

January 11, 1985

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

January 24 (Thursday) - 7:00 p.m. - 10:00 p.m.
January 25 (Friday) - 9:00 a.m. - 5:00 p.m.
January 26 (Saturday) - 9:00 a.m. - 12:00 noon

Important Note: Since other entrances to the State Capitol close at 6:00 p.m., you must enter at the North Annex entrance ("L" Street) on Thursday evening, Jan. 17.

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

January 24-26, 1985

1. Minutes of November 9, 1984, Meeting (sent 12/10/84)
Supplement to Minutes of November 9, 1984, Meeting (sent 12/26/84)

2. Administrative Matters

Schedule for Future Meetings

Memorandum 85-22 (sent 1/9/85)

State Policy on Smoking

Memorandum 85-3 (sent 12/4/84)

Consultant Contract

Memorandum 85-25 (to be sent)

Annual Report

Memorandum 85-2 (sent 1/9/85)

Draft of Annual Report (attached to Memorandum)

Communications

Probate Code Study Schedule

Memorandum 85-27 (to be sent)

3. Recommendations for 1985 Legislative Session

Study L-630 - Notice in Probate Proceedings

Memorandum 85-26 (sent 1/9/85)

Assembly Bill 97 (attached to Memorandum)

Study K-400 - Mediation Privilege

Memorandum 85-17 (enclosed)

Draft of Recommendation (attached to Memorandum)

First Supplement to Memorandum 85-17 (enclosed)

Study H-406 - Abandoned Easements

Memorandum 85-10 (enclosed)

Draft of Recommendation (attached to Memorandum)

Study F-633 - Division of Pensions

Memorandum 85-15 (sent 1/9/85)
Draft of Recommendation (attached to Memorandum)

Study F-670 - Attorney's Fees in Family Law Proceedings

Memorandum 85-4 (sent 1/9/85)
Draft of Recommendation (attached to Memorandum)

Study L-659 - Effect of Adoption or Out of Wedlock Birth on Rights at Death

Memorandum 85-5 (sent 1/9/85)
Discussion Draft (attached to Memorandum)

Study F-661 - Provision for Support if Support Obligor Dies

Memorandum 85-24 (sent 1/9/85)
Recommendation (attached to Memorandum)

Study H-601 - Recording Severance of Joint Tenancy

Memorandum 85-6 (enclosed)
Draft of Recommendation (attached to Memorandum)

Study L-500 - Durable Powers of Attorney

Memorandum 85-8 (sent 1/9/85)
Draft of Recommendation (attached to Memorandum)

Study L-605 - Distribution Under a Will or Trust

Memorandum 85-9 (sent 1/9/85)
Draft of Recommendation (attached to Memorandum)

Study L-828 - Transfer Without Probate of Certain Property Registered by the State

Memorandum 85-23 (enclosed)
Recommendation (attached to Memorandum)

Study L-630 - Wills and Intestate Succession (Follow-up Legislation 1985)

Memorandum 85-1 (sent 12/4/84)
Memorandum 85-18 (sent 12/10/84)

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

Memorandum 85-16 (sent 12/26/84)

5. Study L-640 - Trusts (SPECIAL ORDER OF BUSINESS AT 9:00 A.M. ON JANUARY 25)

Jurisdiction and Venue

Memorandum 85-19 (sent 12/10/84)

Judicial Proceedings Concerning Trusts

Memorandum 85-20 (sent 12/26/84)

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 84-58 (sent 7/23/84)
Memorandum 84-81 (sent 9/19/84)

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 84-58 (sent 7/23/84)
Memorandum 84-80 (sent 9/17/84)
Memorandum 84-81 (sent 9/19/84)

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 (sent 9/19/84)

Proof of Oral Trust

Memorandum 85-21 (sent 12/26/84)
Consultant's Memorandum (attached to Memorandum)

Trustee's Duties and Powers

Memorandum 84-92 (sent 10/30/84)
Draft Statute (attached to Memorandum)

Breach of Trust

Memorandum 84-93 (10/26/84)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 84-93 (sent 12/26/84)

6. Study L-1000 - Probate Code (Jurisdiction; Probate of Wills; Contest of Wills)
Memorandum 85-11 (enclosed)
Draft Statute (attached to Memorandum)
7. Study L-1010 - Probate Code (Executors and Administrators; Appointment; Letters; Termination of Authority; Oath and Bonds)
Memorandum 85-12 (enclosed)
Draft Statute (attached to Memorandum)
8. Study L-1020 - Probate Code (Powers and Duties of Executors and Administrators)
Memorandum 85-13 (sent 1/9/85)
Draft Statute (attached to Memorandum)
9. Study L-1030 - Probate Code (Distribution Without Administration)
Memorandum 85-14 (sent 1/9/85)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-14 (sent 1/9/85)
Draft Statute (attached to Supplement)
First Supplement to Memorandum 84-66 (sent 8/16/84)
10. Study L-1050 - Probate Code (Guardianship-Conservatorship)
Memorandum 85-7 (sent 12/4/84)
First Supplement to Memorandum 85-7 (sent 12/26/84)
Second Supplement to Memorandum 85-7 (sent 1/9/85)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 24-25, 1985

SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on January 24-25, 1985.

Law Revision Commission

Present: Edwin K. Marzec, Chairperson
James H. Davis, Vice Chairperson (Jan. 25)
Roger Arnebergh
John B. Emerson
Bion M. Gregory
Arthur K. Marshall
David Rosenberg
Ann E. Stodden

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

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
Russell Miles, Property and Probate Law (Jan. 25)

Other Persons Present

Edward Brennan, California Probate Referees, San Diego
Charles Collier, State Bar Estate Planning, Trust and Probate
Law Section, Los Angeles (Jan. 25)
Ted Cranston, State Bar Estate Planning, Trust and Probate
Law Section, Los Angeles
Beverly Jean Gassner, California State Bar Family Law Section,
Ontario (Jan. 24)
Paulette Leahy, California Bankers Association, San Diego
James Quillinan, State Bar Estate Planning, Trust and Probate
Law Section, Mountain View
Michael D. Smith, California Newspaper Service Bureau, Los
Angeles (Jan. 25)
Richard L. Stack, Executive Committee, Los Angeles County Bar
Probate and Trust Section
W. John Valentine, California Newspaper Service Bureau, Los
Angeles (Jan. 25)
Lawrence Widdis, Los Angeles Daily Journal, Los Angeles
(Jan. 25)
Robert F. Work, National Newspaper Association, Los Angeles
(Jan. 25)

ADMINISTRATIVE MATTERS

MINUTES OF NOVEMBER 9, 1984, MEETING

The Minutes of the November 9, 1984, Meeting, including the Supplement to the Minutes, as submitted by the staff, were approved as submitted.

COMMISSION ACTIONS TO BE MADE ON ADOPTED MOTION

The Commission determined that actions to send out tentative recommendations for review and comment or to submit recommendations to the Legislature and other Commission actions should be made on a motion adopted by the Commission.

MEETINGS OF THE COMMISSION

The Commission determined that meetings normally should be scheduled to be held on Thursday from 3:00 p.m. to 10:00 p.m. and on Friday from 9:00 a.m. to 6:00 p.m.

SCHEDULE FOR FUTURE MEETINGS

(All meetings will be held in Sacramento)

March

March 21 (Thursday) - 3:00 p.m. - 10:00 p.m.
March 22 (Friday) - 9:00 a.m. - 6:00 p.m.

May

May 16 (Thursday) - 3:00 p.m. - 10:00 p.m.
May 17 (Friday) - 9:00 a.m. - 6:00 p.m.

June

June 27 (Thursday) - 3:00 p.m. - 10:00 p.m.
June 28 (Friday) - 9:00 a.m. - 6:00 p.m.

September

September 12 (Thursday) - 3:00 p.m. - 10:00 p.m.
September 13 (Friday) - 9:00 a.m. - 6:00 p.m.

October

October 10 (Thursday) - 3:00 p.m. - 10:00 p.m.
October 11 (Friday) - 9:00 a.m. - 6:00 p.m.

December

December 5 (Thursday) - 3:00 p.m. - 10:00 p.m.
December 6 (Friday) - 9:00 a.m. - 6:00 p.m.

POLICY ON SMOKING

The Commission considered Memorandum 85-3. No action was taken on this matter.

PROBATE CODE STUDY SCHEDULE

The Commission considered Memorandum 85-27 which set out a schedule for work on the Probate Code study. The Commission indicated that it desired to have a wide distribution of tentative drafts of portions of the new Probate Code as work on those portions is completed.

The Commission deferred adopting a schedule, pending a review of what is accomplished at the January meeting.

The Commission considered what it might do in order to obtain temporary loan of an experienced probate lawyer to assist the staff in preparing material for the new Probate Code. It was agreed that the Chairperson would write a personal letter to a number of large law firms requesting that the firm loan to the Commission for a limited period of time a lawyer from that firm who is experienced in probate law. A list of firms that might be so contacted was prepared. The staff is to prepare a statement of the function that the temporary lawyer would perform and provide the statement to the Chairperson for his use in preparing the letter.

ANNUAL REPORT

The Commission considered Memorandum 85-2 which presented for Commission approval a draft of the Annual Report covering 1984. The Commission deferred taking action on the Annual Report.

COMMUNICATION FROM CALIFORNIA COMMISSION ON STATUS OF WOMEN

The Commission considered a letter from the California Commission on the Status of Women. This letter had been distributed to the members of the Commission prior to the meeting and contained a draft of a legislative proposal to make significant changes in the California law dealing with the management and control of community property.

The Commission directed the staff to respond to the letter from the California Commission on the Status of Women by sending substantially the following letter:

The Law Revision Commission is restricted by statute from taking positions on proposed legislation recommended by others. However, the Commission has studied the problems relating to management and control of community property and has considered the issues presented by your proposed legislation. After making this study, the Commission published a recommendation that set forth the changes in existing law that the Commission concluded are needed. See Recommendation Relating to Disposition of Community Property (September 1983). A copy of this recommendation is enclosed.

STUDY F-633 - DIVISION OF PENSIONS

The Commission considered Memorandum 85-15 containing comments on the tentative recommendation relating to division of employee pension benefit plans. The Commission deferred action on this matter until the March 1985 meeting, pending receipt of a detailed report from the State Bar Family Law Section.

STUDY F-661 - PROVISION FOR SUPPORT IF SUPPORT OBLIGOR DIES

The Commission considered Memorandum 85-24 relating to provision for support if support obligor dies. The Commission reviewed the comments received on the previously approved recommendation.

The Commission determined to add a provision to make clear the extent to which a court may modify or terminate an order made under the proposed legislation. The substance of the following provision was adopted:

Whether or not the court specifically has reserved jurisdiction to modify or terminate an order made under this section, the court may modify or terminate the order at any time prior to the death of the spouse required to pay the support.

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

The Commission considered Memorandum 85-4 containing comments on the tentative recommendation relating to litigation expenses in family law proceedings. The Commission decided to print the recommendation and submit it to the 1985 legislative session.

STUDY H-406 - ABANDONED EASEMENTS

The Commission considered Memorandum 85-10 containing comments on the tentative recommendation relating to abandoned easements. The Commission decided to print the recommendation and submit it to the 1985 legislative session with the changes noted in the memorandum.

STUDY H-601 - RECORDING SEVERANCE OF JOINT TENANCY

The Commission considered Memorandum 85-6 and the attached draft of a previously approved recommendation relating to joint tenancy. The Commission determined that the requirement that an affidavit of giving notice be recorded should be deleted from the recommended legislation (Assembly Bill 96). When work on the Probate Code is completed, the Commission will review whether and in what manner a severing joint tenant should be required to give notice of the severance to the other joint tenant.

STUDY K-400 - MEDIATION PRIVILEGE

The Commission considered Memorandum 85-17, the draft of a tentative recommendation attached to that memorandum, the First Supplement to Memorandum 85-17, the Second Supplement to Memorandum 85-17, and letters from the County of Santa Clara Human Relations Commission and attorney Garrett Elmore which had been distributed prior to the meeting.

The Commission revised the proposed legislation to read in substance as follows:

1152.5. (a) Subject to the conditions and exceptions provided in this section, when ~~parties to a pending civil action~~ persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving the pending action a dispute:

(1) Evidence of anything said or of any admission made in ~~a the course of the mediation session~~ is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, ~~a the mediation session~~, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given. This paragraph does not limit the admissibility of the agreement referred to in subdivision (b) nor does it limit the effect of an agreement not to take a default in ~~the a pending civil action.~~

(b) This section does not apply unless, before the mediation begins, the parties execute an agreement in writing that sets out the text of this section and states that the parties agree that this section shall apply to the mediation. Notwithstanding the agreement, this section does not limit the admissibility of evidence if ~~the person from whom the information was obtained consents~~ all persons who conducted or otherwise participated in the mediation consent to its disclosure.

~~(e)~~ This section does not limit the admissibility of evidence where there is reasonable cause to believe that admission is necessary to prevent or minimize the danger of injury to any person or damage to any property.

~~(d)~~ (c) This section does not limit the admissibility of evidence in a criminal action.

~~(e)~~ (d) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code or by Section 1747 of the Code of Civil Procedure.

~~(f)~~ (e) Nothing in this section makes admissible evidence that is inadmissible under Section 1152.

The preliminary portion of the recommendation and the comment to the proposed new section are to be revised to conform to the revised section. As thus revised, the recommendation was approved for printing and the proposed legislation was approved for introduction at the current session.

STUDY L - PROBATE CODE: PUBLICATION REQUIREMENTS

The Commission considered the portions of Memoranda 85-11 and 85-13 relating to publication of notice. The Commission made the following decisions with respect to the publication requirements:

(1) Number of publications. The Commission decided that the number of publications required at opening of probate proceedings should not be reduced from three to one but should remain at three, as under existing law.

(2) Newspaper published in city or county. The Commission decided that publication of notice of opening probate should be made in a newspaper of general circulation published in the city where the decedent resided, rather than in the county where the decedent resided, as under existing law.

(3) Type size. The Commission decided to recommend in place of the existing type size requirements for notice of opening probate that the type be "readable." The statute should provide that a caption in 8-point type and text in 7-point type or larger is deemed readable.

(4) Form of notice. The Commission decided the notice should be in the same form as existing law, i.e., the publisher should not be authorized to consolidate notices of opening probate and publish the boilerplate text of the notice only once.

(5) Notice of lease. The Commission decided to recommend no change in the existing requirement of publication of notice of a lease of estate property.

STUDY L-500 - DURABLE POWERS OF ATTORNEY

The Commission considered Memorandum 85-8 and the attached tentative recommendation and the First Supplement to Memorandum 85-8. The Commission made the following decisions.

Comprehensive revision of law of agency. The California Bankers Association suggested that a comprehensive revision of the law of agency is needed and urged the Commission to undertake the project. The Commission concluded that it was not now in a position to make a comprehensive study of the law relating to agency. Consideration should be given to whether or not such a study should be undertaken when the project to prepare a new Probate Code is completed.

Comprehensive revision of durable power of attorney statutes. The Estate Planning, Trust and Probate Law Section representative provided a memorandum (attached as Exhibit 1 to these Minutes) suggesting that a Governor's Blue Ribbon Commission be appointed to review the entire matter of durable powers of attorney and matters of a more general nature regarding dying and the termination of life. The Commission decided that it would not delay submitting the recommendation that it has prepared for submission to the 1985 session since the recommended revisions are needed now, and that other matters suggested for study in the State Bar Section Memorandum can be considered by the Commission at a future time.

Court supervision of attorney in fact under durable power of attorney. The California Bankers Association suggested revisions of the durable power of attorney statute to set a standard for the conduct of the attorney in fact and to require court supervision of some actions under the power of attorney. The Commission concluded that it was not now in a position to undertake a study of these matters. Consideration should be given to whether or not such a study should be undertaken when the project to prepare a new Probate Code is completed.

Protection of third persons who rely on durable power of attorney.

The Commission determined that a person who acts in good faith reliance upon a durable power of attorney which appears on its fact to be valid and which is presented to the person by the attorney in fact named in the durable power of attorney should not be liable to the principal or to any other person for so acting if the durable power of attorney is acknowledged before a notary public.

Certificate of notary public. The Commission determined that no change should be proposed in the form of certificate of the notary public as provided by existing law.

Objection by principal to the providing of health care. The Commission decided not to propose the amendment to Section 2440 contained in the tentative recommendation. This amendment was deleted because the power of attorney statute does not preclude the making of health care decisions by a person otherwise authorized if the attorney in fact declines to make the decision. The fear was expressed that the proposed amendment would permit a patient to be kept alive against the patient's desires.

Proof of identity of principal by convincing evidence. The Commission considered various communications suggesting revision in what constitutes "convincing evidence" of the identity of the principal and how the instructions in the statutory forms should be phrased. The Commission decided to revise the preliminary portion of the instructions under the "STATEMENT OF WITNESSES" in the form set out in Section 2450 and in the form set out in Section 2500, to read:

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing proof evidence of the identity of the principal, ~~you must not be aware of any information, evidence, or other circumstances that would lead you, as a reasonable person, to believe that the person signing or acknowledging this instrument as principal is not the individual he or she claims to be and, in addition,~~ you must be presented with and reasonably rely on any one or more of the following:

Requirement that property be described in power of attorney. The Commission approved the following section for inclusion in the durable power of attorney recommendation:

Civil Code § 2513 (added). Specific description of property in power of attorney not required

2513. A power of attorney, whether or not a durable power of attorney, may by its terms apply to all or a portion of the real and personal property of the principal, whether owned by the principal at the time of the giving of the power of attorney or thereafter acquired, whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

Comment. Section 2513 is a new provision that makes clear that a power of attorney may by its terms apply to all real property of the principal, including after-acquired property, without the need for a specific description of the real property to which the power applies. The section is consistent with the provisions of Article 2 (commencing with Section 2460) of Chapter 3.

Disposition of principal's remains. The Commission considered the suggestion that a provision be added to the durable power of attorney for health care statute to resolve any conflict between the durable power of attorney and directions in the principal's will or other document concerning prepaid arrangements or other dispositions of the remains. The Commission decided not to include a provision dealing with this matter in the statute. This decision was made in recognition that the often the person is buried before there is any knowledge of the contents of the other document.

Approval for printing and submission to 1985 Legislature. The Commission approved the recommendation as revised at the meeting for printing and approved the proposed legislation as revised for introduction at the 1985 legislative session.

STUDY L-605 - DISTRIBUTION UNDER A WILL OR TRUST

The Commission considered Memorandum 85-9 and the attached Tentative Recommendation Relating to Distribution Under a Will or Trust.

General approach of recommendation. The Commission approved the general approach of the tentative recommendation. The Commission approved the portions of the tentative recommendation that revised Section 240 and made the conforming revisions which make reference to Section 240.

Section 250. This section was approved as contained in the tentative recommendation, but the last paragraph of the Comment to the section was revised in substance to read:

Subdivision (b) provides that certain language is not an expression of a contrary intention sufficient to negate application of Section 250. For example, if property in a testamentary trust is to be distributed when the trust terminates to "the descendants of the testator per capita" and at the time of distribution the testator's three children survive and one of the surviving children has five children, each of the surviving children take a one-third share; the five grandchildren of the testator take nothing since their parent survives. This results from applying the distribution scheme of Section 240. Under paragraph (1) of subdivision (b) of Section 250, this scheme is not negated by use of the term "per capita," since the living members of the designated class ("descendants of the testator") are not all of the same generation. In this context, it is reasonable to assume that the use of the term "per capita" is not intended to provide a share for a class member whose parent or other ancestor is still living and takes a share, although the drafter of the instrument may provide for such a result by appropriately clear language. In order for the testator's grandchildren in the above example to take under Section 250, their parent (the testator's child) must be dead at the time of distribution. In such a case, the testator's two living children each take a one-third share and the five children of the deceased child share equally in the one-third share their deceased parent would have taken.

Section 253. This section was continued in the tentative recommendation, but the section is to be revised so that the antilapse statute will apply.

Ancestral property doctrine. The Commission noted the objection to the continuation of the ancestral property doctrine and the letter pointing out the uncertainty of the existing language stating the doctrine. However, the Commission did not take any action with respect to repealing or clarifying the statutory statement of the doctrine.

Section 6402. The typographical error in this section should be corrected.

Approval for printing and submission to Legislature. With the revisions made above, the recommendation was approved for printing, and the proposed legislation was approved for introduction at the 1985 legislative session.

STUDY L-618 - UNIFORM TRANSFERS TO MINORS ACT

The Commission considered Memorandum 85-16. The Commission approved the amendment to Probate Code Section 3918 set out as Exhibit 4 of the Memorandum.

The following conforming amendment should be made to Probate Code Section 6345:

6345. The testator in his or her will may provide for successor or ~~alternative~~ substitute custodians and may specify the standard of compensation of the custodian.

These amendments are to be submitted in a bill to be introduced in the 1985 legislative session.

The staff was requested to write to John W. Schooling and to advise him of the Commission's actions at the meeting. He should also be advised that the Commission intends to give serious consideration to his suggestion concerning co-custodians. However, the Commission's staff is now engaged in drafting a new Probate Code and does not have the time to review the entire Uniform Act to determine what changes would be needed to provide for co-custodians. The Commission would greatly appreciate any assistance he can give in putting his suggestion concerning co-custodians in statute draft form.

STUDY L-630 - WILLS AND INTESTATE SUCCESSION (FOLLOW-UP
LEGISLATION 1985)

Probate Code Section 6147 (antilapse statute). The Commission considered Memorandum 85-1 concerning the antilapse statute and the attached letter from Professor Dukeminier suggesting that the Commission consider revising Probate Code Section 6147. After discussing the suggestion, the Commission decided not to recommend any change in Section 6147.

Probate Code Section 649.1 (necessity of administration). The Commission considered Memorandum 85-18 and the attached letter suggesting the need for a clarifying revision of the introductory portion of Probate Code Section 649.1. The Commission approved the staff recommendation to revise subdivision (a) of Section 649.1, to read:

649.1. (a) Except as provided in Section 649.3, when a husband or wife dies intestate leaving property that passes to the surviving

spouse under Section 6401, or dies testate and by his or her will bequeaths or devises all or a part of his or her property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 649.2 and 649.4, and no administration is necessary.

This change should be added to Assembly Bill No. 97 (urgency bill on probate notices).

STUDY L-630 - NOTICE IN PROBATE PROCEEDINGS

The Commission considered Memorandum 85-26 and the attached Assembly Bill 97. The Commission requested that the staff review the bill with Charles Collier, representative of the State Bar Estate Planning, Trust and Probate Law Section.

After reviewing the bill with Mr. Collier, the staff reported that a technical revision suggested by Mr. Collier appeared to be in order and the Commission approved amending the bill to make this revision. The revision would substitute the following for subdivision (b) of Section 1201 as proposed to be added to the Probate Code by the bill:

(b) Subdivision (a) does not apply where the person required to give the notice has actual knowledge of facts which that person reasonably believes gives rise under Section 6408 to the parent-child relationship between the stepchild and the stepparent or the foster child and the foster parent.

The making of this amendment would not affect the requirement of existing law that notice be given to children legally adopted where notice to children is required.

STUDY L-640 - TRUSTS

The Commission considered Memorandum 84-30 and the First Supplement thereto relating to transfer of trusts to or from California, Memorandum 84-31 relating to the validity of trusts for indefinite beneficiaries or purposes, Memorandum 84-32 and the First and Second Supplements thereto relating to the Revised Uniform Principal and Income Act, Memorandum 85-19 and the First Supplement thereto relating to jurisdiction and venue of trust proceedings, and Memorandum 85-20 and the First Supplement thereto relating to judicial proceedings concerning trusts. The Commission approved the draft statutes subject to the following decisions:

Memorandum 84-30 (Transfer of Trusts) and Supplement

Draft § 4653. Contents of petition to transfer. In subdivision (c), the word "true" preceding "copy" should be deleted. Subdivision (h) should be revised to read: "Whether there is any pending civil action in this state against the trustee arising out of the administration of the trust sought to be transferred."

Draft § 4654. Notice and hearing. The period for notice to the Attorney General should be changed from 20 to 30 days to conform with the notice period in subdivision (a).

Draft § 4655. Order granting transfer. Subdivision (b) which requires a finding that the substantial rights of residents of California will not be materially affected by a transfer of a trust to another jurisdiction should be deleted. The comment to this section should state that deletion of this language does not have any effect on the discretion of the court to approve or disapprove a transfer.

Memorandum 84-31 (Validity of Trust for Indefinite Beneficiary or Purpose)

The two draft sections set out in the memorandum were tentatively approved for inclusion in the comprehensive draft statute.

Memorandum 84-32 (Revised Uniform Principal and Income Act) and Supplements

Draft § 4801. Effect on personal income tax and bank and corporation tax. This section should be deleted because it is unnecessary.

Draft § 4802. Definitions. Subdivision (d) which defines "trustee" should be deleted because it is unnecessary in light of the general definition of "trustee" in Probate Code Section 84.

Draft § 4803. Duty of trustee as to receipts and expenditures. The standard of care in subdivision (a)(3) should be conformed to the general standard of care as revised during the 1984 legislative session. Subdivision (b) should be revised to read:

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference ~~of imprudence or partiality~~ arises that the trustee has improperly exercised this discretion from the fact that the trustee has made an allocation contrary to a provision of this ~~part~~ chapter.

Draft § 4804. Income and principal. Subdivision (c) should be split off into a separate section since it is not definitional as are

subdivisions (a) and (b). The staff should consider whether a reference to Section 4805 should be included in the respective definitions of income and principal.

Draft § 4805. When right to income arises; apportionment of income. The anti-apportionment rule in this section should be replaced by the uniform rule providing for apportionment of rents, interest, and annuities.

Draft § 4809. Business and farming operations. The rule against carrying over losses from one year to another in subdivision (a) should be eliminated.

Draft § 4810. Natural resources. In subdivision (a)(3) the word "absolute" preceding "discretion" should be deleted. The 27-1/2 percent standard in subdivision (a)(3) should be replaced with a standard based on the portion of gross receipts allowed as a deduction for depletion in computing taxable income for federal income tax purposes.

Draft § 4811. Timber. Timber should be covered along with other natural resources in Section 4810.

Draft § 4815. Reserve or allowance for depreciation or depletion. The word "absolute" preceding "discretion" in subdivision (a) should be deleted. The staff should consider whether there is any reason to continue the reference to July 1, 1968, in this section, with a view toward eliminating the reference.

Draft § 4816. Application of part. This section should be retained for the time being, but it may be eliminated if its transitional function is adequately covered by provisions in the general transitional and operative date provisions.

Draft § 4817. Severability. This section should be deleted because it duplicates Probate Code Section 11 which covers the entire code.

Memorandum 85-19 (Jurisdiction and Venue) and Supplement

Draft § 1101. Probate court as full-power court. This section should be revised to read: "The superior court sitting in probate has all the powers of the superior court in proceedings ~~properly~~ brought before it ~~pursuant to this division~~."

Draft § 1102. "Principal place of administration of trust" defined. The staff should prepare a revised version of this provision that does not tie the principal place of administration to the location of day-to-day records.

Draft § 1105. Venue. This section should be revised to provide a dual venue rule for inter vivos trusts so that a proceeding may be commenced either in the county where the trust was created or in the county where the principal place of administration of the trust is located. This will parallel the venue rules applicable to testamentary trusts.

Memorandum 85-20 (Judicial Proceedings Concerning Trusts) and Supplement

The Commission decided to retain existing law permitting testamentary trusts to opt for continuing jurisdiction and preserving this rule for pre-1977 testamentary trusts.

STUDY L-659 - EFFECT OF ADOPTION OR OUT OF WEDLOCK BIRTH
ON RIGHTS AT DEATH

The Commission considered Memorandum 85-5 and the attached "Discussion Draft" relating to the effect of adoption or out of wedlock birth on rights at death. The draft was approved for printing as a recommendation and for submission in bill form to the 1985 legislative session after the following revisions were made:

(1) The introductory portion of Section 6408.5 and subdivision (a) of that section were revised to read substantially as follows:

6408.5. Notwithstanding subdivisions (a) and (b) of 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 and the adopted person lived together at any time as parent and child or the natural parent was married to or was cohabiting with the other natural parent at the time the child was conceived and died before the birth of the 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.

(2) Subdivision (c) of Section 6408.5 was revised to read in substance as follows:

(c) If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child or a natural brother or sister of the child or the issue of such brother or sister) inherits from or through a the child on the basis of the relationship of parent and child between that parent and child unless the parent both of the following requirements are satisfied:

(1) The parent of a relative of the parent acknowledged the child and.

(2) The parent or a relative of the parent contributed to the support or the care of the child.

Example 4 in the Comment to Section 6408.5 should be deleted, and the other examples reviewed to determine that they are still accurate in view of the revisions the Commission made in the staff draft.

The Comment to Section 6408.5 should be revised to state that if the child born out of wedlock is adopted, inheritance from or through the child may be precluded under subdivision (a) or (b), even where the requirements of subdivision (c) are satisfied.

STUDY L-828 - TRANSFER WITHOUT PROBATE OF CERTAIN
PROPERTY REGISTERED BY THE STATE

The Commission considered Memorandum 85-23 and the attached Recommendation Relating to Transfer Without Probate of Title to Certain Property Registered by the State which had previously been approved for printing and submission to the 1985 legislative session.

The Commission decided to change the 30-day delay provision to a 40-day delay provision, so that the transfer provision for state registered property could not be used until 40 days after the death of the decedent.

The requirement that creditors have been paid should be limited to "unsecured" creditors.

STUDY L-1030 - PROBATE CODE (DISTRIBUTION WITHOUT ADMINISTRATION)

The Commission considered Memorandum 85-14, the First Supplement to Memorandum 85-14, and the First Supplement to Memorandum 84-66, for the purpose of considering some basic policy issues presented by those materials. The details of the materials were not considered.

The close relative requirement. It was reported that a majority of the Executive Committee of the Estate Planning, Trust and Probate Law Section favored eliminating the close relative requirement. The Commission determined to eliminate the close relative requirement.

General approach of statute. The State Bar Section expressed concern that there was no indication that the California Land Title Association would approve an affidavit procedure for clearing title to real property of small value without a probate proceeding.

The State Bar Section would limit the affidavit procedure for real property to cases where the gross value of the real property was not more than \$10,000 as determined from the full cash value as determined from the current county assessor's roll. This would permit clearing title to desert lots and oil and gas interests of small value.

The State Bar Section would permit use of a court procedure (comparable to a Section 650 procedure) to transfer interests in real property where the gross value of the real and personal property does not exceed \$60,000. The State Bar Section would use a probate referee's appraisal to fix the value of the real property. The staff suggested that the equity value (rather than the gross value) in the real property be the value used to determine whether the summary procedure could be used.

The Commission decided that the gross value concept should be used rather than the equity value concept in determining whether title to real property can be cleared using the court procedure comparable to Section 650. The Commission also approved the State Bar concept that would permit use of the affidavit procedure where the value of the real property is not more than \$10,000. The staff is to discuss the details of the State Bar proposal with the State Bar representatives when preparing the next set of meeting materials on this matter.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

EXHIBIT 1

MEMORANDUM

TO: California Law Revision Commission
(herein "Commission")

FROM: Estate Planning, Trust & Probate Law Section

DATE: January 22, 1985

RE: Durable Power of Attorney For Health Care;
and Memorandum 85-8 dated January 8, 1985

This memorandum is on behalf of the Estate Planning, Trust & Probate Law Section of the State Bar of California. It deals with the Durable Power of Attorney For Health Care in two respects:

1. First, it addresses the Commission's tentative recommendation relating to durable powers of attorney - with most emphasis on the Durable Power of Attorney For Heath Care.
2. Second, it comments and makes recommendations of a broader and more general nature regarding dying, the termination of life and the Durable Power of Attorney For Health Care.

The short form of Durable Power of Attorney for property has been referred, for study and recommendation, to one of the Executive Committee's substantive committees. We will, of course, send the Commission our recommendation as soon as it is available.

We have intentionally delayed, as long as possible, in sending the Executive Committee's comments. The reason: of all the matters on the Commission's current agenda, the issues related to dying and termination of life sustaining procedures, and related issues, are the most susceptible to change, and current legislative and judicial development. In layman's language, they are "hot" topics. We have, accordingly, wanted to bring to the Commission current significant developments since its November 1984 staff memorandum. In this fast moving field, November's recommendations may be eroded by December or January developments!

i.

THE COMMISSIONS TENTATIVE RECOMMENDATIONS:
MEMORANDUM 85-8 DATED JANUARY 8, 1985

A. C.C.2440: Providing Health Care Where Principal Objects.

Pending further study, we recommend C.C.2440 not be deleted.

The subject matter of C.C.2440 deserves further study. Irrespective of "the law," the practice by all physicians, hospitals and health care providers is to determine the patient's wishes if the patient has any means of communicating his/her wishes. While that communication may be only a "wisp," or very small fragment, of comprehension, the patient's wishes are always sought.

We believe that any member of the Commission would not want his/her life snuffed out by withdrawing a ventilator IF he/she had enough cognition to express a desire to "live" even though he/she was technically "brain dead" and even though he/she had previously executed a proper statutory Form Durable Power of Attorney For Health Care. Death is not reversible. Life is too precious. People do change their views regarding their "death." Generally, most normal people want to stay "alive" - irrespective of how the state legislature defines "life"!

The Bartling case considered this issue. Bartling was ambivalent:

"Although they did not challenge his legal competency, the doctors and Glendale Adventist questioned Mr. Bartling's ability to make a meaningful decision because of his vacillation. This opinion was based on the declarations of several nurses who related instances in which the ventilator tube accidentally detached and Mr. Bartling signalled frantically for them to reconnect it. Mr. Bartling also made several statements to his doctors and nurses to the effect that he wanted to live and did not want the ventilator disconnected."

The Court, very properly, considered Bartling's statements; and decided, unanimously, and very properly (in our view) that his primary, clearly expressed, wish was to terminate his life support even though that would, most certainly, hasten his death!

It should not be necessary for a person to incur the expense of a private attorney to sue a hospital to reach

such a relatively simple conclusion as to whether he did or did not wish to have a life sustaining air ventilator disconnected if he ever reached a state of health in which that ventilator was the only thread sustaining his life!

Bartling had executed a Durable Power of Attorney for Health Care which was quite explicit. Therein he stated his desires as follows:

"My desires concerning future medical and supportive care, which I direct my attorney-in-fact to follow, are as follows: . . . I am totally unable to care for myself, and believe that I am dependent on a mechanical ventilator to support and sustain my respiration and life. I continuously suffer agonizing discomfort, pain and the humiliating indignity of having to have my every bodily need and function tended to by others. I do not wish to continue to live under these conditions. It is therefor my intent to refuse to continue on ventilator support and thereby to permit the natural process of dying to occur - peacefully, privately and with dignity. I direct my attorney-in-fact to honor my desires in this regard, and to refuse ventilator support, at such time as I am unable to do so for myself. I am aware that impairment, incapacity and unconsciousness may occur as a result of my refusal of ventilation, but I desire that none of these be deemed to be a medical emergency."

Certainly, more explicit instructions, and authority, could hardly be given.

The second part of this memorandum addresses a more pervasive issue of both national and California concern: dying, the termination of life and the Durable Power of Attorney For Health Care.

Nearly every week brings forth a new major development in the nationwide concern of many disciplines in dying and

the termination of life. Many disciplines are carefully considering the issues in terminating the life of an incapacitated person: ministers; theologians; philosophers; ethicists; physicians; health care providers; attorneys; legislators.

Even in the short two month period since the Commission issued its tentative recommendation L-500 in November, 1984, a number of very important events have occurred:

(a) "Negotiated Death": A new concept "negotiated death," or "death by consensus" is emerging in practice. The negotiations involve the doctor(s), family members, hospital staff, and attorneys for all sides. The issue: to end life sustaining treatment for terminally ill or comatose patients who may, or may not, have left directions for their own continuing care. This development has increased the use of hospital "Ethics Committees" and the formulation of practical guidelines for use in terminating life sustaining treatment.

(b) New York Commission. During the week of December 17-22, 1984, New York's Governor Cuomo appointed a 23 person "blue ribbon" commission on Life and The Law. It's initial report is due May 1, 1984, but the Commission will continue its work thereafter. Among its important topics is discontinuing life sustaining therapies for the terminally ill. (From New York Times, December 23, 1984, p. 12)

(c) Bartling v. Superior Court (Dec. 27, 1984) 2 Civil No. B007907. By far the most important single decision in the field of terminating life sustaining equipment - a respirator that controls the patient's air! The decision was announced on Thursday, December 27, 1984 by a unanimous three judge panel of the Court of Appeal. The legal ramifications of the Bartling case are still being studied by all physicians, other health care providers, district attorneys and private attorneys.

(d) Claire Conroy Case (New Jersey, January 17, 1985). On January 17, 1985, the New Jersey Supreme Court handed down its 6-1 decision in the long awaited case of Claire Conroy. The Court, by a 6-1 vote reversed a unanimous 1983 decision by the Appellate Division of the Superior Court. The full text of the Conroy decision has not been available to the writer of this memorandum at the date of this memorandum; however, its national impact will be very important.

B. Witnessing, Acknowledgment, Etc.

The Executive Committee is very concerned, as clearly pointed out by Francis J. Collin, Jr. in his December 10, 1984 letter (Exhibit 13), that the durable power statute has three different execution procedures. We also understand the concern of the Commission requiring the need of two independent adult witnesses as presently required on the new statutory forms.

4

The Executive Committee is continuing its study of the execution procedures. They clearly present a trap for the average practicing attorney - and, indeed, are rarely even understood by more sophisticated estate planning attorneys. We hope to be able to suggest a simpler more uniform execution procedure that will, accommodate itself to the needs of both the Commission and practicing attorneys.

C. C.C. 2400(a): Voting of Corporate Shares.

The Executive Committee fully supports the Commission. The present prohibition, in C.C. 2400(a), upon the use of a durable power to exercise voting rights, is an anomaly that demands prompt correction. That amendment should be retroactive; or, at least, it should be an urgency provision.

D. Printed Forms Distributed For Use By Person Without Lawyer.

In the past, the Executive Committee has opposed, and presently continues its opposition to, all "consumer type" warnings. However, the Legislature apparently wants these "consumer type" warnings. Accordingly, the Executive Committee will not oppose the proposed amendment which extends these warnings to forms that are either "sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel". Proposed C.C. 2510(2)(b).

E. C.C. 2434(d): Disposition of Principal's Remains.

The Executive Committee suggests that the scope of proposed C.C. 2434(d) be amended to include "a document other than a will". This means of making a gift under Health and Safety Code Section 7151, is expressly sanctioned under H&S 7154(b). These days, many persons use the "card" that is expressly authorized by H&S 7154(b). Also, many persons do not have a will.

Perhaps the best language, to "track" the language in the Uniform Anatomical Gift Act, is "will, card or other document of gift" which appears in H&S 7154(d).

We enclose a proposed amendment to accomplish that change.

F. After Acquired Property.

The Executive Committee concurs that a statutory amendment is not presently necessary to make clear that the authority of the attorney in fact extends to after acquired property.

The Executive Committee is concerned, as is Francis J. Collin, Jr. (Exhibit 13), regarding the language in Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001.

The Executive Committee has referred this question to one of its substantive committees for study and recommendation. We will send that committee's report to the Commission as soon as it is available to the Executive Committee.

II.

General Recommendation: Statewide Commission Appointed by Governor

The Executive Committee recommends that the Commission recommend to the Governor that he appoint a "blue ribbon" statewide Commission to consider the legal problems related to dying and termination of life sustaining procedures. We strongly believe that the Law Revision Commission does not have sufficient time to assemble the view points of the various disciplines that are essential to reach a considered consensus regarding these matters. We believe that a commission somewhat along the lines of the New York Commission is very much needed in California.

Our recommendation would be that the California commission serve without pay, as is true in New York, and that it be composed of the following:

1. The chairman or Executive Director of California Law Revision Commission.
2. From the ministry: one rabbi; one priest; one protestant
3. The president or other designated representative of California Medical Association.
4. The president or other designated representative of California Hospital Association.

5. A couple of professors from Academia who deal with questions pertaining to ethics and philosophical questions associated with dying.

6. A couple of attorneys appointed by the Board of Governors of State Bar of California. We believe that it should include the chairperson of Estate Planning, Trust and Probate Law section or someone designated by him.

7. President or designated representative of the District Attorneys Association.

8. A couple of "members at large" who may not be included in any of the above categories but who have both a concern and viewpoint re the problems of dying. We are thinking of such individuals as the director of a hospice, a representative of the elderly community, and others whose viewpoints should be expressed.

It would be the goal of the committee to study and make recommendations to the Governor with respect to proposed legislation.

Proposed Amendment to C.C. 2434(d)

"(d) Notwithstanding subdivision (a) and (b), a person designated in the principal's will, card or other document of gift to direct the disposition of the principal's remains has priority over the attorney in fact in directing the disposition of the principal's remains; but neither the attorney in fact nor any other person is subject to criminal prosecution, civil liability, or professional disciplinary action for disposition of remains under the authority of the durable power of attorney if the person acts in good faith under the authority of the durable power of attorney without actual knowledge that a person other than the attorney in fact has priority for disposition of remains under the principal's will, card or other document of gift"