
Minutes of meeting
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 9, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on October 9, 1997.

Commission:

Present: Christine W.S. Byrd, Chairperson
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall
Sanford Skaggs
Colin Wied

Absent: Edwin K. Marzec, Vice Chairperson
Dick Ackerman, Assembly Member
Robert E. Cooper
Allan L. Fink
Quentin L. Kopp, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law
Melvin A. Eisenberg, Business Judgment & Derivative
Actions

Other Persons:

Jim Apps, Department of Finance, Sacramento
Herb Bolz, Office of Administrative Law, Sacramento
Blanca Breeze, State Board of Equalization, Sacramento
Frank Coats, Department of Motor Vehicles, Sacramento
Gerald James, Association of California State Attorneys and Administrative Law
Judges, Professional Engineers in California Government, and California
Association of Professional Scientists, Sacramento
Ron Kelly, Berkeley

Charlene Mathias, Office of Administrative Law, Sacramento
Julie Miller, Southern California Edison, Rosemead
Dick Ratliff, California Energy Commission, Sacramento
Larry Starn, Department of Motor Vehicles, Sacramento
Diana Hastings Temple, State Bar Estate Planning, Trust and Probate Law Section,
San Francisco
Therese Tran, Department of Finance, Sacramento
Barbara Wheeler, Association for California Tort Reform, Sacramento

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MINUTES OF SEPTEMBER 11, 1997, MEETING

The Minutes of the September 11, 1997, Commission meeting were approved with the following corrections:

On page 7, line 15, a close parenthesis was inserted before the period.

On page 7, lines 18-19, the parenthetical description was revised to read, “(motion to return property or suppress evidence)”.

ADMINISTRATIVE MATTERS

Meeting Schedule

November 1997. The second day of the November meeting, tentatively scheduled for Friday, November 14, was canceled. The November meeting will be held in Los Angeles on Thursday, November 13, from 9:00 am to 5:00 pm.

December 1997. A second day was tentatively added to the December meeting — Friday, December 12, from 9:00 am to 4:00 pm. The second day is

subject to cancellation, depending on the final schedule for Senate Judiciary Committee's interim study of SB 209.

Annual Report

The Commission considered Memorandum 97-64 and the attached draft of the *1997-1998 Annual Report*. The Commission approved the draft report, subject to revisions necessary to conform it to action on Commission bills and for inclusion of Commissioners' and consultants' activities, and with the following revisions: (1) on page 7, "three" should be "four" and "nine" should be "ten" and (2) on page 20, the title "Esq." should be appended to the names of Commissioners appointed by the Governor who are lawyers and "Hon." should precede Commissioner Marshall's name. The Commission also approved the revised Comments on AB 939 (1997 Cal. Stat. ch. 772) set out in Appendix 5.

Consultants on Administrative Rulemaking

The Executive Secretary reported on the results of his search for an academic consultant to replace Professor Gregory Weber in providing the Commission a private sector perspective on administrative rulemaking issues. The Executive Secretary proposed a joint contract with Robert K. Best of the Pacific Legal Foundation, who is a McGeorge Law School adjunct professor, and with Professor Clark Kelso, also of McGeorge Law School. They would undertake as a team to gather and present private sector perspectives on rulemaking issues coming before the Commission, with one or the other of them attending Commission meetings, depending on scheduling. Compensation would be the standard travel expenses and honorarium for the meeting attendee. The Commission approved this arrangement.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 97-65, reporting on bills in the Commission's 1997 legislative program. The Executive Secretary supplemented the memorandum with the information that the Governor has signed the mediation bill (AB 939 — Ortiz, Ackerman) as Chapter 772 of the Statutes of 1997. The Commission complimented Barbara Gaal of the Commission's legal staff for her excellent work on this bill.

Study B-601 – Business Judgment Rule

The Commission considered Memorandum 97-67, relating to codification of the business judgment rule. The Commission approved the draft recommendation attached to the memorandum for submission to the Legislature. However, in recognition of the limited time that interested persons have had to review the final draft, the Commission reserved the possibility of further modification before printing and submission to the Legislature in the event any further comments are received for consideration at the Commission's November meeting.

The final draft should include a proposed division of existing subdivision (a) of Corporations Code Section 2115 into two paragraphs, breaking the subdivision in the middle between the sentence ending "subsidiary" and the sentence beginning "For".

STUDY F-910 – TERMINATION OF BENEFICIARY DESIGNATION BY DISSOLUTION OF MARRIAGE

See entry in these Minutes under Study L-910.

STUDY H-603 – SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 97-50 concerning the proposal that joint tenancy be severed on death if the survivor is not the decedent's "surviving spouse." The Commission approved the staff recommendation, and made the following decisions:

- The proposed law regarding joint tenancy should be consolidated with the proposed law regarding the termination of beneficiary designations by dissolution of marriage. The consolidated proposal will then be distributed for comment as a tentative recommendation.
- The reference to Probate Code Section 78 in the Comment to proposed Probate Code Section 5500 should be revised to clarify that Section 78 governs the determination of "surviving spouse" status under the proposed law.

STUDY L-659 – INHERITANCE BY FOSTER CHILD OR STEPCHILD

The Commission considered Memorandum 97-62 and attached staff draft of a recommendation on *Inheritance by Foster Child or Stepchild*. The Commission

approved the staff recommendation to add to Probate Code Section 6454(b) the language “other than that person’s refusal to consent or agree to the adoption.” The Commission also added a second paragraph to the Comment. As revised, the section and second paragraph of the Comment will read:

6454. For the purpose of determining intestate succession by a person or the person’s issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person’s foster parent or stepparent if both of the following requirements are satisfied:

(a) The relationship began during the person’s minority and continued throughout the joint lifetimes of the person and the person’s foster parent or stepparent.

(b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier existing at the time the adoption was contemplated or attempted, other than that person’s refusal to consent or agree to the adoption.

Comment. ...

The continuous relationship contemplated by Section 6454 is a family relationship between the foster parent and foster child or between the stepparent and stepchild. Estate of Claffey, 209 Cal. App. 3d 254, 258-59, 257 Cal. Rptr. 197 (1989). It does not require that the status of foster child or stepchild continue for life, however, so long as a parent and child relationship continues to exist. Thus, the fact that the foster child status is terminated after the time the adoption was contemplated or attempted does not affect the child’s right to inherit under Section 6454. See, e.g., Estate of Lind, 209 Cal. App. 3d 1424, 257 Cal. Rptr. 853 (1989). Likewise, divorce of the stepparent does not affect the right of the stepchild to inherit from or through the stepparent under this section. Cf. *In re Estate of Stevenson*, *supra*, at 862, 14 Cal. Rptr. 2d at 254-55 (7-year separation).

The Commission approved the recommendation for printing and submission to the Legislature.

**STUDY L-910 – TERMINATION OF BENEFICIARY
DESIGNATION BY DISSOLUTION OF MARRIAGE**

The Commission considered Memorandum 97-70 proposing that the designation of a spouse as beneficiary to a nonprobate transfer at death should be ineffective if the beneficiary is not the transferor’s “surviving spouse” at the time

of the transferor's death. The Commission approved the general policy of the proposed law, and made the following decisions regarding its implementation:

- The proposed law regarding beneficiary designations should be consolidated with the proposed law regarding the severance of joint tenancy by dissolution of marriage. The consolidated proposal will then be distributed for comment as a tentative recommendation.

- The proposed law should not affect the designation of a relative of a former spouse as a beneficiary.

- The Comment to the proposed law should indicate that the law is to be applied to the fullest extent consistent with federal law.

- The staff should revise the warning provided by Family Code Section 2024 in light of the consolidated proposal. It should be made clear that beneficiary designations may or may not be affected by dissolution of marriage.

- The staff should study the extent to which existing statutory rules of construction may avoid unconstitutional impairment of the obligations of contracts when the proposed law is applied to contracts already in existence at the time the proposed law becomes effective.

- The proposed law should not affect transfers that have been completed by the death of the transferor prior to the proposed law becoming effective.

- The staff should study whether existing provisions of the Probate Code, protecting payors who transfer property according to the terms of a governing instrument, can be broadened to apply to transfers affected by the proposed law.

- Probate Code Section 21111, providing for the treatment of failed probate and nonprobate transfers at death, should be amended to include failed transfers under an instrument that does not provide for the transfer of a "residue."

- The reference to Probate Code Section 78 in the Comment to proposed Probate Code Section 5501 should be revised to clarify that Section 78 governs the determination of "surviving spouse" status under the proposed law.

- The proposed law should affect a beneficiary designation made before marriage, as well as one made during marriage. A similar rule should apply to the proposed law regarding joint tenancy and to Probate Code Section 6227 (revocation of statutory will provision by dissolution of marriage).

- The exceptions to the proposed law should be revised to clarify the nature of a court order or agreement of the parties sufficient to preclude operation of the proposed law and to clarify the requirement that a beneficiary designation be

revocable during the life of the transferor in order to be affected by the proposed law.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-56, attached amendments to SB 209, and revised comments. Except as noted below, the Commission approved these. The Commission also made the following decisions:

§ 1121. Proceedings to which title does not apply

The Commission approved the staff recommendation to revise Section 1121 as follows:

1121. (a) This title does not apply to any of the following:

(1) (a) Judicial review of agency action by any of the following means:

(A) (1) Where a statute provides for trial de novo.

(B) (2) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(C) (3) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(2) (b) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(3) (c) Judicial review of a decision of a court.

(4) (d) Judicial review of an ordinance, ~~regulation rule~~, or resolution, enacted by a county board of supervisors or city council, that is legislative in nature.

(5) (e) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

~~(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.~~

(f) Judicial review of a state agency rule alleged to be in violation of Section 11340.5 of the Government Code.

(g) Proceedings under the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

§ 1123.110. Requirements for judicial review

The Commission revised the first paragraph of the Comment to Section 1123.110 as follows:

Comment.... The ripeness requirement doctrine mentioned in subdivision (a) is not codified in this title, ~~but is found in.~~ It is left to court discretion as under case law. See, e.g., *Pacific Legal Foundation v. California Coastal Comm'n*, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (challenge to Commission's public access guidelines); *Planning & Conservation League v. Department of Fish & Game*, 54 Cal. App. 4th 140, 62 Cal. Rptr. 2d 510, 513-14 (1997) (facial challenge to emergency management measures permit); *State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 707-08, 16 Cal. Rptr. 2d 25, 31-32 (1993) (judicial review of rulemaking). See generally 5 B. Witkin, *California Procedure Pleading* § 815, at 270-72 (4th ed. 1997).

The staff should consider whether the discretionary ripeness doctrine should be codified. The staff should ask for the views of Professor Robert Best of McGeorge Law School.

§ 1123.330. Judicial review of a rule

The Commission approved the staff recommendation to add subdivision (b) to Section 1123.330:

(b) A person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced.

The Commission asked the staff to make clear in the Comment that subdivision (b) is not intended to deprive the court of its discretion to decline to grant judicial review on the ground that the matter is not ripe for review.

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

The Commission approved the staff recommendation to substitute "announced" for "effective" in Section 1123.640(b)(2). The Commission asked the staff for more information on what "announced" means in this context. *Cf.* Code Civ. Proc. § 1094.6(a).

§ 1123.710. Applicability of rules of practice for civil actions

The Commission approved the staff recommendation to revise Section 1123.710 as follows:

1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council not inconsistent with this title, Part 2 (commencing with Section 307) applies, and Articles 1 (commencing with Section 2002) and 2 (commencing with Section 2009) of Chapter 3 of Title 3 of Part 4, apply to proceedings under this title.

(b) The following provisions of Part 2 (commencing with Section 307) do not apply to a proceeding under this title:

(1) Section 426.30.

(2) Subdivision (a) of Section 1013.

(c) A party may obtain discovery in a proceeding under this title only of the following:

(1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.850.

(2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.

(d) The Judicial Council may adopt rules of court governing proceedings in the Supreme Court and courts of appeal for judicial review of agency action, which may be inconsistent with this title.

§ 1123.850. New evidence on judicial review

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.850:

Comment.... The court has broad discretion to receive the evidence by oral testimony or by declaration. *California School Employees Ass'n v. Del Norte Unified School Dist.*, 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 2d 35, 39-40 (1992); see also Section 1123.710 (rules of civil practice apply).

STUDY N-301 – ADMINISTRATIVE RULEMAKING: INTERPRETIVE GUIDELINES

The Commission considered Memorandum 97-68 concerning the proposed exception to rulemaking procedures for a nonbinding statement expressing an agency's interpretation of law. The Commission made the following decisions:

- What had previously been named "interpretive guidelines" under the proposed law should instead be named "advisory interpretations."

- The word "ambiguous" should be struck from proposed Section 11360.010. The Comment to that section should discuss the circumstances, including ambiguity, in which an agency may wish to adopt an advisory interpretation.

- The meaning of the term "law" in proposed Section 11360.010 should be clarified.

- A statement that is required by statute to be adopted as a regulation should not be subject to adoption as an advisory interpretation.
- The Comment to Proposed Section 11360.010 should be revised to avoid any implication that subdivision (c) authorizes an agency to express an interpretation by means other than an advisory interpretation.
- An advisory interpretation should not be accorded any deference by a court interpreting a law that is the subject of the advisory interpretation. However, a Comment should make clear that an agency is not precluded from asserting an interpretation in a judicial proceeding simply because that interpretation has also been expressed in an advisory interpretation.
- An advisory interpretation should not bind anyone other than the adopting agency.
- An advisory interpretation should be subject to review by the Office of Administrative Law (OAL) upon request. OAL will review whether the advisory interpretation satisfies the requirements of the proposed law and is consistent with the law it interprets. OAL may approve or disapprove an advisory interpretation it reviews, or take no action.
- Judicial review of an advisory interpretation should be available after OAL review, regardless of the outcome of the OAL review.
- An agency should be permitted to issue an advisory interpretation interpreting any law that the agency administers or enforces, or that affects the agency.
- Advisory interpretations should be published in the California Code of Regulations, rather than in agency-maintained compilations.

STUDY N-302 – ADMINISTRATIVE RULEMAKING: DIRECT FINAL RULEMAKING

The Commission considered Memorandum 97-69 proposing a streamlined adoption process for regulations that elicit no adverse comment during the public comment period. The Commission made the following decisions:

- A regulation adopted under the proposed law should be called a “consent regulation” rather than a “direct final rule.”
- The staff should solicit input from public agencies to determine whether existing adoption procedures are inefficient when adopting a regulation that is trivial in its impact and to which there is no opposition. If so, the staff should solicit input from public agencies and regulated groups on which elements of rulemaking procedure could be circumvented under an abbreviated adoption

procedure for consent regulations. The results of this factfinding will be summarized by the staff in a memorandum discussing the need for the proposed exception and alternative means of implementing it.

APPROVED AS SUBMITTED

Date

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

Chairperson

Executive Secretary