

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

adl  
05/09/88

Time  
May 20 (Friday) 1:30 p.m. - 4:30 p.m.

Place  
Los Angeles  
Hyatt at LAX  
6225 W. Century Blvd.  
(213) 670-9000

Meeting Room: Bombay A

**AGENDA**

for meeting of

**CALIFORNIA LAW REVISION COMMISSION**

Los Angeles

May 20, 1988

**1. Administrative Matters**

**2. Recommended 1988 Legislation**

Study L-2009 - AB 2841 (Probate Referees and other problems)

Memorandum 88-42 (enclosed)

First Supplement to Memorandum 88-42 (to be sent)

Second Supplement to Memorandum 88-42 (to be sent)

Assembly Bill 2841 (as amended in Senate April 19, 1988)  
(sent 4/26/88)

**IMPORTANT NOTE. THIS MEETING MAY BE CANCELLED. DO NOT ATTEND THIS  
MEETING WITHOUT CALLING TO FIND OUT IF THE MEETING HAS BEEN CANCELLED.**

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
MAY 20, 1988  
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on May 20, 1988.

Commission:

Present:	Ann E. Stodden Chairperson Roger Arnebergh Bion M. Gregory Legislative Counsel	Arthur K. Marshall Edwin K. Marzec Tim Paone Forrest A. Plant Vice Chairperson
Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Vaughn R. Walker

Staff:

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

Consultants:

None

Other Persons:

Irwin D. Goldring, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles  
Nancy Grant, Office of Assemblyman Terry Friedman, 43d Assembly District  
David Lich, Beverly Hills Bar Association, Beverly Hills  
Gary Proctor, California Probate Referees Association, Orange County  
Irving Reifman, California Probate Referees Association, Los Angeles

STUDY L-2009 - AB 2841 (1988 PROBATE LEGISLATION)

The Commission considered Memorandum 88-42 and the First, Second, and Third Supplements to Memorandum 88-42, together with AB 2841 as amended April 19, 1988, and a letter from Garrett H. Elmore of

Burlingame (Exhibit 1 to these Minutes), relating to probate referees and other problems concerning AB 2841.

The Commission voted to reconsider the decision, made at the May 5-6, 1988, meeting, to withdraw its support of AB 2841 and to request Assembly Member Harris to drop the bill. The reasons for reconsideration of the decision are:

(1) The probate referees have agreed to withdraw the provision requiring appointment of a probate referee for the purpose of receiving notice of a waiver petition.

(2) The probate referees have committed to working with the Commission to develop a satisfactory alternative to the split inventory and appraisal.

(3) Assembly Member Harris has strongly advised the Commission that the \$250 cap on appraisal of publicly-traded stock is not appropriate for this bill, and that the Commission should introduce a separate bill on this matter so that it can be considered on its merits, if the Commission so desires.

The Commission voted to recommend adoption of AB 2841, with the amendments attached to the Third Supplement to Memorandum 88-42, subject to the following changes:

§ 406. Political activities of probate referee. The limitations on contributions to the State Controller should apply in "any campaign" for the office of Controller.

§ 1215. Manner of mailing. Subdivision (c), relating to deposit in a "post office, mailbox, subpost office, substation, mail chute, or other like facility" should be simplified to refer to deposit in the United States mail. The same simplification should be made in other parts of the Probate Code that use a similar construction, but not in AB 2841.

§ 7060. Disqualification of judge. The reference to AB 708 of the 1987-88 Regular Session should be converted to Chapter 923 of the Statutes of 1987.

§ 8002. Contents of petition. The reference to material provisions "in the handwriting of the testator" should be replaced by a reference to material provisions "that are handwritten".

§ 8113. Notice involving foreign citizen. The words "if any" should not be added. Instead, the section should refer to "a" recognized diplomatic or consular official of the foreign country "maintaining an office" in the United States. The Comment to the section should include a statement that the section applies only if there is a recognized diplomatic or consular official of the particular foreign country maintaining an office in the United States.

§ 8903. Waiver of appraisal by probate referee. Subdivision (d), which provides for an award of attorney's fees against a probate referee who objects to a waiver without substantial justification, and which precludes a referee who has objected from thereafter appraising property in the estate, was revised to provide that the court "may", rather than "shall" designate a different referee. The sentence concerning financial benefit to the referee was moved from the statute to the Comment. The reason for these changes is that in some small counties having only one referee it may be a problem to try to get a referee from another county, and in the court's judgment the situation may be such that it is O.K. to allow the opposing referee to go ahead and appraise. The Comment will provide legislative intent that as a general rule the referee should not be permitted to appraise and should not benefit financially by the opposition.

§ 9053. Immunity of personal representative or attorney. The reference to "reasonably ascertainable" creditors, and the note in the Comment of the Tulsa case, should not be made. Instead, the Commission will try to deal with the constitutional problem comprehensively, either in AB 2841 if it is still available when the Commission has completed work on the problem, or in another vehicle. The staff should schedule the matter for discussion at the Commission's July meeting.

§ 9370. Claim prerequisite to continuing action. This section should be amended to provide that the plaintiff must petition to substitute the personal representative as a party within three months after the plaintiff receives notice of rejection informing the plaintiff of the need to make the substitution.

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§ 12201. Report of status of administration. The reference to a "highlighted" statement should be replaced by a reference to type size or all capitals, drawn from the durable power of attorney statutory notice form.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

Minutes  
May 20, 1988GARRETT ELMORE  
Attorney At LawP. O. Box 643  
Burlingame, CA., 94011  
Tel. 415-343-5047

May 17, 1988

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

CA LAW REV. COMM'N

MAY 18 1988

RECEIVED

Re: A. B. 2841 (Harris)-Creditor Claim Portion

Dear Chair Stodden and Members,

It is understood this bill is not to be heard on May 24, perhaps not until June or July. It having slowed down, I now respectfully state my disagreement with the April 19 Text, in the following respects

Sec. 9370. As presently written, Sec. 9370 introduces new and unreasonable conditions for the continuation of a pending action.

Present law does not state that the action cannot "be continue...unless all the (three conditions) are satisfied." There is no California case law, to my knowledge that supports this interpretation. Note that a wrongful death action (Pro. C. 573) could not proceed nor could a tort, contract or other civil action, unless the claim was "first" filed and rejected; also, the whole action could be lost by failure to comply with a new one sided "substitution of party" mandate.

It seems clear Sec. 9370 repeals by implication C. C. P. 385, permitting continuance of an action that survives, violates UPC principles (no claim is required to continue a pending action) changes the law as expressed in Pro.C. 709 (see Salinas Nat. Bk. v. Cook 101 Cal. App. 3d 423 (1950), Wills v. Williams, 47 Cal. App. 2d 941 (1974), fn. on page 946 disapproving order for abatement) and is piece meal in concept. I urge you to retain present law, at this time.

Sec. 9103 and deletion of Pro. C. 720. Sec. 9103 has several undesirable provisions. It needs additions to prevent it from being a limited relief section. It also contains a dubious exclusion of a person conducting a trade, business or profession in California.

Small wording changes could improve the section. More importantly, it deals only with lack of knowledge of the estate, not lack of knowledge of wrong and of cause of action under justifiable circumstances. It should be accompanied by provisions based on Sec. 720 but in reduced time limits. Why should the heirs of a doctor, lawyer or business manager who conceals a cause of action during lifetime receive property that would have been lost during lifetime if there were no concealment. However, as stated, Sec. 720 now is too long.

Addition of a section on cause of action arising after death. The way Sec. 9000 (claim) is worded, the Commission Comment is imp-

ortant. However, the Comment (1987) unfortunately contains a reference to the Uniform Probate Code. That Code, as noted above, exempts "pending actions" from claim requirement. If the judge, commissioner, attorney or researcher seeking answers looks to UPC Annotated Laws, he or she will discover that Florida and some other states chose to keep a "pending action" claim requirement, some with a "good cause, late claim" section; others, like Florida, with no "late claim" in this context. The precise problem often seems to revolve about contingent claims for contribution or indemnity that are not filed in strict accordance with the claims law. The "good cause-late claim" states seems to handle the situation easily, depending on specific showings. In Florida, the courts seem to have reluctantly applied the letter of the law, though commenting upon "harshness" (Gates Learjet Corp. v. Moyer, 459 So. 2d. 1092 (Fla. App. 1984), cf. Estate of Morse, 364 N. W. 2d 802 (Minn. App. 1985)). However, a 1986 Florida Supreme Court case seems to permit late claims and waivers by construing the Florida statute as based on rules of practice and as merely a "statute of limitations." Fortunately, in California there is a well defined line of appellate cases that distinguish money claims arising or accruing after death. See Borba Farms, Inc. v. Acheson, 197 Cal. App. 3d 597 (1988). It is submitted that, for the time being, present decisional law to the above effect should be recognized by a section, with appropriate wording, in A. B. 2841.

This addition is not a substitute for statutory sections that would clarify the contingent claim- contribution, indemnity problem. It seems evident to the writer, at least, that no wording formula on that problem can be worked out without more study.

I shall appreciate any favorable consideration the Commissioners may give to this "final statement" of my position and work to date.

Unfortunately, in 1987 I closed my small office and could not keep up with your A. B. 708 and further work. Also, it is regrettable that I entered into this subject matter without a full understanding of the operating practices of the present Commission.

Please consider these very limited comments as a withdrawal of all prior comments, background memo's and attempting drafting for illustration.

Respectfully submitted,

*Garrett H. Elmore*  
Garrett H. Elmore

CC: Hon. Elihu Harris  
Charles A. Collier, Jr.