First Supplement to Memorandum 88-9

Subject: Study L-2009 - Transitional Provisions for AB 2841 (State Bar Comments)

Attached as Exhibit 1 are comments of State Bar Study Team No. 1 on the proposed transitional provisions for the Commission's 1988 probate legislation. See Memorandum 88-9. The Study Team's comments are analyzed below.

Operative date. The proposed operative date is July 1, 1989, a six month deferral. The Study Team feels January 1, 1990, would be better because of the general expectation that new laws take effect January 1. The Commission considered this matter at the January meeting and adopted a July 1 operative date in response to comments of State Bar representatives present at the meeting.

General transitional provision. The proposed general transitional provision (Section 3 on pages 2-3 of Memorandum 88-9) would apply any changes in the Probate Code to pending proceedings except to the extent the statute enacting the change provides otherwise. The Study Team would modify the draft by revising the proposed general provision to use the phrase "the new law" rather than "a new law" throughout the statute. The staff is agreeable to this. The Study Team would also and revise the definition of "new law" to mean "a change in this code, whether effectuated by amendment, addition, ~~or~~ repeal, reenactment, or recodification, of any provision of this code." The staff does not believe the addition of these words would be helpful. By definition, a reenactment or recodification is not a change in law, and we are dealing only with changes in law here. Also, technically speaking, a bill either amends, adds, or repeals; reenacting and recodifying are simply two of the many objectives that may be achieved by amendment, addition, or repeal.

The Study Team objects to subdivision (d) of Section 3, which provides that the contents, notice, hearing, or other matter relating to a petition, account, or other paper filed before the operative is governed by the law in effect when filed and not by the new law. The Study Team agrees that the contents and notice of a petition should be governed by old law, but not further proceedings on the petition. They point out that matters can be delayed and continued, and contests and appeals can occur, which may tie up the matter for years. Any practical problems in applying new law to a petition filed under old law can be handled under subdivision (h), which gives the court flexibility in implementing the new law to the extent reasonably necessary for proper administration of justice.

The Study Team also takes the position that any change in personal representative or attorney fees should be accompanied by an express transitional provision. They would like to see such a provision state that compensation is determined under the new law even if the death occurred or the administration began before the operative date. This should be addressed in the context of the personal representative and attorney fee study.

Inventory and appraisal. The staff has proposed a new Section 407 (page 4 of Memorandum 88-9) to make clear that once a probate referee is appointed by the Controller under old law, a change in law (such as different standards for appointment or different term) does not affect the appointment. The Study Team believes such a section is superfluous, since they understand the general rule to be that once made, an appointment is good for its duration. If people (particularly the probate referees) are satisfied that this section is unnecessary, we have no problem with omitting it. However, it is conceivable to us that absent such a section, a person who has problems with a particular probate referee might seek to have the appointment revoked on the ground that the standards for appointment have changed and the probate referee was appointed by a procedure that fails to satisfy the new standards.

The staff has also proposed that appraisal of an estate by a referee designated by the court before the operative date of the new law should be governed by the old law rather than the new law. The Study Team suggests that delivery of the inventory to the referee, rather than designation, should be the critical event. This makes sense to the staff, since the referee will have taken no steps to appraise the property in the estate until the inventory has been delivered. The staff would revise proposed Section 8805 (page 5 of Memorandum 88-9) as suggested by the Study Team.

The Study Team also suggests that this transitional provision be located among the appraisal procedure provisions rather than among the general inventory and appraisal provisions as proposed by the staff. The staff believes neither location is ideal. Perhaps a new Article 5 (Transitional Provisions) could be located at the end of the appraisal chapter, and this provision could be numbered Section 8980.

Accounts. The staff has proposed an additional 90 days for a personal representative to file any account due during the first year of operation of the new statute. The reason for this proposal is that it may take a personal representative some time to convert journal entry bookkeeping to balance sheet bookkeeping, as required by the new statute. The Study Team doesn't think this is a problem. "We do not see that this section requires accounts to be in any other form than that which, to our knowledge, is now being used throughout the State of California." This is not the same information we have received from the Bar in the past.

One option, if the Commission wishes to allow some flexibility here without having an automatic 90-day extension in every case, would be to provide for an automatic extension on application to the court and notification of interested persons.

Interest and income accruing during administration. The staff has offered a transitional provision that applies new trust interest and income rules to existing trusts but would protect distributions made before the operative date. From reading the Study Team comments, we cannot tell whether they are proposing a different rule.

Rules of procedure. Consistent with its position that the contents and notice of a petition filed before the operative should be governed by old law and subsequent proceedings on the petition should be governed by new law, the Study Team would apply new signing and verification requirements to subsequent papers and would apply new oral objection and continuance provisions to the hearing on the petition.

Litigation involving decedents. The Commission has previously decided that any new rules governing litigation involving a decedent should apply only to decedents who die after the operative date. The staff has suggested that the Commission consider applying the new rules to decedents who die before the operative date in cases where litigation is not commenced until after the operative date. The Study Team would adopt this approach so as to apply the new law to as many cases as is reasonably possible.

Public guardians and public administrators. The Study Team notes the possibility of revising the last sentence of proposed Section 2903 to read, "Possession or control of property by a public guardian before July 1, 1989, is governed by the applicable law in effect before July 1, 1989, notwithstanding its repeal by the act that enacted this chapter." The staff would make this change.

Nondomiciliary decedents. The Study Team would revise proposed Section 12574 (page 9 of Memorandum 88-9) as follows:

> § 12574. Transitional provision
>
> 12574. If the first notice has been published pursuant to former Section 1043 before ~~the~~ July 1, 1989, the procedure provided by former Sections 1043 and 1043a may be pursued to its conclusion in lieu of the procedure in this chapter notwithstanding the repeal of Sections 1043 and 1043a by the act that enacted this section.

The staff does not like the underscored language. It implies that if the old procedure was initiated before the operative date, the new

procedure cannot be used. The staff would either omit the suggested language, or revise it to read, "instead of, or in addition to, the procedure in this chapter."

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

REPORT

TO: VALERIE J. MERRITT
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
JAMES C. OPEL
THEODORE J. CRANSTON
JAMES V. QUILLINAN
IRWIN D. GOLDRING
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: FEBRUARY 18, 1988

SUBJECT: MEMORANDUM 88-9 (Study L -2009 - Transitional Provisions for AB 2841)

Study Team No. 1 conducted a conference call on February 17, 1988. Charles Collier, Richard Kinyon and William Schmidt participated. Sterling L. Ross, Jr., Lynn P. Hart and Michael J. Vollmer did not participate. Our comments are as follows:

General Approach.

We agree with the Commission that the bill should apply to the maximum extent possible to administration proceedings pending on the operative date of the bill and that exceptions should be carved out where necessary. If anything, we believe that too many exceptions have been carved out or that exceptions which have been carved out have gone too far.

We see that the operative date is proposed to be July 1, 1989. We understand the reason for this six month delay is to give additional time to the legal profession to learn

about these provisions. We have no quarrel with this reason, but Mike Vollmer of our Study Team feels, and we all agree, that it would be much better to extend the operative date another six months so that it becomes effective on January 1, 1990. The reason for this is that attorneys and judges are conditioned and accustomed to changes of law occurring on January 1 each year rather than on July 1. We receive new codes on or about January 1 of each year. We hear oral presentations and read written articles in the fall of each year about new laws which will become effective on January 1 of the following year. The Christmas holidays and the football bowl games are vivid reminders of January 1. The legal profession is looking for and is more alert to changes in the law occurring January 1. On the other hand, attorneys are not accustomed to and are not looking for changes in the law occurring on July 1. This is summertime and our thinking is on many things other than changes in the law.

Proposed Probate Code Section 3.

Specifically, we are concerned about the language of proposed Section 3(a)(1) which defines "new law." Since the "new law" reenacts and recodifies portions or the existing law, we feel that the words "re-enactment" and "recodification" should be added to the words "amendment, addition, or repeal" as such words appear in this section. We are concerned that certain sections which have been reenacted or perhaps recodified by being given a new code section might not be included within a concept of an

"amendment, addition, or repeal" of a section of the probate code.

We noticed that the word "a" appears before the words "new law" in at least five instances in Section 3 and its comment. In other places, the word "the" appears before the words "new law" in this section and the comment. We feel that there should consistency and the word "the" should be used throughout to remove the suggestion that the two have a different meaning. The word "a" before the words "new law" appears on the first line of (b), on the second line of (c), on the second line of (h), on the third line of the first paragraph in the comment, and on the first line of the second paragraph in a comment.

Probate Code Section 3(d).

This is one exception that we feel has gone too far. Here we could well be talking about a petition before which was filed before the operative date, but is heard after the operative date. We agree that the contents of the petition and that the notice given to beneficiaries should be governed by the old law, but we feel that any objection or response, hearing on, or order which is made after the operative date should be governed by the new law. We are concerned that hearings can be delayed and continued. They can be contested and appealed and this process could conceivably go on for many years. We feel that the sooner we can switch over to the new law for all, if not the great portion of matters, the better we will be. If this change from the old law to the

new law substantially interferes with the effective conduct of the proceedings or the rights of the parties, the court may correct the situation under the provisions of subsection (h) which we feel is very worth while. If the changes are made in subsection (d), the appropriate revision should be made to the first paragraph and the comments which refers to subdivision (d).

Probate Code Section 3(e) (f) (g) and (h).

They are fine.

The question is raised at the bottom of page 3 and the top of page 4 pertaining to increased compensation than the old law for an action taken where the new law provides more compensation than the old law for this same act. We feel that the increased compensation available under the new law for the identical action taken under the old law before the operative date should be the rule. Charles Collier believes this to be existing case law. It is consistent with the general approach set forth on page 1 and we see no reason to deviate from it. Specifically referring to any change that may be made in the compensation for personal representatives and their attorneys, we suggest that if and when any change is made, the staff and Commission also consider and provide for a transitional rule (which we feel should be that the compensation is determined under the new law even if the death occurred or the administration began before the operative date).

Inventory and Appraisal.

In Section 407 we feel that the first sentence of this section is superfluous as we understand that once the appointment is made it is good for the entire term for which it is made. Perhaps the section does no harm, but we feel it may be confusing. If the staff and Commission feel that if this first sentence should remain, perhaps it could be restated along the following lines: "The appointment of a probate referee by the state controller before July 1, 1989 is valid notwithstanding the repeal of the law under which the appointment was made."

Proposed Section 8805.

This is one exception to the general concept which we feel has gone too far. We feel that the cutoff date should not be the designation of the referee by the court, but should be the submission of an inventory to the referee. We feel that the new law has many new and good features in it and we would like to see it applied as widely as possible as soon as possible. Therefore, we suggest that if any inventory is submitted to the referee after the operative date all matters relating to its appraisal by the referee, including the property to be included in the appraisal, waiver of appraisal, and compensation of the referee are governed by the new law. If an injustice occurs, the court can remedy the injustice under Section 3(h); otherwise, the new law should apply.

The appraisal of properties by a probate referee sometimes include many partial or supplemental inventories which may be submitted to the referee several months or even years after his or her designation or appointment by the court. It would be confusing for the court and for attorneys to work with two different sets of rules depending on whether or not the referee was designated or appointed on or after the operative date.

We feel that this new Section 8805 should be inserted into the bill at page 119, line 12, more appropriately than on page 112, between lines 24 and 25. It seems that this section more appropriately follows the procedure and mechanics for appraisals set forth in Sections 8900 through 8909.

Accounts - Section 10955.

We feel that there is no real need for proposed Section 10955. The staff says that the provisions governing accounts impose a new balance-sheet type account requirement. As we read proposed Section 10900 on page 132 of the bill, we do not see that this section requires accounts to be in any other form than that which, to our knowledge, is now being used throughout the State of California. Certainly the summary statement, together with supporting schedules, is very close to if not identical to the form required by the Los Angeles and Orange County Probate Policy memoranda and the forms described in CEB books which are read and followed statewide. If a particular personal representative or

attorney is confused, in our experience the court would either grant or require a continuance for the account to be put in the proper form. We therefore see no need for this transitional rule and we would recommend that it be eliminated as unnecessary. The fewer exceptions that we have to the general concept and to the general rule, the better we are.

Abatement.

We agree that the new rules should only govern gifts made after the operative date.

Interest and Income Accruing During Administration.

We feel that any income or interest accruing or earned after the operative date should be governed by the new law. Dick Kinyon observes that the old law or existing law is unclear so we would be better to follow the new law which is more explicit. We also feel that there should be a general policy that the new law applies to a will or trust executed before the operative date unless the testator or trustor specifically stated in the will or trust that the law in effect at the time the will or trust was made should apply. In other words, we feel that unless the testator or trustor provides otherwise in his instrument, we should assume that he wanted the rights of parties to be determined under the law in effect at the time those rights were to be determined and not the law in effect at the time the instrument was made.

Rules of Procedure

The staff states that the Commission may wish to consider whether the new technical rules regarding the signing and verification by attorneys should apply to papers filed after the operative date even though the petition was filed before the operative date. We feel that these new technical rules should apply to all papers filed after the operative date even though the petition was filed before the operative date. The staff states that the Commission may also wish to consider whether the new rules governing the determination of oral objections or continuances of hearings should be applied to a proceeding whether the petition was filed before the operative date. Again we feel that the new law should be so applied. We feel that as a practical matter, oral objections and oral continuances of hearings have been honored generally throughout the State of California and have been so honored for several years.

We disagree with the concept of simplicity stated in the last sentence of the first paragraph at the top of page 7. There are two ways to look at simplicity. One is to look at a single proceeding from its start to finish and to say that it is simpler to follow the body of law applicable at the time the proceedings began. The second way is to look at all of the cases or work that a judge or attorney is doing at one time and to say that it is simpler to have most, if not all, of such cases following the same body of law, namely in this case, the new law. We feel that the second concept of simplicity is the preferred concept to be considered in these

matters. We feel that we should switch over as quickly as possible to the new law in as many cases as we can reasonably do so to avoid the confusion and complexity (lack of simplicity) that result when attorneys and judges are confronted by several cases at the same time, some of which are governed by one body of law and others of which are governed by another body of law.

We feel that the special transitional rule provided in Section 7242 on page 68, line 2 of the bill concerning appeals from orders is a good rule.

Litigation Involving Decedents.

The staff states that it is difficult to specify the exact nature of an advantage or disadvantage which might arise from inopportune commencement of action under the new law. We agree. We are not sure what advantages and disadvantages might arise. Consistent with our thinking that the new law should apply as soon as possible to as many cases as is reasonably possible, we feel that the new law should apply to all actions commenced after the operative date rather than actions commenced after the decedent's death. If an injustice results in situations which we cannot now visualize, we feel that the court under Section 3(h) has the power to alter the application of the new law.

Public Guardians and Public Administrators.

We agree with the staff that it should provide that the new law applies only to the seizure of property that occurs

after the operative date. As a technical matter, we notice that the words "notwithstanding its repeal..." which appear in Section 9357 and Section 12574 do not appear in proposed Section 2903. Should they or similar words be used in proposed Section 2903?

Nondomiciliary Decedents - Section 12574.

We agree with the recommendation of the staff. We call its attention to the word "the" following the word "before" on the second line of this section. We feel that it should be deleted. We would also like to suggest that the words "in lieu of the procedure in this chapter" or similar words be inserted after the word "conclusion" in the fourth line of the proposed section.

Respectfully submitted,

STUDY TEAM NO. 1

William V. Schmidt,
Captain

WVS/ds