

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

jd10
02/09/87

<u>Time</u>	<u>Place</u>
February 19 (Thursday) 3:00 p.m. - 8:00 p.m.	Sheraton Grand
February 20 (Friday) 9:00 a.m. - 4:00 p.m.	1590 Harbor Island Dr. San Diego (619) 291-6400

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Diego

February 19-20, 1987

1. Minutes of January 15-16, 1987, Meeting (sent 1/29/87)

2. Administrative Matters

Schedule for Future Meetings

Attached to this Agenda

1987 Legislative Program

Oral Report at meeting

3. Study L-1029 - Marital Deduction Gifts

Memorandum 87-7 (sent 2/5/87)

Draft of Recommendation (attached to Memorandum)

4. Study L-1055 - General Provisions Relating to Notice

Memorandum 87-5 (sent 01/08/87)

Draft of Recommendation (attached to Memorandum)

First Supplement to Memorandum 87-5 (sent 2/5/87)

5. Study L-1025 - Actions Involving Decedent

Second Supplement to Memorandum 86-202 (sent 11/20/86)

Fifth Supplement to Memorandum 86-202 (sent 12/16/86)

6. Study L-1041 -- Rules of Procedure

Draft of Statute

Memorandum 86-91 (sent 9/24/86)

Comments on Draft

Revised First Supplement to Memorandum 86-91 (sent 12/16/86)

Comments of Charles A. Collier, Jr.

Second Supplement to Memorandum 86-91 (sent 12/16/86)

7. Study L-1047 - Appeals

Draft of Tentative Recommendation

Memorandum 86-90 (sent 9/25/86)

Comments on Draft

First Supplement to Memorandum 86-90 (sent 11/19/86)

8. Study L-1027 - Accounts

Draft of Tentative Recommendation

Memorandum 87-1 (sent 12/16/86)

Comments on Draft

First Supplement to Memorandum 87-1 (enclosed)

9. Study L - Name of New Code

Memorandum 87-6 (sent 01/07/87)

10. Study L-1011 - Opening Estate Administration (Review of Comments on Tentative Recommendation)

Memorandum 86-201 (sent 1/21/87)

Draft of Tentative Recommendation (attached to Memorandum)

11. Study L-1039 - Abatement; Interest and Income Accruing During Administration

Memorandum 87-9 (sent 1/29/87)

Draft of Tentative Recommendation (attached to Memorandum)

MEETING SCHEDULE**AS RESCHEDULED AT THE JANUARY MEETING****FEBRUARY 1987**

19 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
20 (Friday)	9:00 a.m. - 4:00 p.m.	Sheraton Grand 1590 Harbor Island Dr. (619) 291-6400

MARCH 1987 Place of meeting changed

12 (Thursday)	3:00 p.m. - 8:00 p.m.	San Francisco
13 (Friday)	9:00 a.m. - 4:00 p.m.	State Bar Building 555 Franklin Street

APRIL 1987

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

MAY 1987 Place of meeting changed

14 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
15 (Friday)	9:00 a.m. - 4:00 p.m.	

JUNE 1987 Dates for meeting changed

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

JULY 1987 Dates for meeting changed

23 (Thursday)	3:00 p.m. - 8:00 p.m.	Newport Beach
24 (Friday)	9:00 a.m. - 4:00 p.m.	

SUGGESTED SCHEDULE FOR SUBSEQUENT MEETINGS**SEPTEMBER 1987**

17 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
18 (Friday)	9:00 a.m. - 4:00 p.m.	

OCTOBER 1987

15 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles
16 (Friday)	9:00 a.m. - 4:00 p.m.	

NOVEMBER 1987

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

DECEMBER 1987

10 (Thursday)	3:00 p.m. - 8:00 p.m.	Newport Beach
11 (Friday)	9:00 a.m. - 4:00 p.m.	

SCHEDULE FOR WORK

February 1987 Meeting

Approval for Printing and Submission to Legislature

Recommendation Relating to Notice in Probate Proceedings
Recommendation Relating to Marital Deduction Gifts

Review Draft Statute

Actions Involving Decedent
Rules of Procedure
Abatement; Interest and Income Accruing During Administration

Approval of Tentative Recommendation for Distribution for Review and Comment

Appeals
Accounts

Review Comments on Tentative Recommendation

Opening Estate Administration

March 1987 Meeting

Additional Aspects of Legislation to be Introduced in 1987

Transitional Provisions
Comments from Interested Persons and Organizations

Review Comments on Tentative Recommendation

Inventory and Appraisal
Distribution and Discharge
Nonresident Decedent
Determining Class Membership
Public Guardian and Public Administrator

April 1987 Meeting

Review of Comments on 1987 Legislation

Approve Tentative Recommendation to Send Out for Review and Comment

Actions Involving Decedent
Rules of Procedure
Abatement; Interest and Income Accruing During Administration

Work on Estate and Trusts Code

Multiple Party Accounts

May 1987 Meeting

Approval for Inclusion in Estate and Trust Code

Opening Estate Administration
Distribution and Discharge
Nonresident Decedent
Determining Class Membership
Public Guardian and Public Administrator

Work on Estate and Trust Code

Compensation and Fees
Antilapse Statute
Operative Date and Transitional Provisions

Review of comments on Tentative Recommendations

Appeals
Actions Involving Decedent
Rules of Procedure
Abatement; Interest and Income Accruing During Administration
Accounts

Approve Tentative Recommendation to Send Out for Review and Comment

Multiple Party Accounts

June 1987 Meeting

Approval for Inclusion in Estate and Trust Code

Appeals
Actions Involving Decedent
Abatement; Interest and Income Accruing During Administration

Approve Tentative Recommendation to Send Out for Review and Comment

Compensation and Fees
Antilapse Statute
Operative Date and Transitional Provisions

July 1987 Meeting

Approve for Inclusion in Estate and Trust Code

Rules of Procedure
Accounts

Review for Technical and Substantive Changes and Prepare Official Comments

Preliminary Provisions and Definitions
General Provisions
Disclaimers
Guardianship-Conservatorship Law
Management and Disposition of Community Property Where Spouse Lacks Legal Capacity
Authorization of Medical Treatment of Adult Without Conservator
Other Protective Proceedings
California Uniform Transfers to Minors Act
Wills
Intestate Succession
Family Protection
Escheat of Decedent's Property
Disposition Without Administration
Trusts

Review Comments on Tentative Recommendations Sent Out for Comment

Compensation and Fees
Antilapse Statute
Operative Date and Transitional Provisions
Multiple Party Accounts
Interest and Income Accruing During Administration
Abatement

September 1987 Meeting

Approve Text of New Estate and Trust Code for Preprint Bill

Approve Text of Recommendation for Estate and Trust Code for Printing

October 1987 Meeting

Conforming Revisions of Sections in Other Codes

December 1987

Printed Commission Recommendation Available for Distribution

Interim Legislative Hearing on Proposed New Code

JANUARY 1988 MEETING

Review Comments from Interested Persons on Bill Proposing New Code

FEBRUARY 1988 MEETING

Approve amendments to proposed new code

MARCH 1988

Legislative hearings and Approval by First House Legislative Committee of bills proposing Estate and Trust Code and Conforming Revisions

NEW PROBATE STUDIES TO BE COMMENCED IN 1988

Prepare Statutory 630 Affidavit Form (for inclusion in new code) (John)
Uniform Transfers to Minors Act

 Make possible to make outright gift to remain in custody until
 age 25

 Co-custodians

Draft New Division of Estate and Trust Code (Powers of Attorney;
 Powers of Appointment)

Claims Procedure for Trusts

Rights of Estranged Spouse

Anti-lapse and Construction of Instruments

Trustee's Use of Section 650 Procedure

Ancestral Property Doctrine

Directive to Physicians (Uniform Act)

Community Property With Right of Survivorship

Transfer on Death Designation for Real Property

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 19-20, 1987
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on February 19-20, 1987.

Law Revision Commission

Present: Arthur K. Marshall, Chairperson Edwin K. Marzec
Ann E. Stodden, Vice Chairperson Forrest A. Plant
Roger Arnebergh Vaughn R. Walker
Bion M. Gregory (Feb. 20)

Absent: Elihu M. Harris, Member of Assembly Tim Paone
Bill Lockyer, Member of Senate

Staff Members

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

Consultants Present

None

Other Persons Present

Edward V. Brennan, California Probate Referees' Association,
San Diego
Phyllis Cardoza, Beverly Hills Bar Association, Probate,
Trust and Estate Planning Section, West Los Angeles
(Feb. 20)
Irwin D. Goldring, Executive Committee, State Bar Estate
Planning, Trust and Probate Law Section, Beverly Hills
John McEvoy, California Probate Referees' Association,
San Diego (Feb. 19)
Valerie J. Merritt, Probate and Trust Law Section, Los
Angeles County Bar Association, Los Angeles
James C. Opel, Executive Committee, State Bar Estate
Planning, Trust and Probate Law Section, Los Angeles
Kenneth Petrulis, Beverly Hills Bar Association, Probate,
Trust and Estate Planning Section, Beverly Hills (Feb. 19)

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY 15-16, 1987, MEETING

The Commission approved the Minutes of the January 15-16, 1987, meeting as submitted by the staff with the following corrections:

On page 3, in the first line of the second paragraph under the heading "TOPIC SELECTED FOR FUTURE STUDY," "decided defer study the problem" was changed to "decided to defer study of the problem". In the next to last line in the same paragraph, "with" was changed to "wish".

On page 6, line 4 under "§ 9052. Form of notice," "with the personal representative and the court" was inserted after "claim".

On page 10, in the second line of the second paragraph under the heading "STUDY L-1028 - INDEPENDENT ADMINISTRATION," "of" was inserted after "review".

On page 14, line 10 of the quoted material at the top of the page, "According" was changed to "Accordingly".

On page 17, the last three lines were revised to read:
included. A similar inclusion should be made in comparable provisions.

In the last paragraph, "execute" was substituted for "make". Maybe it should be phrased in terms of "execution of instrument."

On page 18, in line 2 under the heading "Abandonment of tangible personal property," "Chapter" was changed to "Article".

On page 18, in the first line under "§10511. Investing in securities," "complied" was changed to "compiled". In the second line under the same heading, "requires" was changed to "require". In the sixth line under the same heading, "requires" was changed to "require".

On page 21, in line 6 under the heading "§ 10551. Powers that any personal representative may exercise without court supervision," "superseded" was changed to "supersede".

On page 22, in the second line under the heading "§ 10559. Exercising restricted stock option," "transferrable" was changed to "transferable".

On page 24, in line 15 under the heading "10589. Court supervision and notice of hearing required if personal representative has notice of objection," "reasonable" was changed to "ordinary".

SCHEDULE FOR FUTURE MEETINGS

The following is the schedule for future meetings.

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APRIL 1987

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11 (Friday)	9:00 a.m. - 4:00 p.m.	

LEGISLATIVE PROGRAM

Introduced

SCR 12 - Continues authority to study previously authorized topics
AB 362 - Urgency Trust Bill (Harris)
AB 708 - Comprehensive Probate Bill (Harris)

To be Introduced

Resolution to authorize study of administrative law (Assemblyman Harris has indicated that he will introduce this measure)

APPROVAL OF ACTIONS OF SUBCOMMITTEES AT PRIOR MEETINGS

The Commission approved the actions of the subcommittees at meetings held subsequent to the September 4-5, 1986, meeting, and the actions of the subcommittees were adopted as actions of the Commission.

STUDY L — NAME OF NEW CODE

The Commission considered Memorandum 87-6, concerning the name of the new code. After reviewing the reasons for a new name and considering a number of alternatives, the Commission decided that the new code should be named the Probate Code.

STUDY L-1025 --- ACTIONS INVOLVING DECEDENT

The Commission considered the Second and Fifth Supplements to Memorandum 86-202, relating to actions involving a decedent. The Commission made the following decisions concerning the draft statute.

§ 366.2. Death of person against whom action may be brought. The staff should consider including this provision, which shortens the statute of limitations to one year after the death of a person rather than after issuance of letters, in the 1987 probate legislation, on the theory that the creditor notice requirements in the legislation offset the reduction of the limitation period.

Chapter 4. Death of Party. This chapter heading was revised to read "Chapter 4. Effect of Death."

§ 377.110. Survival of cause of action. The word "law" was changed to "statute" in subdivision (a). The Comment should cross-refer to the other provisions formerly found in Probate Code Section 573.

§ 377.120. Parties. Subdivision (a) was revised to provide for assertion of a cause of action by the decedent's personal representative, or if none, by the decedent's successors in interest.

§ 377.130. Assignability of things in action. This section was revised to read, "Nothing in this article shall be construed as affecting the assignability of causes of action."

§ 377.210. Continuation of action. This section should refer to a "pending" action or proceeding.

§ 377.220. Parties. Subdivision (a) should parallel Section 377.120(a), allowing an action by the successors in interest if there is no personal representative.

§ 377.340. Defenses. The brackets should be removed from the draft and the language inside the brackets retained.

§ 377.510. Successors in interest. This section should be relocated to the front of the chapter, possibly in an article on definitions.

§ 377.520. Damages recoverable. This section should be relocated or rephrased or both to avoid the implication that the damages are recoverable in a wrongful death action.

§ 377.530. Personal representative for whom no letters issued. This section was deleted.

§ 377.540. Preference for actions involving decedent. This section was deleted.

§ 377.550. Service on personal representative. This section was deleted.

§ 9400. Claim prerequisite to bringing action. This section should require that the claim be rejected or not allowed in full before an action is commenced.

§ 9402. Late claim. The last sentence of subdivision (a) should be revised to provide that the court may "require the appointment or reappointment of a personal representative if necessary." The Comment should note the duty of the personal representative to give notice to known creditors.

§ 9403. Claim covered by insurance. Subdivision (a) should refer to a judgment enforced "against the insurer."

§ 13554. Enforcement of liability. The paragraphs under subdivision (c) should be numbered (1) and (2). The Comment should point out that a claim in probate is not prerequisite to a lawsuit under this section.

STUDY L-1028 - INDEPENDENT ADMINISTRATION

The Commission decided to expand subdivision (f) of Section 10501 (matters requiring court supervision) to require court supervision of a sale of estate property to the attorney for the personal representative.

STUDY L-1029 — MARITAL DEDUCTION GIFTS

The Commission considered Memorandum 87-7, together with letters from State Bar Study Team 4 and from Bob Mills, distributed at the meeting. Staff drafts of proposed Section 21503 were attached to the Mills letter and also distributed at the meeting. Copies of the letters and drafts are attached to these Minutes as Exhibits 1 and 2.

The Commission approved the substance of the recommendation relating to marital deduction gifts for printing and submission to the Legislature, with the following changes. The staff should prepare the text of the recommendation in form to be printed, and the statute in the form of amendments to the probate bill, for Commission review at the March meeting. In preparing this material, the staff should seek to obtain review by Ed Halbach, Bob Mills, and Ken Klug.

§ 24. "Beneficiary" defined. The definition of "beneficiary" in the probate bill should be revised to provide, in substance:

24. "Beneficiary" means a person to whom a donative transfer of property is made or the person's successor in interest, and:

(a) As it relates to the estate of a decedent who died intestate, means an heir ~~and, as~~ .

(b) As it relates to the estate of a decedent who died testate, means a devisee.

~~(b)~~ (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent, ~~and includes an owner of an interest by assignment or by other transfer.~~

~~(e)~~ (d) As it relates to a charitable trust, includes any person entitled to enforce the trust.

Comment. The introductory clause of Section 24 is amended to expand the application of the definition to other donative transfers in addition to wills and trusts. Cf. Section 21100(b) ("instrument" means will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property).

The introductory clause also generalizes the provision of Section 24 that relates to successors in interest of a beneficiary. Successors in interest include assignees and other transferees of an interest in a donative transfer of property.

The staff should work on wording.

§ 21100. Definitions. Subdivision (b) was revised to refer to a writing that designates a beneficiary or makes a "donative" transfer of property.

§ 21120. Satisfaction of a pecuniary gift. The first sentence of subdivision (a) should refer to a fiduciary.

§ 21500. "Internal Revenue Code" defined. The words "United States" were deleted from this section. The staff should check with the Legislative Counsel to see whether Section 7 (amendments to laws) is construed to include references to federal law, and whether it might not be amended to make this clear. Alternatively, amendatory language could be added to Section 21500.

References in the draft to specific provisions of the estate tax should be supplemented by references to specific provisions of the gift tax, consistent with the application of the statute.

§ 21502. Severability clause. This section was deleted. The Comment to former Section 1038 should refer to Section 11, which contains a severability clause for the entire code.

§ 21503. Application of formula clause to federal estate tax. The staff should prepare a draft based on the concept that a formula clause does not apply to that portion of the estate tax that is not subject to elimination or reduction. The language of the draft might draw from both versions on page 2 of the handout at the meeting.

§ 21521. Application of chapter. The phrase "the so-called 'estate trust'" should be replaced by the phrase "commonly referred to as the 'estate trust.'"

§ 21522. Marital deduction gifts. The phrase "in order to conform to the intent of the gift" was deleted as unnecessary.

§ 21525. Survival requirement for marital deduction gift. The staff should check the Regulations governing this portion of the Internal Revenue Code to make sure it's consistent.

§ 21540. Charitable remainder unitrusts and annuity trusts. The language relating to the transferor's intention "at the time the instrument is executed" should be moved from the section to the Comment.

STUDY L-1041 - PROBATE (RULES OF PROCEDURE)

The Commission considered Memorandum 86-91 and the draft statute relating to rules of procedure. The Commission also considered the comments of various persons on this material attached to the Revised First Supplement to Memorandum 86-91 and the Second Supplement thereto, as well as letters distributed at the meeting from the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (attached as Exhibit 3) and the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (attached as Exhibit 4). The Commission made the following decisions:

§ 7200. General rules of practice govern

This section should be revised as follows:

7200. (a) The rules of practice applicable to civil actions are applicable to and constitute the rules of practice in proceedings under this division code.

(b) This section does not apply to the extent applicable rules of practice are provided by this division ~~or by rules adopted by the Judicial Council~~.

The comment should be revised to specify which areas of general procedural law are picked up. The comment should also say that this section provides a backup rule that applies where there is no special rule in probate law.

§ 7201. Judicial Council authority

Subdivision (a) of this section should be revised as follows:

7201. (a) The Judicial Council may provide by rule for the practice and procedure under this division code. Unless ~~otherwise expressly provided~~ disapproved by the Judicial Council, a court may ~~not~~ provide by local rule ~~or otherwise provide for any special~~ the practice ~~or~~ and procedure under this division code.

It should also be made clear that court rules governing procedure must be consistent with the applicable statutes.

§ 7203. Costs

This section relating to costs should be applied to the entire code, not just the division on decedents' estates.

§ 7204. Appointment of guardian ad litem

The staff should give further consideration to the relationship between this provision relating to the appointment of a guardian ad litem and the general provisions in the Code of Civil Procedure.

§ 7250. Petitions

This section requiring petitions to be in writing and signed by the petitioner should be broadened to cover reports and accounts and papers other than petitions, perhaps by referring to "pleadings" or by using some other appropriate language. The Commission considered and rejected the proposal that attorneys be permitted to sign pleadings.

§ 7251. Verification required

Subdivision (b) of this section and its comment should be revised as follows:

7251. (a)

(b) The verification of a petition shall be made by the petitioner. The verification of a report or account shall be made by the person making who had the duty to make the report or account. The verification of an objection or response shall be made by the objector or respondent.

Comment.

Subdivision (b) of Section 7251 is a new provision that makes clear the person who is to make the verification. In the case of a corporate fiduciary, a responsible person, such as a corporate officer, should verify a report or account.

§ 7252. Affidavit or verified petition as evidence

The comment to this section should note that the declaration of an attorney would be admissible as an affidavit.

§ 7253. Lis pendens

This section should be consistent with the general lis pendens provisions in the Code of Civil Procedure. The section may be properly limited by referring to proceedings affecting "title to" real property, rather than just proceedings affecting real property. The staff should also consider whether this section is necessary. If this section is revised, Section 2523 in the guardianship and conservatorship law, from which this section was drawn, should be conformed.

§ 7302. Notice of hearing

This section should be revised as follows to reverse its rule:

7302. A hearing under this division shall be ~~ex-parte~~ on notice unless the statute that provides for the hearing ~~requires~~ dispenses with notice.

§ 7303. Response or objections

This section should be revised as follows:

7303. An interested person may, at or before the hearing, make a response or objection ~~orally-or~~ in writing.

The comment should contain a cross-reference to Section 7300 providing that the provisions of this article apply unless a particular statute provides a different procedure.

§ 7304. Continuances

This section should be revised as follows:

7304. An interested person may, either orally or in writing, request time for filing a response or objections to the matter to be heard, for discovery proceedings, or for other preparation for the hearing, ~~and the~~. The court may shall grant a continuance for a reasonable time for any of these purposes.

§ 7305. Witnesses

This section relating to compelling the attendance of witnesses should be omitted.

§ 7306. Hearing and order

This section should be revised as follows:

7306. ~~At--the--hearing--the~~ The court shall hear and determine the any matter at issue and any response or objection presented and shall make such orders as may be appropriate.

§ 7307. New trial

This section should be relocated with the provisions on appeals following the article relating to orders. The reference to Section 7306 in the comment should be to Section 7307.

§ 7350. Recital of jurisdictional facts unnecessary

This section should be revised to conform to earlier decisions made with regard to the jurisdiction and power of the superior court over probate matters.

§ 7351. Entry and filing

This section should be sent to the county clerks' association to see if it is needed.

§ 7352. Renewal, modification, and termination

This section should be omitted. Renewal, modification, and termination of orders should be governed by other general rules or by special rules in particular sections where needed.

§ 7353. Effect of order on liability of personal representative

The staff should give further consideration to the problem of what the personal representative can do after the making of an order authorizing or approving an action but before the time for appeal has expired. The automatic stay provided in draft Section 7401 in Memorandum 86-90 should be considered with this section.

Subdivision (b) of this section relating to the effect of fraud on the personal representative's liability should be deleted. This matter is better left to case law.

§ 7354. Effect of order on third persons

This section should be reconsidered in connection with Section 7353.

§ 7355. Recordation of order affecting real property

§ 7356. Transfer or conveyance of property pursuant to court order

These sections should be revised to require recording of documents affecting title to real property. The staff should review the existing law and propose language that would make clear which types of leases need to be recorded. Language should also be developed to permit recording of a transfer document or memorandum of lease in appropriate cases. Recording should be required in "each" (not "any") county where the real property is located. Subdivision (b) of Section 7355 relating to the notice afforded by recording should be eliminated as unnecessary. Subdivision (b) of Section 7356 requiring the personal representative to execute a transaction in compliance with a court order should also be eliminated as unnecessary.

§ 7357. Enforcement of order

This section should be revised as follows:

7357. An order may be enforced ~~by execution or otherwise as orders and judgments in civil actions~~ as provided in Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

STUDY L-1047 - PROBATE (APPEALS)

The Commission considered Memorandum 86-90 and the draft *Tentative Recommendation Relating to Appeals*. The recommendation was approved subject to the following revisions:

Section 7400. Appealable orders or refusals to make orders

The section was approved as drafted except that subdivision (q) relating to orders appointing guardians ad litem should be deleted. The staff will do further research on the law in this area and should consider including in the comment an appropriate statement of the law on this issue.

Section 7401. Stay on appeal

This section providing for an automatic stay on appeal, subject to the power of the court to make emergency orders, should be given further study and should be considered in connection with the provision on the effect of an order on the personal representative's liability. See draft Section 7353 in Memorandum 86-91. The staff should also consider revising this section to make clear that the powers of the personal representative that are not the subject of the appeal may be exercised notwithstanding the appeal.

Section 7402. Effect of reversal or order appointing personal representative

The alternative version of this section as set out on page 8 of the draft statute was approved.

Section [95]. Judgment roll

When this material is printed, a note should be included soliciting comments of interested persons on the need for this section specifying the contents of the judgment roll. The suggestion has been made that the contents could be left to determination by court rule.

STUDY L-1055 - PROBATE (GENERAL NOTICE PROVISIONS)

The Commission considered Memorandum 87-5, the draft *Recommendation Relating to General Notice Provisions*, and the First Supplement considering comments on the recommendation. The recommendation was approved for printing subject to the following revisions:

Explanatory Text

The text accompanying note 22 on page 5 should be revised as follows: "The proposed law contains a new provision permitting the waiver of notice by a writing signed by the person who would otherwise be required to give be given notice, or the person's attorney, and filed in the proceeding."

Section 1216. Personal delivery instead of mailing

The last two sentences of the comment should be deleted.

Section 1220. Manner of mailing notice of hearing

Subdivision (a) of this section should be revised for clarity to read as follows:

1220. (a) Notice of a hearing shall be given as provided in this section in the following cases:

- (1) Where another section so requires.
- (2) Where notice of a hearing is required but no other period or manner of notice is prescribed by statute, unless the period or manner of notice is ordered by the court or judge.

Section 1250. Request for special notice

Subdivisions (c) to (f) of Section 1250 should be redrafted for clarity to read as follows:

(c) Special notice may be requested of any or all of the following matters:

- (1) Petitions filed in the estate proceeding.
- (2) Inventories and appraisements of the estate, including any supplemental inventories and appraisements.
- (3) Objections to an appraisal made by the personal representative or probate referee.
- (4) Accounts of a personal representative.
- (5) Reports of status of administration.

(d) Special notice may be requested of any matter in subdivision (c) by describing it or of all the matters in subdivision (c) by referring generally to "the matters described in subdivision (c) of Section 1250 of the Probate Code" or by using words of similar import.

(e) A copy of the request shall be personally delivered or mailed to the personal representative or to the attorney for the personal representative. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received.

(f) When the original of the request is filed with the court clerk, it shall be accompanied by a written admission or proof of service.

It was also noted that additional references may need to be added to subdivision (c) of Section 1250 as additional types of papers of which special notice may be requested are discovered.

Section 1252. Notice to be given to person requesting special notice

Subdivision (a) of this section should be revised to require service of a copy of the petition or other paper on persons who request special notice:

1252. (a) If a request has been made pursuant to Section 1250 for special notice of a hearing, the person filing the petition, report, or account, or other paper shall give written notice of the filing, together with a copy of the petition, report, or account, and the time and place set for the hearing, by mail to the person named in the request at the address set forth in the request, at least 15 days before the time set for the hearing.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

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ELECTRONIC MAIL VIA
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PLEASE REFER TO
FILE NO.

February 13, 1987

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: LRC Memorandum 87-7, Marital Deduction

Dear Jim:

On February 6, 1987, Team 4 (Harley Spitler, William Hoisington, Janet Wright and I) discussed LRC Memorandum 87-7, Marital Deduction. Team 4's comments about the above-referenced Memorandum are as follows:

Initially, permit me to compliment the Commission on this revised Memorandum. In view of the substantial revisions, Team 4 only has a few comments which are as follows:

1. Section 21500.

The words "United States" which appear on line 2 should be deleted.

2. Section 21522.

Team 4 is unclear as to the necessity of the following clause "in order to conform to the intent of the gift" (line 4, subsection (a)).

James Quillinan, Esq.
Page 2
February 13, 1987

3. Section 21524(c).

It appears that a verb has been omitted from this subsection. Words such as "shall be paid" should be inserted after the word "property" on line 2.

4. Section 21526(a).

The word "from" should be inserted after the word "fiduciary" on line 2.

5. Section 21540.

Is the clause "at the time the instrument is executed" (line 2) necessary?

If Team 4 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.
Clare Springs, Esq.
William Hoisington, Esq.
Lloyd Homer, Esq.
Chuck Collier, Esq.
James Willett, Esq.
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February 11, 1987

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Marital Deduction Gifts

Dear Nat:

Yet another gremlin has emerged from the Tax Reform Bill of 1986 which perhaps could be dealt with in our revised legislation. The Bill adds an additional estate tax equal to 15 percent of the decedent's excess retirement accumulation. Bill Section 1133, adding new IRC Section 4981. From the estate planner's point of view the problem is that this is an estate tax that cannot be reduced to zero through the operation of a will or trust formula clause. It would have been better if Congress had called this 15% tax an excise rather than an estate tax, but Congress didn't. A statutory "cure" would be to define the federal estate tax where used in a formula clause as the tax imposed by Chapter 11 of the Internal Revenue Code.

I have not discussed this with Ed. It is arguable that this is not a problem of sufficient import (a properly drawn formula clause would escape the problem) to be addressed in the statute. Still, if we are to consider doing so, now is obviously the time.

Sincerely,



Robert A. Mills

cc: Professor Edward C. Halbach, Jr.

§ 21503. Limitation of formula clause

21503. If an instrument makes a disposition of property under a formula intended to eliminate or reduce the federal estate tax, unless the provision or the context requires otherwise, the formula shall be limited to the tax imposed by Chapter 11 (commencing with Section 2001) of Subtitle B of the Internal Revenue Code.

Comment. Section 21503 is new. It creates a rule of construction of formula clauses that excludes Internal Revenue Code Section 4981(d) (increase in estate tax for excess retirement accumulation) from the meaning of "federal estate tax". This is necessary since the tax imposed by Section 4981(d) cannot be eliminated.

CROSS-REFERENCES

Definitions

Instrument § 21100

Internal Revenue Code § 21500

Note. This section responds to a point raised by Bob Mills. Many estate planning instruments use formula gift provisions to take advantage of credits and deductions in the federal estate tax laws. Such a formula may, for example, take advantage of the unlimited spousal deduction by giving the minimum amount of property to a spouse necessary to reduce the remaining estate to an amount on which there will be no federal estate tax. The enactment of Internal Revenue Code Section 4981(d) by the Tax Reform Act of 1986 creates a new type of "estate tax" that is really an income or excise tax and that cannot be eliminated by use of credits and deductions. Thus, if a marital gift formula clause were applied, more and more property would be allocated to the marital gift in an effort to reduce the estate tax to zero, until the whole estate is consumed by the marital gift, and the estate tax would still not be eliminated because the Section 4981(d) tax would still remain.

The solution suggested by Mr. Mills is codified in this section. It would simply provide that a formula clause applies only to the traditional estate tax law and not to the Section 4981(d) tax. This would have the effect of enabling formula clauses to work properly. This approach is not wholly satisfactory, however, for several reasons. If Section 4981(d) is relocated to Chapter 11 (which may well occur since it is misnumbered now), or if another non-reducible "estate tax" is enacted sometime in the future as part of Chapter 11, this section would not work. Also, as a technical matter, it is conceivable that the Section 4981(d) tax could actually be construed to be a tax imposed by Chapter 11, since Section 4981(d) provides that "the tax imposed by chapter 11 with respect to any individual shall be increased by an amount equal to 15 percent of the individual's excess retirement accumulation."

An alternate approach that potentially works better but that requires more sophisticated drafting is to provide that a formula clause operates until the federal estate tax is reduced as low as it will go, and then ceases to operate. This is the approach Professor Halbach prefers. Such a section could read:

§ 21503. Disposition of property under formula clause

21503. If an instrument makes a disposition of property under a formula intended to eliminate or reduce the federal estate tax, disposition of property shall be made under the formula to eliminate or reduce the federal estate tax to the maximum extent possible and further disposition of property shall not be made under the formula.

Comment. Section 21503 is designed to address the problem of a formula clause in an instrument that requires elimination or reduction of the federal estate tax, but the federal estate tax is not subject to elimination or further reduction because of the existence of a tax under Internal Revenue Code Section 4981(d) or for some other reason. If applied literally in this situation, the formula clause would exhaust the estate completely in the impossible effort to eliminate or reduce the federal estate tax. Section 21503 cures this problem by imposing a rule of construction that such a formula clause is to be applied only to reduce the federal estate tax "to the maximum extent possible." Once the maximum reduction is achieved, the formula clause ceases to operate.

CROSS-REFERENCES

Definitions

Instrument § 21100

Property § 62

Note. If this approach is adopted, we will want to have the various bar committees review it very carefully to make sure that it doesn't create new problems or ambiguities in the process of curing old ones. One other approach the staff thinks has potential, though we haven't had a chance to discuss it with our consultants yet, is:

§ 21503. Application of formula clause to federal estate tax

21503. If an instrument makes a disposition of property under a formula intended to eliminate or reduce the federal estate tax, the formula applies only to that portion of the federal estate tax that is subject to elimination or reduction and does not apply to that portion of the federal estate tax that is not subject to elimination or reduction.

Comment. Section 21503 establishes a rule of construction that would apply a formula clause only to the portion of the estate tax that may be reduced or eliminated by credits and deductions. The effect of

this rule is that the formula clause applies to the tax imposed by chapter 11 (commencing with Section 2001) of Subtitle B of the Internal Revenue Code and not to the tax imposed by Section 4981(d) of the Internal Revenue Code.

CROSS-REFERENCES

Definitions

Instrument § 21100

Property § 62

**Los Angeles County
Bar Association**

EXHIBIT 3

Minutes
February 19-20, 1987

617 South Olive Street
Los Angeles, California 90014
213 627-2727

Mailing address:
P.O. Box 55020
Los Angeles, California 90055



February 9, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: California Law Revision Commission -
Memorandum 86-91

Gentlemen:

On behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, I submit the following comments on one of the memoranda listed on the agenda for the meeting scheduled for February 19-20, 1987.

We have reviewed Memorandum 86-92 and the comments thereto which have been made by "Team Two" and Chuck Collier. Generally, this Memorandum relates to the general rules of procedure which will be applicable to estate administration proceedings, and possibly to all proceedings governed by the Estate and Trust Code. As a general matter, they do seem to better organize existing provisions, although the reorganization has produced a few questionable rules.

Proposed Section 7200 provides that, as a general rule, the rules governing civil actions are applicable in probate. However, proposed Section 7200 also allows for special rules as provided in the Probate Code or as adopted by the Judicial Council. Additionally, Section 7250 requires that "Except as otherwise specifically provided in this division, a petition shall be . . . signed by the petitioner . . ." In Chuck Collier's comments, he is concerned that the beginning to Section 7200 creates an ambiguity as respecting Section 7250 and Section 7202 as well. We agree with Chuck's comments in this area. The second paragraph of the comment to Section 7200 states that "Under Section 7200, an attorney may sign a petition as in civil proceedings, but a verification must be done by the person making the petition." We question whether the general rule of

Section 7200 constitutes a specific, contrary provision for purposes of Section 7250, allowing an attorney to sign the pleading. We think that this might be clarified either in the comment or in the language of the sections themselves.

Under Section 7200 is a query concerning whether the rule allowing attorneys to sign petitions should be expanded to cover other papers in probate. We believe that it should.

Proposed Section 7201 aims, in part, at limiting the proliferation of local rules. This is a good idea in theory, but we strongly question the practicality of carrying out this theory. Certainly rules which work well in Los Angeles County might not be appropriate for a small county. Similarly, procedures which work for a small county might be impossible to employ in Los Angeles County. Perhaps the better approach would be to designate particular procedural rules which could not be amended by local rules.

Proposed Section 7203 permits a court to order costs be paid by a party or from the assets of the estate in the absence of a specific statute or Judicial Council rule to the contrary. A query following this proposed section questions whether this provision should be made clearly applicable to all proceedings under the Estate and Trust Code. We believe that this query should be answered affirmatively.

Proposed Section 7204 deals with the appointment of guardians ad litem. Subsection (d) makes inapplicable the rules on this subject contained in Code of Civil Procedure Sections 372 through 373.5. Chuck Collier questions whether this latter provision is meant to make the Code of Civil Procedure sections inapplicable only where they are directly contradictory with the provisions of Section 7204, or whether they are truly completely eliminated. Perhaps this should be clarified. In any event, one provision of Code of Civil Procedure Section 373 involves the concept of appointing a guardian ad litem as nominated by a minor who is at least 14 years old. We believe that Section 7204 might be amended to at least direct the court to inquire as to the desires of such a

minor when appointing a guardian ad litem for him or her.

Proposed Section 7252 provides that "An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." A query following this proposed Section questions whether it is appropriate for such a provision to apply to all proceedings under the Code as it appears to in this case. We believe that the answer to this question should be "yes".

Proposed Section 7253 permits the filing of a lis pendens whenever a proceeding affects real property. Chuck Collier asks whether such a broad provision would allow a beneficiary to file a lis pendens when objecting to an accounting simply because real estate was included among an estate's assets. This is a good point and it should be addressed, probably by providing that the lis pendens can be filed only when an issue in the proceeding is title to real property.

Proposed Section 7302 provides that all hearings may be held ex parte unless the statute providing for the hearing requires notice. Both Team Two and Chuck Collier have commented that this general provision should be reversed to provide that all hearings shall be noticed unless the statute specifically provides that they may be held ex parte. We agree.

Proposed Section 7306 provides that the court shall hear and determine the matters presented and make appropriate orders at the hearing. In commenting on this Section, Chuck Collier notes that the provision of current Probate Code Section 1230 which provides that the party affirming is a plaintiff and that the party denying or avoiding is a defendant has apparently not been carried through into the proposed new Code. He proposes that a provision be added which would state that "The petitioner shall be deemed the plaintiff and the objector shall be deemed the respondent." He notes that including such a provision in the Code would help to clearly establish where the burden of proof lies. We join in this comment.

A seemingly innocuous but rather controversial

provision is contained in proposed Section 7352, which provides that "Upon petition therefor, the court may renew, modify, or terminate an order." There are no time limitations contained in this Section, seemingly denying finality to any probate court order. Clearly, some time limitations must be included in this Section, in order that all affected parties can be sure of the finality of probate proceedings.

Proposed Sections 7355 and 7356 deal with the recordation of orders affecting real property and the transfer or conveyance of property pursuant to court order. Proposed Section 7356 defines the word "transaction" to include a lease, but then has different rules for leases than for other "transactions" as defined in that Section. Team Two's comments suggest that the definition of "transaction" be amended to delete the word "lease" if that is intended, or that the definition of "lease" be refined for purposes of the Section. Finally, the last paragraph of Team Two's comment raises a very important point, namely, the exact effect of the recordation of a court order decreeing the distribution of real property. The comment to the proposed Section simply states that "Recordation of an order for distribution of real property has the effect of a receipt by the distributee." Team Two's comment suggests that this comment be reworded to state that "Recordation of an order for distribution of real property transfers title to the recipient thereof and has the effect of a receipt by the distributee." We agree with Team Two's suggestion.

Sincerely,

Executive Committee
Probate & Trust Law
Section

By: 
Richard Lee Stack

daily3

EXHIBIT 4

Minutes
February 19-20, 1987
V. COUNTY

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February 12, 1987

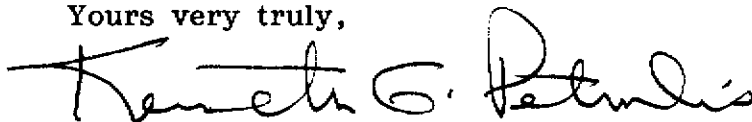
John H. Demouly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Memorandum 86-91 - Rules of Practice

Dear Mr. Demouly:

Attached is a memorandum of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association regarding the proposed changes to the Probate Rules of Practice set forth in the above memorandum.

Yours very truly,



KENNETH G. PETRULIS

KGP/ar

Attach.

cc: Paul Kanin
David Guttman
Ralph Palmieri

the Courts do not allow short continuance periods, if the attorney is unable to obtain the petitioner's signature within the extremely short time involved, the matter will be continued over for three to four weeks. This is a serious problem for attorneys and their probate clients and one that deserves consideration.

The signing and verification of the petition are two distinct issues. While § 7200 suggests that a petition may signed by the attorney, § 7250 states that a petition shall be in writing and signed by the petitioner. The rationale traditionally given for the requirement that the petition be signed personally by the petitioner is that he draws his power directly from the Court and cannot delegate his duties or powers to his attorney. However, the signed of a petition by the attorney does not mean that the attorney is making the petition but, rather, needs only to mean that the attorney represents to the Court that the petition is made by his client, the petitioner. The requirement of the petitioner' signature on the petition, similarly, adds nothing when the verification of the petitioner is attached to the petition, showing that he is indeed making the petition and swearing that all facts therein are true.

The use of a verified petition as evidence in an uncontested proceeding (§ 7252) also creates a problem. Under CCP § 446, while a petition may be verified by the attorney under certain circumstances, a petition verified in that form may not be used as an affidavit or declaration establishing facts alleged in the petition. (See, e.g., CEB, Civil Discovery Practice Before Trial, Vol. 1, §7.39, at p.372.)

In many cases, the facts are personally known to the attorney. In such cases, the law should be made clear that the attorney, if he has personal knowledge of the facts, can establish by affidavit or verification those facts as evidence, when offered in an uncontested proceeding.

Apparently, this is currently the practice in the Probate Court, since all of the attorneys polled noted that they had on occasion verified supplements themselves when they had personal knowledge of the facts, and that those supplements were accepted and approved.

§ 7201. Judicial Council authority

Comment. Some of the committee members felt that local rules, tailored to local conditions or responsive to new case law, were helpful to probate practitioners. Probate rules are published on a statewide basis. It is not clear that anyone has suggested that there is any problem caused by an over proliferation of rules.

§ 7202. Trial by jury

7202. Except as expressly provided in this division, there is no right to a jury trial in proceedings under this division, nor shall the right to a jury trial arise because of the incorporation of any rule of practice applicable to civil actions into this division.

Comment. The comment of Charles Collier, in connection with this section, is most appropriate. There is little or no case law dealing with the right to a jury trial in connection with probate proceedings and, indeed, civil litigators do attempt to apply civil rules regarding the availability of juries to matters tried or initiated in probate. We suggest revising § 7202 as indicated above, to eliminate this ambiguity.

We additionally note that, generally, a matter instituted under the Probate Code is set for trial by the Probate Court and thereby receives preference on the trial calendar, even though the matter may be referred out for trial from the Probate Court to the Master Civil Department. This preference obviously expedites the winding up and closing of estates. However, in the event that the proceeding is not instituted under the Probate Code, it would not receive trial preference. For example in the case of a petition under § 851.5 to determine title to property, if the same action were initiated under the Civil Code, in the form of a constructive trust, particularly in Los Angeles County, the probate estate would have to remain open for four or five years, pending the trial of the matter. The same is true for personal injury actions involving the estate. We, therefore, recommend that a new section be proposed, giving preference on the Civil Trial Calendar to matters to which an estate is a party.

§ 7250. Petitions

Comment. As noted above under the comment to § 7200, we recommend that petitions be signed by the petitioner or attorney.

§7251. Verification required

Comment. As noted above in the comment to § 7200, we recommend that where the facts are personally known to the attorney, that the attorney be allowed to verify petitions or supplements. In many probate proceedings, the verification of an account by the petitioner is largely a fiction, since the receipt and payment of claims, expenses, funds, etc., will have been done by the attorney or staff under the attorney's

supervision. As a matter of fact, in many cases it might be more appropriate for the attorney to sign the verification.

§ 7252. Affidavit or verified petition as evidence

7252. An affidavit or verified petition, report, or account shall be received as evidence when offered in an uncontested proceeding under this code.

Comment. It is suggested that additional language is to conform to the language used in § 7251(a)(1).

§ 7303. Response or objections

7303. An interested person may, at or before the hearing, make a response or objection ~~orally or~~ in writing.

Comment. We suggest deleting the right to make oral objection. In practice, the Court will always require objections to be submitted in writing. If a person appears to make an objection orally, a continuance will be granted for a reasonable period of time to allow the submission of written objections. Without written objections, issues cannot be formulated. § 7304 provides for such continuances.

§ 7352. Renewal, modification, and termination

Comment. Under the Code of Civil Procedure, there are certain time periods set forth for a motion for reconsideration and motion to correct an order, which may be as long as six months. It would seem appropriate, in keeping with the necessity of expediting probate proceedings, that, notwithstanding the time limits generally applicable to civil matters, any petition to renew, modify, or terminate an order which is not a continuing

order, be made within, for example, sixty days following the order. It should further be provided that, if prior to the date of application for modification, etc., the estate has been distributed, that the executor should be absolved of liability to the extent that the estate remaining is not sufficient to satisfy the new order.

§ 7353. Effect of order on liability of personal representative

Comment. It is the practice of probate attorneys to allow for the distribution of property as soon as an order is approved. This is particularly true when there are no objections to the order. We suggest that the section be revised to reflect that, when there are no objections and distributions are made pursuant to the order, but before the period for appeal has expired, the personal representative will not be liable, except to the extent of the undistributed estate.