

0239a
November 27, 1985

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

<u>Time</u>	<u>Place</u>
Dec. 5 (Thursday) - 2:00 p.m. - 10:00 p.m.	State Capitol
Dec. 6 (Friday) - 8:30 a.m. - 4:30 p.m.	Room 125 Sacramento

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

December 5-6, 1985

1. Minutes of October 10-11 Meeting (sent 11/7/85)

POTENTIAL RECOMMENDATIONS TO THE 1986 LEGISLATIVE SESSION FOR REVIEW AND APPROVAL FOR PRINTING AND INTRODUCTION OF BILL IN 1986

2. Study F-602 - Division Upon Dissolution of Marriage of Property Held in Joint Tenancy Form (Retroactive Application of Statute)

Memorandum 85-102 (sent 11/6/85)
First Supplement to Memorandum 85-102 (enclosed)
Draft of Recommendation (attached to First Supplement)

3. Assembly Bill 196 and the Problem of Conflicting Amendments Made by Different Bills to the Same Code Section

Memorandum 85-106 (sent 11/13/85)

4. Study L-640 - Probate Code (Comprehensive Trust Law)

Comprehensive Trust Statute

Memorandum 85-97 (sent 11/7/85)
Draft of Recommendation (attached to Memorandum)
Memorandum 85-101 (to be sent)

Spendthrift Trusts

Memorandum 85-87 (sent 9/26/85; another copy sent 10/17/85)

5. Study L-1030 - Probate Code (Disposition of Estate Without Administration)

Memorandum 85-103 (sent 10/17/85)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 85-103 (enclosed)

6. Study L-1032 - Probate Code (Small Estate Set-Aside)

Memorandum 85-74 (sent 8/29/85; another copy sent 10/17/85)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 85-74 (sent 10/2/85; another copy sent 10/17/85)
Second Supplement to Memorandum 85-74 (11/25/85)

7. Study L-830 - Probate Code (Proration of Taxes)

Memorandum 85-99 (sent 11/25/85)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 85-99 (enclosed)

8. Study L-1020 - Probate Code (Probate Code Section 854)

Memorandum 85-92 (sent 9/20/85; another copy sent 10/17/85)

POTENTIAL TENTATIVE RECOMMENDATIONS FOR APPROVAL FOR DISTRIBUTION TO INTERESTED PERSONS AND ORGANIZATIONS FOR REVIEW AND COMMENT

9. Study L-1028 - Estates and Trusts Code (Independent Administration)

Memorandum 85-71 (sent 8/29/85; another copy sent 10/17/85)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 85-71 (sent 9/4/85; another copy sent 10/17/85)
Second Supplement to Memorandum 85-71 (sent 9/7/85; another copy sent 10/17/85)
Third Supplement to Memorandum 85-71 (sent 9/25/85; another copy sent 10/17/85)
Fourth Supplement to Memorandum 85-71 (sent 11/12/85)
Fifth Supplement to Memorandum 85-71 (sent 11/20/85)
Sixth Supplement to Memorandum 85-71 (sent 11/25/85)

NEW MATERIAL FOR POLICY ISSUE CONSIDERATION

10. Study L-642 - Claims Procedure For Trusts

Memorandum 85-96 (sent 10/31/85)
First Supplement to Memorandum 85-96 (11/25/85)

11. Study L-1027 - Estates and Trusts Code (Accountings)

Memorandum 85-36 (sent 2/28/85; another copy sent 10/17/85)
Draft Statute (attached to Memorandum)

Note. We will begin at page 5 of the draft statute

First Supplement to Memorandum 85-36 (sent 3/8/85; another copy sent 10/17/85)
Revised Second Supplement to Memorandum 85-36 (sent 4/1/85; another copy sent 10/17/85)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 5-6, 1985
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on December 5-6, 1985.

Law Revision Commission

Present:	Edwin K. Marzec, Chairperson	Roger Arnebergh
	Arthur K. Marshall, Vice Chairperson	Bion M. Gregory
	Alister McAlister, Member of Assembly	Ann E. Stodden

Absent: Bill Lockyer, Member of Senate

Staff Members

Present:	John H. DeMouilly	Stan G. Ulrich
	Nathaniel Sterling	

Absent: Robert J. Murphy III

Consultant Present

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

Other Persons Present

Edward V. Brennan, California Probate Referees, San Diego
 James D. Devine, State Bar Estate Planning, Trust and Probate Law Section, Monterey
 Irwin D. Goldring, State Bar Estate Planning, Trust and Probate Law Section, Beverly Hills
 Sandra Kass, Los Angeles County Bar Association, Los Angeles
 Ralph Palmieri, Beverly Hills Bar Probate Section, Los Angeles
 Derrich Phipps, Bank of America, San Francisco
 James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View
 Diana Richmond, State Bar Family Law Section, San Francisco (Dec. 5)
 Jim Schwartz, California Attorney General's Office, San Francisco (Dec. 5)

ADMINISTRATIVE MATTERS

MINUTES OF OCTOBER 10-11, 1985, MEETING

The Minutes of the October 10-11, 1985, Meeting as submitted by the staff were approved after the following corrections were made: On page 4, in the discussion under the heading "1986 Legislative Program," the year "1986" was substituted for the year "1987" in the six places where "1987" appeared in the Minutes as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The Commission changed the dates for its April meeting and changed the places of some of the other future meetings. The revised schedule for future meetings is set out below.

January 1986

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

February 1986

February 13 (Thursday)	3:00 p.m. - 10:00 p.m.	San Francisco
February 14 (Friday)	8:30 a.m. - 6:00 p.m.	

March 1986

March 13 (Thursday)	3:00 p.m. - 10:00 p.m.	Sacramento
March 14 (Friday)	9:00 a.m. - 6:00 p.m.	

April 1986

April 10 (Thursday)	3:00 p.m. - 10:00 p.m.	Eureka
April 11 (Friday)	8:30 a.m. - 6:00 p.m.	

May 1986

May 15 (Thursday)	3:00 p.m. - 10:00 p.m.	Sacramento
May 16 (Friday)	9:00 a.m. - 6:00 p.m.	

June 1986

June 26 (Thursday)	3:00 p.m. - 10:00 p.m.	Monterey
June 27 (Friday)	9:00 a.m. - 6:00 p.m.	

July 1986

July 17 (Thursday)	3:00 p.m. - 10:00 p.m.	San Diego
July 18 (Friday)	9:00 a.m. - 6:00 p.m.	

September 1986

September 4 (Thursday)	3:00 p.m. - 10:00 p.m.	Sacramento
September 5 (Friday)	9:00 a.m. - 6:00 p.m.	

November 1986

November 13 (Thursday)	3:00 p.m. - 10:00 p.m.	Orange County
November 14 (Friday)	9:00 a.m. - 6:00 p.m.	

December 1986

December 4 (Thursday)	3:00 p.m. - 10:00 p.m.	Los Angeles
December 5 (Friday)	9:00 a.m. - 6:00 p.m.	

SUGGESTIONS FOR NEW TOPICS

The Commission considered Memorandum 85-106 and the attached letter from Assembly Member Bill Leonard. In his letter, Assembly Member Leonard expressed concern that the double joining procedures greatly expand bills, create additional workload for consultants who must analyze the bills, cause legislators to question the nature of the amendments, add cost to the price of printing the bills, and create problems for the office of the Legislative Counsel in drafting requested amendments,

The Legislative Counsel outlined procedures that are used in other states for dealing with this problem. Assembly Member McAlister stated that only in two or three instances have bills he authored been chaptered out by later chaptered bills.

The Commission concluded that the problem is primarily a problem of legislative procedure and that the Legislature itself would appear to be the most appropriate body to review the existing procedure and

determine whether a change should be made. The Legislative Counsel indicated his willingness to discuss this matter with Assembly Member Leonard.

The Executive Secretary was directed to advise Assembly Member Leonard of the Commission's discussion and decision.

STUDY F-602 - DIVISION UPON DISSOLUTION OF MARRIAGE OF PROPERTY
HELD IN JOINT TENANCY FORM (RETROACTIVE APPLICATION OF STATUTE)

The Commission considered Memorandum 85-102 and the first supplement thereto, together with a copy of the case of In re Marriage of Lachenmeyer, 85 Daily Journal D.A.R. 3834 (copy attached to these Minutes as Exhibit 1). The Commission determined to recommend legislation as suggested by the staff in the draft attached to the First Supplement to Memorandum 85-102, subject to the following decisions:

(1) The Comment to draft Section 4800.10 (reserved power of the Legislature) should refer to the general welfare authority of the Legislature to enact retroactive legislation. In this connection, it should be pointed out that the Legislature may enact retroactive legislation governing other aspects of community property, such as management and control and rights at death. This statement should not be codified, however.

(2) The operative date provision (Section 4 of Chapter 342 of the Statutes of 1983) should read: "This act applies to proceedings commenced on or after January 1, 1984, regardless of the date of acquisition of the property or the date of any agreement affecting the property.

(3) Copies of the revised recommendation should be distributed to the Commissioners as soon as available.

(4) The staff should inquire of Professor Reppy whether he is interested in preparing a study for the Commission concerning possible extension of the rule of Civil Code Section 4800.1 (community property

presumption rebuttable only by a writing) to cover all husband/wife title forms. The Commission will consider the terms of a contract for such a study if Professor Reppy is interested in the project.

STUDY L-640 - PROBATE CODE (COMPREHENSIVE TRUST LAW)

The Commission considered Memorandum 85-97 and the comprehensive trust law attached to it, Memorandum 85-87 relating to spendthrift trusts, and Memorandum 85-96 and the First Supplement thereto relating to creditors' claims procedures. The Commission also considered a memorandum relating to spendthrift trusts prepared by Professor Russell Niles, a Commission consultant, which is attached to these Minutes as Exhibit 2. The Commission also considered a letter from Mr. Walter T. Shatford II which is attached to these Minutes as Exhibit 3. The Commission approved the Recommendation Proposing the Trust Law for printing and introduction in the 1986 Legislative session, subject to the following revisions:

§ 15300. Restraint on transfer of income

In the second line, the second "the" should be changed to "a."

§ 15301. Restraint on transfer of principal

This section should be revised to adopt the Wisconsin rule permitting judgment creditors to reach amounts of principal in the hands of the trustee that are due and payable. See Wis. Stat. Ann. § 701.06(2) (West 1981). Accordingly, this section should be revised to read substantially as follows:

15301. (a) Except as provided in subdivision (b) and in Sections 15304 to 15307, inclusive, if the trust instrument provides that ~~the~~ a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal ~~under the trust~~ may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

~~(b) At the termination of the beneficiary's interest in the trust after the death of the beneficiary's interest~~
in After an amount of principal has become due ~~of~~ and payable to the beneficiary, ~~a judgment creditor may file~~ ~~a~~ under the trust instrument, upon petition to the court under Section 709.010 of the Code of Civil Procedure ~~for~~ by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of ~~the beneficiary's interest~~ in such principal amount. The court in its discretion may issue an order directing the trustee to satisfy all or part of the judgment out of ~~the beneficiary's interest~~ in such principal amount.

§ 15302. Trust for support

In the third line, the second "the" should be changed to "a."

§ 15305. Claims for child or spousal support

This section should be revised to treat enforcement of child and spousal support against the beneficiary's interest in a spendthrift trust in the same manner. Thus the trust instrument would not be able to prevent enforcement of spousal support by an express prohibition. To implement this policy, this section should be revised substantially as follows:

15305. (a) As used in this section, "support judgment" means a money judgment for support of the trust beneficiary's spouse or former spouse or minor child.

(b) ~~Subject to subdivision (a), if~~ If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of such payments as they become due and payable, presently or in the future.

(c) ~~Subject to subdivision (a), whether~~ Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or

part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.

(d) ~~In the case of a judgment for the support of a minor child, this~~ This section applies to a support judgment notwithstanding any provision in the trust instrument. In the case of a judgment for support of a spouse or former spouse, this section applies unless the trust instrument expressly provides otherwise.

The redraft of this section should be circulated to the Commissioners for editorial approval before it is sent to the printer.

§ 15307. Income in excess of amount for education and support subject to creditors' claims

This section should be revised to read substantially as follows:

15307. If a trust instrument does not contain a valid direction for accumulation of income, notwithstanding a restraint on transfer of a beneficiary's interest in the trust under Section 15300 or 15301, any amount to which the beneficiary is entitled under the trust instrument or pursuant to the exercise of the trustee's discretion in excess of the amount that is or will be necessary for the education and support of the beneficiary, and to which the beneficiary is entitled, may be applied to the satisfaction of a money judgment against the beneficiary. Upon the judgment creditor's petition under Section 709.010 of the Code of Civil Procedure, the court may make an order directing the trustee to satisfy all or part of the judgment out of the beneficiary's interest in the trust.

The reference to valid directions for accumulation of income should be omitted because it is unnecessary in light of the clause "to which the beneficiary is entitled under the trust instrument or pursuant to the exercise of the trustee's discretion." The comment to this section should make clear that the court can issue a continuing order to apply to payments that become due and payable in the future. The comment should also make clear that the section does not make all trusts into spendthrift trusts; transfer of the beneficiary's interest in the trust may be restrained only where the settlor intends to do so.

The redraft of this section should be circulated to the Commissioners for editorial approval before it is sent to the printer.

§ 15407. Effect of disposition in favor of "heirs" or "next of kin" of settlor

The mechanical standard determining the class of "heirs" or "next of kin" as those who would take if the settlor died at the time modification or termination is sought should be replaced by a flexible standard under which the court has discretion to determine the beneficiaries who are reasonably likely to take. Thus if the consent of all heirs or next of kin cannot be obtained, this section would permit the court, on petition of a beneficiary, to excuse the requirement of obtaining the consent of beneficiaries who are not reasonably likely to take.

§§ 16000-16014. Trustee's duties

The comment to each of these sections relating to the trustee's duties should contain a cross-reference to Section 16463 permitting the beneficiary to consent to the acts of the trustee and to relieve the trustee from liability that would otherwise arise from a breach of a duty.

§ 18201. Creditor's rights against revocable trust after settlor's death

The Commission discussed the policy questions raised in Memorandum 85-96 and the First Supplement thereto relating to creditors' rights against revocable trust assets after the settlor's death. The Commission decided that the substantive rule of Section 18201 making such assets liable if the settlor's estate is not adequate to satisfy expenses of administration and claims of creditors should be retained in the bill even though there is no implementing procedural scheme. Proposals for an appropriate procedure are under

study by the State Bar and others. This question should be deferred for consideration at a later time, the first priority now being the completion of the revision of the Probate Code.

To remedy a technical defect, Section 18201 should be revised as follows:

18201. Upon the death of a settlor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation during at the time of the settlor's lifetime death is subject to the claims of creditors of the decedent settlor's estate and to the expenses of administration of the estate to the extent that the decedent settlor's estate is inadequate to satisfy such claims and expenses.

STUDY L-830 - ESTATES AND TRUSTS CODE (PRORATION OF TAXES)

The Commission considered Memorandum 85-99 and the First Supplement thereto, reviewing comments concerning the Commission's tentative recommendation on proration of estate taxes. The Commission approved the recommendation for printing and submission to the Legislature after making the following changes:

Location and numbering of statute. The proration statute should be located in the code as Division 9, running from Section 14500 to 14645. This will enable use of whole numbers and avoid the need for renumbering when the new Estates and Trusts Code is enacted.

§ 970.010. Definitions. The Comment to subdivision (b) ("person interested in the estate") should note that the definition includes but is not limited to recipients of nonprobate property such as joint tenants and beneficiaries under life insurance policies. Technical changes in the definition of "property" in subdivision (c) and the Comment were made as suggested in the Note following this section. The words "fair market" were deleted from the definition of "value" in subdivision (d), and a Comment was added as suggested in the Note following this section. A new definition of "personal representative" was added as suggested in the Note following this section.

§ 970.020. Transitional provision. The references to "estate" should be revised to make clear it is the taxable estate and not the probate estate that is being referred to, perhaps by substitution of the defined term "property".

§ 971.010. Proration among persons interested in estate. Subdivisions (b)(1) and (2) were replaced by a provision that, "This section does not apply to the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument."

§ 971.020. Manner of proration. The words "as near as may be" should be deleted from the section. The provision should include a cross-reference to Section 971.030 (allowance for credits, deductions, and other adjustments). The Comment should incorporate a statement that the proration encompasses gifts included in the gross estate as suggested in the Note following the section.

§ 971.030. Allowance for credits, deductions, and other adjustments. A provision was added to this section stating in substance, "In making a proration of an estate tax, interest on extension of taxes and interest and penalties on underpayment of taxes shall be charged to equitably reflect the benefits and burdens of the extension or underpayment and of any associated tax deductions."

§ 971.040. Trusts and temporary interests. The Commission suggested the staff look into the possibility that the Principal and Income Law might cover the problem raised in the Note concerning payment of estate taxes by a life tenant. In any case, the Commission does not believe the proration statute is the proper context in which to address the problem.

§ 971.050. Proration of additional tax on certain qualified real property. Subdivision (b) was revised as suggested in Ken Klug's letter attached to the First Supplement to Memorandum 85-99.

§ 971.060. Proration of extended estate tax. A sentence should be added to the Comment as suggested in the Note following this section to the effect that a person who is forced to pay more than the person's apportioned share has a right of reimbursement.

§ 971.070. Where property not in possession of personal representative. Subdivision (a) should make clear that the personal representative is to collect interest and penalties along with the estate tax. Reference should be made to the provisions of "this chapter" rather than "this article." In subdivision (b), any amount of prorated taxes not recoverable from the persons to whom they are prorated should be equitably prorated among the remaining persons rather than among the residuary beneficiaries. A new subdivision (c) was added as provided in the Note following the section to give persons required to overpay an express right of reimbursement against persons who underpay their prorated share. The Comment should include a note that failure of a personal representative to make a good faith effort to collect is a breach of fiduciary duty for which the personal representative may be liable.

§ 972.010. Who may commence proceedings. Subdivision (c) should be revised to provide that jurisdiction is in the superior court of the county in which the estate of the decedent may be administered. If the estate has already been administered, the court of administration should have jurisdiction.

§ 972.030. Notice of hearing. The notice of hearing should be 30 days rather than 10 days and should inform the recipient of the need to respond before 30 days expires. The staff should examine Probate Code Section 851.5 for other relevant procedural provisions.

§ 972.040. Court order to effectuate proration. The statute should make clear that the court order for proration of estate taxes includes interest and penalties. A provision should be added that the court order is a judgment that may be enforced against the persons against whom estate taxes have been prorated. The order should be appealable.

§ 972.060. Reciprocity of enforcement. Subdivision (c) and the introductory clause of subdivision (a), relating to reciprocity, should be deleted and the title of the section revised accordingly. The staff should give further attention to the need for the section as well as for the reciprocity provision, and the matter perhaps referred to an expert.

§ 975.010. Proration of taxes on generation-skipping transfers. Where changes have been made in the proration of estate tax provisions, parallel changes should be made in the generation-skipping transfer tax provisions.

§ 977.010. Who may commence proceedings. This provision should be drafted parallel to the comparable venue provision for proration of estate taxes.

§ 977.030. Notice of hearing. The notice period should be 30 days.

§ 977.040. Court order to effectuate proration. The court order should be appealable.

STUDY L-1020 - PROBATE CODE (PROBATE CODE SECTION 854)

The Commission considered Memorandum 85-92 and determined that Probate Code Section 854 should be amended as set out below in the probate bill recommended to the 1986 Legislature:

Probate Code § 854 (amended). Option to purchase given in will

SEC. ____ . Section 854 of the Probate Code is amended to read:

854. (a) When any option to purchase real or personal property is given in a will duly admitted to probate, the optionee may petition the court or an order authorizing the executor or the administrator with the will annexed to transfer or convey such property upon compliance with the terms and conditions stated in the will.

(b) The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by ~~Section~~ Sections 1200 and 1200.5 ~~of this code.~~

(c) Such order shall not be made unless the court shall find that the rights of creditors will not be impaired or shall

require bond in an amount and with such surety as the court shall direct or approve. ~~The order shall not be entered unless the court shall find that all inheritance taxes payable in said proceedings have been paid or the State Controller, an inheritance tax attorney or a subordinate inheritance tax attorney has, in writing, consented to the entry of the order by the court.~~

(d) The petition must be filed within any time limitations stated in the will, or, in any event, within ~~six~~ nine months after the issuance of letters testamentary or letters of administration with the will annexed; provided, however, that if any time limitation in the will is measured from the death of the testator such time shall be extended by the period between such death and the issuance of such letters but in no event to more than ~~six~~ nine months after such issuance.

Comment. Section 854 is amended to make three changes:

(1) To delete the former provision that required either a court finding that all inheritance taxes had been paid or consent by the State Controller. Inheritance taxes have been eliminated in California. See Rev. & Tax. Code § 13301.

(2) To add to the notice requirements a reference to Section 1200.5 (notice by mail). When Section 854 was enacted in 1963, the section required notice as provided in Section 1200. At that time, Section 1200 required notice by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in Section 1200.5, but a conforming revision was not made to Section 854. Thus this amendment accomplishes the original purpose of Section 854 as enacted.

(3) To substitute "nine months" for "six months" in subdivision (d). The Law Revision Commission has been advised by probate practitioners that the former six-month period did not allow sufficient time to file the petition.

A conforming amendment to Section 1200.5 (set out below) also should be made in the bill recommended to the 1986 Legislature:

Probate Code § 1200.5 (amended). Notice by mail or personal service

SEC. _____. Section 1200.5 of the Probate Code is amended to read:

1200.5. (a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such.

(5) A petition for the sale of stocks or bonds.

(6) A petition for confirmation of a sale ~~of~~, a petition to grant an option to purchase real property, or a petition to authorize a transfer or conveyance to one given an option to purchase property of the decedent given in a will duly admitted to probate.

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine.

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security.

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property.

(10) A petition for an order authorizing or directing the investment of money.

(11) An account of an executor or administrator or trustee.

(12) A petition for partial or ratable or preliminary or final distribution.

(13) A petition for the delivery of the estate of a nonresident.

(14) A petition for determination of heirship or interests in an estate.

(15) A petition of a trustee for instructions.

(16) A petition for the appointment of a trustee.

(17) Any petition for letters of administration or for probate of a will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued.

(18) A report of status of administration.

(19) A petition for family allowance.

(20) An objection to the appraisement made by the executor, administrator, or probate referee.

(21) A petition under Section 709 for leave to file a claim against the estate after the expiration of the prescribed period.

(22) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have

given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

(c) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(d) This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(e) The notice required by this section shall be in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Comment. Section 1200.5 is amended to add a reference in paragraph (6) of subdivision (a) to a petition to authorize a transfer or conveyance to one given an option to purchase the decedent's property given in a will duly admitted to probate. See Section 854.

STUDY L- 1027 - ESTATES AND TRUSTS CODE (ACCOUNTINGS)

The Commission continued its consideration of Memorandum 85-36 and the First Supplement and Revised Second Supplement thereto, relating to accountings in decedents' estate administration. The Commission made the following decisions relating to the draft statute attached to Memorandum 85-36.

§ 8521. Notice of hearing. A provision should be added in subdivision (d) or another appropriate place that if the petition includes a request for fees, the notice of hearing shall so state.

§ 8522. Contest of account. Subdivision (b) should be rephrased to state that, "At or before the hearing, the contestant shall file written exceptions to the account."

§ 8524. Settlement of claim not properly made or allowed. The Commission considered and rejected the State Bar suggestion that the court may allow a debt paid without a claim if the debt was justly due, "without regard to when payment was made."

§ 8525. Effect of order settling account. The staff should research the case law concerning subdivision (b) to see whether the rule stated in the subdivision has been abrogated.

STUDY L-1030 - PROBATE CODE (DISPOSITION OF
SMALL ESTATES WITHOUT ADMINISTRATION)

The Commission considered Memorandum 85-103 (and the attached staff draft of a Recommendation Relating to Disposition of Estates Without Administration) and the First Supplement to Memorandum 85-103.

The recommendation, with the revisions described below, was approved for printing and submission to the 1986 Legislature. The preliminary portion of the recommendation will need to be revised to reflect the changes made in the statute by the Commission. In addition, the office of the Legislative Counsel in preparing the statute in bill form proposes a few technical or clarifying revisions in the recommended legislation, and these technical or clarifying revisions will be reviewed by the staff in preparing the recommended legislation and included in the recommended legislation if appropriate.

Section 13201 of the recommended legislation imposes a \$35 fee for the services of the court clerk in filing and issuing a certified copy of an affidavit under the affidavit procedure for real property not exceeding \$10,000 in value. The county clerks should be advised of this provision and their comments solicited.

§ 13006. Successor of the decedent

The Executive Secretary reported that the office of the Legislative Counsel in preparing the bill draft had made subdivision (b) of this section a separate section and had made other technical revisions in the section.

§ 13050. Exclusions in determining property or estate of decedent or its value

Subdivision (b)(3) was revised to add "floating home" so that this provision will conform to the provision of the Health and Safety Code which provides an affidavit procedure for transfer of title or registration to a manufactured home, mobilehome, commercial coach, truck camper, or floating home.

§ 13052 (new section). Application of part

A new section was added to the statute, to read substantially as follows:

13052. (a) Except as provided in subdivision (b), this part applies whether the decedent died before, on, or after January 1, 1987.

(b) This part does not apply and the law in effect at the time of payment, delivery, or transfer shall apply if the payment, delivery, or transfer is made pursuant to former Probate Code Sections 630 to 632, inclusive, prior to January 1, 1987.

§ 13100. Transfer of personal property without probate

Section 13100 was revised to delete the phrase "and the gross value of the decedent's real property, if any, in this state does not exceed ten thousand dollars (\$10,000)."

§ 13101. Furnishing of affidavit

Subdivision (f) was deleted to conform to the revision made in Section 13100.

Subdivisions (k) and (1) were revised to read:

(k) "The affiant or declarant requests that the described property be paid, transferred, or delivered to the affiant or declarant."

(1) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

§ 13102. Presenting decedent's evidence of ownership

This section was revised to read as set out below:

13102. (a) If the decedent had evidence of ownership of the property described in the affidavit or declaration and the holder of the property would have had the right to require presentation of the evidence of ownership before the duty of the holder to pay, deliver, or transfer the property to the decedent would have arisen, the evidence of ownership, if available, shall be presented with the affidavit or declaration to the holder of the decedent's property.

(b) If the evidence of ownership is not presented to the holder pursuant to subdivision (a), the holder may require, as a condition for the payment, delivery, or transfer of the property, that the person presenting the affidavit or declaration provide the holder with a bond or undertaking in a reasonable amount determined by the holder to be sufficient to indemnify the holder against all liability, claims, demands, loss, damages, costs, and expenses that the holder may incur or suffer by reason of the payment, delivery, or transfer of the property. Nothing in this subdivision precludes the holder and the person presenting the affidavit or declaration from dispensing with the requirement that a bond or undertaking be provided and instead entering into an agreement satisfactory to the holder concerning the duty of the person presenting the affidavit or declaration to indemnify the holder.

Subdivision (b) above is revised to reflect the substance of a revision suggested by the office of the Legislative Counsel to permit the parties to make an agreement concerning the extent of the liability of the person furnishing the affidavit or declaration. The office of the Legislative Counsel is drafting the precise language along the lines set out above and we will substitute the Legislative Counsel language for the language set out above if it is an improvement on the language set out above.

§ 13103. Inventory and appraisal of real property required

The following was substituted for the second sentence to this section:

The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee

selected by the affiant or declarant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

§ 13105. Transfer of property to successor

The introductory portion of subdivision (b) of Section 13105 was revised to read:

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof within a reasonable time,

The Comment to Section 13105 should be revised to add a statement that under the second sentence of subdivision (b) the holder does not act unreasonably in refusing to pay, deliver, or transfer the property if the refusal is because the holder has reason to believe that there might be estate taxes payable.

§ 13106. Protection of transferor from liability

The last sentence of this section was revised to read in substance:

The holder may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

§ 13110. Personal liability to person having superior right

This section was revised to read in substance as follows:

13110. (a) Except as provided in subdivision (b), each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable to the extent provided in Section 13112 to any person having a superior right by testate or intestate succession from the decedent.

(b) If the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable to the person having the superior right for three times the fair market value of the property. For the purposes of this subdivision, "the fair market value of the property" is the fair market value, valued as of the time the affidavit or declaration is presented under this chapter to the holder of the decedent's property, excluding any liens and

encumbrances at that time on the property paid, delivered, or transferred to the person liable under this subdivision.

(c) An action to impose liability under this section is forever barred five years after the affidavit or declaration is presented under this chapter to the holder of the decedent's property. The five year period allowed for commencing the action is tolled during the minority of the person having the superior right but is not tolled for any other reason.

§ 13111. Restitution if estate proceeding commenced

This section was revised to read in substance:

13111. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from that property and (B) interest at the rate payable on a money judgment on the fair market value of the property. For the purposes of this subdivision, "the fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c), if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, "the fair market value of the property" is the fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on that property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Sections 13109 or 13110.

(d) An action to enforce the liability under this section is forever barred three years after the affidavit or declaration was presented under this chapter to the holder of the decedent's property. The three year period provided in this subdivision is not tolled for any reason.

§ 13112. Limitation on liability

13112. (a) A person to whom payment, delivery, or transfer of the decedent's property has been made under this chapter is not liable under Section 13109 or 13110 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13111.

(b) Except as provided in subdivision (b) of Section 13110, the aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on the property at that time.

§ 13153. Notice of hearing

The first portion of this section was revised to read:

The clerk of the court shall set the petition for hearing. At least 10 days before the hearing on the petition, notice of the hearing . . .

§ 13157. Attorney's fee

The substance of the following was added at the end of Section 13157:

If there is no agreement between the lawyer and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for such services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the lawyer and the client concerning the attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

§ 13200. Filing affidavit in superior court

Paragraphs (8) and (9) of subdivision (a) of Section 13200 were revised to read:

(8) "The affiant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property, and no other

person has a superior right to the interest of the decedent in the described property."

(9) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

Subdivision (c) of Section 13200 was revised to read:

(c) There shall be attached to the affidavit an inventory and appraisement of the real property in the decedent's estate in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisement of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisement shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

§ 13205. Personal liability to person having superior right

Section 13205 was revised to read in substance as follows:

13205. (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.

(b) If the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, "the fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued under Section 13202, of the property the person liable took under the certified copy of the affidavit to which the other person has a superior right, excluding any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. The five-year period allowed for commencing the action is tolled during the minority of the person having the superior right but is not tolled for any other reason.

§ 13206. Restitution if estate proceeding commenced

The substance of the following section was substituted for Section 13206 of the staff draft:

13206. (a) Subject to subdivisions (b), (c), and (d) if proceedings for the administration of the decedent's estate are commenced, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, "the fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, "the fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the estate elects:

(1) The restitution of the property as improved to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B)

the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Sections 13204 or 13205.

(e) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. The five year period provided in this subdivision is not tolled for any reason.

§ 13207. Limitation on liability

Section 13207 was revised to read in substance as follows:

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time.

§ 13502. Election of administration

The substance of the following was substituted for subdivision (a) of Section 13502:

13502. (a) Upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, all or a portion of the following property may be administered under Division 3 (commencing with Section 300):

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the

quasi-community property that belongs to the decedent under Section 101, and the separate property of the decedent.

(2) The one-half of the community property that belongs to the surviving spouse under Section 100 and the one half of the quasi-community property that belongs to the surviving spouse under Section 101.

The Comment should state that this revision continues existing practice. The probate experts advised the Commission that not all of a decedent's estate must be probated under existing law and under present practice less than all of a decedent's estate subject to probate may be probated. Based on this representation, the Commission modified the section to read as set out above.

§ 13505. Application of this part

This section was revised to read:

13505. This part applies whether the deceased spouse died before, on, or after January 1, 1987.

§ 13540. Right of surviving spouse to dispose of real property

The Commission reviewed and approved Section 13540. The letter from the California Land Title Association, indicating that the section is useful in creating marketable titles, was noted.

§ 13542. Dispositions under former law not affected

The words "does not affect" was substituted for "saves" in the Comment to Section 13542.

§ 13550. Personal liability of surviving spouse

Subdivision (a) of Section 13550 was made a separate section, to read substantially as follows:

13550. Except as provided in Sections 951.1, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in that section.

Subdivision (b) should be made a separate section.

§ 13552. Effect of commencement of proceedings for administration
of estate of deceased spouse

Subdivision (b) was revised to apply to creditors "who have or who secure" the acknowledgment in writing of the liability of the surviving spouse. This revision was considered clarifying to make clear that the surviving spouse remains liable where the surviving spouse signed a writing before the death of the other spouse that acknowledged the liability of the surviving spouse for the debt.

§ 13553. Surviving spouse not liable if all property administered (new)

A new section was added as Section 13553 (and Section 13553 of the staff draft was renumbered to be Section 13554). New Section 13553 reads in substance as follows:

13553. The surviving spouse is not liable under this chapter if all the property described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is administered under Division 3 (commencing with Section 300).

§ 13600. Collection of salary or other compensation, not exceeding
\$5,000, by affidavit

A new section, numbered as Section 13600, was adopted, to read in substance:

13600. (a) At any time after a husband or wife dies, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may, without procuring letters of administration or awaiting probate of the will, collect salary or other compensation owed by an employer for personal services of the deceased spouse, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net.

(b) Not more than five thousand dollars (\$5,000) net in the aggregate may be collected by or for the surviving spouse under this chapter from all of the employers of the decedent.

(c) For the purposes of this chapter, a guardian or conservator of the estate of the surviving spouse may act on behalf of the surviving spouse without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

§ 13601. Contents of affidavit or declaration

Existing Section 13600 was renumbered as Section 13601 and subdivision (a) and the introductory portion of subdivision (b) were deleted and replaced by the substance of the following:

13601. (a) To collect salary or other compensation under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the employer of the deceased spouse stating all of the following:

Paragraph (6) was revised to require that the compensation be paid "promptly" to the affiant or declarant.

Paragraph (10) of subdivision (b) was revised to read:

(10) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

It should be made clear that the amount of earnings to be paid to the surviving spouse is \$5,000 net, so that the \$5,000 limit permits the spouse to receive \$5,000 if the net earnings are equal to or exceed that amount.

The persons who can collect on behalf of the surviving spouse should be clearly stated--such as the conservator or guardian.

§ 13601. Payment of earnings by employer

It was suggested that this section might be made the first section in the chapter. The section should be revised to require that the employer "promptly" pay; such a provision should impose a duty on the employer upon receipt of the affidavit promptly to pay the money to the person presenting the affidavit.

§ 13602. Protection of employer from liability

The last sentence should be revised so that it is consistent with the revision made to other comparable provisions in the draft statute.

§ 13604. Rights of heirs or devisees of deceased spouse not affected

A triple damages provision should be added to this provision where the surviving spouse is acting fraudulently.

§ 13650. Filing of petition

The Commission discussed whether this section should be revised to permit the petition to be filed by a person to whom the surviving spouse has given a durable power of attorney that is broad enough to authorize the filing of the petition. The Commission decided not to revise the section.

§ 13653. Filing petition with petition for probate proceeding

The word "filed" was substituted for "joined" in this section.

§ 13654. Probate of will or administration not precluded by petition

The word "filed" was substituted for "joined" in this section.

§ 13655. Notice of hearing

In this section, the word "filed" was substituted for "joined" wherever the word "joined" appears.

§ 13656. Court order

The following sentence was added at the end of subdivision (a):

The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

The following sentence was added at the end of subdivision (b):

If the court determines that property passes to the surviving spouse, the court may issue any further orders which may be necessary to cause delivery of that property or its proceeds to the surviving spouse.

The last portion of the last sentence of subdivision (c) was revised to read:

. . . the court shall issue an order describing the property and confirming the ownership of the surviving spouse and may issue any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

§ 13659. Inventory and appraisal

Before the last sentence of the Comment, the following was added: "The petitioner may consider the independent appraisal useful for purposes of capital gains taxes or other taxes."

§ 13660. Attorney's fee

The substance of the following should be added to Section 13660:

"If there is no agreement between the lawyer and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the lawyer and the client concerning the attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

STUDY L-1032 - ESTATES AND TRUST CODE
(SMALL ESTATE SET-ASIDE)

The Commission considered Memorandum 85-74 (and the attached Draft of Recommendation) and the first and second supplements to that memorandum. The recommendation, with the revisions described below, was approved for printing and submission to the 1986 Legislature. The preliminary portion of the recommendation will need to be revised to reflect the changes made in the statute by the Commission.

§ 6600. "Decedent's estate" defined; exclusions in determining estate
of the decedent or its value

The Comment to this section was revised to read substantially as follows:

Comment. Subdivision (a) of Section 6600 is a new provision that defines "decedent's estate." This definition replaces the phrase "the whole estate" used in former Section 640. As defined in subdivision (a), "decedent's estate" is not limited to probate assets. The term includes all personal property, wherever located, and all real property located in this state, excluding the property described in subdivision (b).

Subdivision (a) requires, for example, that the decedent's one-half share of the community and quasi-community property be included in determining the decedent's estate or its value, whether or not the decedent's interest is set apart to the surviving spouse under Sections 13650-13660, unless the interest is excluded in determining the estate of the decedent under subdivision (b) as would be the case, for example, if the property is held in joint tenancy. This is consistent with prior law. Estate of Pezzola, 112 Cal.App.3d 752, 169 Cal.Rptr. 464 (1980).

Subdivision (a) makes clear that real property located outside California is not included in determining the estate of the decedent or its value. The rule under former Probate Code Section 640 was unclear. See Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971). Apparently real property outside California was not included under former law, since former Section 644 required "an inventory and appraisal to be prepared in the manner prescribed by law and filed within such time as the court may allow" and an inventory and appraisal does not include real property located outside California.

Subdivision (b) of Section 6600 continues former Section 647 without substantive change. Subdivision (b) excludes any interest that terminates at death in determining the estate of the decedent or its value. If the interest is one that passes to another on the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides that the interest is to be transferred or paid to another upon the death of the decedent, subdivision (b)(1) requires that the value of the interest be excluded in determining the estate of the decedent or its value. For example, if there is a policy of insurance on the decedent's life and the proceeds are payable to a named beneficiary (not to the decedent's estate), the insurance proceeds are excluded in determining the estate of the decedent or its value. Similarly, for example, if the decedent has a retirement plan that provides

benefits to a surviving spouse, those benefits are excluded in determining the estate of the decedent or its value. Subdivision (b) also excludes, for example, life interests in trusts and life estates. See Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal.Rptr. 464 (1980); O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985).

§ 6601. "Minor child" defined

The Commission discussed whether the court should be permitted to set aside a small estate to any person to whom a family allowance could be paid. The Commission decided not to expand the scope of the draft.

§ 6604. Contents of petition

This section was revised to delete the language "to the surviving spouse and minor children of the decedent, or one or more of them," in the introductory clause of the section and to add a new paragraph to subdivision (b), to read:

(8) The requested disposition of the estate of the decedent under this chapter and the considerations that justify the requested disposition.

The Comment to Section 6604 was revised to add the substance of the following:

Paragraph (8) is new. This paragraph provides necessary information so that the court may make an appropriate order under Section 6609. Section 6609 permits the court in its discretion to set aside the small estate to the surviving spouse and minor children of the decedent, or any one or more of them. See the Comment to Section 6609. Paragraph (8) requires that the petition request that the estate of the decedent be set aside to the surviving spouse and minor children of the decedent, or one or more of them. The petition, for example, may request that the small estate be set aside to one of the minor children and exclude the other minor children and the spouse, or it may request that the small estate be set aside in unequal shares to the minor children. In determining whether to make such an order, the court must take into account the various considerations listed in subdivision (b) of Section 6609.

Sections 6605 and 6606 of draft

These sections are replaced by the sections set out below:

§ 6605. Filing of petition

6605. (a) If proceedings for the administration of the estate of the decedent are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

(b) If proceedings for the administration of the estate of the decedent are not pending, a petition filed under this chapter may, but need not, be filed with a petition for the probate of the decedent's will or for administration of the estate of the decedent.

(c) A petition may be filed under this chapter at any time prior to the final distribution of the estate.

§ 6606. Persons who may file petition.

6606. (a) A petition may be filed under this chapter by any of the following:

- (1) The person named in the will of the decedent as executor.
- (2) The surviving spouse of the decedent.
- (3) The guardian of a minor child of the decedent.
- (4) A child of the decedent who was a minor at the time the decedent died.
- (5) The personal representative of the decedent if a personal representative has been appointed for the decedent's estate.

(b) The guardian of a minor child of the decedent may file the petition without authorization or approval of the court in which the guardianship proceeding is pending.

§ 6607. Notice of hearing

Subdivision (a) of this section was revised to read:

(a) Where proceedings for the administration of the estate of the decedent are not pending when the petition is filed under this chapter and the petition under this chapter is not joined with a petition for the probate of the decedent's will or for administration of the estate of the decedent, the petitioner shall give notice of the hearing by mail not less than 10 days before the hearing to each heir and devisee of the decedent, and to each person named as executor who is not petitioning, if known to the petitioner. A copy of the petition shall be sent with the notice of hearing given to the surviving spouse, each child, and each devisee, who is not petitioning.

The Comment should note that existing law does not require that a copy of the petition be provided with the notice of hearing.

§ 6608. Inventory and appraisal

A reference to "paragraph (1) of subdivision (a) of Section 605" was substituted for the reference to Section 605.

§ 6609. Court order

The substance of the following was added at the end of subdivision (b) of Section 6609:

If the surviving spouse has remarried at the time the petition is heard, it is presumed that the needs of the surviving spouse do not justify the setting aside of the small estate, or any portion thereof, to the surviving spouse. This presumption is a presumption affecting the burden of proof.

In subdivision (c), the last portion of the subdivision was revised to read:

to the surviving spouse and minor children of the decedent or any one or more of them.

The substance of the following was added at the end of the second paragraph of the Comment to Section 6609:

"Under some circumstances, the court may order that the small estate be set aside to one of the minor children and exclude the other minor children and the spouse, or that the small estate be set aside in unequal shares to the minor children, or that the small estate be set aside to the surviving spouse and exclude the minor children. If determining the assignment to make, the court must take into account the various considerations listed in subdivision (b). See also Section 6604(b)(8) (petition must include the requested disposition of the decedent's estate and the considerations justifying the requested disposition).

§ 6612. Order where estate not set aside

Section 6612 should be revised to refer to petitions "filed" with another petition rather than petitions "joined" with another petition.

§ 6613. Attorney's fee

This section should be revised so that it is consistent with Section 13660 as revised by the Commission. See the discussion of Section 13660 in these Minutes.

§ 6614. Applicability of chapter

This section was revised to read:

6614. This chapter applies only if the decedent died on or after January 1, 1987. If the decedent died before January 1, 1987, the case shall continued to be governed by the law applicable to the case prior to January 1, 1987.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

FAMILY LAW**Retrospective Application of Statute
Deprives Spouse of Due Process
Cite as 85 Daily Journal D.A.R. 3834**

In re the Marriage of
William and Jean Lachenmyer
WILLIAM LACHENMYER,
Respondent,

JEAN A. LACHENMYER,
Appellant.

No. D001582

Super. Ct. No. D173041

California Court of Appeal

Division One

Filed November 18, 1985

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas, Jr., Judge. Reversed.

Steven J. Cote and Richard E. Gattis for Appellant.

Ashley, Brady & Cerniglia and John A. Brady for Respondent.

Jean A. Lachenmyer appeals that portion of the judgment dividing community property which awarded the parties' condominium to her husband, William Lachenmyer, under application of Civil Code section 4800.2.¹ That section provides for reimbursement of separate property contributions to the acquisition of community property.

Jean contends: (1) retroactive application of section 4800.2 is unconstitutional as a deprivation of vested property rights without due process of law; (2) section 4800.2 does not apply to a "gift" of separate property to the community; (3) the trial court improperly applied section 4800.2 in determining William's reimbursement.

We hold retroactive application of section 4800.2 to this case is not constitutionally valid. We need not reach the other issues, and we remand the matter to the trial court for proceedings consistent with this opinion.

FACTS

Jean and William signed a prenuptial agreement on November 18, 1977, and were married in California on December 14, 1977. The agreement listed their items of separate property and provided that these respectively remain their separate property. The agreement provided for amendment by a writing. William listed the Solana Beach condominium here in dispute as his separate property.

On October 23, 1979, William executed a quitclaim deed prepared by Jean, transferring the Solana Beach condominium from William to "William Lachenmyer and Jean A. Lachenmyer, husband and wife as joint tenants."² At the hearing, William testified he made the transfer in response to Jean's threats to leave him at a time when he faced heart surgery. Jean denied making the threats. The parties separated on March 22, 1982. The court issued an interlocutory decree of dissolution on August 17, 1983, and judgment dividing community property on April 16, 1984.

Jean contends retrospective application of section 4800.2 (effective Jan. 1, 1984) is unconstitutional because it deprives her of vested property rights without due process of law. We agree and reverse the trial court's holding that retroactive application of section 4800.2 is constitutionally valid.

The Legislature clearly intended section 4800.2 to apply retroactively. The bill enacting sections 4800.1, 4800.2 and amending section 5110 provided:

"This act applies to the following proceedings:

"(a) Proceedings commenced on or after January 1, 1984.

"(b) Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of the property are not yet final on January 1, 1984." (Stats. 1983, ch. 342, § 4.)

However, legislative intent alone is not sufficient. Retroactive application of the section must pass constitutional muster. We take for guidance on the due process issue the Supreme Court's recent decision in *In re Marriage of Buol*, supra, 39 Cal.3d 751. The Buol court held section 4800.1³ may not constitutionally be applied to cases pending before its effective date; so applied, the section impairs vested property rights without due process of law. (Id., at p. 754.) Section 4800.1 sets a presumption that all property acquired during the marriage in joint tenancy is community property.⁴ The section 4800.1 presumption is rebuttable only by a writing to the contrary.

The question in Buol at trial was the separate versus community property nature of the house which Mrs. Buol purchased with her earnings during the marriage. Title was taken in joint tenancy. The trial court found the parties had an enforceable oral agreement under *In re Marriage of Lucas* (1980) 27 Cal.3d 808, that the earnings and house were Mrs. Buol's separate property. Accordingly, the court awarded Mrs. Buol the house. (Buol, supra, at p. 755.) While appeal was pending, the Legislature enacted section 4800.1.

The Supreme Court stated that at the time of trial, Mrs. Buol had a vested property interest in the house as separate property. It applied the definition used in *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 591, in footnote 7, i.e., "'property rights that are not subject to a condition precedent.'" (Buol, supra, at p. 757, fn. 6.) Under the old law, only proof of an oral agreement was necessary to protect this interest; the section 4800.1 retroactive requirement of a writing to evidence intent to maintain the joint tenancy asset as separate property substantially impaired that interest. The section eliminated "the means by which one might prove the existence of the vested property right [thereby] affect[ing] the vested property right itself." (Buol, supra, at p. 759.)

However, the Supreme Court noted vested rights are not immutable; the state has a "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people." (Bouquet, supra, 16 Cal.3d at page 592.) The court applied its own analysis from Bouquet and *Addison v. Addison* (1965) 62 Cal.2d 558, to conclude that, unlike Bouquet and Addison, the justification for retroactive application did not apply in Buol. Neither does it apply in the instant case.⁵

As the court explained, in both Bouquet and Addison, "the state's paramount interest in the equitable dissolution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws." (Buol, supra, at p. 761.) The Bouquet court retroactively applied an amendment to section 5118 making the postseparation earnings of both spouses, not just the wife, separate property. (Bouquet, supra, 16 Cal.3d at p. 586.) In Addison, the court applied new quasi-community property legislation to property in the husband's name acquired before the quasi-community property concept was enacted. (Addison, supra, 62 Cal.2d at pp. 566-567.) The Buol court continued: "No such compelling reason exists for applying section 4800.1 retroactively. Sec-

tion 4800.1 cures no 'rank injustice' in the law and, in the retroactivity context, only minimally serves the state interest in equitable division of marital property at tremendous cost to the separate property owner." (Buol, supra, at p. 761.)

Section 4800.2 does not cure a rank injustice in the former law. Under the former scheme, a spouse presumptively received no reimbursement for separate property contributions to the community. (Lucas, supra, 27 Cal.3d at p. 816.) However, in the context of the marital relationship, courts validly presumed gratuitous intent when one spouse bestowed separate property on the community. No doubt a recognition of true donative intent attending a transfer during a healthy marriage relationship was the foundation of the presumption. There is nothing unfair about this presumption. Moreover, parties were free to provide for reimbursement by agreement. A similar rule has been deemed "supported by sound policy considerations." (Lucas, supra, 27 Cal.3d at p. 815.) The present case is far removed from the sex-based discrimination at the heart of Bouquet and the inequity in Addison of providing the innocent spouse with nothing in divorce proceedings brought on grounds of adultery. In this case, there is nothing so inherently unfair in preserving the condominium as community property free from reimbursement as to justify the impairment of Jean's vested community property rights in it by imposing a reimbursement requirement that was not present until section 4800.2 became effective.

Retroactive application of section 4800.2 only minimally serves the state interest in equitable division of marital property in cases such as this where the character of the property as community property⁶ is undisputed and the sole question is reimbursement. The section changes the rules of the game by adding a writing requirement with which it is impossible to comply and which the Supreme Court deemed constitutionally infirm in the context of section 4800.1 in Buol. The section's due process violation is compounded by the reversal of the presumption itself and the new requirement of an agreement for nonreimbursement where none at all was required before. This makes for a stronger case than in Buol where retroactive application of section 4800.1 would have vitiated the parties' oral agreement establishing the house as separate property, "which the trial court found to be valid and enforceable under existing law." (Buol, supra, 39 Cal.3d at p. 763.) Section 4800.2's reversal of the presumption of gift and its addition of the requirement of a writing to waive the right to reimbursement serve to make the new 4800.2 presumption more conclusive when applied retroactively than that of 4800.1. (See Buol, supra, at pp. 757-763.) There is no way for Jean to protect her community interest in the condominium free from reimbursement.

Retroactive application of section 4800.2 would result in substantial cost to Jean as the holder of a community property interest in the condominium. William would receive a windfall to which he was not entitled when the community property interest was created. Jean's vested community property interest not subject to reimbursement cannot constitutionally be impinged by retroactive application of section 4800.2.

Judgment reversed.

LEWIS, J.

We Concur:

KREMER, P.J.
STANFORTH, J.

1. All statutory references are to the Civil Code unless otherwise specified. Section 4800.2 provides:

"In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division. As used in this section, 'contributions to the acquisition of the property include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.'"

2. The parties lived in the condominium prior to marriage until approximately September 1981, when they moved to William's father's home. They leased the condominium to tenants after their move. William and Jean remained in the father's home until their separation in March 1982. William inherited the home on his father's death in October 1982, and was living there at the time of the property division.

3. Section 4800.1 provides:

"For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

"(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

"(b) Proof that the parties have made a written agreement that the property is separate property."

4. Before section 4800.1, only the parties' single family residence was subject to the community property presumption (§ 5110, as amended by Stats. 1979, ch. 373).

5. We acknowledge that Jean at the time of the transfer into joint tenancy had a vested property right in the condominium as community property undiminished by reimbursement. (See § 5105; See v. See (1966) 64 Cal.2d 778' 785 [in absence of an agreement, use of separate property for community purposes is a gift to the community].)

6. The trial court apparently relied on the special presumption of community property arising from joint tenancy form of title. Either under former section 5110 or new section 4800.1, the condominium is presumptively community property. Discounting William's claims of duress, the court found the condominium to be community property.

EXHIBIT 2

MEMORANDUM

TO: John H. DeMouly
California Law Revision Commission

FROM: Russell D. Niles

DATE: December 2, 1985

RE: Study L640--Spendthrift Trusts Memorandum 85-87
Staff Draft: Chapter 2. Restrictions on
Voluntary and Involuntary Transfers.
§§ 15300-15309.

The background study prepared for the Commission [dated November 24, 1984, attached to Memorandum 85-61, dated May 31, 1985] posed a number of policy choices to be considered by the Commission. The policy decisions made by the Commission at the August 1985 meeting are reflected in the staff draft of §§ 15300-15309. The purpose of this memorandum is not to challenge any of the basic decisions of the Commission but to suggest a few improvements or clarifications in the draft.

I support the repeal of the Trust Garnishment Law, although it was an improvement over the pre-existing California Law. A statute based on the Restatement of Trusts is preferable and that is why I recommended the Wisconsin statute as a model.

Since I cannot be present at the December meeting, I am submitting comments on several sections and adding a postscript suggesting other changes that logically should be made in certain sections of the Civil Code.

§ 15300 Restraint on transfer of income.

This section is a modernized and extended version of Civil Code § 867. It is not limited to the life of a beneficiary or a lesser term of years, and therefore should not refer to "the" beneficiary but to "a" beneficiary--any income beneficiary. There might be two or more beneficiaries, taking concurrently or serially, for so long as a trust may endure under Civil Code § 771 and interests vest under Civil Code §§ 715.2-716. [The traditional term "alienate" is broader and more accurate than "transfer." Cf. § (1) of the Winconsin statute.]

§ 15301 Restraint on transfer of principal.

Subsection (a) does not carry out the full intent of the Commission. As drafted, "the 'beneficiary's interest in principal" means, or could be construed to mean, "the income beneficiary" as used in the preceding section. I understand that the Commission wants to make all beneficial interests in trust principal to be inalienable while the

trust endures, including a remainder that becomes possessory after the termination of the trust. The initial beneficiary could be entitled to the income (the usual income trust) or to an annuity (payable out of both income and principal) or to periodic payments from principal with the income accumulated (subject to Civil Code §§ 723-725.) During the initial period, or any permitted later period, fixed payments or discretionary payments of principal could be made to the initial or other beneficiary. And at the termination of the trust, the principal could be payable to another beneficiary free of trust. I understand that the Commission contemplates that a settlor may impose a disabling restraint on alienation on any interest in trust principal, contingent, or vested. The word "the" should be changed to "a".

Subparagraph (b) is unclear because the staff has attempted to shield principal payments until the trust terminates. I submit that this is wrong. When trust principal is presently payable, there is no sound reason why a trustee should frustrate a creditor by failing to pay it over. I suggest that either the Wisconsin section (2) or the Restatement § 153 is superior to the present draft.

In my 1984 Memorandum I argued (as have many of my colleagues) that remainders after trusts should not be

subject to a disabling restraint on alienation. I based this on the first Restatement of Property. I must concede that the second Restatement of Property, Donative Transfers, has taken a much different view and has approved reasonable restraints on alienation of remainders, even remainders after legal life estates. The Wisconsin statute is in accord with the view of the Commission. Professor Griswold's model statute permitted no spendthrift restraints on principal. The two states that adopted his statute, however, Louisiana and Oklahoma, deleted Griswold's section and accepted the opposite rule, in accord with Wisconsin.

§ 15302 Trust for Support.

I am not sure that the section is necessary.

§ 1530 Transferee of creditor cannot compel trustee to exercise discretion: liability for payment to or for beneficiary.

This section seems to me to state present California law. I defer to my colleague Professor Edward Halbach. He should be asked about this section.

§ 15304 Where settlor is a beneficiary.

No comment.

§ 15305 Claims for Child or Spousal Support.

The most glaring defect of the California law before the enactment of the Trust Garnishment Law was that a claimant with a judgment for child support could not recover any share of the income of a spendthrift trust without assuming the burden of proving that the trust income was in excess of the amount needed for the support and education of the income beneficiary. If the beneficiary had left the jurisdiction the burden could not be met. The same rule applied to a wife or a former wife with a judgment for support or alimony.

The Trust Garnishment Law allowed a claimant with a judgment for support of a child or a spouse or a former spouse to reach half of the periodic payments of a spendthrift trust unless the beneficiary assumed the burden of proving hardship. The difference in the burden of proof is often decisive.

The current draft states a middle position. A judgment for child or spousal support, subject to subparagraph (d), may be enforced in supplementary proceedings (C.C.P. § 709.010) by an order to pay income or principal to the claimant to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case. The claimant has the burden of proving the

claim to be "equitable and reasonable" but need not prove that the amount is "excess." As Erwin Griswold has said, statutes like C.C.P. § 709.010 may be the "ultimate solution of the spendthrift trust problem."

I am, however, much concerned with the section as it applies to spouses and former spouses, and especially with subparagraph (d).

First of all, neither the Restatement in § 157 nor the Wisconsin statute in paragraph (4) includes a "spouse". The Restatement in § 157 refers to a "wife" but not to a "spouse."

As is made clear in the recent California cases the duty of a beneficiary to support his or her family is based on strong public policy and is quite unlike an obligation assumed by contract. I do not presume to know what public policy should be about spouses or former spouses in childless marriages. Almost all spendthrift trust problems involve a balancing of the rights and interests of the donor, the donee and those who have claims against the donee. It is generally recognized, especially in the later cases, that the donor should not be permitted to give a safe living to a beneficiary and protect him or her from obligations as compelling as the duty to support children. But does public policy require a donor to make his or her benefactions

subject to the claims of a spouse or former spouse (of either sex) of a childless marriage? I think the policy decision could go either way but I do not think it seemly to have the individual case depend on what the donor or the donor's lawyer has provided in the trust instrument. My experience would suggest that the "boiler plate" in all law offices would soon include a provision shielding a beneficiary against claims of a spouse.

I would prefer the Wisconsin decision to limit the favored support claim to children and to leave spouses and former spouses to the remedy afforded by C.C.P. § 709.010. As suggested earlier this remedy is a very substantial one even with the limitations imposed by § 15307 because of the discretion given to the court. While the court must protect the beneficiary in the amount necessary for support and education, the court has the power to determine what that amount is. The court may tailor the relief granted in the individual case, and could impose a lien on the debtor's interest if that was better than a present sale of the interest.

The combination of § 15307 and C.C.P. § 709.010 place claimants other than support claimants in a better position than they occupy in a state without such statutes. The Restatement gives favored claim status under § 157 (b) and

(c) to persons who render necessary services or provide necessary supplies to the beneficiary. The Commission has apparently decided that such a favored claim is not essential in California. Without such a favored claim, the beneficiary may not receive credit at the grocery store, or even be admitted to some hospitals, or be accepted as a patient or a client by some professionals. Nevertheless a plaintiff with a claim for necessaries does not have too difficult a burden of proof under C.P.C. § 709.010 because essential services should count as part of the reasonable support of the beneficiary. The Wisconsin statute has no provision for a favored claim beyond child support (and support by public institutions) and I agree that it is not essential. Some reference to this problem should be made in the commentary.

There is one other related problem. Should a beneficiary of a spendthrift trust be able to assign a share of the benefits of a spendthrift trust for the support of a child or a spouse? Such assignments are valid in New York under statutes similar to the staff draft. It would be helpful to the Bar if the Commission would deal expressly with this problem.

§ 15306 Liability for public support.

I have not studied all phases of this problem. I still think that the Commission should ask a qualified person to make a study. If that is not feasible, I suggest that § 15306 be sent to Professor Frolik of the Pittsburgh Law School with a request that he give the Commission the benefit of his criticism.

§ 15307 Income in excess of amount for education and support subject to creditor's claim.

This was discussed in connection with § 15305.

§ 15308 Subsequent modification of Court's order.

Necessary.

§ 15309 Disclaimer not a transfer.

Necessary.

ADDENDUM

1. § 15301 will require repeal or modification of C.C. § 711. See also C.C. § 699.
2. It is not settled in California whether or not a remainder after a trust is an equitable or a legal interest while the trust endures. See C.C. § 871. See also C.C. § 865 and § 826. When a settlor transfers property to a trustee, to pay income to A for life, and at A's death to transfer the property to B outright, is the duty of the trustee to transfer the property an active duty that prevents the Statute of Uses from executing the use? Many questions about remaindermen being necessary parties to trust litigation, about statutes of limitation, etc. depend on whether or not the trustee represents all beneficiaries. The Commission in § 15301 apparently consider remainders after spendthrift trust to be equitable interests. If so, why not clarify the confusion in the California law? See Scott, Trusts 3d. ed. §§ 69-71.

EXHIBIT 3

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WALTER T. SHATFORD II
WALTER T. SHATFORD III

November 20, 1985

MEMO TO ARTHUR K. MARSHALL

In re: Law Revision as to Trusts for the Handicapped

1. The number of handicapped persons in this state is very large. As used herein I refer to those who cannot cope without help. Thus I include the mentally ill (with over 2,000,000 in the U.S. and 100,000 fresh ones each year), the developmentally handicapped, elderly with Alzheimer's, etc.

2. Many parents of modest means want to provide for the comfort of the handicapped person. They don't want to have the modest estate used to replace, for example, a monthly S.S.I. check of around \$400, but want the money to be used for needs for which the government check is not enough and also to provide an anchor to windward if the government benefit, due to a change in law, should be cut off.

3. Normally a resort is had to the trust device, either testamentary or in life.

4. In trying to advise clients we enter a real morass. While the Restatement of Trusts 2nd, Section 157, appears to allow favored creditors, including the U.S. and a state, to reach the trust, California seems to allow for a trust which is to be for items needed in excess of governmental help. C.C. 859 only allows creditors to reach the surplus of a trust if "no valid direction for accumulation is given." In Estate of Lawrence (1968) 267 C.A.2d 77, 72 C.R.851, there was a direction for accumulation, yet the court blithely said, at pg. 83:

"But we do not think it was intended that, where as here, a valid direction is given for the accumulation of surplus income, the entire effect of section 859 is thereby nullified. Rather, we think the section should be construed so as to permit creditors to reach mandatory payments due from a trustee to the beneficiary of a spendthrift trust provided, of course, a finding is made, based upon sufficient evidence, that such payments are not necessary for the education and support of the beneficiary."

5. If section 859 is not to be given its plain meaning then

November 20, 1985

it should be revised to reflect the above ipse dixit. Personally I favor its plain meaning, buttressed by language tossing out the judicial exception.

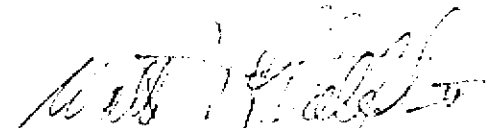
6. The nationwide confusion is well illustrated by the annotation at V-21 ALR 4th 729, entitled "ELIGIBILITY FOR WELFARE BENEFITS AS AFFECTED BY CLAIMANT'S STATUS AS TRUST BENEFICIARY".

7. Witkin, Summary of California Law, 5th Ed., deals with the problem at pages 5452-5460, but leaves matters fairly well up in the air.

8. Incidentally, a typical trust provision is that set forth in the enclosed page 75 from "Alternatives, A Family Guide to Legal and Financial Planning for the Disabled".

9. Most experts in the field agree that the common trust provision for disbursements to be made by the Trustee according to his discretion as to what is needed for support, taking into account other sources of income or principle, is thought to be a sure loser.

10. There is a real need for unfortunate parents to at least know where they stand.



WALTER T. SHATFORD II

WTS/ayr

Encl.

Sprinkling trusts. The sprinkling trust allows the trustee to have the decision-making power to distribute income and principal among a number of beneficiaries. The trustee controls the timing and the amount of the distributions. The trustee can distribute larger amounts of income and principal to the beneficiary who is in the most need. For example, you might create a sprinkling trust for your five children, one of whom is handicapped. In one year, your handicapped child might need an operation and the trustee would distribute a larger portion of the trust income to pay for the operation. In another year, the trustee might spend the larger portion of the income on another child for college tuition. In a third year, the trustee might distribute the income equally among the five children.

This sprinkling trust can be combined with "supplemental benefits" language. The trustee has discretion to distribute principal and income according to the needs of the healthy beneficiaries and is restricted to distribute funds to the mentally disabled beneficiary only in excess of funds supplied by government agencies. It is believed that this type of trust would be very difficult for the state to collect from because not only does it contain the "supplemental benefits" language but it would also be unfair to the other beneficiaries for the state to seize the trust assets. This type of language could be drafted something like this:

This trust shall be designated "The Smith Children's Trust," and the beneficiaries shall be George Smith, Sally Smith, and Timothy Smith. Upon the death of my wife, or upon my death if she predeceases me, the trustee shall hold the balance of my estate for the benefit of the beneficiaries above-named in a common fund and, as to George Smith and Sally Smith, shall pay as later defined whatever part of the income and/or principal the trustee deems necessary and desirable for the comfortable care, support, maintenance, medical care, welfare, and education of the beneficiaries. As to my son, Timothy Smith, the trustee may make payment only for extra and supplemental care, maintenance, support, and education in addition to and over and above the benefits Timothy Smith otherwise receives as a result of his handicap or disability from any local, state, or federal government or from any private agency, any of which provides services or benefits to handicapped persons. It is the express purpose of the grantor to use the trust estate only to supplement other benefits received by this beneficiary.

Short-term trust. The short-term trust, also called the Clifford or reversionary trust, can accumulate money for a disabled person and provide a tax shelter for the creator of the trust. The creator of the trust places assets into a trust as a temporary gift to the disabled