

07/10/89

<p><i>DATE &amp; TIME:</i></p> <ul style="list-style-type: none"><li>• July 13 (Thursday) 1:30 pm - 6:00 pm</li><li>• July 14 (Friday) 9:00 am - 2:00 pm</li></ul>	<p><i>PLACE:</i></p> <ul style="list-style-type: none"><li>• Los Angeles Sheraton Plaza La Reina 6101 West Century Los Angeles 90045 (213) 642-1111</li></ul>
<p><i>NOTE:</i> Changes may be made in this Agenda. For meeting information, please call (415) 494-1335.</p>	

FINAL AGENDA

*for meeting of*

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF FEBRUARY 9-10, 1989, COMMISSION MEETING (sent 2/21/89;  
another copy sent 5/2/89)
2. MINUTES OF APRIL 13, 1989, COMMISSION MEETING (sent 5/2/89)
3. ADMINISTRATIVE MATTERS
  - Election of Officers  
Memorandum 89-45 (sent 5/2/89)
  - Communications from Interested Persons
4. 1989 LEGISLATIVE PROGRAM
  - Handout at Meeting
  - General Comments  
Memorandum 89-47 (sent 6/30/89)
  - L-612 - 120-Hour Survival Requirement  
First Supplement to Memorandum 89-47 (sent 6/27/89)
  - L-636 - No Contest Clauses  
Second Supplement to Memorandum 89-47 (sent 6/27/89)

5. STUDY L-1025 - NOTICE TO CREDITORS

Alternative Approaches to Tulsa Problem  
Memorandum 89-48 (sent 5/10/89)

Immunity of Personal Representative  
First Supplement to Memorandum 89-48 (sent 6/30/89)

6. STUDY L-608 - WILL DEPOSITARIES

State Bar Conference of Delegates Proposal  
Memorandum 89-51 (sent 7/6/89)

7. STUDY L-3013 - UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Special Order Memorandum 89-53 (sent 5/26/89)  
of Business Draft Tentative Recommendation (attached to memorandum)  
on July 13 Consultant's Study (attached to memorandum)  
at 4:00 pm First Supplement to Memorandum 89-53 (sent 6/19/89)  
Second Supplement to Memorandum 89-53 (sent 6/19/89)  
Third Supplement to Memorandum 89-53 (sent 6/19/89)  
Fourth Supplement to Memorandum 89-53 (sent 6/23/89)  
Fifth Supplement to Memorandum 89-53 (sent 6/30/89)  
Sixth Supplement to Memorandum 89-53 (sent 7/7/89)

8. STUDY L-3019 - STATUTORY SHORT FORM POWER OF ATTORNEY

Draft of Tentative Recommendation  
Memorandum 89-50 (sent 5/15/89)

Comments of State Bar Team  
First Supplement to Memorandum 89-50 (sent 7/7/89)

9. STUDY L-3007 - IN-LAW INHERITANCE

Draft of Tentative Recommendation  
Memorandum 89-49 (sent 6/8/89)

10. STUDY L-1029 - MARITAL DEDUCTION GIFTS

Qualified Domestic Trust--Draft of Tentative Recommendation  
Memorandum 89-52 (sent 5/26/89)

11. STUDY L-3012 - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Comments on Tentative Recommendation  
Memorandum 89-54 (sent 6/19/89)

12. 1990 LEGISLATIVE PROGRAM

Memorandum 89-46 (sent 6/15/89)

MEETING SCHEDULE

July 1989

13 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
14 (Friday)	9:00 a.m. - 2:00 p.m.	

August-September 1989

Aug. 31 (Thurs.)	1:30 p.m. - 6:00 p.m.	Sacramento
Sept. 1 (Fri.)	9:00 a.m. - 2:00 p.m.	

October 1989

12 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
13 (Friday)	9:00 a.m. - 2:00 p.m.	

November-December 1989

Nov. 30 (Thurs.)	1:30 p.m. - 6:00 p.m.	San Francisco
Dec. 1 (Fri.)	9:00 a.m. - 2:00 p.m.	

STATUS OF COMMISSION STUDIES

(as of June 30, 1989)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
F-641 /L-3020	Limitations on Disposition of Community Property	4/88	9/88			
H-111	Assignment & Sublease --related issues	12/88	[10/89]			
L-1029	Marital Deduction Gifts --noncitizen spouse	5/89	[7/89]			
L-3005	Anti-Lapse & Other Rules	1/88	5/88			
L-3007	In-Law Inheritance	2/88	12/88	[7/89]		
L-3012	Uniform Management of Institutional Funds Act	8/88	12/88	2/89	[7/89]	
L-3013	Uniform Statutory Rule Against Perpetuities	5/89	[7/89]			
L-3019	Statutory Short Form Power of Attorney	5/89	[7/89]			
N	Administrative Law	[10/89]				

[date] = scheduled

**SCHEDULE FOR WORK ON NEW PROBATE CODE** Rev. June 1, 1989

PROJECT	SCHEDULED	COMPLETED
Introduction of bill	March 10, 1989	Feb. 22, 1989 AB 759 (Friedman)
Staff review of bill completed and draft prepared for amendments to bill	April 30, 1989	April 27, 1989
Amendments sent to Legislative Counsel	May 1, 1989	April 28, 1989
Bill amended and reprinted	June 1, 1989	May 30, 1989
Staff prepares draft of official Comments	July 1, 1989	
Review of bill, as amended, completed by staff, Bar, and other interested persons	Sept. 1, 1989	
Review of official Comments completed by staff, Bar, and other interested persons	Sept. 1, 1989	
Commission approves substantive amendments to bill	Oct. meeting	
Draft of Comments checked by staff and Comments sent to printer for printing	Nov. 1, 1989	
Commission approves bill as amended and any additional amendments	January 1990 meeting	
Report containing revised and new Comments approved by Commission	January 1990 meeting	
Bill passes Assembly	January 1990	
Bill amended in Senate to make any needed additional amendments	February 1990	
Legislative Committees approve Report containing new and revised Comments	April 1990	
Bill passes Senate; Assembly Concurrence in amendments; Bill sent to Governor	May 1990	

EXHIBIT 1  
STATUS OF 1989 COMMISSION BILLS

Minutes  
July 13, 1989

(as of July 10, 1989)

Legislative Program:

AB 156 (Judiciary/Friedman): Urgency probate bill	SB 536 (Beverly): Assignment and sublease
AB 157 (Judiciary/Isenberg): Misc. creditor remedies	SB 985 (Beverly): Multiple-party accounts
AB 158 (Friedman): General probate bill	SCR 11 (Lockyer): Continuing authority to study topics
AB 625 (Harris): Statutory authority of CLRC	<u>Other Measure of Interest:</u>
AB 831 (Harris): Trustees' fees	ACR 30 (Speier): Study Family Relations Law

BILL STATUS		AB 156	AB 157	AB 158	AB 625	AB 831	SB 536	SB 985	SCR 11	ACR 30 Not LRC
Introduced		12/19/88	12/19/88	12/19/88	2/14/89	2/22/89	2/17/89	3/7/89	12/19/88	2/15/89
Last Amended		5/04/89	5/16/89	6/23/89		6/1/89	5/03/89	6/19/89		4/5/89
First House	Policy Committee	Feb 8	May 25	May 3	Mar 29	May 31	May 16	May 25	Feb 7	Apr 13
	Fiscal Committee	----	Jun 14	----	Apr 20	----	----	----	Feb 27	May 18
	Passed House	Feb 23	Jun 22	May 15	Apr 27	Jun 8	May 26	Jun 8	Mar 2	May 25
Second House	Policy Committee	Apr 25	[Jul 18]		Jun 14	[Aug 22]	[Aug 23]	[Jul 18]	Mar 29	Jun 14
	Fiscal Committee	----	----	----	Jun 28	----	----	----	Apr 20	Jun 28
	Passed House	May 11			Jul 6				Apr 27	Jul 6
Concurrence		May 15			----				----	----
Governor	Received	May 17							----	----
	Approved	May 25							----	----
Chaptered by Secretary of State	Date	May 25							May 1	Jul 7
	Ch. #	21							Res 35	Res 70

----: not applicable      [ ]: scheduled

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
JULY 13, 1989  
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on July 13, 1989.

Commission:

Present:	Forrest A. Plant Chairperson	Bion M. Gregory Legislative Counsel
	Edwin K. Marzec Vice Chairperson	Ann E. Stodden
	Roger Arnebergh	Vaughn R. Walker

Absent:	Elihu M. Harris Assembly Member	Arthur K. Marshall
	Bill Lockyer Senate Member	Tim Paone

Staff:

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

Consultants:

Charles A. Collier, Jr., Probate Law

Other Persons:

Irwin D. Goldring, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles  
Michael Harrington, California Bankers Association, Trust State Government Affairs Committee, San Francisco  
Anne Hilker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles  
Susan T. House, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles  
David E. Lich, Legislative Committee, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Beverly Hills  
Marshal A. Oldman, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles  
Michael V. Vollmer, State Bar Estate Planning, Trust and Probate Law Section, Irvine  
Michael Whalen, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles  
Shirley Yawitz, California Probate Referees Association, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF FEBRUARY 9-10, 1989, MEETING

The Commission approved the Minutes of the February 9-10, 1989, meeting with the following change:

Under "Administrative Matters", the heading entitled "Minutes of December 1-2, 1988, Meeting" should read "Minutes of January 12-13, 1989, Meeting".

MINUTES OF APRIL 13, 1989, MEETING

The Commission approved the Minutes of the April 13, 1989, meeting without change.

ELECTION OF OFFICERS

The Commission elected a new Chairperson and a new Vice Chairperson. Edwin K. Marzec was unanimously elected as Chairperson, and Roger Arnebergh was unanimously elected as Vice Chairperson. They will hold office for a one year term, commencing on September 1, 1989.

1989 LEGISLATIVE PROGRAM

The staff made the report on the 1989 Legislative Program attached to these Minutes as Exhibit 1.

In connection with the legislative program, the Commission considered Memorandum 89-47 and the First and Second Supplements to Memorandum 89-47. Action on the First Supplement is recorded below at L-612 (120-hour survival requirement), and action on the Second Supplement is recorded below at Study L-636 (no contest clauses).

The staff reported that it understands that a representative of the Probate Referees Association is organizing opposition to the attorneys fee bill, although the Association has not taken a position on the bill; it appears likely that this opposition is the reason for the procedural difficulties the Commission has been having with the bill. The representative of the Association present at the meeting stated that the Association is not opposed to the bill. The staff asked the representative to look into what's going on.

The Commission discussed ACR 30, which directs the Commission to study family relations law on the same priority as administrative law. The staff will give the Commission a memorandum concerning the procedure for this study for consideration at the August/September Commission meeting.

#### COMMUNICATIONS FROM INTERESTED PERSONS

The Executive Secretary circulated copies of a letter from Henry A. Preston of Chicago, Illinois, concerning the probate process as carried out in the Los Angeles County Superior Court, for Commission review. A copy of the letter is attached to these Minutes as Exhibit 2.

#### STUDY L-608 - WILL DEPOSITARIES

The Commission considered Memorandum 89-51 and the attached staff draft concerning will depositaries. The Commission also considered a letter from Kathryn Ballsun for Team 4 of the Estate Planning, Trust and Probate Law Section of the State Bar, a copy of which is attached to these Minutes as Exhibit 3. The Commission decided to table the proposal. The Commission asked the staff to consider, as time permits, whether more limited legislation is needed to authorize an attorney who intends to go out of practice to turn over wills and other estate planning documents to another attorney or law firm for safekeeping.

The Commission asked the staff to prepare a letter to Assembly Members Isenberg and Friedman. The letter should report that the Commission is of the view that the State Bar Conference of Delegates proposal is not feasible, primarily because of the cost involved in using the Secretary of State as depository of last resort. The letter should also report that the Commission will consider whether legislation is needed to authorize attorneys to turn over their files to a nongovernmental depository when the attorney ceases to practice.

The Commission thought legislation is needed to require financial institutions to permit decedent's family members who have a key to decedent's safe deposit box to gain access to the box to get a copy of decedent's will and to remove original burial instructions. If a will

of the decedent is found in the box, the original should be forwarded to the county clerk, and a copy should be provided to the family member. Cf. Prob. Code § 8200 (custodian of will must deliver the will to county clerk within 30 days after testator's death). The Commission considered proposed Section 331 set out in the memorandum. The section should be broadened to apply to all financial institutions, including savings and loan associations and credit unions. The section should make clear that it does not limit use of the affidavit procedure to obtain the contents of the box. The Comment should note that a family member without a key to the safe deposit box must obtain letters before access will be granted. The Comment should note that "will" includes a codicil (Section 88). The staff should redraft the section in accordance with the foregoing, and bring it back to the Commission for further consideration.

STUDY L-612 - 120-HOUR SURVIVAL REQUIREMENT

The Commission considered the First Supplement to Memorandum 89-47, analyzing the objections of the Los Angeles County Bar Association to the 120-hour survival requirement recommendation in AB 158. After discussion of the merits of the recommendation the representatives at the meeting agreed to withdraw their opposition as part of a compromise package in which changes to the no contest clause recommendation (see Study L-636, below) and the notice to creditors recommendation (see Study L-1025, below) would also be made. Support letters from the Los Angeles County Bar Association, the State Bar Association, and the California Bankers Association should be addressed to Assemblyman Friedman, with a copy to the Commission.

STUDY L-636 - NO CONTEST CLAUSE

The Commission considered the Second Supplement to Memorandum 89-47, analyzing the objections of the Los Angeles County Bar Association to the no contest clause recommendation in AB 158. As part

of the compromise package on AB 158, referred to above in connection with Study L-612, the Commission agreed to recommend revision of proposed Section 21305 (declaratory relief) basically as set out on page 2 of the memorandum, with addition of language that a litigant may not get a determination under Section 21305 whether the exceptions in Sections 21306 or 21307 apply.

STUDY L-1025 - NOTICE TO CREDITORS

The Commission considered Memorandum 89-48, relating to alternative approaches to the Tulsa problem. The Commission discussed the various possible approaches to solving the due process problem, and noted that the Uniform Probate Code intends to adopt a one-year statute of limitations, along the lines of the Commission's original recommendation on this matter. The Commission decided to resubmit its original recommendation on this matter to the 1990 legislative session.

The Commission also considered the First Supplement to Memorandum 89-48, with the State Bar's suggestions concerning Probate Code Section 9053 (immunity of personal representative). As part of the compromise package on AB 158, referred to above in connection with Study L-612, the Commission agreed to recommend amendment of Section 9053 basically as set out on page 3 of the memorandum, with the addition of language that the personal representative is not liable for a failure to give notice if the estate is still open, and with the clarification that proceedings to enforce the liability of the personal representative must be commenced within 16 months after issuance of letters.

STUDY L-1029 - MARITAL DEDUCTION GIFTS

The Commission deferred consideration of Memorandum 89-52, relating to qualified domestic trusts, until the September 1989 meeting in order to monitor progress of federal legislation on the matter and to give the relevant State Bar team additional time to review and comment on the proposal.

STUDY L-3007 - IN-LAW INHERITANCE

The Commission considered Memorandum 89-49 and the attached *Tentative Recommendation Relating to In-Law Inheritance*. The Commission approved the Tentative Recommendation for distribution to interested persons for comment.

STUDY L-3012 - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The Commission considered Memorandum 89-54 relating to the comments received on the *Tentative Recommendation Relating to the Uniform Management of Institutional Funds Act*. The Commission approved the recommendation to print and for introduction in the 1990 legislative session, subject to the following revisions:

Probate Code § 18504. Investment authority

The bracketed language should not be added into the introductory paragraph of Section 18504 as had been suggested. Accordingly, this section should read as follows:

18504. In addition to an investment otherwise authorized by law or by the applicable gift instrument, ~~{and without restriction to investments a fiduciary may make,}~~ the governing board, subject to any specific limitations set forth in the applicable gift instrument ~~{or in the applicable law other than law relating to investments by a fiduciary}~~, may do any or all of the following:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, deeds of trust, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations or partnerships, and obligations of any government or subdivision or instrumentality thereof.

(b) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution.

(d) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar

organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

The Comment to this section should make clear that the forms of investment listed in this section are by way of illustration, and not limitation. The Comment should be revised as follows:

Comment. Section 18504 continues former Education Code Section 94604 without change, except that ~~(1) language has been added to the introductory clause to make it consistent with Section 4 of the Uniform Management of Institutional Funds Act (1972) and (2)~~ in subdivision (a) a reference to deeds of trust has been added and an unnecessary comma following the word "associations" has been omitted. The forms of investment listed in subdivisions (a) and (d) following the word "including" are illustrations and not limitations on the general authority provided in these subdivisions. As to the construction of provisions drawn from uniform acts, see Section 2.

#### STUDY L-3013 - UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The Commission received the materials concerning the Uniform Statutory Rule Against Perpetuities, consisting of Memorandum 89-53 (with the consultant's background study and a draft tentative recommendation), the First through Sixth Supplements to Memorandum 89-53, and two items distributed at the meeting which are attached to these minutes as Exhibit 4 (Report from Team #1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section) and Exhibit 5 (letter from Professor Waggoner). The Commission heard a general description of the origin of USRAP and discussed the approach to take in considering this subject. The Commission directed the staff to prepare an analysis of the issues that have been raised in the law review articles and letters received for consideration at or before the February 1990 meeting.

STUDY L-3019 - STATUTORY SHORT FORM POWER OF ATTORNEY

The Commission considered Memorandum 89-50 and the First Supplement to Memorandum 89-50 and made the following decisions.

Designation of Co-Agents. Provisions (consistent with those found in the existing California short-form statute) should be added to the statutory form to permit designation of co-agents. A provision should be added to the statute that a statutory form is not invalid merely because it does not include a provision that permits the designation of co-agents.

"Springing Power" Provision. The Commission decided not to add a springing power optional provision to the statutory form.

Technical Correction in Language. The word "incapacitated" is to be substituted for "disabled, incapacitated, or incompetent" in the text of the form and in the instruction that follows the text. This will conform the form to the California Uniform Durable Power of Attorney Act and would be sufficient to comply with the law of a state having the official text of the Uniform Durable Power of Attorney Act.

Approval for Distribution for Comment. After the revisions indicated above have been made (and typographical errors in the staff draft have been corrected), the tentative recommendation is to be distributed to interested persons and organizations for review and comment. The goal is to submit a recommendation on the Uniform Act to the 1990 session of the Legislature.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

EXHIBIT 1  
STATUS OF 1989 COMMISSION BILLS

(as of July 10, 1989)

Legislative Program:

AB 156 (Judiciary/Friedman): Urgency probate bill  
 AB 157 (Judiciary/Isenberg): Misc. creditor remedies  
 AB 158 (Friedman): General probate bill  
 AB 625 (Harris): Statutory authority of CLRC  
 AB 831 (Harris): Trustees' fees  
 SB 536 (Beverly): Assignment and sublease  
 SB 985 (Beverly): Multiple-party accounts  
 SCR 11 (Lockyer): Continuing authority to study topics  
 Other Measure of Interest:  
 ACR 30 (Speier): Study Family Relations Law

BILL STATUS	AB 156	AB 157	AB 158	AB 625	AB 831	SB 536	SB 985	SCR 11	ACR 30
Introduced	12/19/88	12/19/88	12/19/88	2/14/89	2/22/89	2/17/89	3/7/89	12/19/88	2/15/89
Last Amended	5/04/89	5/16/89	6/23/89		6/1/89	5/03/89	6/19/89		4/5/89
Policy Committee	Feb 8	May 25	May 3	Mar 29	May 31	May 16	May 25	Feb 7	Apr 13
Fiscal Committee	-----	Jun 14	-----	Apr 20	-----	-----	-----	Feb 27	May 18
Passed House	Feb 23	Jun 22	May 15	Apr 27	Jun 8	May 26	Jun 8	Mar 2	May 25
Policy Committee	Apr 25	[Jul 18]		Jun 14	[Aug 22]	[Aug 23]	[Jul 18]	Mar 29	Jun 14
Fiscal Committee	-----	-----	-----	Jun 28	-----	-----	-----	Apr 20	Jun 28
Passed House	May 11			Jul 6				Apr 27	Jul 6
Concurrence	May 15			-----				-----	-----
Governor	May 17							-----	-----
Approved	May 25							-----	-----
Chaptered by Secretary of State	May 25							May 1	Jul 7
	21							Res 35	Res 70

-----: not applicable [ ]: scheduled

Minutes  
July 13, 1989

EXHIBIT 2

CA LAW REV. COMM'N

JUL 12 1989

RECEIVED

SIDLEY & AUSTIN

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2049 CENTURY PARK EAST  
LOS ANGELES, CALIFORNIA 90067  
213: 553-8100 TELEX 18-1391

520 MADISON AVENUE  
NEW YORK, NEW YORK 10022  
212: 418-2100 TELEX 97-1698

1728 EYE STREET, N.W.  
WASHINGTON, D.C. 20006  
202: 429-4000 TELEX 89-463

ONE FIRST NATIONAL PLAZA  
CHICAGO, ILLINOIS 60603

TELEPHONE 312: 853-7000

TELEX 25-4364

TELECOPIER 312: 853-7312

18 KING WILLIAM STREET  
LONDON, EC4N 7SA, ENGLAND  
441: 821-1616 TELEX 924125

5 SHENTON WAY  
SINGAPORE 0106  
65: 224-3000 TELEX 28754

ASSOCIATED OFFICE:

HASHIDATE LAW OFFICE  
IMPERIAL TOWER, 7TH FLOOR  
1-1, UCHISAIWAICHO 1-CHOME  
CHIYODA-KU, TOKYO 100 JAPAN  
03-504-3800 TELEX 02-228108

July 7, 1989

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

Dear Stan:

I know it's been awhile since you heard from me but as you can see I'm now in Chicago working at Sidley & Austin. One of the partners here acted as an executor for a relative in California and had a lot of comments on the process, particularly the complexities of the probate process in L.A. County. While he had first planned to address his letter to the judges in Los Angeles, I thought that it might be more useful to forward the letter to you at the Commission, since that is where changes in the law come about. After having practiced here for a year, I have to agree that while there a few things I like about California probate practice, the whole process is extremely cumbersome as compared to Illinois. I hope you and the Commission will consider Mr. Preston's comments when considering any changes to the probate code.

I do miss working on California legislation but I still try to keep abreast by being on the mailing list. I hope that everything is well with you.

Best regards,



Amy J. Bernstein

AJB:mjw  
Enclosure

cc: Henry A. Preston

HENRY A. PRESTON  
One First National Plaza, Suite 2550  
Chicago, Illinois 60603  
(312) 853-7423

July 5, 1989

To the California Law Revision Commission

I am writing to complain about the probate process as carried out in the Superior Court of Los Angeles County.

I was Executor of the Will of Edith A. Smith, deceased. Mrs. Smith died in March 1986. I am her cousin and was named as Executor by her Will. It was admitted to probate and I was appointed as Independent Executor in April 1986. The estate was closed recently in 1988 and I have been discharged. The case was No. P 706312 in that Court. My complaints are based entirely on my experience as Executor. I have practiced probate law in Illinois for most of the 40 years since I was first admitted to practice; I have drawn a great number of wills and trusts and have handled the probate of numerous estates; for many years I was involved with various committees of the Illinois State Bar Association and the Chicago Bar Association concerned with the updating and improvement of the probate process in Illinois.

The facts concerning Mrs. Smith's estate are not complicated. She was a semi-retired motion picture and television actress who lived in a modest home just off of Wilshire Boulevard in Los Angeles. She died in March 1986, a widow, her husband, Kent Smith, also a motion picture and television actor, having predeceased her in 1985. She had a modest estate, the principal asset of which was her home. She had some bank accounts and a small amount of tangible personal property, including household furnishings, furniture, works of art, and an automobile. All of her property was her separate property, she having received nothing from her husband, who died essentially penniless. In addition, she was beneficiary of and grantor of an inter-vivos trust, of which my brother and I are Trustees, the corpus of which is a modest inheritance which Mrs. Smith received from her grandparents upon her mother's death about ten years ago. This trust is an Illinois trust and the corpus is held in Illinois. The sole beneficiary of this trust following Mrs. Smith's death is her niece, Anne Frazor, of Stephenville, Texas. The total value of Mrs. Smith's estate at the time of her death was about \$360,000 and the value of the assets in her living trust was about \$65,000 at that time.

Mrs. Smith's Will was originally drawn by a California attorney. It was revised in minor respects by me at the time her husband was admitted to the Motion Picture and Television

Hospital in 1984. A codicil was added by another California attorney, shortly prior to her death. The Will is quite simple: (1) her tangible personal property is left to her niece, Anne Frazor; (2) a specific bequest of \$2,000 was given to a friend; (3) immediately upon her death, her Executor is directed to sell the real estate on such terms as he deems advisable; (4) the balance of the estate, including the proceeds of the real estate, is left to the Trustees of her inter-vivos trust; (5) I was appointed as Executor with specific directions that I was to serve without bond; (5) the Executor is given all of the powers and discretions afforded to trustees and fiduciaries under the laws of California. A codicil executed shortly prior to Mrs. Smith's death made specific bequests totalling \$15,000 to two friends and a charitable organization (increasing the bequest to one of the friends but not changing the original Will).

After Mrs. Smith's death, I engaged Oscar Wiseman, the attorney who had drawn Mrs. Smith's codicil, as attorney for the estate. The estate was opened in April 1986 and I was appointed as Independent Executor, but without power of sale of the real estate. A dispute having arisen between me and Mr. Wiseman relating to the sale of the real estate, he withdrew and J. Michael Schulman was engaged as attorney for the estate in June 1986 and he has acted in that capacity from then forward. A claim was filed against the estate by the Motion Picture & Television Hospital in Los Angeles for \$55,000 for the cost of services rendered by it to the decedent's deceased husband, Kent Smith, during 1983-1985 over and above the amounts of his pension. Suit was filed on this claim. The suit was tried before a branch of the Los Angeles County Superior Court resulting in a judgment against the estate in August 1987 for about \$35,000. After this judgment was paid, the Executor's final accounts were submitted and the estate was finally closed in April 1988.

The details of the administration of the estate and my complaints about it are discussed under the various headings below:

1. The Bond Requirement. Despite the fact that Mrs. Smith's Will specifically stated that her Executor was to serve without bond and despite the facts that I was a relative of Mrs. Smith, had served as her Trustee for many years, and was, as such Trustee, the principal beneficiary of her estate, a bond was required of me as her Executor and a further bond was required in order for me to be given the authority to sell the real estate. These bonds cost \$1,400 per year, or \$1,800 for the two years that the estate was open. Although this was never fully explained to me, I assume that the reason for this was that I was an out-of-state resident. I am at a loss to understand by what authority the Court can assume to ignore the specific provisions of a decedent's will respecting the bond requirement, especially where the principal and only beneficiary of the estate (and the trust which is the residuary beneficiary) is an adult perfectly willing to consent to the Executor serving without bond. The net

result was to reduce the beneficiary's inheritance by the amount of bond premium, a not inconsiderable amount in view of the total size of the estate. In Illinois, the Court can, in its discretion, require surety on an out-of-state executor's bond despite a waiver in the will, but could do so only on application by a beneficiary or other person interested in the estate. In all my practice, I've never heard of a case in Illinois where a waiver of surety on an Executor's bond has been totally ignored, as was done in this case.

2. The Limited Authority of the Independent Executor. At the outset, I was pleased when I obtained letters appointing me Independent Executor of Mrs. Smith's estate. We have an independent executor act in Illinois, adopted in 1980, which has proved to be very helpful in simplifying the administration of smaller estates (such as Mrs. Smith's), with the consequent savings in court costs and attorneys's fees. I served on various bar association committees which assisted in the process of getting the Illinois act through the legislature. I have handled a number of estates under the Illinois act and a few under similar acts in effect in other states (Texas, for example), and I have found such acts to be useful and, generally, to accomplish the purposes for which they were enacted. This is definitely not the case with the California act. If the administration of the act in this case is indicative of the general practice in California, then I can only say that the California independent administration of estates act is essentially useless -- it accomplishes no savings of time and expenses over what would have otherwise been required, and, if anything, seems to be even more costly.

If Mrs. Smith's estate had been administered under the Illinois independent administration of estates act, and if, as is the case, the sole individual residuary beneficiary of the estate was a competent adult perfectly agreeable: (1) there would have been no necessity for the Executor to seek court approval of his inventory - an inventory would have been prepared but not submitted to the court; (2) there would have been no necessity for an appraisal of the personal property or the real estate by a court appointed appraiser and the consequent appraisal fee, a competent appraisal of the real estate was obtained before the real estate contract was entered into by the principal beneficiary herself and the personal property was given entirely to her; (3) there would have been no necessity to obtain, at considerable expense, a court order authorizing the sale of decedent's real estate, especially where the explicit provisions of the Will authorized and directed the real estate to be sold on such terms as the Executor deemed appropriate. Moreover, the obtaining of the court order authorizing the sale of the real estate delayed the closing of the sale for some two months with consequent loss of interest and caused substantial additional expense necessarily incurred to maintain the property in saleable condition during the time; (4) there would have been no reason for the Executor to delay paying the small specific bequests

provided in the Will since the estate assets were more than sufficient, by many times, to pay all claims and expenses, and the delay in payment, resulting entirely from uncertainty as to whether the bequests could be paid without court approval, imposed a severe hardship on the individual grantees; (5) there would have been no necessity for the Executor to submit his final accounts to the court for approval. This process delayed the actual closing of the estate for about five months after the only claim against the estate had been settled and paid and the final account prepared. The reasons for the delay, cited by the court assistant, were so insubstantial, in my opinion, as to be frivolous. They caused several unnecessary court appearances and considerable expense and wasted time by the attorney representing the estate. In Illinois, after all specific bequests and claims have been paid and after all those interested in the estate had reviewed and approved the final account, the Executor would have only had to file a Final Report in order that the estate be closed and the Executor discharged; (6) there would have been no necessity for the Executor and the attorney for the estate to seek additional compensation for their services since, even at standard rates, the amount of services required and the consequent fees would have been very considerably less. In fact, both the Executor and the attorney agreed with the principal beneficiary to charge below their usual and customary rates in view of what was perceived, at the outset, to be a very simple and uncomplicated administration. I estimate that, had a truly simplified administration been allowed, the fees of the Executor and the attorneys for the estate would have been about \$15,000 less than those actually allowed, based on the lesser amount of services that would have been required.

In fact, as I look back on it, I can't see that the so-called independent administration of the Smith estate saved anything. As the estate was in fact administered, there was nothing that the Independent Executor was required to do that he would not have been required to do under a full-blown administration. In short, the independent administration was simply useless. I estimate that it cost the estate (and the principal beneficiary) about \$30,000 in fees, expenses, and other costs, over and above what it should have cost and would have cost if the estate had been administered in Illinois or Texas. This is not to mention the delay in being able to distribute the estate to the principal beneficiary for about seven months after the estate was ready to be closed.

3 Authority to Sell the Real Estate. Mrs. Smith's Will, in Article III, after disposing of her tangible personalty and providing for specific bequests, specifically directed her Executor to proceed to sell her real estate immediately following her death on such terms and conditions as the Executor deemed advisable. Mrs. Frazor, the principal beneficiary of the estate, attended Mrs. Smith at the time of her death, made appropriate funeral arrangements, and initiated arrangements for disposition of the tangible personal property which was given to her and for

management and protection of the real property. This was a considerable inconvenience to her since she lived in a small town in Texas, and had to leave her family to come to California for this purpose. After Mrs. Smith's death, there was considerable interest in the purchase of the real estate. Mrs. Frazor immediately caused an appraisal to be made of the property by a reputable real estate company, and, upon receiving an offer for the purchase of the property which exceeded the appraisal figure by about 5%, accepted the offer on behalf of the estate, after first checking with me as Executor, even though I had not then been appointed as such. It was our belief that it would have been irresponsible to refuse such an advantageous offer. The attorney for the estate knew about the offer and was in the process of applying for letters testamentary. However, his application failed to ask for or obtain authority for the Executor to sell the real estate. When it was discovered that an additional application would have to be made, together with notice to those interested in the estate, before approval could be granted to proceed with the sale, the original attorney resigned and a new attorney was engaged, who was able to obtain the necessary authority. This whole process delayed the closing for about two and a half months after the time when the closing would otherwise have been had. This delay endangered the sale and was costly to the estate. Not only did the estate lose the interest on the proceeds of the sale for that time (about \$5,000), but incurred additional expenses in having to maintain the property for the period (cleaning, inside and outside maintenance, pool cleaning, utilities, mortgage interest, taxes, etc.), not to mention the additional services required by the Executor, the attorney for the estate and the court appointed appraiser. I estimate the cost of these was at a minimum of \$5,000 for a total cost of \$10,000. In addition to all of this, is the premium on the additional bond that had to be given in the amount of \$1,200/yr. for two years. I don't understand how the court can, with any sense of justice, equity or protection of the public, justify ignoring the explicit provisions of a decedent's will and costing the estate and the principal beneficiary the substantial sums that were of absolutely no benefit to the estate. The decedent herself would have been outraged at this profligate wasting of her property.

4. Insubstantial Objections to the Final Accounts. A number of minor objections were raised when the Executor's final accounts were submitted for approval. None of them had any substance. The accounts as submitted were in perfect balance and the corrections did not change the final figures in the accounts at all. This would not be important except for the facts that the corrections involved substantial extra work and delayed the closing of the estate for about four months. The objections which especially annoyed me were as follows:

(a) When I prepared the original inventory, I included the balance in decedent's savings account as that shown in the last entry in her passbook (about \$14,000). The amount actually

received from the savings institution included pre-death interest of \$17. This was shown in the account as interest and not as principal as it should have been. To correct this error, a supplemental inventory had to be prepared, signed and filed -- at a cost in lawyers' and paralegal time of probably several hundred dollars and a delay of some two weeks.

(b) The Executor received about \$296,000 net from the sale of decedent's real estate. The details of this transaction were clearly shown on the closing statement prepared by the escrow company, a copy of which was attached to the original petition for approval of the Executor's accounts. This was not acceptable. The details of the closing were required to be shown in the petition itself. This required a supplement to the petition to be prepared and filed and a postponement of the hearing date for a month.

(c) The Executor chose the date of October 31, 1987 as the ending date for his accounts, since the \$300,000 certificates of deposit, in which about 90% of the estate's assets had been invested, matured on October 18, 1987, enabling the substantial claim of the Motion Picture & Television Institute to be paid. In view of the expected early approval of the accounts, there seemed to be no point in renewing these certificates. Nevertheless, when the accounts were first submitted for approval, an objection was raised that the amount in the estate's checking account then exceeded the federally insured limit of \$100,000. This necessitated a delay of the hearing on approval of the accounts for two months and some time and expense arranging for the purchase of \$200,000 in treasury bills. This was a complete waste of time and money.

(d) In the final account, the Executor was required to pay interest on the specific bequests after one year from date of death. Ordinarily this would have been unobjectionable, except for the fact that it was apparent from the beginning that the cash assets of the estate would be much more than sufficient to pay all claims and expenses several times over. I was unable to obtain authority to pay the small bequests (totalling \$15,000) without going to the difficulty and expense of obtaining an order of partial distribution. Nevertheless, I paid one of them about four months after the estate was opened without such authority because the beneficiary was in need and I paid the remaining two (including one to a charitable organization) about a year after the date of death, still without any specific authority to do so. An independent executor should have authority to pay specific bequests, especially to charitable organizations and to needy beneficiaries, where the assets of the estate, after allowance for all claims, are more than sufficient.

In summary, I think that the administration of Mrs. Smith's estate cost the ultimate beneficiary substantially more than it would have, if due effect had been given to the provisions of Mrs. Smith's Will and if the Independent Executor had been

states which provide for the independent administration of estates. Also, I think the administration of the estate was unduly delayed by the probate process.

Two other features of the California probate process contributed to what I consider the unnecessary difficulties and expenses of administering Mrs. Smith's estate, although I understand that they are probably so ingrained in California law that there is no change of changing them. The first is the statutory fixing of executors' commissions and attorneys' fees. The second is the necessity for contested claims against an estate being filed and prosecuted as separate cases and not handled by the probate court.

I believe that the statutory executor's commission and attorneys' fees in this case were substantially higher than would have been warranted had the Independent Executor been given the degree of independence from court supervision that is implicit in the term "independent", as afforded in other states - especially so, since, in this case, all of the beneficiaries were of age and willing to consent to the actions taken by the Executor and to the lower fees. I understand the necessity for court supervision of fees where minor beneficiaries or persons under disability are involved, but it seems to me this should be invoked only where there is some question as to the amount of the fees and not where the amount is acceptable to all, including the representatives of those under disability. On the other hand, it seems to be the limit on the fees is unfair in cases where there are complexities requiring additional time and effort on the part of the Executor and the attorney handling the estate.

In this case, the Motion Picture and Television Fund, as operator of a hospital, filed a \$55,000 claim against the estate. This claim was contested by the Executor on the basis, among others, that the claim had been waived. The contest of the claim involved a separate suit in the Los Angeles Superior Court, substantial trial preparation, and a one-day trial, in which the estate was successful in reducing the claim by about 40%. It also involved the engagement of an additional attorney to handle the case and his separate additional fee. There was considerable duplication of effort both on the part of the attorneys involved and the court. How much simpler it would be if contested claims could be handled by the same court and attorneys who were involved in the estate administration!

In conclusion, I hope my bringing these matters to your attention may contribute in some small way to improvement and increased efficiency in the probate process in California. I'm sure that practitioners and executors of modest estates such as Mrs. Smith's would greatly appreciate it if that happened.

Yours very truly,

Henry A. Preston

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## STANTON AND BALLSUN

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PLEASE REFER TO  
FILE NO.

899001L.714

July 5, 1989

James Quillinan, Esq.  
Diemer, Schneider, Luce & Quillinan  
444 Castro Street, #900  
Mountain View, California 94041

BY FAXRe: Deposit of Wills and Other Instruments

Dear Jim:

On June 30, 1989, Clark Byam, Lloyd Homer, Bruce Ross, and I discussed the draft of the will depository provisions prepared by the staff of the Law Revision Commission.

Team 4 believes that there is a real problem being addressed by the proposal. However, Team 4 thinks that the Commission's proposal (although a great deal of effort is reflected in it) fails to address the problem adequately. In preparing this report, Team 4 reviewed extensive materials from the State of Oregon. Oregon enacted a will depository system into law (wills were deposited with a county clerk), but the Oregon legislature repealed the authorizing legislation because the expense of maintaining the system was too great. At the present time, the Oregon legislature is considering still another proposal which would permit the destruction of old wills; we are attempting to follow this legislation.

Although Team 4 is uncertain about the best solution for an obviously troubling situation, Team 4, at least, would propose for consideration the following:

(1) Team 4 suggests that the State Bar of California widely publicize and promote the concept that attorneys should not retain original estate planning documents. Attorneys who do not retain original estate planning documents tend to reduce the risk of malpractice. Team 4 is uncertain whether legislation should be enacted, although Team 4 does suggest that appropriate rules of professional conduct be enacted.

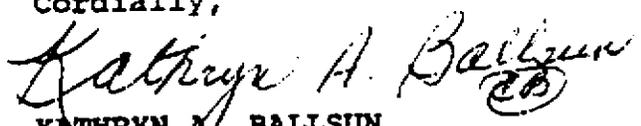
(2) As a practical solution, Team 4 suggests that the county clerk in the county where the deceased or retir-

James Quillinan, Esq.  
July 5, 1989  
Page 2.

ing attorney practiced be authorized and mandated to accept original estate planning documents, including wills, trusts, etc. An appropriate registration fee would be charged. Any document so submitted would be considered to be a sealed document, only available to the creator of the document, that creator's conservator or executor.

Thank you for your consideration. If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,



KATHRYN A. BALLSUN  
A Member of  
STANTON AND BALLSUN  
A Law Corporation

KAB/mkr

- cc: Irwin Goldring, Esq.
- Harley Spitler, Esq.
- Lloyd Homer, Esq.
- Bruce S. Ross, Esq.
- Barbara Miller, Commissioner
- James Willett, Esq.
- Clark Byam, Esq.

REPORT

TO: JAMES V. QUILLINAN  
IRWIN D. GOLDRING  
STERLING L. ROSS, JR.  
VALERIE J. MERRITT  
MICHAEL V. VOLLMER  
CHARLES A. COLLIER, JR.  
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT

DATE: July 7, 1989

RE: LRC MEMORANDUM 89-53  
(UNIFORM STATUTORY RULE AGAINST PERPETUITIES--  
Tentative Recommendation)

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Study Team #1 held a conference call on July 6, 1989. Michael G. Desmarais, Lynn P. Hart, Richard S. Kinyon, Sterling L. Ross, Jr., Michael V. Vollmer, and William V. Schmidt participated. Michael G. Desmarais was unable to participate in the entire conference call.

COLLECTIVE OPINION

We should state at the outset that no member of the team had read all of the materials pertaining to this subject which included: (1) a Tentative Recommendation of approximately 80 pages; (2) a Report by Charles A. Collier, Jr. with three attachments including a law review article by Professor Waggoner; (3) Memorandum 89-53 which was a law review article

by Professor Dukeminier and several letters of recommendation from law professors; and (4) the First Supplement which included an eleven page letter by Professor Jesse Dukeminier and a fifty page law review article by Professor Bloom, as well as the Second Supplement, Third Supplement and Fourth Supplement to the Memorandum. Some of us had read more of the material than others. The Fifth Supplement arrived after our conference call.

None of us have completely made up our minds and each of us is willing to (and in some cases would like to) receive additional input before we make a final decision.

We are impressed that Charles Collier and Professor Edward C. Halbach, Jr. as well as the American College of Probate Counsel and the American Bar Association has recommended the adoption of this Uniform Act. We are also impressed by the fact that Professor Dukeminier and other professors oppose the adoption of the Act in California. Also, as a general matter, we find little or no litigation involving the rule against perpetuities in our practices. As a result, we do not believe that the rule against perpetuities is a big problem in California.

We also would like to point out that this is the first time that we have had an opportunity to study or review this subject, and in view of the complexity of the subject of the

matter and the number of pages presented to us together with the opposing academic arguments, we do not feel that we can make a meaningful recommendation at this time. However, we are certainly willing to keep an open mind.

INDIVIDUAL OPINIONS

Richard Kinyon felt that the act may be premature in California and that we should put the burden on the proponents of the bill to justify the need for change in California law.

Terry Ross basically feels the same way as Dick Kinyon. He feels that the argument of uniformity among the states is not a particularly strong one because many Uniform Laws are not uniformly adopted among the states of the United States.

Lynn Hart feels that we need more time and more information before we can give meaningful input.

Michael Vollmer was strongly in favor of the act of the beginning of our conference call and still favors the adoption of the act. He stated as we concluded our call that he wanted to make sure that the Uniform Act allowed for reformation at or near the beginning of the ninety year period as well as at or near the end of the period. If so, he continues to support the adoption of the act.

William V. Schmidt has mixed emotions. He generally supports the act because of its simplicity, hopeful uniformity and those distinguished persons who support it. However, he

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feels that Professor Dukeminier makes several good points in opposition to the act and he would very much like to hear Charles Collier or Ed Halbach, or both respond to the letter of Professor Dukeminier.

POINTS OF DISCUSSION

Michael Vollmer states that California law already includes a sixty year period and the extension from sixty to ninety is not something that he feels is that objectionable. He basically feels the new act is a great idea.

Many members of our team thought that if there is to be litigation validating or invalidating an interest under the rule against perpetuities, the sooner the litigation and its resulting final decision, the better for everyone concerned, unless there was a statute of limitations which prevented an attack against the validity of an interest after its period of time had run.

Lynn Hart expressed the concern that under the ninety year wait and see theory of the proposed act it would be extremely difficult to ascertain the transferor's intention for purposes for reformation after the passage of ninety years. She agreed with Dick Kinyon that its better to resolve the question of the validity or invalidity of the interest at the beginning and then reform the instrument if the interest is found to be invalid.

Terry Ross stated that present California law seemed fine to him and he is an advocate of the theory "If it ain't broke, don't fix it." Terry says that he is from Missouri and he wants to be shown and convinced that this would improve California law.

Our study team discussed how we would draw savings clauses if the new law were passed. Three of us agreed without opposition from the other two that we would probably use language which would say that our trusts would terminate either (1) twenty-one years after specified lives in being or (2) at the expiration of ninety years from the creation of the interest, whichever occurred last.

From our superficial study it seems to us that simplicity would only result if the present rule against perpetuities was completely abolished in favor of a flat ninety year period of time, or if savings clauses would be written to terminate an irrevocable trust only on the expiration of ninety years after the date of its creation. However, we do not feel that California lawyers, in drawing their savings clauses, will confine themselves only to the ninety year period when they have both periods available to them. Thus, the existing complexity with its alleged practical difficulties of administration would seemingly remain and the alleged simplicity of the Uniform Act is seemingly diminished.

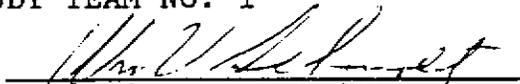
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SUMMARY

It is fair to say that all five members of the team presently have an open mind and agree that they could change their minds with additional input and information. However, in my opinion, the present position of Kinyon and Ross opposes the adoption of the act and the opinion of Hart was initially slightly in favor of the act and at the end of the conference slightly opposed to the act. The opinion of Vollmer was strongly in favor of the act subject to the question pertaining to the applicability of early reformation under the Uniform Act. I am slightly in favor of the act and would be more strongly in favor of the act but for some of the points made by Professor Dukeminier in his letter. Thus, our team is split in its opinion and needs more time and information before it feels it can make a meaningful recommendation.

Respectfully submitted,

STUDY TEAM NO. 1

By: 

William V. Schmidt  
Captain

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Law School

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LAWRENCE W. WAGGONER  
*Lewis M. Simes Professor of Law*

July 10, 1989

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

Re: Study L-3013, Uniform Statutory Rule Against Perpetuities

Dear John:

I have just received word of two more enactments of the Uniform Statutory Rule Against Perpetuities -- Montana and Nebraska. Both states adopted wait-and-see for the first time.

This brings the number of enacting states to nine, or nearly 20 percent of the states.

Yours sincerely,

  
Lawrence W. Waggoner