

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

jd10
03/04/87

<u>Time</u>	<u>Place</u>
March 12 (Thursday) 3:00 p.m. - 8:00 p.m.	State Bar Building
March 13 (Friday) 9:00 a.m. - 4:00 p.m.	Board Room 555 Franklin Street San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

March 12-13, 1987

1. Minutes of February 19-20, 1987, Meeting (to be sent)

2. Administrative Matters

Meeting Schedule

See the note at the bottom of the attached meeting schedule

1987 Legislative Program

Oral Report at meeting

3. Study L - Probate Code - Assembly Bill 708

Memorandum 87-11 (sent 2/24/87)
Assembly Bill 708 (attached to Memorandum)

4. Study L-1025 - Amendments to AB 708 (Creditor Claims Against Decedent)

Memorandum 87-13 (sent 3/3/87)
First Supplement to Memorandum 87-13 (enclosed)

5. Study L-1037 - Amendments to AB 708 (Supervised Administration)

Memorandum 87-14 (sent 3/3/87)
First Supplement to Memorandum 87-14 (to be sent)

6. Study L-1028 - Amendments to AB 708 (Independent Administration)

Memorandum 87-15 (sent 2/24/87)

7. Study L-1029 - Amendments to AB 708 (Marital Deduction Gifts)

Memorandum 87-16 (enclosed)

8. Study L-2005 - Amendments to AB 708 (Conforming Revisions and Miscellaneous Amendments)

Memorandum 87-17 (to be sent)

9. Study L-1055 - Amendments to AB 708 (Notice)

Memorandum 87-18 (sent 3/3/87)

10. Study L-1041 - Amendments to AB 708 (Procedure)

Memorandum 87-19 (sent 3/3/87)

11. Study L-640 - AB 362 (Trusts)

Memorandum 87-20 (to be sent)

12. Study L-1027 - Accounts

Draft of Tentative Recommendation

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

Comments on Draft

First Supplement to Memorandum 87-1 (sent 2/9/87)

Second Supplement to Memorandum 87-1 (sent 3/3/87)

13. 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)

First Supplement to Memorandum 86-201 (sent 3/3/87)

14. Study L-1035 - Administration of Estates of Missing Persons Administration (Review of Comments on Tentative Recommendation)

Memorandum 86-206 (to be sent)

Draft of Tentative Recommendation (attached to Memorandum)

MEETING SCHEDULE
(AS DETERMINED AT THE FEBRUARY 1987 MEETING)

MARCH 1987

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

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

JUNE 1987

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

JULY 1987

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

SEPTEMBER 1987

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

Note. The Sacramento meeting is scheduled to end at 3:30 p.m. The PSA flights to Los Angeles from Sacramento leave Sacramento at 3:20 p.m. and 5:50 p.m. Does the Commission wish to end the meetings in Sacramento at an earlier time so that members and others will be able to make the 3:20 p.m. flight?

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
MARCH 12-13, 1987
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on March 12-13, 1987.

Law Revision Commission

Present: Arthur K. Marshall, Chairperson Roger Arnebergh
Ann E. Stodden, Vice Chairperson Bion M. Gregory
Elihu M. Harris, Member of Assembly Forrest A. Plant
(Mar. 13) Vaughn R. Walker

Absent: Bill Lockyer, Member of Senate Tim Paone
Edwin K. Marzec

Staff Members

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

Absent: Robert J. Murphy III

Consultants Present

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

Other Persons Present

Edward V. Brennan, California Probate Referees' Association,
San Diego
Phyllis Cardoza, Beverly Hills Bar Association, Probate,
Trust and Estate Planning Section, Los Angeles
James D. Devine, State Bar Estate Planning, Trust and Probate
Law Section, Monterey
Jonathan Ferdon, San Francisco Public Administrator/Public
Guardian Office, San Francisco (Mar. 12)
Michael Harrington, California Bankers Association, San
Francisco
Valerie J. Merritt, Probate and Trust Law Section, Los
Angeles County Bar Association, Los Angeles
James Quillinan, Executive Committee, State Bar Estate
Planning, Trust and Probate Law Section, Mountain View
Shirley C. Yawitz, California Probate Referees' Association,
San Francisco (Mar. 12)

ADMINISTRATIVE MATTERS

MINUTES OF FEBRUARY 19-20, 1987, MEETING

The Minutes of the February 19-20, 1987, Meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The Commission considered the schedule for future meetings. The Commission determined that the September meeting should be held in Los Angeles and the October meeting should be held in Sacramento. This change was made for the convenience of persons who will be attending the Annual Meeting of the State Bar. The time when the meeting ends on Friday was changed for meetings held in Sacramento.

The staff should check to determine whether the September meeting can be held at the State Bar Building in Los Angeles. If the State Bar Building does not have a meeting room available for the September meeting, the meeting should be held at a hotel near the Los Angeles Airport.

The following is the schedule for future meetings.

April 1987

9 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
10 (Friday)	9:00 a.m. - 2:00 p.m.	State Capitol

May 1987

14 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
15 (Friday)	9:00 a.m. - 2:00 p.m.	State Capitol

June 1987

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

July 1987

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

September 1987

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

October 1987

15 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
16 (Friday)	9:00 a.m. - 2:00 p.m.	

November 1987

19 (Thursday)	3:00 p.m. - 8:00 p.m.	San Francisco
20 (Friday)	9:00 a.m. - 2:00 p.m.	

December 1987

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

LEGISLATIVE PROGRAM

Passed First House

Assembly Bill 362 (Urgency Trust Bill) (Harris) (Amendments Required)

Not Yet Set for Hearing in First House

Assembly Bill 708 (Comprehensive Probate Bill) (Harris) (Amendments Required)

Senate Concurrent Resolution 12 (Continues Authority to Study Previously Authorized Topics) (Lockyer)

Assembly Concurrent Resolution 42 (Authorizes Study of Administrative Law) (Harris)

The Executive Secretary reported that the amendments to Assembly Bill 708 have been sent to the Legislative Counsel's office to be drafted in a form in which they can be adopted by the Assembly. The amendments are so substantial that it will take some time for the Legislative Counsel's office to prepare the amendments in proper form. Since it is our plan to have Assembly Bill 708 amended and be in print for at least a week before the committee hearing on the bill in the Assembly, it may not be possible to make any revisions in the amendments sent to the Legislative Counsel. Additional amendments will be needed to Assembly Bill 708 as amended and these amendments will be made after the bill passes the Assembly. These additional amendments will include any amendments that the Commission determines at the March meeting should be made to the bill (unless those amendments can be included in the amendments now being prepared by the Legislative Counsel). The goal is to have the Assembly Judiciary Committee hear Assembly Bill 708 early in April.

A letter from Leslie Rothenberg, on behalf of the Natural Death Act/Durable Power of Attorney subcommittee of the Los Angeles County Bar Association Bioethics Committee, was handed out at the meeting and briefly discussed by the Commission. A copy of this letter is attached as Exhibit 1 to these Minutes.

STUDY L - AMENDMENTS TO ASSEMBLY BILL 708

The Commission considered Memorandum 87-11. As indicated in this memorandum, the staff has prepared a series of memorandums for the March meeting relating to various portions of Assembly Bill 708. Attached to these memorandums are amendments to Assembly Bill 708. A consolidated set of the amendments attached to the various memorandums has been sent to the Legislative Counsel's office for drafting. The amendments attached to each of the memorandums will be reviewed at the meeting and approved as proposed or with revisions. If revisions are made in the amendments, an effort will be made to include them in the amendments being drafted by the Legislative Counsel's office. If it is not possible to include those revisions in the amendments being drafted by the Legislative Counsel's office, the bill will be amended without the revisions and the revisions will be made after the bill has passed the Assembly.

**STUDY L-640 -AMENDMENTS TO ASSEMBLY BILL 362
(AMENDMENTS TO DEAL WITH INCREASE IN FEES BY CORPORATE TRUSTEES)**

Commissioner Harris expressed concern that some corporate trustees have increased or are increasing their fees to an amount that is unreasonable. He stated that he was warned that this would happen when the legislation to remove testamentary trusts from court supervision was considered, but he did not believe that it would happen. He asked the Commission, in cooperation with the Estate Planning, Trust and Probate Law Section of the State Bar and the probate and trust law committees of local bar associations, to develop legislation to deal with this problem. The Commission agreed that it would look into the problem.

**STUDY L-640 - AMENDMENTS TO ASSEMBLY BILL 362
(TRUST CLEANUP PROVISIONS)**

The Commission considered Memorandum 87-20 and the First Supplement thereto relating to amendments to AB 362 (trusts). The Commission also considered a letter from Kenneth M. Klug on this

subject, which is attached as Exhibit 2. The staff was directed to prepare a set of amendments to AB 362 implementing the Commission's decisions for consideration at the April meeting. The proposed amendments were tentatively approved subject to the following revisions:

§ 15405. Guardian ad litem; consent to modification or termination

This section should be revised as follows:

15405. For the purposes of Section 15403 and 15404, the consent of a beneficiary who ~~is legally incapacitated,~~ lacks legal capacity, including a minor, or is an unascertained, or unborn person may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so. In ~~this case determining whether to give consent,~~ the guardian ad litem may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of the trust.

§ 15410. Distribution of property of trust with uneconomically low principal

The Commission rejected the suggestion to provide for distribution to income beneficiaries at termination of a trust with uneconomically low principal where the trust does not provide another manner of distribution. It was concluded that it would be fairer to distribute the property to living beneficiaries on an actuarial basis. This would provide a flexible rule that does cut off principal beneficiaries. Section 15410 should be revised substantially as follows:

15410. At the termination of a trust, the trust property shall be disposed of as follows:

(a) In the case of a trust that is revoked by the settlor, as directed by the settlor.

(b) In the case of a trust that is terminated by the consent of the settlor and all beneficiaries, as agreed by the settlor and all beneficiaries.

(c) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument.

(d) If a trust is terminated by the trustee pursuant to subdivision (b) of Section 15408, the trust property shall may be distributed as determined by the trustee pursuant to this subdivision, the standard provided in subdivision (c) without the need for a court order. Where the trust instrument does not provide a manner of distribution at termination and the settlor's intent is not adequately

expressed in the trust instrument, the trustee may distribute the trust property to the living beneficiaries on an actuarial basis.

§ 16222. Participation in business; change in form of business

This section should be revised to provide that the lease of four or fewer residential units is not the operation of a business or other enterprise. The effect of this revision is that the trustee will not be required to seek court approval to continue leasing as many as four residential units that are a part of trust property.

16222. (a) Subject to subdivision (b), the trustee has the power to continue or participate in the operation of any business or other enterprise that is part of the trust property and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

(b) Except as provided in subdivision (c), the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court. For the purpose of this subdivision, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise.

(c) The trustee may continue the operation of a business or other enterprise for a reasonable time pending a court hearing on the matter or pending a sale of the business or other enterprise.

(d) The limitation provided in subdivision (b) does not affect any power to continue or participate in the operation of a business or other enterprise that the trustee has under a trust created by an instrument executed before July 1, 1987.

§ 16441(a). Measure of liability for interest

The staff was directed to revise the language set out in the memorandum to make it clearer. The staff should also consider appropriate language for inclusion in the section or in the comment that would make clear what rate of interest applies to damages for breach of trust before July 1, 1987.

§ 17457. Administration of transferred trust

The staff was directed to propose further revisions of this section to make clear that the dispositive provisions and the validity

of a foreign trust that is transferred to California are governed by the law that applied before it was transferred.

STUDY L-1025 — CREDITOR CLAIMS

The Commission considered Memorandum 87-13 and the First Supplement to Memorandum 87-13, together with a letter from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (attached to these Minutes as Exhibit 3), relating to creditor claims and payment of debts. The Commission approved the draft statute for incorporation into AB 708, subject to the following changes. The Commission understands that because of time constraints, it may be necessary to delay amending the changes into AB 708 until after the bill has been heard in the Assembly.

§ 709. The first sentence was revised to read "...the plaintiff shall in like manner file his or her claim ~~with the clerk~~ as required in other cases." The references to the "prescribed period" were replaced by the phrase "four months after the date letters are first issued to a general personal representative."

§ 719. The references to "executor or administrator" should be changed to "personal representative". The staff should note the problem of liability of a personal representative for costs to be dealt with later in connection with liability for costs generally.

§ 9100. The second "the" was deleted from the first line of this section. Subdivision (a)(3) was revised to read, "The claim does not arise out of the creditor's conduct of a trade, business, or profession in the state."

§ 9150. Subdivision (b) was revised to read, "A claim shall be filed with the court and a copy shall be mailed to the personal representative." Failure to mail a copy to the personal representative should not invalidate the claim; however any loss caused by the failure should be borne by the plaintiff. A provision should be added requiring any claim form to include a proof of service, which may be completed by the claimant. Subdivisions (c) and (d) were deleted. Conforming changes should be made in other sections of the statute that are affected by these changes.

§ 9151. The second sentence of subdivision (b) was revised to read, "An original voucher may be withdrawn after a copy is provided, which shall be attached to the claim."

§ 9202. This section should not be divided into subdivisions. The second sentence was revised to read, "Any claim by the director shall be filed within four months after notice is given."

§ 9203. The 90 day notice requirement should be moved from this section to Section 9202, so that it applies only to the Director of Health Services.

§ 9253. Subdivision (a) was revised to provide for tolling the statute of limitations until "notice of" allowance, approval, or rejection. Subdivision (b) was revised to provide that allowance or approval of a claim "in whole or in part" further tolls the statute of limitations as to the part allowed or approved during administration.

§ 9257. Subdivision (d) should be revised to allow an award of attorney's fees either for prosecuting or defending an action by the creditor, but only if the prosecution or defense of the action was unreasonable.

§ 11426. Subdivision (d) should be (b).

§ 11429. This section should have language added to make clear that the remedy of an unpaid creditor, including a creditor ordered by the court to be paid, is not against distributees or creditors who have been paid.

**STUDY L-1028 - AMENDMENTS TO ASSEMBLY BILL 708
(INDEPENDENT ADMINISTRATION)**

The Commission considered Memorandum 87-15 relating to the independent administration provisions of Assembly Bill 708. The Commission approved the Amendments to Assembly Bill 708 which were attached to the memorandum with the qualifications noted below.

The Commission discussed the letter from Charles A. Collier, Jr., which was handed out at the meeting and is attached to these Minutes as Exhibit 4.

Section 10501 (pages 141 and 142 of Assembly Bill 708). The Commission approved the substance of the following provision:

Notwithstanding the provisions of this section, the provisions of subdivisions (f) to (k), inclusive, do not apply to transactions between the personal representative as the personal representative and the personal representative as an individual where all of the following requirements are satisfied:

- (1) The personal representative is the sole beneficiary of the estate.
- (2) The period for filing creditor's claims has expired.
- (3) No request for special notice is on file.
- (4) The claims that were filed have either been paid, settled or withdrawn or the creditor who filed the claim has consented to the transaction.

Notwithstanding the provisions of this section, the provisions of subdivisions (f) to (k), inclusive, do not apply to transactions between the personal representative as the personal representative and the personal representative as an individual where all of the following requirements are satisfied:

- (1) All the known heirs or devisees have consented to the transaction.
- (2) The period for filing creditor's claims has expired.
- (3) No request for special notice is on file.
- (4) The claims that were filed have either been paid, settled or withdrawn or the creditor who filed the claim has consented to the transaction.

The staff should consider redrafting Section 10501 along the lines suggested by Mr. Collier in his letter.

Section 10590 (page 155 of Assembly Bill 708). On page 155, lines 10 and 11, strike out "any interested person" and insert "a person described in Section 10581." This amendment makes clear that a creditor who has no right to notice may not seek court review of a proceeding. The creditor can file a request for special notice if the creditor desires to receive notice of proposed action so that the creditor can prevent the proposed action by objecting and preserve the creditor's right to obtain court review under Section 10590. Allowing a creditor who has not filed a request for special notice to seek court review would undermine the finality of action taken pursuant to a notice of proposed action, as it would allow third parties without limit to obtain court review of the action after it has been taken.

Amendment 17. This amendment should refer to page 139, line 37.

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Amendment 66. The words "to the issuer or its successor" were substituted for the words "to the issuer."

Technical amendment. The following technical amendment was approved by the Commission:

AMENDMENT

On page 159, strike out lines 1 and 2 and insert:

Dated: _____

(SIGN HERE)

STUDY L-1029 -- MARITAL DEDUCTION GIFTS

The Commission considered Memorandum 87-16, relating to marital deduction gifts. The Commission approved the recommendation for printing and the statute for submission to the Legislature, with the following changes. The Commission understands that because of time constraints, it may be necessary to delay amending the changes into AB 708 until after the bill has been heard in the Assembly.

§ 21502. Application of formula clause to federal estate tax. This section was revised to read, "If an instrument makes a transfer of property under a formula intended to eliminate the federal estate tax or the federal gift tax, the formula shall be applied to eliminate or to reduce to the maximum extent possible the federal estate or gift tax." The staff should also attempt to draft language to cover a situation where a gift is made to a bypass trust in the maximum amount that will be free of tax, in order to limit the gift to the amount that will not cause or increase the tax.

§ 21525. Survival requirement for marital deduction gift. This section should be split into two parts. The first part should limit a marital deduction survival requirement to 6 months. The second part should limit a common disaster survival requirement to the time of any final audit of the federal estate tax return.

**STUDY L-1030 - AMENDMENTS TO ASSEMBLY BILL 708
(DISTRIBUTION WITHOUT ADMINISTRATION)**

The Commission considered an amendment to Section 13100 of the Probate Code that was handed out at the meeting. This section is included in the provisions relating to the affidavit procedure for collection or transfer of personal property.

The Commission determined that the introductory portion of subdivision (a) of Section 13101 should be amended in Assembly Bill 708 to read as follows:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

The Commission also determined to renumber existing subdivision (c) of Section 13101 to be subdivision (d) and to add a new subdivision (c) to read:

(c) If the person or persons executing the affidavit or declaration claim under the decedent's will, a copy of the will shall be attached to the affidavit or declaration.

The following Comment was approved for amended Section 13101:

Comment Section 13101 is amended to require that a copy of the decedent's will be attached to the affidavit or declaration if the persons executing the affidavit or declaration claim under the decedent's will. This addition makes Section 13101 consistent with Sections 13152(c) (contents of petition for court order determining succession to real property) and 13200(d) (affidavit procedure for real property of small value).

**STUDY L-1035 - ADMINISTRATION OF ESTATES OF MISSING PERSONS
PRESUMED DEAD (COMMENTS ON TENTATIVE RECOMMENDATION)**

The Commission considered Memorandum 86-206 which analyzed comments received on the *Tentative Recommendation Relating to Administration of Estates of Missing Persons Presumed Dead*. The Commission decided that Part 12 (commencing with Section 12400) of Division 7 should be added to AB 708 in the current legislative session. The Commission made the following decisions:

§ 12401. Presumption of death for purposes of estate administration

This section should be revised as follows:

12401. In proceedings under this division part, a person who ~~is absent~~ has not been seen or heard from by those who are likely to have seen or heard from that person for a continuous period of five years, ~~during which time the person has not been heard from,~~ and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

§ 12404. Petition for administration

This section should be revised as follows:

12404. (a) A petition may be filed in the court having jurisdiction under Section 12403 for the administration of the estate of a missing person.

(b) The petition may be filed by any ~~one or more of the following:~~

~~(1) The spouse of the missing person.~~

~~(2) A relative of the missing person.~~

~~(3) A person interested in the estate of the missing person who may be appointed as a personal representative, other than a person described in paragraph (12) of subdivision (a) of Section 422.~~

(c) In addition to the matters otherwise required in a petition for administration of the estate, the petition shall state all of the following:

(1) The last known place of residence and the last known address of the missing person.

(2) The time and circumstances ~~of the person's disappearance~~ when the missing person was last seen or heard from.

(3) That the missing person has not been seen or heard from by the persons ~~most~~ likely to ~~hear~~ have seen or heard from the missing person (naming them and their relationship to the missing person) for a period of five years and that the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any the search or the inquiry made concerning the whereabouts of the missing person.

The comment to this section should indicate the effect of the incorporation of the list of persons who may petition for appointment as a personal representative. The comment should also state that the petition may be made on information and belief.

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

This section should be revised as follows:

12406.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a ~~reasonably~~ diligent search and to report the results of the search. The court may order the search to be made in any manner that seems the court determines to be advisable, including any or all of the following methods:

.

The comment to this section should state that the removal of the word "reasonably" in the authority of the court to order a "reasonably diligent search" is not a substantive change.

§ 12408. Recovery of property by missing person upon reappearance

This section should be revised as follows:

12408. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that recovery from distributees is equitable in view of all the circumstances, but an action under this paragraph is forever barred five years after the time the distribution was made.

(b) The remedies available to the missing person under subdivision (a) are ~~in addition to any remedies available to the missing person~~ exclusive, except for any remedy the missing person may have by reason of fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the order for final distribution, when it becomes final, is conclusive as to the rights of the missing person ~~and~~ the rights of the beneficiaries of the missing person, and the rights of all other persons interested in the estate.

(d) If a dispute ~~exists~~ arises as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under Section 1080, notwithstanding the limitations of time prescribed in Section 1080, for the determination of the identity of the person claiming to be the reappearing missing person.

**STUDY L-1037 - AMENDMENTS TO ASSEMBLY BILL 708
(SUPERVISED ADMINISTRATION)**

The Commission considered Memorandum 87-14, the First Supplement to Memorandum 87-14, and letters from Charles A. Collier, Jr. and H. Neal Wells which were handed out at the meeting. Copies of these letters are attached to these Minutes as Exhibits 4 and 5.

Supervised Administration Generally

The Commission considered Memorandum 87-14 relating to the supervised administration provisions of Assembly Bill 708. The Commission approved the Amendments to Assembly Bill 708 which were set out on the white pages attached to Memorandum 87-14 with the following qualifications:

Amendment 129. This amendment requires the examination of a surviving partner if the surviving partner is "a resident within the state at the time of the [confirmation] hearing" and is able to be present in court. The staff should consider the problem of compelling the attendance of the surviving partner if the surviving partner is not within the county. The staff should draft provisions to be added by amendment to Assembly Bill 708 to provide a method of compelling the surviving partner to attend the hearing.

Section 9730 (page 78 of Assembly Bill 708). This section should be extended to permit investment without the need for court authorization in direct obligations of the State of California maturing not later than one year from the date of making the investment.

Option to purchase given in will. On page 107, lines 15 and 16, strike out "not later than 30 days after the option is exercised".

Section 10206 (pages 118-119 of Assembly Bill 708). This section should be revised to retain the law under existing Probate Code Section 801 that the sale must not be confirmed until the purchaser provides the required bond.

Broker's Commissions

The Commission considered the First Supplement to Memorandum 87-14 relating to the rules governing compensation of agents and brokers. The Commission approved the addition to the Comment to Section 10161 and the Comments to the new sections proposed to be added to Assembly Bill 708 (as set out in the pink pages attached to First Supplement to

Memorandum 87-14). The Commission also approved the amendments to Assembly Bill 708 (yellow pages attached to First Supplement to Memorandum 87-14).

The Commission also approved the following technical amendment to Assembly Bill 708:

AMENDMENT

On page 114, line 28, strike out "Subject to Section 10162, the" and insert:

The

Creditor's Right to Reach Nonprobate Assets

The Commission discussed Mr. Klug's suggestion that a clear statement of the law concerning a creditor's right to reach nonprobate assets be drafted. The Commission determined that this problem is one that should be considered at a future time. The staff is to add this problem to the list of matters that will be considered when the new Probate Code has been drafted.

STUDY L-1041 - AMENDMENTS TO AB 708 (PROCEDURE)

The Commission considered Memorandum 87-19 and the attached draft of amendments to AB 708 relating to procedure. The amendments were approved as submitted. Amendment 3, which restores the exact language of Probate Code Section 1222 relating the duty to record, was approved for inclusion in AB 708. However, when this subject is next presented to the Commission, the staff should consider whether this section should provide that the personal representative is liable for any damages caused by the failure to record.

STUDY L-1055 - AMENDMENTS TO AB 708 (NOTICE)

The Commission considered Memorandum 87-18 and the attached draft of amendments to AB 708 relating to general notice provisions. The amendments were approved as submitted.

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March 12-13, 1987

**STUDY L-2005 - AMENDMENTS TO AB 708
(CONFORMING REVISIONS AND MISCELLANEOUS AMENDMENTS)**

The Commission considered Memorandum 87-17 and the First Supplement thereto and the attached drafts of amendments to AB 708 relating to conforming revisions and miscellaneous amendments. The amendments were approved as submitted, subject to the following technical corrections:

Amendment 18

The reference to page "47" should be page "17".

Amendment 21

The word "the" should also be struck out in line 19 on page 52.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

Leslie Steven RothenbergA PROFESSIONAL CORPORATION
LAWYER AND MEDICAL ETHICIST16751 Edgar Street, Pacific Palisades, California 90272
(213) 454-9933

March 3, 1987

The Hon. Barry Keene, Senator
406 State Capitol
Sacramento, CA 95814Re: Proposed amendments to the Natural Death Act and Durable
Power of Attorney for Health Care

Dear Senator Keene:

On behalf of the Natural Death Act/Durable Power of Attorney subcommittee of the Los Angeles County Bar Association Bioethics Committee, I want to thank you for sharing this proposed legislation with us and giving us an opportunity to comment. We are mindful of the role that our Bioethics Committee played in the adoption and implementation of the California Natural Death Act (your Assembly Bill 3060 in 1976) and the Durable Power of Attorney for Health Care (your Senate Bill 762 in 1983, and your Senate Bills 1365 and 1367 in 1984), and want to continue our constructive role in this process. The views expressed below do not reflect the position of the Los Angeles County Bar Association, but simply that of our subcommittee. In view of the time constraints, this letter also does not reflect the views of the entire Bioethics Committee, but it will be presented to them for their approval at our next meeting on March 11.

As I conveyed in my telephone call to Mr. Peter Hansel of your staff on February 26 and again today, our subcommittee is of the view that the proposed legislation could actually defeat the goals of both existing statutory approaches noted above and will not resolve the concerns of the senior citizen groups that prompted your consideration of this legislation. Specifically, we believe that: 1) the Natural Death Act, while flawed in the manner suggested by the senior citizen groups, is, regrettably, largely irrelevant to current efforts by California residents to use advance directives as a means to control future medical treatment decisions; 2) the Durable Power of Attorney for Health Care law, while perhaps not perfect, is an excellent vehicle for stating the entire spectrum of treatment preferences (and appointing a proxy or representative, if desired), and that this law does not need major revisions; 3) the Uniform Rights of the Terminally Ill Act, in our view, has major problems and does not significantly improve the statutory approach that we already have in California; 4) the proposed attempt to repeal both the Natural Death Act and the Durable Power of Attorney for Health Care law, and recodify them

The Hon. Barry Keene
March 3, 1987
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together with the language of the Uniform Rights of the Terminally Ill Act, not only has significant drafting problems but would also open the door to repealing or significantly altering the Durable Power of Attorney for Health Care statute by its opponents in the Legislature; and 5) the concern of senior citizens groups--that many nursing home operators refuse to honor either Natural Death Act directives or Durable Powers of Attorney for Health Care presented by or on behalf of patients in their facilities for fear of being fined by the State Health Department--will not be corrected by this proposed legislation.

We recommend that you consider authorizing the California Law Revision Commission to examine the topic and propose any necessary revisions to both existing laws. The Commission has developed considerable expertise in dealing with these substantive problems and has widely acknowledged expertise in drafting complex, technical statutory revisions. In our view, the Commission has existing authority to review these statutes, and you could simply send it a letter asking it to give priority to such a review of those statutes and consideration of revisions. Alternatively, you could amend Senate Concurrent Resolution 12 (Lockyer) that gives legislative authority to the Commission to continue work on existing topics by adding language such as: "and the Commission shall give priority to reviewing the Natural Death Act and the Durable Power of Attorney for Health Care laws for any needed changes." Commission consideration has the added advantage of allowing all groups concerned about these statutes to convey their concerns and suggestions to the Commission before it produces a final recommendation, thereby permitting you to introduce a bill that will already have wide support.

If you decide to go ahead with the proposed legislation, we urge you strongly to confine the proposed changes to the Natural Death Act and to leave unchanged the Durable Power of Attorney for Health Care laws.

Finally, by this letter, we are offering to meet with senior citizen groups to explore current problems experienced by nursing home patients, consider options for dealing with those problems under existing law, and discuss educational programs that might benefit senior citizens statewide in helping them make their wishes known regarding treatment preferences and having those wishes appropriately honored.

The Hon. Barry Keene
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We would be pleased to consider further developments with regard to this proposed legislation and would appreciate being informed of any decisions or new developments on this topic. Thank you again for allowing us to share our views with you.

Sincerely,



Leslie Steven Rothenberg
Chairperson, Natural Death Act/Durable Power of Attorney
subcommittee

LSR:ms

Enclosure (list of members of the Bioethics Committee, per your request)

cc: Members of the LACBA Bioethics Committee
Donald P. Baker, Esq., President, LACBA
Richard Walch, Esq., Executive Director, LACBA
Catherine I. Hanson, Esq., Legal Counsel, CMA
Ms. Susan Talcott and Ms. Lillian Rabinowitz, Gray Panthers

MEMBERS OF THE LOS ANGELES COUNTY BAR ASSOCIATION BIOETHICS COMMITTEE

(*)-members of the Natural Death Act/Durable Power of Attorney subcommittee

*Prof. Vicki Michel, Co-Chair
*Griffith Thomas, M.D., J.D., Co-Chair
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*Leslie Steven Rothenberg, Esq.
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*Carol Scott, Esq.
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Irene Silverman, Esq.
*William Clark Stanton, Esq.
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Catherine Villara
Judith Weinstein, M.D.

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA



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March 9, 1987

Mr. James V. Quillinan
Attorney at Law
444 Castro Street, Suite 900
Mountain View, California 94041

Re: Law Revision Commission Memo 87-20

Dear Jim:

A quick review of Memorandum 87-20 shows only one issue that is deemed to be a policy decision with respect to the trust law. Aside from the comments below, we have no further comments with respect to this memo.

Section 15408 of the new trust law allows for the Trustee to terminate a trust without petitioning the Court where the trust principal does not exceed \$20,000 in value. The present statute would require that the trust assets be distributed in accordance with the settlor's intent. Although the California Bankers' Association representatives were in agreement with that standard at the time the trust law was being drafted, they now say that the standard is too vague and would require the trustee to petition the Court to determine the ultimate distribution of the trust assets. While we do not believe that the standard is vague, if the banks are so uncomfortable that they would petition the Court for instructions, then we agree that the standard should be made more clear. LRC Staff is proposing a change in accord with the CBA recommendation that the trust assets be distributed to the income beneficiary. We believe that such a distribution is improper.

We recommend that when a trust of less than \$20,000 is terminated, the trust assets should be distributed as

Mr. James V. Quillinan
March 9, 1987
Page Two

agreed upon by the income beneficiaries and remaindermen in being, and if they are unable to agree, to be distributed in accordance with an actuarial approach. That is the manner in which economically small trusts are presently distributed: the income beneficiary receives a portion of the assets equivalent to the present value of the income interest (calculated for term certain or for a life estate, depending upon the period of the income beneficiary's entitlement) with the remainder divided among the remainder beneficiaries. An actuarial distribution is more in accordance with the testator's intent than is a distribution of the entire corpus to the income beneficiary.

It should be remembered that many small trusts are established by persons of modest means for the benefit of disabled or retarded children. The parents want the child to receive the income from the trust, to ensure the child has a minimum stipend. While it may be good public policy to terminate small trusts, we must recognize that doing so defeats the intention of many testators. We should not further thwart testamentary plans by giving the entire trust principal to the income beneficiary. We would prefer to see Section 15408(b) deleted than to amend Section 15410 to provide that the entire trust estate be distributed to the income beneficiary.

If Section 15408(b) is retained, we recommend that language be added to prohibit termination of an otherwise irrevocable trust where the settlor and trustee are the same person. For example, a parent may set up an irrevocable living trust for the benefit of a child, by distributing to the trust the annual exclusion amount of \$10,000. If local law allows the trustee to terminate that trust, the otherwise irrevocable trust would be terminable (revocable) under local law, and the Internal Revenue Service would probably take the position that for tax purposes, the trust does not exist. This problem can be cured by redrafting Section 15408(b) to read as follows:

Mr. James V. Quillinan
March 9, 1987
Page Three

(b) Notwithstanding Subdivision (a), if the trust principal does not exceed \$20,000 in value, a trustee has the power to terminate the trust unless the trustee is the settlor of the trust.

Very truly yours,



Kenneth M. Klug

cc: Theodore J. Cranston
Michael V. Vollmer
James F. Rogers
James D. Devine
Charles A. Collier, Jr.

Exhibit 3

Minutes
March 12-13, 1987

OSCAR LAWLER
1896-1966
MAX FELIX
1922-1954
JOHN M. HALL
1916-1973

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H. NEAL WELLS III
PARTNER

March 10, 1987

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

Re: Memorandum 87-13
Creditor's Claims

Dear Jim:

The Executive Committee of the Estate Planning, Trust and Probate Law Section addressed the following policy questions raised by the above memorandum:

1. Section 9257: Should litigation expenses be awarded a creditor who sues on a rejected claim and wins? The Executive Committee does not concur in Mr. Crabtree's suggestion that litigation expenses should be awarded. As noted in my letter concerning 87-14, the Executive Committee is of the view that the imposition of litigation expenses would foster litigation and would be used as leverage by disgruntled creditors to force the approval of marginal claims.

2. Section 9203 (A): The Executive Committee still feels very strongly that this subsection should be deleted. A Personal Representative who has not requested a release from personal liability within the first 90 days after appointment may have no alternative but to keep an estate open for many years (or to retain a substantial cash reserve for this period) in order to prevent personal liability which otherwise could be avoided by

1 1

simply requesting a release from the appropriate taxing authority and awaiting 6-9 months. A tax reserve for 6 to 9 months (while awaiting the clearance) is certainly better than a tax reserve for the 3 to 4 years which may be required if the personal representative misses the 90 day cut-off proposed by the new Section 9203(a) and must await the complete running of the general statute of limitations.

On behalf of Team 3, I have reviewed the memorandum from a technical standpoint and offer the following suggestions:

1. Section 709: Insert the words "and personal representative" after the word "clerk" in the first sentence of this section. This is consistent with the dual claim filing procedures adopted by the Commission.

2. Section 709: Substitute the words "four months after the date letters are first issued to a general representative" for the words "within the prescribed period" and like words appearing throughout the section. Otherwise, the prescribed period could mean to include all extensions otherwise permitted by the code (e.g. the 30 day extension for a creditor who was given late actual notice and the one year extension to an out of state creditor). I assume it was not the intent of the staff to give up to two years (including the extensions) to file a petition pursuant to this section.

3. Section 719: Substitute the words "personal representative" for the words "executor or administrator" in the three places they appear. Insert the words "by the personal

representative" after the word "defended" in the last sentence so that it is clear that the personal representative is liable only for his individual acts and not the acts of a prior personal representative or a co-defendant.

4. The assessment of costs against the personal representative, subject to reimbursement from the estate is existing law. However, has the staff or the Commission considered whether it is appropriate to hold the personal representative liable when the estate is insolvent and cannot make a reimbursement? Neither Team 3 nor the Executive Committee has considered the problem and it may be worthy of thought.

5. Section 9100: Delete the extra "the" in the first line of the section.

6. Section 9103(1): Change "the" to "this" in the sixth word of the subsection 1 and the next to last word of subsection 2 consistent with the next to last word in subsection 3.

7. Section 9150(b)(2): Should the words "mailed or" be deleted? The notice to creditors cautions the mailing by certified mail, return receipt. If the caution is not heeded, shouldn't the creditor bear the risk of nondelivery or proof of time? If mailing is sufficient, what would be the posture of claims which were mailed but not delivered? What if the failure is not discovered until after distribution? The concept of having a claim filed when mailed, rather than received raises too many problems to be practicably utilized.

8. Section 9253(A): Add the words "notice is given of" after the word "until" because it is the notice and not the allowance, approval or rejection that should restart the statute. Otherwise, the creditor has no way of knowing that the statute is running again.

9. Section 9253(C): Add the words "in so far as the approved or allowed portion" or similar words to the end of the sub-section. If the claim is only approved in part, the statute should restart as to the rejected portion of the claim.

10. Section 9304(C): Delete the sentence "The claim of exemption may be made at any time before the time the abstract and notice are served, recorded, or filed under subdivision (b) with respect to the property claimed to be exempt." If the family did not know of the levy until the abstract and notice are served, they should not thereupon be precluded from asserting their claim of exemption.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Reed".

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March 9, 1987

WRITER'S DIRECT DIAL NUMBER

VIA EXPRESS MAILJames V. Quillinan, Esq.
Diemer, Schneider, Jeffers, Luce
& Quillinan
Suite 900
444 Castro Street
Mountain View, California 94041Re: California Law Revision - AB-708

Dear Jim:

The following are some comments on the technical corrections to AB-708 and some substantive issues relating, in particular, to the Independent Administration of Estates Act.

The substantive issues were raised by members of Team Four and in several instances that team's recommendation has been approved by the Executive Committee.

Independent Administration
of Estates Act

1. Section 10501, at pages 141-142, raises a substantive issue when the personal representative is also the sole beneficiary. In those cases, if creditors are protected, it would not seem necessary to file a court petition for approval of various transactions between the personal representative and himself as sole beneficiary. This position has been approved by the Executive Committee. Bill Hoisington suggested the following additional language be added at the end of that section:

"Notwithstanding the foregoing, the provisions of subsections (f) through (k) shall not apply in the following cases: (1) where the personal representative is the sole beneficiary of the estate, the period for filing creditor's claims has expired and no request for special notice is on file; and (2) where all persons interested in the estate have consented to the proposed action, the period for filing claims has expired, and no request or special notice is on file."

IRELL & MANELLA

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

James V. Quillinan, Esq.
March 9, 1987
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Perhaps the word "and" connecting (1) and (2) should be "or."

2. Section 10590: The amendment in 85-15 to this section adds the words "described in Section 10581" following the word "person" on line 3, page 155. The view of both Team Four and the Executive Committee is that subpart (b) of the same section should have a similar limitation. That is, the court may review the action taken upon motion of "any person, described in Section 10581." The thought was that as now worded it allows, for example, a creditor who has no right to notice to seek court review of a proceeding. This would undermine the finality of action taken pursuant to a notice of proposed action, as it would allow third parties without limit to have court review thereof.

The following are my personal comments on the various technical amendment memoranda referred to hereinafter. I am only commenting on those technical amendments where I believe there is some need for clarification or further amendment. The remaining technical amendments appear satisfactory.

1. Memorandum 87-15:

a. Amendment 17: It should refer to page 139, line 37.

b. Amendment 27: This again refers to Section 10501. I believe the structure of this section is awkward. I would suggest that it be relettered and renumbered so that sub (a) refers to all actions which require court supervision whether there is full or limited authority. That would include what is now in (a)-(d) and (f)-(i). Subpart (b) could then state that "Where the personal representative has been granted limited authority, court supervision in addition is required for the following." Then the four subparagraphs now found in (e) would be listed (on sale of real property, etc.). A new subparagraph (c) could incorporate the substantive change referred to above for this section dealing with the situation where the personal representative is the sole beneficiary.

c. Amendment 66: The words inserted "to the issuer" are perhaps unduly restrictive as many corporations are now merged into other corporations, etc. Perhaps the language should be "to the issuer or its successor."

d. Possible amendment (there is no amendment number), page 150, lines 21-24: I continue to believe that it is unnecessary and should be deleted. The language on the same page at lines 32-36 seems to me is appropriate, because that relates to situations where notice is not otherwise required.

James V. Quillinan, Esq.
March 9, 1987
Page Three

e. Possible amendment, page 151, lines 22-26:
I believe that an attorney drawn waiver which is substantially the same as the Judicial Council form should be permitted.

2. Memorandum 87-17 and First Supplement:

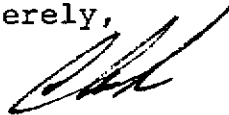
a. Amendment 18: Amendment No. 3 in Memorandum 87-19 changes this language in proposed Section 1292 to restate what is now in the Probate Code. You will recall that the Executive Committee voted to retain the permissive language of Section 1292. Amendment 18 bearing the word "thereof" does not seem to correctly refer either to Section 1292 as in AB-708 or to the proposed substitution of language in Memorandum 87-19. Perhaps Amendment 3, Memorandum 87-19, is intended to supersede this change. This change in any event appears to be inaccurate as the word "thereof" does not appear at the point indicated.

3. Memorandum 87-18:

a. Amendment 18: In revising this language, I believe that the words "to all of the following" which now appear on line 20 need to be moved to the end of the introductory language or new subparagraph (c), so that that introductory language would read "Unless the section requiring notice specifies the persons to be given notice, notice shall be mailed to all of the following."

These are the only technical changes which I believe required some further clarification or modification. This letter does not attempt to discuss any other changes which may be appropriate of a technical nature that are not raised in the Memoranda from Staff.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Lloyd Homer, Esq.
James Devine, Esq.
James Opel, Esq.
Irwin Goldring, Esq.
Kathryn Ballsun, Esq.
William Hoisington, Esq.
Harley Spitler, Esq.

Exhibit 5

Minutes
March 12-13, 1987

OSCAR LAWLER
1896-1966
MAX FELIX
1922-1954
JOHN M. HALL
1918-1973

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H. NEAL WELLS, III
PARTNER

March 10, 1987

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

Re: Memorandum 87-14
Supervised Administration

Dear Jim:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar addressed the following policy questions raised by the above memorandum:

1. Section 9730: Should the personal representative be permitted to invest money of the estate in direct obligations of the State of California maturing not later than one year from the date of making the investment? The Executive Committee concurred unanimously in the extension.

2. Section 9601: Should the personal representative be subjected to more severe sanctions for wilful or grossly negligent breaches of duties? The Executive Committee does not concur in Mr. Crabtree's suggestion for the imposition of attorneys' fees. To the contrary, the Executive Committee is of the view that allowing the imposition of attorneys' fees against the personal representative would (1) promote litigation against decedent's estates and (2) jeopardize strong actions by personal representatives in adversarial situations due to the threat of personal liability.

Just as punitive damages have become almost boiler plate in civil litigation, so requests for attorneys' fees would become boiler plate in litigation against estates. For a timid personal representative, or one who is serving solely for the compensation, the threat of personal liability could cause accession to the wishes of the opposition, or giving away too much in settlement, than would be the case if the personal representative continued to have only fiduciary responsibilities.

3. Section 9653: Should the Commission study the rights of a creditor to reach non-probate assets irrespective of whether a fraudulent transaction is present? The Executive Committee concurs with the staff that the study should be made and has appointed a committee chaired by Ted Cranston to assist the Law Revision Commission in this regard. The Executive Committee (including Ken Klug) appreciates that the study is complex and that the staff and the commission will not be able to address it for awhile.

4. Section 9653: Should a creditor be able to pursue an action to recover property transferred in fraud of creditors without an assignment of the cause from the personal representative to the creditor? The Executive Committee concurs with the staff that the right to proceed directly against the holder of the property should be retained by the personal representative in the absence of the assignment noted above. The decision of the Executive Committee (including Mr. Klug) was unanimous.

5. Section 9981: What happens if an option is exercised but a petition is not filed within 30 days? The

Executive Committee has never considered the 30 day filing period as a jurisdictional requirement. Instead, the 30 day period has been viewed as merely a duty which could be enforced by an interested person if the personal representative failed to act within the allotted time. To avoid an ambiguity in this regard, a code comment that the 30 day rule is not jurisdictional would be helpful.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Neal".