

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

12/28/90



<p>DATE & TIME:</p> <ul style="list-style-type: none"> • January 10 (Thursday) 1:30 pm - 6:00 pm • January 11 (Friday) 9:00 am - 2:00 pm 	<p>PLACE:</p> <ul style="list-style-type: none"> • San Jose Radisson Hotel 1471 North 4th St. San Jose 95112 408/452-0200
<p>NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p>	

FINAL AGENDA*for meeting of***CALIFORNIA LAW REVISION COMMISSION**

1. MINUTES OF NOVEMBER 29-30, 1990, COMMISSION MEETING (sent 12/14/90)
2. ADMINISTRATIVE MATTERS
 - PERSONNEL MATTERS
 - Memorandum 91-1 (JHD) (sent 12/11/90)
 - LOCATION OF MEETINGS
 - Memorandum 91-7 (NS) (sent 12/7/90)
 - 1991 LEGISLATIVE PROGRAM
 - Oral Report at Meeting
 - COMMUNICATIONS FROM INTERESTED PERSONS
3. STUDY F-1000 - FAMILY CODE
 - Report on Progress of Study
 - Memorandum 91-5 (JHD) (sent 12/14/90)
4. STUDY H-409 - APPLICATION OF MARKETABLE TITLE ACT TO EXECUTORY INTERESTS
 - Comments on Tentative Recommendation
 - Memorandum 91-3 (SU) (to be sent)

5. STUDY L-3002 - RELOCATION OF POWERS OF APPOINTMENT FROM CIVIL CODE TO PROBATE CODE

Draft Statute

Memorandum 91-9 (SU) (sent 12/20/90)

6. STUDY L-3049 - STATUTORY WILL

Draft Statute

Memorandum 91-2 (JHD) (sent 12/19/90)

First Supplement to Memorandum 91-2 (sent 12/27/90)

7. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Draft Statute

Memorandum 90-122 (SU) (sent 11/13/90; another copy sent 12/11/90)

First Supplement to Memorandum 90-122 (to be sent)

8. STUDY L-3051 - POUR-OVER WILL FOR CONSERVATEE

Memorandum 91-11 (RJM) (sent 12/14/90)

9. STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

Memorandum 91-10 (NS) (sent 12/18/90)

10. STUDY D-327 - BONDS AND UNDERTAKINGS

LIMITATIONS ON PERSONAL SURETIES

Memorandum 90-86 (NS) (sent 11/06/90; another copy sent 12/11/90)

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MEETING SCHEDULE

January 1991

Jan. 10 (Thur.) 1:30 p.m. - 6:00 p.m. San Jose
Jan. 11 (Fri.) 9:00 a.m. - 2:00 p.m.

February 1991

Feb. 21 (Thur.) 1:30 p.m. - 6:00 p.m. Los Angeles
Feb. 22 (Fri.) 9:00 a.m. - 2:00 p.m.

March 1991

No Meeting

April 1991

Apr. 11 (Thur.) 1:30 p.m. - 6:00 p.m. Fresno
Apr. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

May 1991

May 9 (Thur.) 1:30 p.m. - 6:00 p.m. Los Angeles
May 10 (Fri.) 9:00 a.m. - 2:00 p.m.

June 1991

June 13 (Thur.) 1:30 p.m. - 6:00 p.m. Sacramento
June 14 (Fri.) 9:00 a.m. - 2:00 p.m.

July 1991

July 18 (Thur.) 1:30 p.m. - 6:00 p.m. San Diego
July 19 (Fri.) 9:00 a.m. - 2:00 p.m.

August 1991

No Meeting

September 1991

Sep. 12 (Thur.) 1:30 p.m. - 6:00 p.m. San Francisco
Sep. 13 (Fri.) 9:00 a.m. - 2:00 p.m.

October 1991

Oct. 10 (Thur.) 1:30 p.m. - 6:00 p.m. Sacramento
Oct. 11 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1991

Nov. 14 (Thur.) 1:30 p.m. - 6:00 p.m. Los Angeles
Nov. 15 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1991

No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JANUARY 10, 1991
SAN JOSE

A meeting of the California Law Revision Commission was held in San Jose on January 10, 1991.

Commission:

Present:	Roger Arnebergh Chairperson	Bion M. Gregory Legislative Counsel
	Edwin K. Marzec Vice Chairperson	Forrest A. Plant Sanford Skaggs

Absent:	Bill Lockyer Senate Member	Arthur K. Marshall Ann E. Stodden
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Staff:

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

None

Other Persons:

Carol Reichstetter, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles
Terry Ross, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Mill Valley
Harley Spitler, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco
Bob Temmerman, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Campbell
Shirley Yawitz, California Probate Referees Association, San Francisco

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF NOVEMBER 29-30, 1990, MEETING

The Commission approved the Minutes of the November 29-30, 1990, Commission Meeting as submitted by the staff.

LOCATION OF MEETINGS

The Commission considered Memorandum 91-7. The Commission changed the location of the April 11-12 meeting from Fresno to Sacramento.

PERSONNEL MATTERS

The Commission considered Memorandum 91-1, containing the Executive Secretary's report on personnel and financial matters. No action was required or taken concerning the report.

The Commission raised the issue whether anyone had been appointed to replace Assembly Member Harris on the Commission. The staff noted that we have received no word of a new appointment. Commissioners Plant and Gregory indicated that they would mention the matter to Assembly Member Isenberg.

Vice Chairperson Marzec will seek to arrange a meeting between the Commission and the new Governor. He will also seek to obtain a new appointment by the Governor to fill the vacancy created by the appointment of Brad R. Hill to a judicial position.

1991 LEGISLATIVE PROGRAM

The Executive Secretary made the following report on the Commission's 1991 legislative program.

The resolution on the Commission's authority to study topics has been introduced by Senator Lockyer as SCR 4.

Drafts of the following bills have been received from Legislative Counsel and are ready for introduction.

(1) Access to decedent's safe deposit box.

(2) Repeal of in-law inheritance. Assembly Member Sher carried this bill last session, and is the likely author this year. The Commission has received letters supporting repeal of in-law inheritance from the Los Angeles County Bar Association and Beverly Hills Bar Association. The staff is waiting to receive a letter of support from the State Bar Estate Planning, Trust and Probate Law Section before asking Assembly Member Sher to author this bill.

Seven other bills are being drafted by Legislative Counsel:

(1) General probate bill. The general probate bill will contain the following recommendations:

Debts That Are Contingent, Disputed, or Not Due
Remedies of Creditor Where PR Fails to Give Notice
Repeal of Civil Code Section 704 (U. S. Bonds)
Disposition of Small Estate Without Probate

Right of Surviving Spouse to Dispose of Community
Property
Litigation Involving Decedents
Compensation in Guardianship and Conservatorship
Proceedings
Gifts in View of Impending Death
Technical and Minor Substantive Revisions

We will amend into this bill the cleanup amendment to Civil Code Section 2476 relating to the certificate of acknowledgement of a notary public in a statutory form power of attorney set out in the First Supplement to Memo 90-122 and approved at this meeting.

(2) Urgency probate bill.

(3) Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care. Senator Keene is the likely author.

(4) TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property. Senator Kopp has agreed to be the author.

(5) Powers of Fiduciaries. This bill will contain the following recommendations:

Recognition of Trustee's Powers
Recognition of Agent's Authority Under Statutory
Form Power of Attorney

(6) Uniform Statutory Rule Against Perpetuities. Senator Beverly is the likely author. We will add to this bill the recommendation on Application of Marketable Title Statute to Executory Interests which was approved at this meeting.

(7) Commercial real property leases. This bill will contain the following recommendations:

Remedies for Breach of Assignment or Sublease
Covenant
Use Restrictions

The staff has sent to the Assembly Judiciary Committee the correction of the cross-reference to a repealed section in the statute on discovery after judicial arbitration.

STUDY D-327 - BONDS AND UNDERTAKINGS

The Commission considered Memorandum 90-68 relating to possible limitations on personal sureties. The Commission decided not to pursue this matter.

STUDY F-1000 - FAMILY CODE

The Commission considered Memorandum 91-5, relating to the progress of the Family Code project. The Commission indicated that the tentative outline of the Code attached to the memorandum should be revised so that the substantive provisions do not begin with termination of marriage. The statute should generally be organized chronologically, with solemnization of marriage preceding termination of marriage, and the like.

The Commission approved the tentative schedule for staff production of the Family Code as set out in the memorandum, with revision of the Family Law Act and related provisions completed by July 1, 1991. The manner of circulation of the staff draft and Commission review of comments on it was not determined. Among the possibilities discussed were to prepare in advance a tentative outline for Commission review, after which the staff draft would be printed and distributed for comment. Another possibility is to obtain a preprint bill of the statute part of the draft and distribute it together with a printed version of the staff comments. No decision was made on these matters.

STUDY H-409 - APPLICATION OF MARKETABLE TITLE
ACT TO EXECUTORY INTERESTS

The Commission considered Memorandum 91-3 concerning comments received on the *Tentative Recommendation Relating to Application of Marketable Title Act to Executory Interests* (November 1990). The Commission also considered a letter from Ronald P. Denitz (see Exhibit 1) and a report from Study Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (see Exhibit 2), which were distributed at the meeting. The Commission approved the recommendation to print, subject to the decisions reported below. The proposed legislation will be included in the bill to implement the Uniform Statutory Rule Against Perpetuities.

The Commission made the following decisions:

Civil Code Section 885.010. "Power of termination" defined

The inclusion of executory interests within the definition of "power of termination" should be limited to executory interests representing restrictions on the use of real property. This change is made in response to Professor Jesse Dukeminier's discussion of the need to distinguish between executory interests that are the equivalent of reversionary interests (which should be included in the marketable title statute) and executory interests that are more equivalent to remainder interests (which should be subject to the perpetuities period, not the marketable title limitations). See Exhibit 12 to Memorandum 91-3. Accordingly, Section 885.010(a)(2) should be revised by adding the double-underscored language:

885.010 (a) As used in this chapter, ~~"power:~~

(1) "Power of termination" means the power to terminate a fee simple estate in real property to enforce a restriction in the form of a condition subsequent to which the fee simple estate is subject, whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise, and includes a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to Section 885.020.

(2) "Power of termination" includes the power created in a transferee to terminate a fee simple estate in real property to enforce a restriction on the use of the real property in the form of a condition subsequent to which the fee simple estate is subject, whether the power is characterized in the instrument that creates or evidences it as an executory interest, executory limitation, or otherwise, and includes the interest known at common law as an executory interest preceded by a fee simple determinable.

(b) A power of termination is an interest in the real property.

(b) (c) For the purpose of applying this chapter to other statutes relating to powers of termination, the terms "right of reentry," "right of repossession for breach of condition subsequent," and comparable terms used in the other statutes mean "power of termination" as defined in this section.

The Commission also approved the following language for addition to the Comment to Section 885.010, as set out in the memorandum:

Executory interests are also subject to the limitations provided in the statutory rule against perpetuities. See Prob. Code §§ 21202 (application of statutory rule), 21205 (90-year wait-and-see period). Thus, an executory interest that becomes invalid under the statutory rule against perpetuities may not be renewed under this chapter. Similarly, if an executory interest terminates under this chapter, it is fully terminated and does not continue for purposes of the statutory rule against perpetuities. See Section 885.060 (effect of expiration of power of termination).

Civil Code § 885.015. Application of chapter

The Commission approved the proposed amendment of Civil Code Section 885.015, to read as follows:

885.015. This chapter does not apply to any of the following:

(a) A ~~reversionary--interest~~ power of termination conditioned upon the continued production or removal of oil or gas or other minerals.

(b) A ~~reversionary--interest--in~~ power of termination as to separately owned improvements or fixtures conditioned upon the continued leasehold or possessory interest in the underlying land.

The Commission considered the remarks of Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section relating to the meaning of the language "reversionary interest." The option of keeping "reversionary interest" in Section 885.015 and adding a reference to "executory interest" in subdivisions (a) and (b) was considered. The Commission concluded that using "power of termination" is preferable since this chapter of the statute relates only to powers of termination and the exception to the coverage of the chapter should track the scope of the chapter. The staff will write the State Bar team explaining the decision.

Civil Code § 885.030. Expiration of power of termination

The Commission approved the following revision of the Comment to Section 885.030:

Comment. Section 885.030 provides for expiration of a power of termination after 30 years, notwithstanding a longer or indefinite period provided in the instrument reserving the power. The expiration period supplements the rule against

~~perpetuities, which has been held inapplicable.~~ The rule against perpetuities does not apply to reversionary powers of termination. See *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919); Prob. Code § 21225(g) (exclusion from statutory rule against perpetuities). Executory interests remain subject to the limitations provided in the statutory rule against perpetuities. See Comment to Section 885.010; Prob. Code §§ 21202 (application of statutory rule), 21205 (90-year wait-and-see period).

The expiration period runs from the date of recording rather than the date of creation of the power of termination because the primary purpose of Section 885.030 is to clear record title. The expiration period can be extended for up to 30 years at a time by recordation of a notice of intent to preserve the power of termination. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the power of termination does not enable enforcement of a power that has expired because it has become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest), 885.040 (obsolete power of termination), & Comments.

For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration). This section does not affect conservation easements pursuant to Sections 815-816. See Section 880.240 (interests excepted from title) & Comment. See also Section 885.015 (exceptions from chapter) & Comment.

Exception for Executory Interests Shifting Between Charities

The Commission considered the policy issue concerning whether an additional exception should be included in the proposed legislation so that the 30-year marketable title period would not apply in cases involving two charities. The Commission decided not to adopt such an additional exception.

STUDY L-3002 - RELOCATION OF POWERS OF APPOINTMENT FROM CIVIL CODE TO PROBATE CODE

The Commission deferred consideration of Memorandum 91-9 concerning relocation of the powers of appointment statute from the Civil Code to the Probate Code because the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section was not prepared to comment on the memorandum.

STUDY L-3013 -- APPLICATION OF MARKETABLE
TITLE STATUTE TO EXECUTORY INTERESTS

See Study H-409.

STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

The Commission deferred consideration of Memorandum 91-10 concerning a procedure for a creditor to reach nonprobate assets because the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section was not prepared to comment on the memorandum.

STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

The Commission deferred consideration of Memorandum 90-122 and the draft comprehensive powers of attorney statute at the request of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. Mr. Harley Spitler informed the Commission that the State Bar Section would have comments on the memorandum ready by April and the Commission postponed consideration of the memorandum until the April meeting.

The Commission considered the First Supplement to Memorandum 90-122 relating to the certificate of acknowledgement of a notary public in a statutory form power of attorney. The Commission approved the following cleanup amendment, to be amended into the Commission's 1991 general probate bill:

Civil Code § 2476 (amended), Requirements for legally
sufficient statutory form power of attorney

2476. A statutory form power of attorney under this chapter is legally sufficient if all of the following requirements are satisfied:

(a) The wording of the form complies substantially with Section 2475. A form does not fail to comply substantially with Section 2475 merely because the form does not include the provisions of Section 2475 relating to designation of coagents. A form does not fail to comply substantially with Section 2475 merely because the form uses the sentence "Revocation of the power of attorney is not effective as to a

third party until the third party learns of the revocation" in place of the sentence "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation," in which case the form shall be interpreted as if it contained the sentence "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation."

(b) The form is properly completed.

(c) The signature of the principal is acknowledged. Notwithstanding Sections 1188 and 1189, the certificate of acknowledgment of notary public required by Section 2475 is sufficient if it is in substantially the form set out in either Section 2475 or Section 1189.

Comment. Section 2476 is amended to make clear that the certificate of acknowledgment of the notary public required in a statutory form power of attorney is sufficient if it is substantially in the form set out in Section 2475 or substantially in the form set out in the general statute governing certificates of acknowledgment (Civil Code Section 1189).

STUDY L-3049 - CALIFORNIA STATUTORY WILL

The Commission considered Memorandum 91-2 and First Supplement concerning California statutory will. A letter dated January 9, 1991, from Michael Vollmer of the cognizant Subcommittee of the State Bar Estate Planning, Trust and Probate Law Section was delivered to the Commission at the meeting. A copy of Mr. Vollmer's letter is attached to these Minutes as Exhibit 3.

The representative of the State Bar Probate Section said the State Bar has a proprietary interest in the statutory will legislation for the following reasons:

(1) The statutory will legislation was originally developed and recommended by the State Bar.

(2) The State Bar distributes statutory will forms. This has been a big and successful program for the State Bar, and the State Bar considers it to be an important public service.

(3) As practicing attorneys who work with these problems on a daily basis, they should have more control over this legislation than on other Commission matters.

The State Bar representative said these reasons require a different relationship between the State Bar and Law Revision Commission than has existed on other matters.

The Commission decided to leave this matter to the State Bar and to take no further action on it.

STUDY L-3051 - POUR-OVER WILL FOR CONSERVATEE

The Commission deferred consideration of Memorandum 91-11 concerning a pour-over will for a conservatee because the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section was not prepared to comment on the memorandum.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

Tishman West Companies10960 Wilshire Boulevard
Los Angeles, CA 90024-3710
Telephone 213 477-1919
Facsimile 213 479-0229

January 7, 1991

CA LAW REV. COMMISSION

JAN 09 1991

RECEIVED

BY FAX AND BY MAILNathaniel Sterling, Esq.
Associate Executive Secretary
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Study H-409 - Application of Marketable Title Act to
Executory Interests - Comment on Tentative Recommenda-
tions - Your Memorandum 91-3 (Our Law Revision Commis-
sion File #18)

Dear Nat:

Please advise the Commission that, although I will not be able to attend the January 10, 1991 Commission Meeting, the Staff's January 3, 1991 recommendations regarding the Tentative Recommendation in the captioned matter are satisfactory, except that I am both puzzled and admittedly concerned by Professor Dukeminier's comments regarding "Family Wealth Transfers".

Even though I am unfamiliar with the technicalities involved, I hope that new Statutory provisions will not do anything to upset or frustrate (a) devises in existence or (b) devises contained in pre-existing wills or revocable trusts of those parties who have become incapacitated but have not yet died. Perhaps "Family Wealth Transfers" should be reserved for future study without slowing down the Recommendation in chief.

If any substantially different Recommendation or substantial changes in the presently existing Tentative Recommendation are proposed by the Commission, I hope that you will be able to

Nathaniel Sterling, Esq.

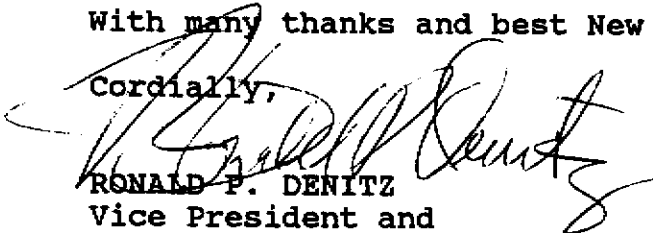
- 2 -

January 7, 1990

permit me to review and give input as to such differences or changes.

With many thanks and best New Year's wishes, I am,

Cordially,



RONALD P. DENITZ
Vice President and
General Counsel
TISHMAN WEST COMPANIES

RPD:hm

JAN-09-1991 12:46 FROM RAIN SCHMIDT WALLACE TO

14153832074 P.02

Study H-409

EXHIBIT 2

Minutes, January 10, 1991

REPORT

TO: BRUCE S. ROSS, CHAIR
VALERIE J. MERRITT
STERLING L. ROSS, JR.
ROBERT E. TEMMERMAN, JR.
CLARK R. BYAM
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT (Captain)
STUDY TEAM NO. 1

DATE: January 9, 1991

RE: CLRC Tentative Recommendation relating to Application
of Marketable Title Statute to Executory Interests and
Memorandum 91-3 (Comments on Tentative Recommendation)

Study Team No. 1 conferred by a conference call between Richard S. Kinyon and William V. Schmidt on January 9, 1991. Monica Dell'Osso and Dennis J. Gould were originally scheduled to participate, but were unable to do so.

Richard Kinyon and I generally agree that the tentative recommendation is a good one. Although we never, or almost never, see executory interests in our practice, we agree with the staff that the potential existence of such interest for 90 years could act as an undesirable cloud on the title. If such executory interests were treated the same as powers of termination under the marketable title statute, they would be subject to the 30-year rule under Civil Code Section 885.030. The shorter time, even though it may be renewed for additional 30-year periods of time by the proper recording, seems preferable.

Yesterday I received Memorandum 91-3 from Valerie Merritt which contains the thirteen letters received by the Commission in response to this tentative recommendation. It also contains revisions recommended by the staff. I had an opportunity to discuss with Richard S. Kinyon the proposed revision on page 2 of the Memorandum pertaining to Civil Code Section 885.015. We both agree that the 30 year rule should not apply to a power of

termination conditioned upon the continued production or removal of oil or gas or other minerals. However, the recommended change by the staff of Civil Code Section 885.015, which replaces the words "reversionary interest" with the words "power of termination" raises the question of whether a "reversionary interest" is now to be included within the meaning of a "power of termination".

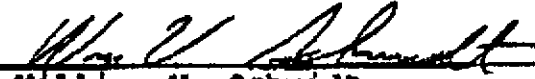
A "power of termination" is defined in Civil Code Section 885.010, but such a definition, even with the proposed changes on page 5 of the recommendation, do not seem to include a "reversionary interest". However, the citation to Witkin, Summary of California Law, cited at footnote 7, states that a "reversionary interest" is considered as remaining in the grantor; hence, it is always vested. The same theory is applied to a "power of termination". Therefore, both are excluded from the application of the rule against perpetuities.

If the intent then is to have a "reversionary interest" covered by the Marketable Title Statute, should the definition of a "power of termination" in Civil Code Section 885.010 not expressly include a "reversionary interest"? Is "a possibility of reverter" the same as a "reversionary interest"?

Respectfully submitted,

STUDY TEAM NO. 1

By:


William V. Schmidt,
Captain

Study L-3049

EXHIBIT 3

Minutes, January 10, 1991

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



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(415) 561-8289

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Reporter

LEONARD W. POLLARD II, *San Diego*

Chair

BRUCE S. ROSS, *Severy Hills*

Vice-Chair

WILLIAM V. SCHMIDT, *Newport Beach*

Executive Committee

ARTHUR N. BREIDENBECK, *Burlingame*
CLARE R. BYAM, *Redwood*
SANDRA J. CHAM, *Los Angeles*
MONICA DELL'ORSO, *Oakland*
MICHAEL G. DEMARINI, *San Jose*
ROBERT J. DURHAM, JR., *La Jolla*
MELITA FLECK, *La Jolla*
ANDREW S. GARD, *Los Angeles*
DENNIS J. GOULD, *Oakland*
DON E. GREEN, *Sacramento*
JOHN F. HARRIS, *Crisley*
BRUCE S. ROSS, *Severy Hills*
WILLIAM V. SCHMIDT, *Newport Beach*
THOMAS J. SUTLER, *San Francisco*
ROBERT L. SULLIVAN, JR., *Primo*
ROBERT E. TENNERMAN, JR., *Campbell*
MICHAEL V. VOLLMER, *Irvine*

REPLY TO:

January 9, 1991
For delivery via Sterling Ross

Mr. John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 04303-4739

Re: California Statutory Will Project
Study L-3049, Memorandum 91-2

Dear Mr. DeMouilly:

I am responding to your latest proposed revisions (memo dated 12/18/90) to the California Statutory Will project. I had thought that the Commissioners had asked, at the end of the last session on November 29, 1990, that you meet with me to try to reach some sort of tentative agreement (or, at the least, a list of specific disagreements) concerning the proposed language of the Statutory Will. Having not heard from you, I assume that the holidays and distance between Palo Alto and Irvine made this impractical for you. This late response to your 12/18/90 changes results in part from my personal holiday schedule. To assist the Commission in reviewing decisions (and to avoid having to look at things about which the Section and the Staff do not disagree), I have attached a "cut and paste" version of the Staff recommended 12/18/90 provisions, modified to show how the Section would prefer the Statutory Will be drafted. I have highlighted with asterisks those places where the Section version differs from the Staff recommendation.

1. Guiding Principles. You will recall the Section's four 4 guiding principles in our redrafting efforts (as set forth in my November 26, 1990 letter to you):
 - a. Keep it simple.
 - b. Give the user understandable choices. This is why we recommended the question and answer format (hereafter "Q&A") at the beginning of the form to define terms.
 - c. Say what you mean and mean what you say. We must remember that a lawyer will not be looking over the user's shoulder to answer questions.
 - d. Remember who the likely users will be. These will probably be the elderly with grown children; young couples with minor children who, our experience tells us, have definite beliefs of what is best for their particular family; military families; people with small estates; and people in the process of getting a divorce.

Our goal was to balance accuracy and choices with simplicity. Perhaps we should now add a fifth principle:

- e. Keep it consistent. What we mean by this is that we should either (i) rely heavily on the Q&As to define terms (thus making the will itself shorter), or (ii) place critical information within the will form itself.

2. Consider Other State Drafts. The Staff and the Section looked at other state's efforts, particularly Maine, Michigan and Wisconsin. These other state's forms may give us guidance, but should be adopted only if appropriate to California.

3. 120 Hour Survivorship. Until just a year or so ago, there were no statutory 120 hour survivorship provisions whatsoever in California. The 120 hour survival provision was first applied to intestacy cases only (the Section opposed this because of federal tax problems, but the Commission apparently thought that the people with larger estates who would be affected would usually not die intestate). In late 1990 the 120 hour survival provision was slipped into the existing Statutory Wills, again apparently because the Commission thought that people with large estates would not use the Statutory Will forms. If we assume these premises are still valid, then the issue becomes whether the 120 hour survival provision should appear (i) only in the Q&A section (Staff recommendation, Q&A paragraph 8), or (ii) only in the body of the Statutory Will itself (and not in the Q&A section), or (iii) in both the Q&A and the body of the Will. The Section prefers that it appear in both places because it is critical to the principle of "saying what you mean and meaning what you say". "Survives me" is not considered by the "ordinary user" to mean "survives me by 120 hours". The "keep it simple" principle would have it defined in the Q&A section only. This is a policy decision for the Commission.

4. Anti-Lapse Provisions. Except for spousal survival (by 120 hours), the Staff wants there to be no mention in the Will itself of what happens if a child or other family member beneficiary fails to survive the testator, thus relying solely on Probate Code Section 6147 anti-lapse provisions. The Section thinks that an "ordinary user" of the form Will would expect survival to be required with respect to specific gifts of personalty, cash and realty, but might want the residue of the estate to pass to the issue of at least a deceased child. This is the exact scheme set forth in all three of the Statutory Wills studied by the Staff (Maine, Michigan and Wisconsin - see Exhibits 5, 6 and 7 to the Staff's 9/4/90 memo). As an illustration, if I leave a specific \$50,000 gift to my father, I probably expect that he needs it for his support - and I probably do not want the \$50,000 to pass to my siblings if my father does not survive me. Similarly, if I leave my house to my daughter, I probably want her to have that particular house to live in, and if she does not survive me, then I may not want it to pass to her children (who may be grown and in college).

5. Definition of Trust in Q&A. The Section's Q&A definition of a "trust" was thought to be too brief. The Staff's Q&A question 18 is clearly too long, especially since there is no trust in the proposed Statutory Will form. Our proposed new definition is a compromise and is now shown as question 19 (in case the Commission decides to lengthen the definition, at least it will not cause persons not interested in it to skip the other definitions).

6. Order of Specific and Residual Gifts. The Staff has recommended that the residue of the estate be given away in question 2, and that specific (optional) gifts be covered in questions 3, 4 and 5. The Section thinks it is more logical that specific gifts be covered first (in paragraphs 2, 3 and 4) and that what is left (the residue) be covered last (in paragraph 5). The Section's position in ordering of the gifts is exactly that taken in all three of the other Statutory Wills studied (Maine, Michigan and Wisconsin).

7. Death Taxes. The Staff believes that allocation of death tax liabilities should be ignored because (i) most users will not have estates worth more than \$600,000, so there will be no death tax liability, and (ii) our default proration statute works just fine. This approach meets the "simplicity" principle. The Section believes that most users would expect that specific gifts would be free of death taxes, and that if a tax were to be imposed, then it should be borne by the residue of the estate (which in most cases should be the bulk of the user's estate). As an illustration, if I give \$25,000 to my nephew and my \$400,000 house to my daughter, I think the "ordinary user" would expect that these beneficiaries would get

exactly those assets, and this is what the Section draft would do even if death taxes are payable. If my estate were worth \$700,000, and \$37,000 in death taxes were assessed, then under the Staff position, my nephew would get \$23,679 (not \$25,000) and my daughter would have to pay over to my estate \$21,143 to cover her share of death tax liabilities attributable to the house under the proration statutes. The Section position is consistent with the "say what you mean" principle.

8. Encumbrances. The Staff proposal on the gift of the residence says nothing about encumbrances (California law says that the residence would pass "subject to encumbrances"), and this is consistent with the "keep it simple" principle. The Section prefers that the gift be made expressly subject to mortgages and encumbrances, because it alerts the user to what happens (and if the user wants the house to pass free and clear of a \$150,000 mortgage, then the user can make a specific gift of \$150,000 to the beneficiary). None of the 3 other states' statutory wills reviewed say anything about encumbrances.

9. Guardianships/Custodial Accounts. The experience of the members of the Section demonstrates that a testator:

(i) frequently does not want assets to pass to beneficiaries (particularly children) at age 18, and instead prefers that outright distribution be deferred until a more mature age (perhaps as high as age 25);

(ii) frequently does not want the same person who raises the children to also handle the money set aside for the children (particularly when the guardian of the person will be an ex-spouse of the testator); and

(iii) almost always wants to make the above decisions himself or herself (because it is the testator's money and the testator believes that he or she knows what is best for the child), and does not want to delegate these decisions to the court or even necessarily to the designated Executor. As an illustration, I may designate my 70 year old father as an executor (because he is local, financially wise, and because he does not have to perform services for too long a time period); but I may want someone else (perhaps an Arizona resident closer to my age and philosophy on raising children) to serve as a custodian or guardian for my children because he or she is younger or because he or she might be tougher (or easier) in doling out money to my children.

That is why the Section believes the positions of guardian of the person and guardian (or custodian) of assets should be separate decisions (as the Maine and Michigan Wills provide) and that a custodial option to as late as age 25 should be available.

10. Bond. The Staff believes that the form itself (and not just Q&A question 17) should state that "Your estate must pay for the bond if one is required". The Section believes that this is clearly covered in Q&A question 17 (where the reason

for requiring a bond is also set forth) and that's sufficient. This may be the only place where the Staff goes for the principle "what you say is what you mean" and the Section says "Keep it simple". The Section really doesn't have any strong feelings about this issue either way.

11. Mandatory Clauses/Substantial Compliance Issues. After the Commission makes the policy decisions as to the form of the Statutory Will itself, it should then be possible for the Staff and the Section to confer and "flesh out" the mandatory provisions and definitions for review by the Commission. One unresolved matter relates to whether the Commission wishes to recommend publication of the Statutory Will in Spanish, Vietnamese, and/or other languages.

12. Interest of Senator Kopp. Senator Kopp has called the Section and the State Bar to express his interest in sponsoring a revised Statutory Will bill. I have suggested to him that if a consensus is reached at the LRC level, then that may meet his objectives. Once the Commission makes its policy decisions, perhaps it would be appropriate to send Senator Kopp a draft of the LRC proposed draft for review and comment. I have promised to get back in touch with Senator Kopp, and would appreciate whatever early attention the Commission feels is appropriate in this regard.

Very truly yours,


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