, 1985)

Part 7. Effective of Homicide (§§ 250-256) (Enacted 1984 - 1984 Cal. Stats. Ch. 527 - AB 2255 - Operative January 1, 1985)

Part 8. Disclaimer of Testamentary and Other Interests (§§ 260-295) (Enacted 1983 - Operative January 1, 1984) (Currently a division rather than a part)

DIVISION 3. (RESERVED - could compile durable power of attorney provisions in this division by transfer from Civil Code) (Existing Division 3 will be repealed when new Divisions 7 and 8 become operative)

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

Parts 1-8. (§§ 1400-3803) (Existing law)

Part 9. California Uniform Transfers to Minors Act (§§ 3900-3925) (Enacted 1984 - 1984 Cal. Stats. Ch. 243 - AB 2492 - operative January 1, 1985)

DIVISION 5. NONPROBATE TRANSFERS (§§ 5100-5407) (Enacted 1983 - Operative July 1, 1984)

DIVISION 6. WILLS AND INTESTATE SUCCESSION (§§ 6100-6806) (Enacted 1983 - Operative January 1, 1985)

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS (§§ 7000-) (Scheduled for submission as a part of the new Probate Code to be submitted to 1989 legislative session)

DIVISION 8. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION (§§ 8000-)
(Scheduled for submission as a part of the new Probate Code to
be submitted to 1989 legislative session)

DIVISION 9. TRUSTS (§§ 9000-) (Work in Progress - scheduled for
submission to 1986 legislative session - to be operative
January 1, 1988)