

CALIFORNIA LAW REVISION COMMISSION

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



09/03/91

DATE: • September 12 & 13	PLACE: • Los Angeles
• Sept. 12 (Thursday) 10:00 am - 12:00 noon 1:30 pm - 6:00 pm	<i>Hermosa Room</i> Hyatt Hotel at LAX 6225 West Century Los Angeles 90045 (213) 670-9000
• Sept. 13 (Friday) 9:00 am - 12:00 noon 1:30 pm - 4:00 pm	
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.	

FINAL AGENDA*for meeting of*

CALIFORNIA LAW REVISION COMMISSION

Thursday and Friday, September 12 & 13, 1991

1. MINUTES OF JULY 25-26, 1991, COMMISSION MEETING (sent 8/23/91)
2. ADMINISTRATIVE MATTERS
 - 1991 ANNUAL REPORT
 - Memorandum 91-57 (SU) (to be sent)
 - SUBSCRIPTION AND ITEM CHARGES FOR COMMISSION MATERIALS
 - Exemption and Modification Requests (NS) (oral report at meeting)
 - COMMUNICATIONS FROM INTERESTED PERSONS
3. 1991 LEGISLATIVE PROGRAM
 - Memorandum 91-52 (NS) (to be sent)

4. STUDY D-1001 - 1-92 CREDITORS' REMEDIES MATTERS.

Draft of Tentative Recommendation

Memorandum 91-50 (SU) (sent 7/17/91 for July meeting)

First Supplement to Memorandum 91-50 (sent 8/13/91)

Second Supplement to Memorandum 91-50 (enclosed)

5. STUDY F-3050/L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

Draft of Tentative Recommendation

Memorandum 91-53 (NS) (sent 8/19/91)

6. STUDY L-708 - SPECIAL NEEDS TRUST FOR DISABLED MINOR OR INCOMPETENT PERSON

Memorandum 91-55 (RJM) (to be sent)

7. STUDY L-3002 - POWERS OF APPOINTMENT

Policy Issues

Memorandum 91-38 (SU) (sent 4/25/91 for June meeting)

First Supplement to Memorandum 91-38 (sent 6/4/91 for June meeting)

Second Supplement to Memorandum 91-38 (sent 6/21/91)

Third Supplement to Memorandum 91-38 (sent 8/13/91)

8. STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Memorandum 91-47 (RJM) (sent 7/17/91 for July meeting)

9. STUDY L-3054 - ACCOUNT OF GUARDIAN OR CONSERVATOR

Memorandum 91-46 (RJM) (to be sent)

10. STUDY L-3055 - COMPENSATION IN GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

Memorandum 91-41 (RJM) (sent 7/10/91 for July meeting)

First Supplement to Memorandum 91-41 (sent 8/13/91)

Second Supplement to Memorandum 91-41 (sent 8/13/91)

11. STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT (PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION)

Draft of Tentative Recommendation

Memorandum 91-33 (RJM) (sent 4/25/91 for June meeting)

First Supplement to Memorandum 91-33 (sent 5/24/91 for June meeting)

Second Supplement to Memorandum 91-33 (sent 6/5/91 for June meeting)

Third Supplement to Memorandum 91-33 (sent 6/21/91 for July meeting)

12. STUDY L-3051 - TRANSFER OF OMITTED PROPERTY TO TRUST BY CONSERVATOR

Revised Draft of Tentative Recommendation

Memorandum 91-36 (RJM) (sent 4/17/91 for June meeting)

First Supplement to Memorandum 91-36 (sent 5/24/91 for June meeting)

Second Supplement to Memorandum 91-36 (sent 7/10/91 for July meeting)

13. STUDY L-603 - SELF-PROVING WILL

Draft of Tentative Recommendation

Memorandum 91-23 (RJM) (sent 4/17/91 for June meeting)

First Supplement to Memorandum 91-23 (sent 5/16/91 for June meeting)

Second Supplement to Memorandum 91-23 (sent 6/7/91 for June meeting)

Third Supplement to Memorandum 91-23 (sent 8/13/91)

14. STUDY L-3052 - NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

Revised Draft of Tentative Recommendation

Memorandum 91-39 (RJM) (sent 4/25/91 for June meeting)

First Supplement to Memorandum 91-39 (sent 5/24/91 for June meeting)

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

Draft of Tentative Recommendation

Memorandum 91-40 (SU) (sent 5/30/91 for June meeting)

First Supplement to Memorandum 91-40 (sent 7/16/91 for July meeting)

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

Policy Issues

Memorandum 91-10 (NS) (sent 12/18/90; another copy sent 4/16/91 for June meeting)

First Supplement to Memorandum 91-10 (sent 5/13/91 for June meeting)

Second Supplement to Memorandum 91-10 (sent 5/30/91 for June meeting)

Third Supplement to Memorandum 91-10 (sent 6/7/91 for June meeting)

17. STUDY L-659.01 - INHERITANCE INVOLVING ADOPTED CHILD (PROBATE CODE § 6408)

Memorandum 91-56 (RJM) (sent 8/29/91)

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MEETING SCHEDULE

<u>August 1991</u>	No Meeting	
<u>September 1991</u>		<u>Los Angeles</u>
Sep. 12 (Thur.)	10:00 a.m. - 6:00 p.m.	
Sep. 13 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>October/November 1991</u>		<u>Sacramento</u>
Oct. 31 (Thur.)	10:00 a.m. - 5:00 p.m.	
Nov. 1 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>December 1992</u>	No Meeting	
<u>January 1992</u>		<u>Los Angeles</u>
Jan. 23 (Thur.)	10:00 a.m. - 6:00 p.m.	
Jan. 24 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>February 1992</u>	No Meeting	
<u>March 1992</u>		<u>Sacramento</u>
Mar. 12 (Thur.)	10:00 a.m. - 5:00 p.m.	
Mar. 13 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>April/May 1992</u>		<u>San Francisco</u>
April 30 (Thur.)	10:00 a.m. - 6:00 p.m.	
May 1 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>June 1992</u>	No Meeting	
<u>July 1992</u>		<u>San Diego</u>
July 9 (Thur.)	10:00 a.m. - 6:00 p.m.	
July 10 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>August 1992</u>	No Meeting	
<u>September 1992</u>		<u>Sacramento</u>
Sep. 10 (Thur.)	10:00 a.m. - 5:00 p.m.	
Sep. 11 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>October 1992</u>	No Meeting	
<u>November 1992</u>		<u>Los Angeles</u>
Nov. 12 (Thur.)	10:00 a.m. - 6:00 p.m.	
Nov. 13 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>December 1992</u>	No Meeting	

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 12-13, 1991
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on September 12-13, 1991.

Commission:

Present:	Edwin K. Marzec Chairperson Arthur K. Marshall Vice Chairperson	Roger Arnebergh (Sept. 12) Forrest A. Plant Sanford Skaggs Ann E. Stodden
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Bion M. Gregory Legislative Counsel

Staff:

Present:	Nathaniel Sterling Stan Ulrich	Robert J. Murphy III Pamela K. Mishey
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Consultants:

None

Other Persons:

Joni S. Ackerman, Legislative Committee, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Los Angeles (Sept. 12)
Seymour R. Appleby, California Probate Referees Association, Hayward (Sept. 13)
Clark Byam, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Pasadena (Sept. 12)
Phyllis Cardoza, Legislative Committee, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Los Angeles (Sept. 13)
Edmond R. Davis, Los Angeles (Sept. 12)
Valerie Merritt, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles
Bob Temmerman, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Campbell
Shirley Yawitz, California Probate Referees Association, San Francisco (Sept. 12)

MINUTES OF JULY 25-26, 1991, COMMISSION MEETING

The Commission approved the Minutes of the July 25-26, 1991, Commission meeting as submitted by the staff, with the correction of the spelling of the name of Browne Greene on page 1 of the Minutes.

ADMINISTRATIVE MATTERS

RECOGNITION OF FORMER CHAIRPERSON ARNEBERGH

The Chairperson on behalf of the Commission presented to former Chairperson Arnebergh a plaque recognizing his service as Chairperson during 1990/91.

GUBERNATORIAL APPOINTMENTS TO THE COMMISSION

The Chairperson reported that he had spoken with appointments personnel in the Governor's office. They are working on this, but it is not their top priority item.

SUBSCRIPTION AND ITEM CHARGES FOR COMMISSION MATERIALS

The Executive Secretary reported on the status of the new system of charging for Commission materials. In response to requests for exemptions from the charging system, the Commission made the following decisions:

(1) A reduced price subscription for tentative recommendations in a single field should be offered, at a price to be set by the staff. It is contemplated that this price would be in the \$25-\$50 range.

(2) The state agencies that have requested an exemption from charges for administrative law meeting materials should not receive a blanket exemption. However, the staff should try to work out some other arrangement with the affected agencies, for example a pooling arrangement in which copies for several agencies are sent to one location for redistribution.

(3) The Commission should continue existing exchange arrangements with other law reform agencies, on request.

(4) County law libraries that are not on the Commission's mailing list should be invited to subscribe to tentative recommendations and printed reports, at standard rates.

(5) Law publishers that provide the Commission with printed materials should be provided with Commission materials on a complimentary exchange basis. Publishers that would continue to receive complimentary materials on this basis are Bancroft-Whitney, West, and CEB.

(6) Former Law Revision Commissioners should not be exempt.

The Commission also admonished the staff to make every effort to ensure that Commission expenses are charged to the subscription account and not against other funds available to the Commission.

DONATIONS TO THE COMMISSION

The Executive Secretary reported, in response to a previous Commission inquiry, that donations to the Commission may be accepted and credited to the Commission's budget, with the approval of the Director of Finance.

ANNUAL REPORT FOR 1991

The Commission considered Memorandum 91-57 and the draft Annual Report for 1991 attached thereto. The Commission approved the Annual Report for printing, subject to additional necessary editorial revision to update the 1991 legislative program and the following revisions:

The letter of transmittal of the Annual Report should call the Governor's attention to the problem of vacancies on the Commission, if there are any vacancies at the time the letter is prepared. This is crucial at this time because of the existing vacancy and the impending expiration of the terms of four Commissioners. The staff should also note the problem in a separate personal letter to the Governor when the Annual Report is forwarded if any vacancies remain.

The following should be added on page 13: The Commission will also be preparing recommendations on major problem areas in the law, including development of a comprehensive power of attorney statute, procedures for creditors to reach nonprobate assets, and treatment of community property held in joint tenancy form.

1991 LEGISLATIVE PROGRAM

The Commission considered Memorandum 91-52, reporting the status of the Commission's 1991 legislative program. The Commission approved the report attached to the memorandum revising a few Comments. The revised Comments simply combine two different Comments where the same section is affected by two different Commission recommendations.

STUDY D-1001 -- MISCELLANEOUS CREDITORS' REMEDIES MATTERS

The Commission considered Memorandum 91-50, and the First and Second Supplements thereto, concerning miscellaneous creditors' remedies matters. The Commission approved the revised draft attached to the Second Supplement to be circulated as a tentative recommendation.

STUDY F-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 91-53, together with a letter distributed at the meeting from Team 2 of the Estate Planning, Trust and Probate Law Section of the State Bar of California (attached to these Minutes as Exhibit 1), relating to nonprobate transfers of community property. The Commission approved the draft of the tentative recommendation attached to the memorandum to be distributed for comment, with the following changes.

Preliminary Part

On page 5, line 18, the word "revocation" should be replaced by the word "consent", so that the clause reads: "a consent should only be revocable in writing".

On page 7, lines 14 and 15, the following sentence should be deleted: "At this time the Commission recommends only that California law recognize federal preemption in the area."

Outline

The numerals 5122 to 5132 in the outline should be revised to 5022 to 5032. Corresponding changes should be made to any erroneous references in the statute and comments.

Prob. Code § 5002 (added). Limitations imposed by instrument

The staff should consider alternate phrasings for the reference to "an instrument described in Section 5000", such as an instrument "of a type" described in Section 5000. The Comment might simply note that the reference includes the specific instruments named in Section 5000 as well as others of that nature. If a change is made, it should be done consistently throughout the draft.

Prob. Code § 5003 (added). Protection of holder of property

The last clause of subdivision (a) should refer to the person who executed the provision "directing the nonprobate transfer" or a similar phrase, for clarity. The same addition should be made in subdivision (c).

§ 5010. "Written consent" defined

The Comment might refer to "joint action by both spouses in writing".

§ 5011. Governing provision of instrument, law, or consent

The reference to federal preemption should be deleted from subdivision (b) and included in the Comment rather than the statute.

The reference to contrary state "law" should be changed to a contrary state "statute specifically" applicable.

§ 5020. Written consent required

The parenthetical reference in the second paragraph of the Comment to "preempting federal law" should be replaced by a general reference to Section 5011 without further characterization.

§ 5021. Transfer without written consent

In subdivision (a), the staff should consider referring to the "nonconsenting" spouse's interest. If this is done, the statute should be reviewed for consistency of usage.

In subdivision (b), similar treatment should be given to the "surviving nonconsenting" spouse, if useful for clarity.

The listing of remedies in the last paragraph of the Comment should be by way of example "and without limitation".

§ 5023. Effect of modification

Subdivision (b) might refer to the "consenting" spouse, if that will help understanding without unduly complicating the drafting.

Subdivision (b)(2) should be reversed, so that the rule being circulated for comment is that a change of beneficiaries by the surviving spouse does not affect the beneficiary designation or consent of the first to die spouse. The statute should state that if the terms of the consent authorize the surviving spouse to make changes after the death of the consenting spouse, then the interest of the deceased consenting spouse is deemed to be transferred to the surviving transferor spouse. The reason for this reversal is that it helps preserve the community property rights of the first spouse to die in what may be the most significant asset of the marriage, and if the spouses want to leave the survivor with (in effect) a general power of appointment over the property, they can do that by agreement. The tentative recommendation should call attention to the various perspectives on this issue and particularly invite comment on it.

§ 5030. Revocability of written consent

The reference in subdivision (c) to Section 5023 should be deleted in reliance on the language in the Comment pointing out the interrelationship. The Comment should cross-refer to the transitional provision. The reference to Section 5123 should be corrected to Section 5023.

§ 5031. Form and delivery of revocation

Subdivisions (a)(1) and (a)(2) should be combined and should require a writing, including a will, that identifies the provision directing the nonprobate transfer to which consent is being revoked, provided it is delivered to the other spouse before the other spouse's death.

The Comment should be expanded to note that the provisions of the governing instrument may specify the manner of revocation of consent.

STUDY L-603 - SELF-PROVING WILL

The Commission considered Memorandum 91-23, the attached staff draft of a *Tentative Recommendation Relating to Self-Proving Will*, and the First, Second, and Third Supplements. The Commission rejected the proposal, and decided not to submit any recommendation on this subject. The Commission thought the proposal would create more problems than it would solve.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS
WITH ATTORNEY

The Commission considered Memorandum 91-47 and attached staff draft of a *Recommendation Relating to Deposit of Estate Planning Documents With Attorney*. The Commission discussed the general approach of the draft, but did not go through the draft section by section.

The Commission favored requiring estate planning attorneys to give written notice to the client, with written acknowledgement by the client, that it is the client's duty to keep the attorney advised of changes in the client's address. If the client fails to do this and as a result the attorney cannot return the document to the client, that attorney and successor custodians would be relieved of liability in connection with custody of that document. Perhaps this should be limited to wills that are older than a certain age, such as ten years. This should not affect the validity of the will. See Prob. Code § 8223

(proof of lost or destroyed will). The attorney should be required to try to contact the client by certified mail with return receipt requested.

The Commission asked the staff to investigate the possibility that some public agency, such as the State Registrar of Vital Statistics, might be willing to accept old estate planning documents for storage if they were put on microfilm or microfiche, with a filing fee to be paid by the transferring attorney. Cf. Health & Safety Code § 10036.

The Commission also thought there was merit to keeping the proposal in the *Recommendation* for transfer to another attorney or depository where a willing recipient can be found, and giving notice of the transfer to the State Bar.

There was some sentiment on the Commission for authorizing county clerks to destroy wills of decedents filed under Probate Code Section 8200 if no probate has been commenced within some period after the filing, such as seven years or ten years.

The Commission asked the staff to bring back a revised draft.

STUDY L-708 - SPECIAL NEEDS TRUST FOR
DISABLED MINOR OR INCOMPETENT PERSON

The Commission considered Memorandum 91-55, the attached staff draft of a *Tentative Recommendation Relating to Special Needs Trust for Disabled Minor or Incompetent Person*, and the First Supplement. The Commission revised proposed Section 3604 as follows:

Prob. Code § 3604 (added). Reimbursement from trust for
public support

3604. (a) On the death of a minor or incompetent person who is the beneficiary of a trust established under Section 3602 or 3611, trust property is subject to a claim for public support provided to the beneficiary to the extent reimbursement would be authorized under the Welfare and Institutions Code if the property were in the beneficiary's estate.

(b) A public entity asserting a claim under this section shall accept the amount collected in full satisfaction of its claim for reimbursement for public support provided to the beneficiary, and shall release all liens for the purpose of enforcing the claim.

This revision is needed because the trust may have beneficiaries in addition to the injured person. The settlement may be with the entire family. The parents of the injured person may have claims for reimbursement provided for out of the trust. The intent of Section 3604 is to allow public reimbursement after the death of the injured beneficiary, without regard to the possibility of other trust beneficiaries.

With this change, the Commission approved the *Tentative Recommendation* for distribution for comment.

STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT
(PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION)

The Commission considered Memorandum 91-33, the attached staff draft of a *Tentative Recommendation Relating to Preliminary Distribution Without Court Supervision Under the Independent Administration of Estates Act*, and the First, Second, and Third Supplements. The Commission revised proposed Probate Code Section 10520 in the *Tentative Recommendation* as follows:

Prob. Code § 10520 (added). Preliminary distribution of specified personal property

10520. (a) If the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person, the personal representative has the power to ~~do~~ make preliminary distributions of the following:

~~(1) To make preliminary distribution of interest and income~~

(a) Income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10.

~~(2) To make preliminary distribution to specific devisees of household~~

(b) Household furniture and furnishings, motor vehicles, clothing, jewelry, and ~~personal effects~~ other tangible articles of a personal nature to the persons entitled to the property under the decedent's will or under the laws of intestate succession, not to exceed an aggregate fair market value to all persons of fifty thousand dollars (\$50,000) computed cumulatively through the date of distribution. Fair market value shall be determined on the basis of the inventory and appraisal.

~~(3) To make preliminary distribution of cash~~

(c) Cash to the general pecuniary devisees entitled to it under the decedent's will or to the persons entitled to it under the laws of intestate succession, not to exceed ten thousand dollars (\$10,000) to any one devisee person.

~~(b) Notwithstanding subdivision (a), distribution may not be made under this section to the personal representative.~~

Comment. Section 10520 is new. The section permits the personal representative to take the specified action after giving notice of proposed action, but without court approval. Sections 10500, 10510. A person given notice of proposed action who fails to object waives the right to have the court later review the proposed action. Section 10590.

Section 10520 is permissive. See Section 10510. The personal representative may seek court approval if the personal representative so desires. Section 10500(b). If the personal representative seeks court approval of a preliminary distribution, the personal representative may proceed under Section 11623 which requires less notice than the general provision for a court-supervised distribution (Section 11601).

STUDY L-3002 -- POWERS OF APPOINTMENT

The Commission considered Memorandum 91-38, and the First, Second, and Third Supplements thereto, concerning the power of appointment statute. In view of the largely nonsubstantive nature of the recommendation, the agreement of interested bar groups, and the need to amend Assembly Bill 1722 in a timely fashion, the Commission decided to approve the statute as a recommendation and not make it available as a tentative recommendation. The staff will prepare an explanatory text and circulate it for Commission review and then prepare the recommendation for printing.

The Commission approved the draft statute attached to the First Supplement to Memorandum 91-38 subject to the following revisions:

Prob. Code § 630.5. Judicial relief from formalities imposed by donor

Section 630.5 (alternative 1) as set out in the First Supplement to Memorandum 91-38 was approved as revised:

§ 630.5. Judicial relief from formalities imposed by donor

630.5. (a) Where an appointment does not satisfy the formal requirements specified in the creating instrument as provided in subdivision (a) of Section 630, the court may

excuse compliance with the formal requirements and determine that exercise of the appointment was effective if both of the following requirements are satisfied:

(1) The appointment approximates the manner of appointment prescribed by the donor.

(2) The failure to satisfy the formal requirements does not defeat the accomplishment of a significant purpose of the donor.

(b) This section does not permit a court to excuse compliance with a specific reference requirement under Section 631.

It was reported at the meeting that Team 3 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section supports this proposed revision.

Prob. Code § 641. Exercise of power of appointment by residuary clause or other language

The Commission decided not to adopt the 1989 Uniform Probate Code revision of the rule concerning exercise of powers of appointment by a residuary clause or a disposition of all of the testator's property (see discussion of UPC § 2-608 in Memorandum 91-38 and in the draft statute attached to the First Supplement at pp. 11-12). Consequently, Section 641 will continue the existing rule of Civil Code Section 1386.2 and its comment:

§ 641. Exercise of power of appointment by residuary clause or other language

641. (a) A general residuary clause in a will, or a will making general disposition of all the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to exercise the power.

(b) This section applies in a case where the donee dies on or after July 1, 1982.

Comment. Section 641 continues former Civil Code Section 1386.2 without substantive change. The word "intention" has been changed to "intent" for conformity with Section 640(a).

Section 641 adopts the substance of Uniform Probate Code Section 2-610 (1989). Under this section, a power of appointment is not exercised unless there is some manifestation of intent to exercise the power. A general residuary clause or disposition of all of the testator's property, alone, is not such a manifestation of intent. This

section recognizes the need for a uniform rule on the question and the fact that donees today may frequently intend that assets subject to a power of appointment pass to the takers in default, particularly assets held in a marital deduction trust. See Unif. Prob. Code § 2-610 comment (1989); French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property?*, 1979 Duke L.J. 747.

Under Section 641, a general disposition of property in the donee's will may exercise a power of appointment if there is some other indication of intent to include the appointive property in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from will. Section 640 sets forth a nonexclusive list of types of evidence that indicate an intent to exercise a power of appointment. An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power. See *Bank of New York v. Black*, 26 N.J. 276, 286-87, 139 A.2d 393, 398 (1958). Section 641 does not apply where the donor has conditioned the exercise of the power on a specific reference to the power or to the instrument that created the power or has specified a specific method of exercise of the power. See Sections 630, 631.

STUDY L-3044 -- COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission commenced consideration of Memorandum 91-40, the attached staff draft of a tentative recommendation relating to power of attorney law attached to the memorandum, and the First and Second Supplements to the memorandum. The Commission considered the first 26 pages of the draft, covering draft Sections 2400.010-2415.070. The Commission made the following decisions:

Location of Statute

The Commission discussed the question of where the power of attorney statute should be located but deferred the decision so that the views of Commissioner Gregory could be heard.

Conflicts Between Powers

The question of overlapping and inconsistent powers should be addressed in the statute. The statute should probably provide that the last executed power controls if there is a conflict.

§ 2400.030. General rule concerning application of title

§ 2405.030. Form of durable power of attorney after January 1, 1993

It was noted that references to 1993 in these sections will be changed to 1994. Due to the delay in consideration of the proposed statute, a bill could not be introduced before the 1993 legislative session.

§ 2400.030 [sic]. Scope of title

This section number is in error. The staff will make the correction and check for other necessary adjustments. The comment should note that the principal may specify choice of law in the power of attorney.

§ 2400.040. Durable powers of attorney under law of another jurisdiction

This section should be simplified to provide for the recognition of durability of powers of attorney executed in other states. This section should not attempt to state conflicts of laws principles.

§ 2402.030. Agent

The question whether the statute should use "agent" or "attorney in fact" was deferred so that the State Bar could present its arguments on the issue.

§ 2402.110. Durable power of attorney for property

The comment to this section should include a sample listing of delegable powers that are not limited to property matters, such as deciding where the principal will live, providing meals, hiring household employees, providing transportation, and picking up mail.

§ 2402.130. Health care

The bracketed language in this section should be omitted. The effect of this omission is to permit a durable power of attorney for property to make dispositions under the Uniform Anatomical Gift Act,

authorize an autopsy, and direct disposition of remains. (These types of decisions can also be made under a durable power of attorney for health care.)

A comment here or elsewhere should note that personal care matters covered in an instrument denominated as a durable power of attorney for health care would be valid because to that extent the power is a durable power of attorney for property.

Person

"Person" should be defined generally for the comprehensive power of attorney statute to cover both natural persons and entities. This definition would be useful in provisions such as Section 2415.010 ("Any person having the capacity to contract . . .").

§ 2402.210. Power of attorney

Subdivision (a) of this section should be revised as follows:

(a) "Power of attorney" means a written agency-agreement ~~or other~~ instrument, however denominated, that is executed by a natural person and grants powers to an agent. A power of attorney may be durable or nondurable, and may grant powers with regard to property or health care or both, ~~and may be executed on a statutory or other form that satisfies the requirements of this title.~~

The last clause is stricken because it can be misconstrued as a limitation and is not needed. The statute should also make clear that the power of attorney statute does not apply to other types of agencies governed by special statutes, such as real estate agents.

§ 2402.350. Third person

This definition should be revised as follows:

2402.350. "Third party" or "third person" means any person or other entity, other than the principal or agent, ~~who acts on a request from, contracts with, relies on, or otherwise deals with an agent, and includes a person described as a third party.~~

Dating Powers of Attorney

The staff should draft a rule on dating of powers of attorney for Commission consideration drawn from the holographic will provisions.

Acknowledgment

The Commission reaffirmed that acknowledgment should not be required, but the comment should explain that acknowledgment is necessary for recording real property transactions.

§ 2410.020. Permissible purposes

This section should be revised as follows:

2410.020. In a power of attorney for property, a principal may delegate grant to an agent general powers to act ~~in--a--fiduciary--capacity~~ on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes.

§ 2410.040. Effect of agent's acts under durable power of attorney during principal's incapacity

The staff should consider whether the last two clauses (" . . . notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive.") are needed in this section.

§ 2410.050. Warning statement in durable power of attorney for property

The warning required in printed forms (other than statutory forms) should be revised to state the need for a date and for acknowledgment, and that a power can be revoked only if the principal has capacity.

§ 2410.060. Nomination of fiduciary in durable power of attorney

The word "fiduciary" in this section's heading should be changed to "conservator." Subdivision (a) should refer to a durable power of attorney "for property."

§ 2410.070. Springing power of attorney

The introductory clause of subdivision (a) should refer to a springing power of attorney "for property."

§ 2410.080. Lapse of time

The comment should contain a cross-reference to Sections 2410.040 (effect of agent's acts under durable power of attorney during principal's incapacity) and 2410.130 (termination of power of attorney for property).

§ 2410.110. Variation of duties and liabilities between principal and agent

This section was discussed but not approved, pending receipt of additional views from bar commentators. Concern was expressed that the separate agreement might be so counter to the basic power of attorney that it would supplant it. It was noted that the section would apply only to agreements between principals and agents, and would not affect the rights of third persons acting without notice. It was suggested that a separate agreement might be an appropriate way to deal with compensation for the agent.

§ 2410.120. Manner of modification or termination by principal

The authority to make an oral modification or termination of a power of attorney should be deleted from subdivision (b). Subdivision (d) should be reexamined to determine the appropriate language concerning recording of the power of attorney.

§ 2410.130. Termination of power of attorney for property

The staff should research the meaning of "extinction of the subject" of the power of attorney in subdivision (a)(2). In subdivision (a)(3), "revocation" should be changed to "termination." In subdivision (a)(5), "renunciation" should be replaced by "resignation" or "refusal to act" or other appropriate language.

§ 2410.140. Termination of nondurable power of attorney for property

The alternative rule that suspends (rather than terminates) a nondurable power of attorney during any period of incapacity was discussed. The Commission decided to retain the existing termination rule, subject to reconsideration when comments from bar groups are received.

§ 2410.150. Certified copy of power of attorney

The staff should investigate further the feasibility of empowering court clerks and city clerks to certify copies of powers of attorney.

§ 2415.030. Multiple agents

§ 2415.040. Successor agents

The language proposed to be added to these sections on pages 7 and 8 of Memorandum 91-40 was approved.

§ 2415.050. Compensation of agent

The agent should be entitled to compensation as provided in the power of attorney or, if not forbidden by the power of attorney, the agent should be entitled to reasonable compensation on petition to the court. Reimbursement for expenses should be permitted without the need to petition, although objectors could petition for an accounting by the agent.

§ 2415.060. Delegation of agent's authority

Subdivision (a) should be revised as follows:

(a) An agent from time to time may revocably delegate any or all of the powers granted in a power of attorney for property, whether durable or nondurable, to one or more qualified persons qualified to exercise the powers delegated, subject to any directions or limitations of the principal expressed in the power of attorney, but the agent making the delegation remains responsible to the principal for the exercise or nonexercise of the powers delegated.

§ 2415.070. Relation of agent to court-appointed fiduciary

Subdivision (b) should refer to a conservator "of the estate."

STUDY L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

See discussion under Study F-3050.

STUDY L-3051 - TRANSFER BY CONSERVATOR TO TRUST
OF UNINTENTIONALLY OMITTED PROPERTY

The Commission considered Memorandum 91-36, the attached staff draft of a *Tentative Recommendation Relating to Transfer by Conservator to Trust of Unintentionally Omitted Property*, and the First and Second Supplements. The Commission approved the following amendments to Probate Code Section 2580:

Probate Code § 2580 (amended). Petition to authorize proposed action

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

- (1) Benefiting the conservatee or the estate.
- (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
- (3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

- (1) Making gifts of principal or income, or both, of the estate, outright or in trust.
- (2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.
- (3) Exercising or releasing the conservatee's powers as donee of a power of appointment.
- (4) Entering into contracts.
- (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.

(6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.

~~(6)~~ (7) Exercising options of the conservatee to purchase or exchange securities or other property.

~~(7)~~ (8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

- (i) Life insurance policies, plans, or benefits.
- (ii) Annuity policies, plans, or benefits.
- (iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

~~(8)~~ (9) Exercising the right of the conservatee to elect to take under or against a will.

~~(9)~~ (10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

~~(10)~~ (11) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

~~(11)~~ (12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

Comment. Section 2580 is amended to add paragraph (6) to subdivision (b).

If property is discovered after the conservatee's death that has been unintentionally omitted from a trust created by the conservator or conservatee, the conservator has control of the property pending its disposition according to law. Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).

STUDY L-3054 - ACCOUNT OF GUARDIAN OR CONSERVATOR

The Commission considered Memorandum 91-46. The Commission approved the staff recommendation to leave resolution of these technical problems to Senator Henry Mello and the conservatorship working group.

STUDY L-3055 - COMPENSATION IN GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

The Commission considered Memorandum 91-41, the attached *Recommendation Relating to Compensation in Guardianship and Conservatorship Proceedings*, and First and Second Supplements. The

Commission revised the four sections and Comments in the recommendation as follows:

Prob. Code § 1470 (amended). Discretionary appointment of legal counsel

1470. (a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines such person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel, whether the services were rendered and the expenses incurred before or after the date of the order appointing counsel.

(c) The court shall order the sum fixed under subdivision (b) to be paid:

(1) If the person for whom legal counsel is appointed is an adult, from the estate of such person.

(2) If the person for whom legal counsel is appointed is a minor, by a parent or the parents of the minor or from the minor's estate, or any combination thereof, in such proportions as the court deems just.

(d) The court may make an order under subdivision (c) requiring payment by a parent or parents of the minor only after the parent or parents, as the case may be, have been given notice and the opportunity to be heard on whether the order would be just under the circumstances of the particular case.

Comment. Subdivision (b) of Section 1470 is amended to make clear that, when legal counsel is appointed under this section, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

Subdivision (b) deals with compensation when counsel has been appointed. Section 1470 does not affect the right to compensation in cases not covered by the section. See, e.g., Estate of Moore, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorneys' fees of unsuccessful petitioner); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (compensation of attorneys for petitioner for adult guardianship, even though proposed ward retained someone else as attorney).

Prob. Code § 1472 (amended). Compensation of mandatory court-appointed counsel

1472. (a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel, whether the services were rendered and the expenses incurred

before or after the date of the order appointing counsel, and shall make a determination of the person's ability to pay all or a portion of such sum.

(2) If the court determines that the person has the ability to pay all or a portion of such sum, the court shall order the conservator of the estate or, if none, the person to pay in such installments and in such manner as the court determines to be reasonable and compatible with the person's financial ability.

(3) In a proceeding under Chapter 3 (commencing with Section 3100) of Part 6 for court authorization of a proposed transaction involving community property, the court may order payment out of the proceeds of the transaction.

(4) If a conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay such sum to the private counsel to the extent the court determines the person is unable to pay.

(c) The payment ordered by the court under subdivision (a) shall be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the duties of the public defender and the county has compensated such counsel. In the case of other court-appointed counsel, the payment shall be made to such counsel.

Comment. Paragraph (1) of subdivision (a) of Section 1472 is amended to make clear that, when legal counsel is appointed under Section 1471, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

Although Section 1472 requires the court to fix compensation of counsel "upon conclusion of the matter," this does not prevent the court from making an award of compensation during the pendency of the guardianship or conservatorship proceeding. See W. Johnstone, G. Zillgitt, & S. House, California Conservatorships § 4.57, at 197-98 (2d ed., Cal. Cont. Ed. Bar 1983). The "matter" to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

Section 1472 deals with compensation when counsel has been appointed. The section does not affect the right to compensation in cases not covered by the section. See, e.g., Estate of Moore, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorneys' fees of unsuccessful petitioner); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (compensation of attorneys for petitioner for adult guardianship, even though proposed ward retained someone else as attorney).

Prob. Code § 2640 (amended). Petition by guardian or conservator of estate

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services rendered ~~in that capacity~~ to that time.

(2) The guardian or conservator of the person for services rendered ~~in that capacity~~ to that time.

(3) The attorney for services rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation requested in the petition as the court determines is just and reasonable to the guardian or conservator of the estate for services rendered ~~in that capacity~~ or to the guardian or conservator of the person for services rendered ~~in that capacity~~, or to both, and (2) such compensation requested in the petition as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both, whether the services were rendered before or after the date of the order appointing the guardian or conservator. The compensation so allowed shall thereupon be charged to the estate. Legal services for which the attorney may apply to the court for compensation be compensated include those services rendered by any paralegal performing the legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

Comment. Subdivision (c) of Section 2640 is amended to make clear the court is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 2641 (compensation of guardian or conservator).

Subdivision (c) is also amended to delete the former reference to compensation for which the attorney may "apply to the court." Under Section 2640, the application to the court for the attorney's compensation is made by the guardian or conservator of the estate, not by the attorney.

Prob. Code § 2641 (amended). Petition by guardian or conservator of person

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time ~~in such capacity~~, whether the services were rendered before or after the date of the order appointing the guardian or conservator.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate.

Comment. Section 2641 is amended to make clear the court is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 2640 (compensation of guardian or conservator).

With these revisions, the Commission approved the recommendation for printing and submission to the 1992 Legislature.

STUDY L-3052 - NONPROBATE TRANSFER TO A TRUSTEE
NAMED IN DECEDENT'S WILL

The Commission considered Memorandum 91-39, the attached staff draft of a *Tentative Recommendation Relating to Nonprobate Transfer to a Trustee Named in Decedent's Will*, and First Supplement. The Commission approved the *Tentative Recommendation* for distribution for comment.

STUDY L-659.01 - INHERITANCE INVOLVING ADOPTED CHILD
(PROBATE CODE SECTION 6408)

The Commission considered Memorandum 91-56 and First Supplement. The Commission asked the staff to try to redraft Section 6408 from scratch. The Commission asked the staff to set out the policy options and the reasons for the present provisions.

There was some sentiment for the simpler Uniform Probate Code approach of permitting the adoptee to inherit from natural relatives only in the case of a stepparent adoption (inheritance by natural relatives from the adoptee is precluded unless the parent has openly treated the child as his or hers and has not refused to support the child). UPC § 2-114 (1990). But the majority view on the Commission was that we should not make drastic revisions to a statute so recently enacted, and rather should try to make the existing section clearer.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

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

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**REPLY TO: Robert E. Temmerman
Our File No. T-0977**

September 10, 1991

Mr. Nathaniel Sterling, Esquire
California Law Revision Commission
4000 Middlefield Road D-2
Palo Alto, CA 94303-4739

**RE: Memorandum 91-53
Nonprobate Transfers of Community Property (Draft of Tentative Recommendation)**

Dear Nat:

On September 4, 1991, Team 2 of Estate Planning, Trust and Probate Law Section of the State Bar of California held a two hour conference call concerning the above-referenced memorandum.

Twelve of the twenty three members of Team 2 participated in the call. The participants included Irwin D. Goldring, Sterling Ross, Jr., Arthur Bredenbeck, William L. Hoisington, James V. Quillinan, Michael G. Desmarais, Elizabeth M. Engh, Thomas J. Barger, James A. Barringer, J. Robert Foster, Dick W. Konig, Jim Hastings and myself.

The following comments are those of Team 2 only as the full Executive Committee of the Section will not meet until Monday, September 16, 1991, after the next LRC Meeting scheduled for September 13 and 14. The full Executive Committee will consider this memorandum at its next meeting.

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The following comments of Team 2 deal with Introduction and Recommendations contained in Pages 1 through 8 of the staff draft of the TR.

1. The staff should be congratulated for a job well done in drafting proposed legislation on these most difficult issues. Team 2 agrees that it is important have legislation for the 1992 session. However, Team 2 suggest that the following revisions be made however before putting the TR out for public comment.
2. Page 1 - Footnote:
Team 2 realizes that the issues of quasi-community property present different policy considerations. Although there was some sentiment on team 2 to have the proposed legislation deal with both community property and quasi-community property, the consensus of the team was that it was first necessary to deal with the community property issues. The quasi-community property issues in the nonprobate transfer arena can be subsequently addressed.
3. Page 5 - Footnote 11:
Team 2 recognizes that a revocation of a spousal consent to a nonprobate transfer of community property should not be effective unless the other spouse is informed of the revocation. However, Team 2 believes that the proposed statutory requirement of having a will admitted to probate as one of the two methods to revoke the consent is unduly restrictive. This matter will be discuss more fully in the comments to §5031 below.
4. Page 7- Federal Preemption:
Team 2 is concerned with the statement that "the Commission recommends only that California law recognize federal preemption in this area". The LRC had previously suggested that the staff criticizes the Ablamis decision. The staff chose simply to note the existence of the decision and states that the Commission will be giving it further study. If the staff does not intend to criticize the Ablamis decision then Team 2 recommends deletion of the above quoted sentence since the California Supreme Court frequently looks to legislative history and oftentimes quotes from LRC comments. The Ablamis case or a similar case may eventually be appealed to the Supreme Court. Team 2 proposes to delete the statement from the TR that California Law recognizes preemption.

The following comments relate to the proposed statutes and comments governing nonprobate transfers of community property beginning on Page 9 of the TR.

1. Page 9 - Outline:
The reference to §§5122, 5123, 5130, 5131 and 5132 in the outline are apparently errors and should be changed to read §§5022, 5023, 5030, 5031 and 5032 respectively.

2. Page 11 - §5002:
Team 2 suggests deleting the words "described in" and inserting in its place the words "within the scope of". Team 2 is concerned that if the instrument was not particularly described within §5000 then §5002 and perhaps §5003 may not apply.
3. Page 11 - §5003(a):
Team 2 again recommends deleting the words "described in" and replacing them with the words "within the scope of". See §5002 above. Team 2 also would insert the words "directing the nonprobate transfer" after the word "provision" in the second to last line of Subdivision (a) to add clarity.
4. Page 11 - §5003(b):
Team 2 conducted significant discussion concerning the ability of an individual claiming an adverse interest in the property to hold up the transfer of the property in compliance with a provision for a nonprobate transfer of death. Finally, on an 8 to 3 vote, Team 2 favored the statute as drafted allowing a person to make a claim in the property by merely serving written notice claiming in adverse interest in the property. This makes it easier for a claimant to tie up payment and does not foreclose the possibility of getting a court restraining order. A vocal minority of Team 2 was concerned about the ability of a claimant to hold up payment for an unlimited amount of time. The minority suggested perhaps a forty day time limit in conformity with other probate code sections allowing distribution without probate. The minority felt three days provided in the finance code was too short.
5. Page 12 - §5003(c):
Team 2 suggest inserting the words "directing the nonprobate transfer" after the word "provision" in line 2 of subdivision (c) for clarification purposes.
6. Page 12 - §5003(Comment):
Some member of Team 2 were very much concerned with the increased cost of a estate planning, particularly in the moderate sized estates that this and other sections of the nonprobate transfer provisions may cause. Our Team has previously opined that the dramatic expansion of the scope of nonprobate transfers from former Probate Code §160 will make it more difficult and much more expensive to adequately plan an estate. The estate planner may now be forced to look at every document of ownership described in §5000 in order to do his or her appropriate due diligence. Team 2 wanted to point out that §5003 when combined with §5000 will definitely increase the cost of estate planning to people with small and moderately sized estates.

7. Page 13 - §5010:
Team 2 notes that the words "written consent" were not defined in §5010. Rather, the terms were defined by inclusion. Team 2 suggests a rewrite of this section with a more appropriate definition. Team 2 also recommends a definition for the word joinder, or at least a cross reference to other sections. Team 2 has previously suggested that may be more helpful to have definitions that affect Part I of Division 5 to be at the beginning. Team 2 notes that there is still no definition for "nonprobate transfer", "joinder", or "holder". Team 2 believes that it would be most helpful to have definitions for these terms and to locate those definitions at the beginning of Part 1.
8. Page 13 - §5001(b):
Certain members of Team 2 can not understand the purpose of this paragraph commenting "If it is preempted it is preempted". Team 2 suggests deleting paragraph (b) in its entirety or at least moving it to the Comment portion and suggesting that the matter is subject to the "effect of federal law". This would have the effect of deleting the reference to the controversial word "preemption".
9. Page 14 - §5013:
One member of Team 2 suggested that it would be most helpful to practitioners for a statute to provide an exclusive list of methods for waiving or releasing rights in community property.
10. Page 15 - §5014:
Team 2 agrees with the staff and recommends that codification of the law governing nonprobate transfers of community property should also be applied to a spousal consent executed before the operative date of the codification. Team 2 agrees with the exception to retroactive application provided in subdivision (b).
11. Page 16 - §5020. Comment:
Team 2 recommends deleting the word "preempting" in the second paragraph in the comment for the reasons stated above.
12. Page 17 - §5021:
Team 2 agrees that the Court should have discretion to fashion an appropriate remedy depending upon the circumstances of the case. However, Team 2 requests some clarifying language in subdivision (b). Team 2 suggests the use of the description "surviving nonconsenting" before the word "spouse" in line 1 and in line 3. Team 2 also suggests the modifier "nonconsenting" be inserted before the word "spouse's" in line 4 of subdivision (a).

13. Page 17 - §5021. Comment:

One member of Team 2 felt that it would helpful to have a non exclusive list of remedies listed in the Comment portion to this section.

14. Page 18 - §5023:

This section is the guts of the donative transfers of community property study. The Commission has settled on the "Halbach" approach apparently reasoning that the consenting spouse understands that circumstances may change after the consenting spouse's death and the deceased consenting spouse is no longer able to give consent to the changed terms. The Commission reasons that the surviving spouse is in a better position to judge the needs of potential beneficiaries as circumstances change in the interim period. The proposed statute assumes that the consenting spouse expresses confidence in the survivor.

Team 2 strongly opposes this approach and aligns itself with the "Kasner" approach. Team 2 believes that the death of the consenting spouse seals the designation of beneficiaries consented to and any subsequent actions by the surviving spouse can only affect that spouse's interest in community property. Team 2 believes that "Kasner" approach is more consistent with the overall community property rights of spouses. Team 2 believes that the reasonable expectation of the spouse who grants the consent to a nonprobate transfer is that the property will pass in the manner consented to. Nevertheless, Team 2 recognizes that most spouses would leave their interest to the discretion of the surviving spouse. Therefore, Team 2 suggests additional language (in new subdivision c) to the section to allow the original consent form to authorize changes by the surviving spouse. If this provision were in the law, team 2 anticipates that most forms of consent would include this option as it makes things simpler for the holder of the property in the long run.

Team 2 recommends a rewrite of subdivision (b)(2) in accordance with the opinions outlined above and the addition of subdivision (c) or perhaps the addition of a subdivision (b) (3) which would provide that if the terms of the consent to the nonprobate transfer authorize the surviving spouse to make changes after the death of the consenting spouse, then the interest of the deceased consenting spouse in the community property shall be deemed to be transfer to the surviving spouse and, that spouse may make a modification that is effective as to both the surviving spouse's and the deceased spouse's interest in the community property.

15. Page 18 - §5023(b)(1):

Team 2 recommends inserting the word "nonconsenting" before the word "spouse's" in lines 1 and 2.

16. Page 19 - §5030:

Team 2 suggest the cross reference to §5014(b) in the Comment portion of this section as §5014(b) references §5030.

It was the consensus of Team 2 that subdivision (c) needs to be rewritten to prevent the circular effect and reasoning of the reference to §5023. Team 2 believes that the effect of the death of a consenting spouse should be addressed in one place and not in both §5023 and §5030.

The reference to §5123 in the Comment portion of the statute should be corrected to reflect §5023.

17. Page 20 - §5031:

The term "provision" is used three times in this section. It was unclear to a majority of the members of Team 2 precisely what a "provision" is. Team 2 suggests a definition of the word "provision" be utilized in the suggested definition portion of Division 5 of the Probate Code.

Subparagraph (1) provides that a revocation of consent to a particular disposition of community property be delivered in writing to the married person before the person's death. Team 2 suggests that perhaps a writing delivered to the holder of the community property asset should also be sufficient to revoke the consent. Team 2 was also unclear whether the use of the word "person's" in Subparagraph (1) referred to the married person or to that person's spouse. Team 2 suggests a rewrite of this section to avoid any ambiguity.

Subparagraph (2) provides that where the written revocation is made in the consenting spouse's Last Will and Testament, additional requirement should be imposed that the Will first be admitted to probate before the death of the other spouse. Team 2 felt that this subparagraph was much too restrictive. Team 2 believed that a frivolous contest might be filed just to delay the admission of a will to probate in a situation where the surviving spouse may be terminally ill. Team 2 suggest that it may be appropriate to modify the subparagraph to provide that a Will filed for probate before the married person's death that was eventually admitted to probate may be an appropriate solution. Team 2 also suggests deleting the word "express" and replacing it with "adequate".

Terry Ross, a member of Team 2 that stayed on the conference call until the bitter end commented that the revocation by will to a consent previously given is a problem from a policy standpoint. Estate planner now, more than even, utilize living trusts as the primary estate planning vehicle. There is a danger that inconsistent provisions in a decedent's will can revoke an intervivos trust. Also, in light of the extensive use

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of living trusts as will substitutes, it does not make sense to permit a revocation by will but not permit a revocation by the more commonly used will substitute.

Finally, the written consent to the nonprobate transfer of community property should also be able to be revoked in the manner provided for in the governing instrument e.g. life insurance policy, death beneficiary designation under a written instrument, etc.

18. Page 21 - Conforming changes:
Team 2 recommends that a conforming change or at least a cross reference should be made to Probate Code §102.

I am a member of Team 2 and will be at the next meeting of the Law Revision Commission on Thursday, September 12 and Friday, September 13, 1991 if additional discussion or clarification of our views is desired.

Sincerely,



Robert E. Temmerman, Jr.
Substitute Team Captain
RET/gmd (ster910.let)

cc: Members of Team 2 (by mail)
Members of the Executive Committee (by handout at Excomm Meeting)
Valerie J. Merritt (via Federal Express)