

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

jd10
9/3/86

<u>Time</u>	<u>Place</u>
September 4 (Thursday) 3:00 p.m. - 8:00 p.m.	State Capitol
September 5 (Friday) 9:00 a.m. - 3:30 p.m.	Room 125 Sacramento

REVISED FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

September 4-5, 1986

1. **Minutes of July 17-18, 1986, Meeting (sent 7/24/86)**

2. **Administrative Matters**

Approval of Subcommittee Actions at Commission Meetings
Held June 26-27, 1986, and July 17-18, 1986

Election of Officers

Memorandum 86-67 (sent 6/16/86)

Schedule for Future Meetings

Proposed Schedule for 1st Quarter of 1987 (attached)

Budget for 1987-88

Memorandum 86-78 (sent 8/28/86)

Discussion of Estate and Trust Code Schedule

See project schedule attached

3. **1986 Legislative Program**

Memorandum 86-73 (sent 8/26/86)

4. **Study F-603 - Retroactive Application of Property Division
Legislation**

Memorandum 86-74 (sent 7/30/86)

Background Study (attached to Memorandum)

5. **Study L-1033 - Estate and Trust Code (Determining Class Membership)**
Memorandum 86-56 (sent 5/19/86)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 86-56 (sent 7/7/86)
6. **Study L-1040 - Estate and Trust Code (Public Guardians and Public Administrators)**
Memorandum 86-54 (sent 6/4/86)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 86-54 (sent 7/7/86)
Second Supplement to Memorandum 86-54 (sent 8/22/86)
Third Supplement to Memorandum 86-54 (sent 8/26/86)
Portion of Memorandum 86-79 (sent 8/28/86)
7. **Study L - Terminology Used in Comments to Indicate How New Section Compares With Existing Law**
Memorandum 85-113 (sent 3/21/86)
First Supplement to Memorandum 85-113 (sent 5/12/86)
Portion of Memorandum 86-79 (sent 8/28/86)
8. **Study L-1038 - Estate and Trust Code (Abatement)**
Memorandum 86-59 (sent 6/4/86)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-59 (sent 6/18/86)
Second Supplement to Memorandum 86-59 (sent 7/24/86)
Portion of Memorandum 86-79 (sent 8/28/86)
Letter from State Bar Team 4 (handout at meeting)
9. **Study L-1035 - Estate and Trust Code (Administration of Estates of Missing Persons)**
Memorandum 86-57 (sent 5/19/86)
Draft of Tentative Recommendation (attached to Memorandum)
Portion of Memorandum 86-79 (sent 8/28/86)
10. **Study L-1046 - Estate and Trust Code (Nonresident Decedent)**
Memorandum 86-61 (sent 6/18/86)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-61 (sent 8/28/86)
Second Supplement to Memorandum 86-61 (sent 8/28/86)
Portion of Memorandum 86-79 (sent 8/28/86)

11. **Study L-655 - Estate and Trust Code (Inventory and Appraisal)**

Memorandum 86-75 (sent 7/30/86)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 86-75 (sent 8/22/86)

12. **Study L-1047 - Estate and Trust Code (Appeals)**

Memorandum 86-76 (sent 7/30/86)
Draft of Statute (attached to Memorandum)
Letter from State Bar (handout at meeting)

13. **Study L-1045 - Estate and Trust Code (Definitions)**

Memorandum 86-77 (sent 8/28/86)
Draft of Tentative Recommendation (attached to Memorandum)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 4-5, 1986
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on September 4-5, 1986.

Law Revision Commission

Present: Edwin K. Marzec, Chairperson
Bion M. Gregory (Sept. 4)
Roger Arnebergh
Tim Paone
Ann E. Stodden

Absent: Bill Lockyer, Member of Senate
Alister McAlister, Member of Assembly
Arthur K. Marshall, Vice Chairperson

Staff Members

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

Consultant Present

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

Other Persons Present

Edward V. Brennan, California Probate Referees' Association,
San Diego
James D. Devine, State Bar Estate Planning, Trust and
Probate Law Section, Monterey
Nancy E. Ferguson, California Probate Referees' Association,
Chico
Beverly Jean Gassner, Executive Committee, State Bar Family
Law Section, Ontario (Sept. 4)
Valerie J. Merritt, Probate and Trust Law Section, Los
Angeles County Bar Association, Los Angeles
Kenneth Petrulis, Probate Trust and Estate Planning
Section, Beverly Hills Bar Association, Beverly Hills
James Quillinan, State Bar Estate Planning, Trust and Probate
Law Section, Mountain View (Sept. 5)
James R. Scannell, Public Administrator and Public Guardian,
San Francisco (Sept. 4)
James A. Willett, State Bar Estate Planning, Trust and
Probate Law Section, Sacramento
Shirley Yawitz, California Probate Referees' Association, San
Francisco (Sept. 5)

ADMINISTRATIVE MATTERS

MINUTES OF PREVIOUS MEETINGS

Minutes of May 15-16, 1986, Meeting. The Commission approved the action of the subcommittee at the June 26-27, 1986, Meeting in approving the Minutes of the May 15-16, 1986, Meeting (With the corrections noted on page 2 of the Minutes of the June 1986 Meeting).

Minutes of June 26-27, 1986, Meeting. The Commission approved the action of the subcommittee at the July 17-18, 1986, Meeting in approving the Minutes of the June 26-27, 1986, Meeting (as submitted by the staff).

Minutes of July 17-18, 1986, Meeting. The Commission approved the Minutes of the July 17-18, 1986, Meeting, with the following corrections:

On page 9, in the portion of the text of Section 9620 set out in the Minutes, the word "estate" should be in strikeout.

On page 9, in the portion of the text of Section 9621 set out in the Minutes, the word "estate" should be in strikeout.

On page 17, in paragraph (4) of subdivision (e) of Section 10200, set out near the bottom of the page, the material in strikeout should be underscored.

ACTIONS OF SUBCOMMITTEES AT PREVIOUS MEETINGS

The Commission approved the actions of the subcommittees at the June 26-27, 1986, Meeting, and the July 17-18, 1986, Meeting, and the actions of the subcommittees were adopted as actions of the Commission.

ELECTION OF OFFICERS

The Commission elected Arthur E. Marshall as Chairperson of the Commission and Ann E. Stodden as Vice Chairperson of the Commission. The Commission will determine the term of their offices at the October meeting.

FUTURE MEETINGS

October 1986

16 (Thursday)	3:00 p.m. - 8:00 p.m.	The Newporter
17 (Friday)	9:00 a.m. - 4:00 p.m.	1107 Jamboree Road Newport Beach 92660 (714) 644-1700

November 1986

13 (Thursday)	3:00 p.m. - 8:00 p.m.	State Capitol
14 (Friday)	9:00 a.m. - 3:30 p.m.	Sacramento

December 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Holiday Inn
5 (Friday)	9:00 a.m. - 4:00 p.m.	150 E. Angeleno Burbank 91510 (818) 841-4770

January 1987

15 (Thursday)	3:00 p.m. - 8:00 p.m.	State Bar Bldg.
16 (Friday)	9:00 a.m. - 4:00 p.m.	San Francisco

February 1987

19 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
20 (Friday)	9:00 a.m. - 4:00 p.m.	

March 1987

12 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
13 (Friday)	9:00 a.m. - 3:30 p.m.	

BUDGET FOR 1987-88

The Commission approved the staff-proposed budget for the 1987-88 fiscal year which was attached to Memorandum 86-78.

The Commission approved the purchase of a new copying machine with money available for expenditure during the 1986-87 fiscal year. The machine is to be one determined by the Department of General Services to be suitable for use by the Commission and will cost approximately \$16,000. The purchase is subject to obtaining approval of the Department of Finance (1) to expend the remainder of a continuing appropriation made in a prior fiscal year (approximately \$7,000) and (1) to transfer the remainder of the amount required to purchase the machine (estimated to be approximately \$9,000) from the category of outside consultants to equipment.

1986 LEGISLATIVE PROGRAM

The following is a report on the 1986 Legislative Program.

Enacted

Statutes of 1986, Ch. 49 - Assembly Bill 625 - Buol Case Urgency Bill (provides that 1983 statute applies only to proceedings commenced after January 1, 1984)

Statutes of 1986, Ch. 783 - Assembly Bill 2625 - Comprehensive Probate Bill (Disposition of Estate Without Administration; Small Estate Set-Aside; Proration of Estate Taxes; Technical and Clarifying Revisions) (Signed by Governor 9/14/86)

Statutes of 1986, Ch. 820 - Assembly Bill 2652 - Comprehensive Trust Statute (Signed by Governor 9/14/86)

Statutes of 1986, Res. Ch. 65 - Assembly Concurrent Resolution 93 - Continues Commission Authority to Study Topics Previously Authorized for Study

Dead

Assembly Bill 2626 - Reservation of Legislative Power for Disposition of Property in Marriage Dissolution Cases (Heard by Assembly Judiciary Committee on February 25 and not sufficient votes in favor of bill to approve it)

Referred to Inactive File at Request of Commission

Assembly Bill 195 - Law Revision Commission Statute

STUDY F-603 - RETROACTIVE APPLICATION
OF PROPERTY DIVISION LEGISLATION

The Commission considered Memorandum 86-74 and the attached background study prepared by Professor Reppy relating to retroactive application of property division legislation. The Commission also heard the view of the State Bar Family Law Section Executive Committee expressed by Beverly Gassner that this session's enactments may also be held unconstitutional under Buol and Fabian, and that if this occurs the situation will be intolerable. The Commission decided to defer decision on possible future legislation until it receives the Executive Committee's analysis of the solution proposed by Professor Reppy, as well as comments on the possibility of a more stringent burden of proof or of a constitutional amendment.

STUDY L - ESTATE AND TRUST CODE SCHEDULE

The Commission discussed the schedule on the Estate and Trust Code. The Commission determined that it would not be possible to submit the entire new code for enactment in 1987. The Commission determined that it would submit the the 1987 Legislature portions of the new code as amendments and additions to the existing Probate Code. The staff is to recommend to the Commission at the October meeting those portions that might be submitted to the 1987 Legislature.

STUDY L - TERMINOLOGY USED IN COMMENTS

The Commission considered Memorandum 85-113 and the First Supplement thereto relating to the terminology used in comments to indicate how a new section compares to existing law. The proposal to include an explanation of this terminology in the Comment to Section 2 of the new code was approved. The Commission decided to discontinue the use of the phrase "continues without substantive change" and to use "restates without substantive change" instead.

STUDY L-655 - ESTATE AND TRUST CODE (INVENTORY AND APPRAISAL)

The Commission considered Memorandum 86-75 and the first supplement thereto, together with letters from the Beverly Hills Bar Association Probate, Trust and Estate Planning Section Legislation Committee (attached to these Minutes as Exhibit 1, relating to inventory and appraisal. The Commission made the following decisions concerning the draft tentative recommendation attached to the memorandum.

§ 406. Political activities of probate referee. Subdivisions (a)(1) and (a)(2) should be reversed for clarity, with (2) an exception to (1). Subdivision (c) should be adjusted accordingly, and should also include a reference to reappointment. A provision should be added to make removal mandatory in case of violation of the section.

§ 8805. Failure to timely file inventory and appraisal. The Comment to this section should note that liability for injury would include attorney's fees incurred in compelling the filing of the inventory and appraisal. The provisions on accountings should be expanded to include a procedure for compelling the filing of an inventory and appraisal, and a cross-reference included in this section.

§ 8851. Claims against personal representative. This section was deleted, and the Comment to the repealer should note that it was unnecessary.

§ 8871. Examination. Subdivision (c) was revised to provide for a reasonable attorney's fee.

§ 8872. Subpoena to appear and account. This section should utilize the citation procedure.

§ 8901. Appraisal by personal representative. The first sentence of subdivision (a)(1) should refer to "Money and other cash items." Subdivision (b) should be made into a separate section.

§ 8903. Waiver of appraisal by probate referee. The reference to waiver within four months was deleted in reliance on the general provisions requiring prompt appraisal. The staff was directed to bring this section back for further Commission review at the October Commission meeting after the Governor has acted on AB 2896 (Harris).

§ 8907. Retention of records by probate referee. This section was revised to require that the records be offered to the personal representative rather than to the beneficiaries. The records may be offered at any time, but should be held for three years, after which they may be destroyed without further notice.

§ 8920. Designation by court. This section should be expanded to apply either where there is no person available or where the court does not designate an available person.

§ 8961. Amount of commission and expenses. The staff was directed to bring this section back for further Commission review at the October Commission meeting after the Governor has acted on AB 2896 (Harris).

STUDY L-1033 - ESTATE AND TRUST CODE (DETERMINING CLASS MEMBERSHIP)

The Commission considered Memorandum 86-56 and the First Supplement thereto relating to determining class membership. The Commission approved the draft tentative recommendation for distribution for comment, with the revised version of Section 323 set out in the First Supplement.

STUDY L-1035 - ESTATE AND TRUST CODE
(ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD)

The Commission considered Memorandum 86-75 relating to administration of estates of missing persons presumed dead. The Commission approved the the draft tentative recommendation to be distributed for comment, subject to the following decisions:

§ 12406. Determination whether person is person presumed to be dead;
search for missing person

Subdivision (b)(1) should be revised as follows:

(1) Inserting in one or more suitable *newspapers* or other periodicals a notice requesting information from any person having knowledge of the whereabouts of the missing person.

§ 12408. Recovery of property by missing person upon reappearance

The Commission considered but rejected the suggestion of the Los Angeles County Bar Association (see the letter attached to Memorandum 86-79) that subdivision (a)(2) be revised to refer to property "or any interest therein." It was noted that Section 62 defines "property" to include an interest therein.

§ 12409. Application of part

The comment to this section should explain why these provisions apply only to cases in which the petition is filed after December 31, 1983. This section continues the operative date of the 1983 revision of this procedure which is appropriate since the current revision does not change the substance of the 1983 revision.

STUDY L-1038 - ESTATE AND TRUST CODE (ABATEMENT)

The Commission considered Memorandum 86-59, the First and Second Supplements thereto, the portion of Memorandum 86-79 with comments from the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association relating to abatement, and a report dated August 28, 1986, from Study Team 4 of the Executive Committee of the Estate Planning, Trust and Probate Law Section that was handed out at the meeting. A copy of the report of Study Team 4 is attached to these Minutes as Exhibit 2. The Commission made the following decisions:

One Set of Definitions For Abatement and For Interest and Income

The Commission thought it would be best to have one set of definitions applicable both to the article on abatement and to the article on distribution of interest and income accruing during administration. The staff should consider whether those two sets of provisions should be combined in a single chapter, with definitions applicable to the entire chapter.

§ 6191. Purposes for which abatement made

The Commission revised Section 6191 to read:

6191. Except as provided in Sections 6562 and 6573, shares of distributees abate as provided in this article for all purposes, including payment of the matters specified in Section 11420, satisfaction of preferred devises, and payment of expenses on specifically devised property pursuant to Section 6184, and without any priority as between real and personal property.

§ 6192. Order of abatement

The Commission decided not to adopt the scheme of Section 6192 requiring general and specific devises to abate pro rata. Instead, the Commission decided to keep existing law which requires general devises to abate before there is any abatement of specific devises. The preference for the testator's spouse and kindred will be within each class, so that general gifts to nonrelatives must abate first, then general gifts to the testator's spouse and kindred, then specific gifts to nonrelatives, and finally specific gifts to the testator's spouse and kindred.

§ 6193. Court discretion to carry out testator's intent

The Commission decided to keep the bracketed language "or purpose" in Section 6193.

§ 6194. Abatement after sale or use incident to administration

A question was raised whether Section 6194 should be deleted as covered by Section 6191. Professor Halbach thought Section 6194 would be useful where one specifically devised asset must be sold, so that other specific devisees may be required to "contribute" to achieve abatement, rather than requiring every specifically devised asset to be sold. The Commission was persuaded by this view, and decided to keep Section 6194.

When specifically devised property is sold or used, Section 6194 should make clear what valuation is used for the property in fixing the amount of the contribution from other specific devisees. The staff should consider what valuation date should be used. Should it be date of death? Date of sale? Should the specific devisee get the benefit of an increase in the value of the property since death? Should the specific devisee bear a loss in value since death? Should the value specified in the inventory and appraisal be used?

The Commission decided to change the language "sold or used incident to administration" to "sold or used during administration."

The staff should consider whether the substance of Section 6194 should go in a subdivision of Section 6191, rather than in a separate section.

§ 6195. No sale of specific devise to exonerate other devise

The Commission approved Section 6195 as set out in the First Supplement to Memorandum 86-59.

Abatement in Pretermission Cases

The Commission approved the staff recommendation to keep the special pro rata abatement rule for pretermission cases (Prob. Code §§ 6562, 6573).

STUDY L-1040 - ESTATE AND TRUST CODE
(PUBLIC GUARDIANS AND PUBLIC ADMINISTRATORS)

The Commission considered Memorandum 86-54 and the first three supplements thereto, together with a portion of Memorandum 86-79 (comments of Los Angeles County Bar Association), relating to public guardians and public administrators. The Commission approved the draft tentative recommendation for distribution for comment, after making the following changes.

§ 2905. Termination of authority of public guardian. A sentence should be added to this section to the effect that letters may be issued to "the public guardian" of a county, and upon appointment of a successor public guardian, such letters are sufficient to authorize the successor to act. The Comment to this section should note that this recognizes the practice in some counties.

§ 2907. Advance on expenses of public guardian. The first sentence of subdivision (b) was revised to read: "As a means of advancing necessary expenses of a public guardian, the county board of supervisors may establish a revolving fund to be used by the public guardian." The Comment should emphasize that to the extent the funds in the estate are insufficient to reimburse the county for advances, the expenditures are a county charge.

§ 2920. Taking possession or control of property. This section should be limited to an award of "reasonable" costs.

§ 2921. Application for appointment. A provision for 15 days notice and an order after a hearing should be added to this section.

§ 2923. Letters, oath, and bond. This section should be revised to provide for issuance rather than procurement of letters, and a provision added that letters may be issued to the "public guardian" of a county without naming the public guardian.

§ 2942. Inventory and appraisal of estate. This section should be removed from the current draft and the Commission will consider a comparable provision applicable to all conservatorship estates, not just those handled by the probate referee, that would excuse appraisal of small estates and estates not involving sales. The staff was directed to develop a draft along these lines, in consultation with the public guardians and the probate referees.

§ 2943. Disposition of property on death of ward or conservatee. The Comment to this section should note that for estates over \$5,000 and under \$10,000, the Probate Code Section 1143 procedure is available.

§ 2944. Expenses of public guardian. The words "pro rata" were deleted from the draft. The \$4,000 figure should be adjusted to correspond to whatever small-estate non-appraisal figure is adopted. The justification for this provision should refer to the cost of liability coverage for the public guardian as well as the cost of the official bond.

§ 7600. Notice of death. This section should be deleted in reliance on other duties (see Section 7620).

§ 7620. Report of public officer or employee. "Misappropriation" should be added to this section, and reference should be made to property "subject to" rather than "liable to" loss.

§ 7623. Providing information and access. "Misappropriation" should be added to this section, and reference should be made to property "subject to" rather than "liable to" loss.

§ 7641. Appointment of public administrator. This section should be adjusted to parallel Section 2944.

§ 7645. Expiration of term of office. This section should be adjusted to parallel Section 2905.

§ 7680. Summary disposition authorized. The word "further" should be deleted from subdivision (a)(1). Subdivision (c) should read: "Nothing in this article precludes the public administrator from filing a petition with the court pursuant to any other provision of this division." The Comment should note that this would include interpretation of a will or determination of persons entitled to distribution.

§ 7682. Payment of demands. The word "attorney's" should be deleted from subdivision (a).

§ 7683. Distribution of property. The Comment should make reference to Military and Veterans Code Section 1035, and that section should be amended to provide that the post is a beneficiary for purposes of distribution. The introductory portion of subdivision (b) should read: "If there are no beneficiaries", and the subdivision should be revised to provide for escheat to the county in all summary disposition cases. Subdivision (c) would no longer be necessary.

§ 7685. Public administrator's statement of disposition. This section should excuse filing with the clerk for estates under \$10,000, but a Note should call attention to this change and solicit comments on it.

STUDY L-1045 - ESTATE AND TRUST CODE (DEFINITIONS)

The Commission considered Memorandum 86-77 relating to definitions and approved the draft tentative recommendation to be distributed for comment, subject to the following decisions:

§ 21. Account

This section should be revised as follows to avoid any confusion with accounts submitted in the course of an accounting:

21. "Account" means, when used to mean a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangement.

§ 23. Annulment of marriage

This section defining "annulment of marriage" to include adjudication of nullity of marriage was deleted as unnecessary. It was noted that the Civil Code uses a variety of terminology, including "annul", "annulment", "declared a nullity", "adjudged a nullity", and "judgment of nullity".

§ 48. Interested person

When this tentative recommendation is distributed, the last sentence of the note relating to the possible need to revise the definition to conform with the guardianship and conservatorship law, which follows the comment should be omitted.

§ 59. Predeceased spouse

Subdivision (c) relating to a "valid proceeding concluded by a judgment purporting to terminate all marital property rights" should be deleted because it is confusing, misleading, and unnecessary.

§ 78. Surviving spouse

Subdivision (c) should be deleted for the same reason as subdivision (c) of Section 59.

Subdivision (d), relating to a situation where divorced persons remarry each other, should be deleted because it is unnecessary in light of the basic requirement that the parties be married at the time of the decedent's death.

§ 82. Trust

The Commission approved the substance of the following provision to be added to the Trust Law (Division 9 commencing with Section 15000):

Nothing in this division or in Section 82 is intended to prevent the application of all or part of the principles or procedures of this division to an entity or relationship that is excluded from the definition of "trust" provided by Section 82 where these principles or procedures are applied pursuant to statutory or common law principles, by court order or rule, or by contract.

Section 82 should be revised to provide that it is subject to the above provision. A bill should be introduced to accomplish these revisions before the Trust Law becomes operative on July 1, 1987.

STUDY L-1046 - ESTATE AND TRUST CODE (NONRESIDENT DECEDENT)

The Commission considered Memorandum 86-61 and the attached staff draft of provisions relating to nonresident decedents, the First and Second Supplements to Memorandum 86-61, and the portion of Memorandum 86-79 with comments of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association relating to nonresident decedents. The Commission made the following decisions:

Elimination of Published Notice for Small Deposits

Existing law requires publication of notice before a personal representative from another state may use the summary collection procedure to remove funds on deposit in a California financial institution. Prob. Code § 1043a. The Commission decided to eliminate publication of notice if the amount on deposit is \$1,000 or less. In such a case, the cost of publication is too great in relation to the size of the account.

As under existing law, there should be a 30-day waiting period to permit a creditor, heir, or beneficiary to appear and assert a claim. If no claim is made during the 30-day waiting period, the financial institution may deliver the funds to the personal representative without any showing that notice has been published.

§ 12504. Foreign personal representative

The Commission decided to define "foreign personal representative" to mean a personal representative appointed in another state (defined in Probate Code Section 74), and not to include a personal representative appointed in a foreign country. The effect of this is to continue existing law, and to reject the staff recommendation to permit a personal representative appointed in a foreign country to use California's summary collection provisions (see proposed Section 12550) and to receive property ordered to be distributed in California ancillary administration (see proposed Section 12530). The staff should check to make sure this decision does not conflict with most-favored-nation treaties.

§ 12521. Petition for probate of will

Subdivision (a) of Section 12521 requires a petition for probate of a nonresident decedent's will to include "[a]n authenticated copy of the will." This should be revised to read "[t]he will or an authenticated copy thereof."

§ 12530. Conditions for distribution

Subdivision (a) should be revised to authorize distribution to the foreign personal representative of "the personal property of a nonresident decedent in this state". This makes clear that the section does not authorize distribution of real property to a foreign personal representative.

Under existing law, in the absence of a finding that distribution to the foreign personal representative is for the best interests of the estate, it appears that the California court in ancillary administration may make distribution directly to estate beneficiaries. See In re Estate of Hudson, 63 Cal. 454 (1883); 2 California Decedent Estate Administration § 34.56, at 1376 (Cal. Cont. Ed. Bar 1975). The Commission discussed whether Section 12530 should expressly authorize distribution to estate beneficiaries, but ultimately decided not to put this authority in the section. However, the Comment to the section should note that the court has this power.

§ 12551. Notice of intent to collect

The Commission decided to increase the 30-day notice period for collection of funds on deposit in a financial institution to the four-month period applicable to all other kinds of personal property.

§ 12552. Payment or delivery to foreign personal representative

The Commission was troubled by the reference in the introductory clause to a "debt" owed to the decedent. Perhaps this is comprehended within the meaning of "personal property of the decedent." The staff should consider whether this usage of the term "debt" is consistent with other statutory sections. If this usage is not uniform, the Commission wanted the introductory clause revised to say: "The person ~~indebted to or~~ holding money or personal property of the decedent shall ~~pay the debt or~~ deliver the money or property to the foreign personal representative"

Paragraph (2) of subdivision (b) of Section 12552 should be revised to read:

- (b) The foreign personal representative has presented to the person all of the following documents:
 - (1)

(2) An authenticated copy of the letters of the foreign personal representative and an affidavit that the foreign personal representative ~~was validly appointed by a court of competent jurisdiction in the foreign jurisdiction~~ is still serving in that capacity.

(3) An affidavit that to the best of affiant's knowledge, in this state there is no other personal representative of the decedent, no petition for appointment of a personal representative is pending, and no ancillary administration will be commenced.

The Comment should make clear that when a creditor or beneficiary objects to removal of the decedent's property from this state, the person holding the property should continue to hold it until ancillary administration proceedings are commenced, and then should deliver the property to the California representative.

§§ 12560-12564 (distribution based on foreign order)

The Commission deleted all of proposed Article 2 (distribution of California real property based on final decree of distribution in another jurisdiction). The Commission thought the proposed article was not useful, particularly in view of the newly-enacted summary procedure for a court order to determine succession to real property (Prob. Code §§ 13150-13157) and for collection of real property of small value by affidavit (Prob. Code §§ 13200-13209).

§ 12570. Filing proof of authority

Subdivision (c) of Section 12570, which reads "[a]ny will of the decedent", should be revised to read "[t]he decedent's will, if any".

§ 12571. Sale of real property

The Commission deleted Section 12571. The Commission was concerned that sale of real property without ancillary administration might not give enough protection to California creditors. Also, although the section permitted sale of real property without full ancillary proceedings, it did require an abbreviated court proceeding for the sale, so the savings in time and costs were marginal.

§ 12572. Maintaining actions and proceedings

It should be made clear that a foreign personal representative who collects money as a result of a suit brought in California may not remove the money from California without publication of notice to creditor (Section 12551). The staff should consider whether the

defendant in the California action should have a duty not to make payment to the foreign personal representative on a judgment or settlement until the foreign personal representative shows publication of notice, or whether this duty should fall solely on the foreign personal representative.

The cross-reference in Section 12572 to "Section 12550" should read "Section 12570".

§ 12590. Jurisdiction by act of foreign personal representative

The Commission decided to keep the bracketed word "personally" in the Section 12590, but the section should also make clear that this refers to the personal representative acting in his or her representative capacity.

§ 12591. Jurisdiction by act of decedent

Section 12591 should not be limited to proceedings "relating to the estate," but the section or Comment should make clear that jurisdiction over the foreign personal representative is in his or her representative capacity.

A question was raised whether Section 12591 permits a creditor to sue the foreign personal representative in California without first filing a creditor's claim in the domiciliary proceeding. The Comment should make clear that this section does not permit noncompliance with creditors' claim procedures.

The last sentence of the Comment, which refers to Section 12560 in the deleted article, should be deleted.

§ 12592. Effect of adjudication for or against personal representative

The Comment to Section 12592 should make clear, as under Section 12591, that the section does not authorize noncompliance with creditors' claims procedures.

Approval to Send Out for Comment

Commissioner Stodden asked to see the revised version of Sections 12591, 12592, and the Comments to those sections, before the draft is sent out for comment. If these provisions are satisfactory to Commissioner Stodden, the staff may send out the revised draft for comment.

STUDY L-1047 - ESTATE AND TRUST CODE (APPEALS)

The Commission considered Memorandum 86-76 relating to appeals and also the letter from K. Bruce Friedman, attached hereto as Exhibit 3. The draft statute was approved subject to the following decisions:

§ 95. Judgment roll

The Commission deferred decision on whether to recommend that the contents of the judgment roll should be left to court rule. The staff should seek the views of persons in the court system to see whether it is desirable or feasible to omit this section. If this provision is retained, a reference to the statement of decision should be included.

§ 7500. Appealable orders or refusals to make orders

The existing approach of listing appealable orders in one section should be continued.

Subdivision (d) should be revised to read: "Setting apart a probate homestead or property claimed to be exempt from enforcement of a money judgment."

Subdivision (g) should be revised to read: "Directing or authorizing the granting of an option to purchase ~~real~~ property."

The provision permitting an appeal from an order fixing an inheritance tax or determining that none is due should be deleted from this section, but retained as to proceedings concerning estates subject to the tax in a transitional provision.

A provision should be added to this section making an order appointing a guardian ad litem appealable.

§ 7501. Effect of reversal of order appointing personal representative

The staff should attempt to deal generally with the problem of the power of the probate court during the time that a matter is on appeal.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

August 19, 1986

BEVERLY HILLS BAR ASSOCIATION
PROBATE, TRUST AND ESTATE PLANNING SECTION
LEGISLATION COMMITTEE
Cornelia Heather, Esq.
Kenneth G. Petrulis, Esq.

CALIFORNIA LAW REVISION COMMISSION
Study L-655 - Estate and Trust Code (Inventory
and Appraisal)
Memorandum 86-75 dated 7/24/86

BHBA Suggested Changes - Sections 400-453 and
8800-8963*

§402. Qualification examination

BHBA Comments

Section 402(c) requires transmission of a list of candidates who have received a passing score in their examination and we feel that since the administration of the exam includes development of standards for passage, as well as giving and scoring the examination, the list of public information should include not only names, but scores as well, to see if these duties are being carried out.

§406. Political activities of probate referee

406. (a) A probate referee or any person who is an applicant for or seeking appointment or reappointment to act as a probate referee shall not, directly or indirectly, solicit, receive, or contribute, or be in any manner concerned in soliciting, receiving, or contributing, any of the following:

(1) Any assessment, subscription, contribution, or political service for any campaign for the office of State Controller.

(2) Any assessment, subscription, or contribution to any party, incumbent, or candidate exceeding two hundred dollars (\$200) in any one year for any campaign for any partisan public office of this state.

(b) A violation of this section is a misdemeanor.

(c) The State may not appoint or reappoint as a probate referee and shall revoke the appointment of any person who violates subdivision (a)(1) or who, within the two-year period preceding the date of the appointment, violates subdivision (a)(2), and any such appointment or reappointment is void. However, all acts not otherwise invalid performed by the person before revocation of the person's appointment are valid.

BHBA Comments

1. The same policies that govern appointment, also apply to reappointment, since both terms are used in other sections.

2. Section 406(c) indicates that it is contemplated that an appointment should be revoked for any of the reasons set forth in that subdivision. The suggested revision affirmatively states the mandatory duty of the State Controller to revoke an appointment.

3. The LRC comment to this subdivision suggests that revocation of an appointment for violation of this section

should be discretionary. We feel, however, that there is little reason to distinguish between whether any of the forbidden political activities occurs before or after the date of the appointment, since it is clearly prohibited in both instances.

§8805. Failure to timely file inventory and appraisal

BHBA Comments

1. Section 8805(b) makes a personal representative liable for injury to the estate arising from the failure to file an inventory and appraisal in a timely manner. This is a good concept. However, it is nearly always impossible to prove any substantial injury from the failure of the representative to file in a timely manner. This is true, even though the filing may be 6 months or a year late. We suggest, or request, therefore, that the committee consider adding some non-exclusive provision or language to the comments, such as one allowing attorney's fees or some similar compensation to an interested person who successfully petitions the court to have the executor file an inventory and appraisal. Without such a provision, we feel that this section is of little practical use, since in most cases the court will not remove the personal representative or find any liability or injury to the estate.

§8851. Claims against personal representative

BHBA Comments

We realize that this new section restates former Probate Code §602. However, it appears to state the obvious. Is this section necessary, or could it be eliminated? We suggest a comment that this section is not necessary because there is no implication in the law to the contrary.

§8870. Subpoena to appear and be examined concerning decedent's property

8870. (a) On petition by the personal representative or an interested person, the court may issue a subpoena to a person to appear before the court or for deposition and be examined under oath concerning any of the following allegations:

BHBA Comments

1. We believe it would be much more efficient and effective to use a deposition procedure to obtain information concerning decedent's property, and that this should be expressly stated in the code section. It would also eliminate unneeded court appearances.

2. The revisions from former Probate Code §613, substituting a petition for a complaint and a subpoena for a citation, are similarly welcomed as a means of simplifying the discovery procedure.

§8871. Examination

8871. (a) At the examination, in addition to oral examination, interrogatories may be put to the person subpoenaed pursuant to Section 8870, and witnesses may be produced and examined on either side. All such interrogatories and answers shall be in writing, signed by the person examined, and filed with the court.

BHBA Comments

See BHBA Comments to §8870.

§8872. Subpoena to appear and account

8872. (a) On petition by the personal representative or any interested person, the court may issue a subpoena to a person who has possession or control of property in the decedent's estate to appear before the court and make an account under oath of the property and the person's actions with respect to the property.

(b) Disobedience of a subpoena issued pursuant to this section may be punished as a contempt of the court issuing the subpoena.

BHBA Comments

1. In many instances, the personal representative may be the person who has possession or control of property in the decedent's estate, which the personal representative claims as its own, or the personal

representative may be an executor who is a partner of the decedent. In either case, it would be advantageous if any interested person, as well as the personal representative, was able to force an accounting of property belonging to the estate.

§8873. Wrongful taking, concealment, or disposition of property in estate

8873. A person who has wrongfully taken, concealed, or disposed of property in the estate of the decedent is liable for twice the value of the property recoverable in an action or petition by the personal representative or any interested person for the benefit of the estate.

BHBA Comments

1. At some points in the revisions, "petition" is distinguished from "action". The first change makes it clear that both an action or petition are covered by this section.

2. Since it is unlikely that the personal representative would ever bring a petition or action against himself to recover property which it has wrongfully taken, concealed or disposed of, we suggest the addition of the words "or any interested person", to make it clear that if the property is acquired by the petition or action of some other person, the personal representative would also be subject to the same liability

for twice the value of the property recoverable, if it was the person concealing, etc., the property.

September 3, 1986

BEVERLY HILLS BAR ASSOCIATION
PROBATE TRUST AND ESTATE PLANNING SECTION
LEGISLATIVE COMMITTEE
Kenneth G. Petrulis, Esq.
Cornelia L. Heather, Esq.

CALIFORNIA LAW REVISION COMMISSION
Study L-1040 - Estate and Trust Code
(Inventory and Appraisal)
Memorandum 86-75 dated 7/24/86

BHBA Suggested Changes - Sections 8900-8963*

Section 8901. Appraisal by Personal Representative

"(a) The personal representative shall appraise the following property, excluding items whose fair market value is, in the opinion of the personal representative, an amount different from the face value:

(1) Money, currency, and cash items. As used in this paragraph, a "cash item" is a check, draft, money order, or similar instrument issued before the decedent's death and can be immediately converted to cash.

(2) Refund checks issued after the decedent's death, including tax and utility refunds.

(3) Accounts (as defined in Section 21) in financial institutions.

(4) Money market accounts.

*Deletions crossed through; additions underlined.

(5) Proceeds of life and accident insurance policies and retirement plans payable on death in lump sum amounts.

(b) Notwithstanding the provisions of Subsection (a) of this Section, the personal representative shall appraise securities held in a brokerage account which are sold upon an established stock or bond exchange and securities held in a brokerage account which are sold "over-the-counter."

(c) The personal representative or the personal representative's attorney is not entitled to receive compensation for extraordinary services by reason of appraising any property in the estate."

BHBA Comments.

We favor new Subsections (a)(2) and (4). We would like to change Subsection (b) to (c) and add a new Subsection (b) to provide that the personal representative shall appraise securities held in a brokerage account which are sold upon an established stock or bond exchange or sold "over-the-counter." The values of securities held in a brokerage account and sold upon an established stock or bond exchange or sold "over-the-counter" are readily ascertainable by a broker at little or no cost to the estate; therefore, it should not be necessary to pay a probate referee to value such securities.

We would also be in favor of adding that the personal representative shall appraise all securities sold upon an established stock or bond exchange or sold "over-the-counter" whether or not such securities are held in a brokerage account because quotations for such securities are readily available to the personal representative in daily newspapers.

Section 8903. Waiver of Appraisal by Probate Referee.

"(a) The court may, for good cause, waive appraisal by a probate referee in the manner provided in this section.

(b) The personal representative may apply for a waiver either in the petition for appointment of the personal representative or in a separate petition filed in the administration proceedings, but the petition may not be made later than the time the personal representative delivers the inventory to the probate referee or four months after letters are first issued to a general representative, whichever occurs first. The petition shall have attached to it a copy of the proposed inventory, ~~and~~/appraisal the name and qualifications of the proposed appraiser and a statement that sets forth the good cause that justifies the waiver.

(c) The hearing on the waiver shall be not sooner than 15 days after the petition is filed. A copy of the petition, together with the proposed inventory ~~and appraisal~~, and the name and qualifications of the proposed appraiser and notice of the date of the hearing shall be served on, and in the same manner as on, all persons who are entitled to notice pursuant to Section [926].

(d) Notwithstanding Section 8901, if the petition is granted, the inventory ~~and appraisal~~ attached to the petition

and the appraisal prepared by the appraiser named in the petition shall be filed pursuant to Section 8800."

BHBA Comments.

The words "and appraisal" in Sections (b), (c) and (d) should be stricken and the following words substituted in their place: "and the name and qualifications of the proposed appraiser."

If the petition for waiver is denied, the proposed appraisal attached to the petition can not be used to value property for purposes of the inventory; and yet estate funds may be used to pay the cost of the appraisal. It would, therefore, be in the best interest of the estate not to require the filing of a proposed appraisal with the petition for waiver; setting forth the name and qualifications of the proposed appraiser in the petition should provide the court with sufficient information upon which to base its decision respecting waiver of the probate referee's appraisal.

Section 8907. Retention of Records by Probate Referee.

"A probate referee who appraises property in an estate shall retain possession of all appraisal reports and backup data used by the referee to appraise the property for a period of three years after the appraisal is filed. After three years, the probate referee shall offer to the ~~beneficiaries/of/~~ ~~property~~ last acting personal representative information used by the referee to appraise the property. Any information not requested by the ~~beneficiaries~~ last acting personal representative may be destroyed."

BHBA Comments.

The terms "beneficiaries of property" and "beneficiaries" should be stricken from the last two sentences.

After three years it would be very difficult for the probate referee to determine exactly who the beneficiaries of the property are and where they reside; it would be much easier for the probate referee to offer the information to the last acting personal representative who in turn could offer it to the beneficiaries if requested by them, or if in such personal representative's judgment, he or she believes that the beneficiaries should receive it. If any information is not requested by the last acting personal representative, then the information may be destroyed after three years.

Section 8920. Designation by Court.

"The court shall designate the probate referee from among persons appointed by the State Controller to act as a probate referee for the county. If there is no person available who is able to act, or if the court in its discretion under Section 8922 does not designate any person available who is otherwise able to act, the court may designate a probate referee from another county."

BHBA Comments.

The following phrase should be added to the last sentence: "or if the court in its discretion under Section 8922 does not designate any person available who is otherwise able to act."

Section 8920 should be revised to make it clear (as suggested in the comment to Section 8922) that if there is no person available who is able to act or if the court in its discretion under Section 8922 does not designate any of the persons otherwise available to act, the court may then designate a probate referee from another county.

Section 8961. Amount of Commission and Expense.

"As compensation for services the probate referee should receive all of the following:

(a) A commission of one-tenth of one percent of the total value of the property for each estate appraised, subject to Section 8962. The commission shall be computed excluding property appraised by the personal representative pursuant to Section 8901 and shall be reduced for property appraised by an independent expert to the extent required by Section 8904.

(b) Actual and necessary expenses allowed by the court, including expenses agreed upon by the personal representative and the probate referee subject to court approval, for each estate appraised. The referee shall file with the inventory a verified account of the referee's expenses.

BHBA Comments.

The following phrase should be added to the first sentence of (b): "including those expenses agreed upon by the personal representative and the probate referee subject to court approval."

Adding this phrase will make it clear that the personal representative and the probate referee may agree respecting expenses (subject to court approval) just as they can agree under Section 8904 respecting the probate referee's fee.

STANTON AND BALLSUN

A LAW CORPORATION

AVCO CENTER, SIXTH FLOOR

10860 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90024-4018

(213) 474-6257

TELEX/FAX (213) 474-1246

KATHRYN A. BALLSUN
PAUL L. STANTON
CORNELIA L. HEATHERELECTRONIC MAIL VIA
ABA/NET I.D. # ABA2769PLEASE REFER TO
FILE NO.

August 28, 1986

FEDERAL EXPRESS

James V. Quillinan, Esq.
444 Castro Street, #900
Mountain, CA 94041Re: Second Supplement to Memorandum 86-59
Study L-1038 - Estate and Trust Code (Abatement)

Dear Jim:

On August 22, 1986, Team 4, (Harley Spitler, Janet Wright and I) discussed LRC Memorandum 86-59, Study L-1038 - Estate and Trust Code (Abatement).

The responses of Team 4 to the issues raised in the Memorandum are as follows:

1. With respect to the articles dealing with Abatement and Distribution of Interest and Income (Memoranda 86-59 and 86-60, respectively), Team 4 strongly believes that all relevant terms should be defined in a separate and new chapter and that these definitions should be applicable to the entire article.
2. Section 6191
 - a. "Preferred devises" should be defined in the separate chapter referred to in item 1.
 - b. Does elimination of the words "under the testator's will" imply that a devise by some other means may be encompassed by this section? To eliminate confusion, the issue should be dealt with in the comments.
 - c. Team 4 believes that the issue of the treatment of tangible personal property in abatement situations warrants further study. One member feels that no preference should be given to tangible personal property in an abatement situation and that any unusual circumstance can be dealt with under Section 6193.

3. Section 6192

- a. The Commission should abandon its previous decision. General devises should abate before specific devises.
- b. Specific and general devises to non-relatives should abate completely before abatement of such devises to a spouse or kindred of the testator; kindred requires definition . See 3d below.
- c. What does the phrase "property not disposed of by will" mean? We suggest that this phrase be deleted and that "property passing by intestacy" be used instead.
- d. Team 4 believes that neither "not related" nor "kindred" should be used. For priority within a class, references should be specific, e.g. spouse, descendants, ancestors. Thereafter, everyone would abate equally.

4. Section 6193

- a. Team 4 agrees that "or purpose" should remain in the statute.
- b. Team 4, as distinguished from the Executive Committee of the Probate, Trust and Estate Planning Section as a whole, strongly believes that a rebuttable presumption should be created.
- c. Team 4, as distinguished from the Executive Committee of the Probate, Trust and Estate Planning Section as a whole, believes that the Court should consider extrinsic evidence.

5. Section 6194

- a. The words "incident to" should be deleted (line 2), and the word "during" substituted.
- b. In accordance with the staff's suggestion, Section 6194 should be deleted, and the suggested language added to Section 6191.

6. As mentioned in a previous letter, Team 4 and Ken Klug discussed several issues not raised by Memorandum 86-59 or its supplements. In all instances discussed below, expenses of administration create the abatement issue. The issues and our conclusions are:

- a. The first issue concerns a surviving spouse who takes property by using a form of summary administration, e.g. a community property set aside procedure (Section 650). As a matter of California public policy, Team 4 believes that the property confirmed to a surviving spouse via a summary administration procedure should not be subject to abatement.

Example:

Blackacre to son.

Residue to wife.

Wife confirms title to the residue by using the community property set aside procedure.

The residue is not subject to abatement.

- b. A second issue involves a spouse who elects to probate property devised by the deceased spouse. In this instance, the spouse has elected to avail himself/herself of the benefits of probate. Therefore, the property devised to the surviving spouse is subject to the burdens of probate, including abatement.

Example:

Blackacre to son.

Residue to wife.

Wife elects to have the residue probated.

The residue is subject to abatement.

James V. Quillinan, Esq.
Page 4
August 28, 1986

c. Example:

100 shares of G.M. to son.

100 shares of Ford to spouse.

Residue to X.

Wife elects to probate the Ford shares.

Wife will share the burden of abatement pro rata with son.

d. Team 4 believes that the same results as above should occur in intestacy situations or where there are pretermitted heirs. The critical factor is whether the surviving spouse avails himself/herself of a summary administration procedure.

e. As a note, Team 4 believes that the positions taken herein do not impact Section 980.

If Team 4 and the Executive Committee may be of further assistance, please do not hesitate to contact us.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN,
A Member of
STANTON and BALLSUN
A Law Corporation

KAB/kf

c: Richard Polse, Esq.
Harley Spitler, Esq.
Janet Wright, Esq.
Chuck Collier, Esq.
James Willett, Esq.
Irv Goldring, Esq.
Jim Devine, Esq.
Jim Opel, Esq

K. BRUCE FRIEDMAN
JACK H. OLIVELAW OFFICES
FRIEDMAN & OLIVE
A PROFESSIONAL CORPORATION
1430 ALCOA BUILDING
ONE MARITIME PLAZA
SAN FRANCISCO, CALIFORNIA 94111
[415] 434-1383GLENN A. ZAHLER
OF COUNSEL

August 20, 1986

James V. Quillinan, Esq.
Diemer, Schneider, Jeffers, Luce & Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041Re: LRC Memo 86-76, Appeals

Dear Jim:

A combination of my being on the East Coast for the American Bar meetings and the difficulty of reaching others at the last minute has resulted in discussion of the above only by Lloyd and me.

I would go along with the staff recommendations on Appeals and the Judgment Roll (without limiting the application of Section 7500 (g) to real property options). In the area of appeals, there is something to be said, in the interest of procedural certainty, for retaining the substance of the present Code sections.

In new Section 7500, Lloyd would prefer to the list of appealable orders a statement that all orders in probate, except for specifically listed orders, are appealable. I am not sure what orders we would make non-appealable, and prefer to stick with the substance of present Probate Code Section 1240, as preserved in Section 7500.

Sincerely yours,



K. Bruce Friedman

KBF:kcc

cc: Irwin D. Goldring
Lloyd W. Homer
Charles A. Collier, Jr.
James A. Willett
Diane C. YuJames F. Rogers
William H. Plageman, Jr.
James C. Opel
James R. Goodwin
James D. Devine