

Memorandum 86-205

Subject: Study L-1033 - Determining Class Membership (Comments on
Tentative Recommendation)

The *Tentative Recommendation Relating to Determining Class Membership* was distributed for comment in September 1986. We have received 23 letters approving and commenting upon this recommendation. These letters are attached as exhibits.

This memorandum analyzes substantive comments we have received. These comments are discussed following the relevant sections in the revised draft recommendation attached hereto.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

BELAN M. WAGNER

ATTORNEY AT LAW

15200 SUNSET BOULEVARD, SUITE 207

PACIFIC PALISADES, CA 90272

(213) 454-0637

October 10, 1986

California Law Revision Committee
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative recommendations relating to
The New Estate and Trust Code

Gentlemen:

I received and approve of the tentative
recommendations relating to:

1. Administration of Estates of Missing
Persons Presumed Dead;
2. Determining Class Membership;
3. Preliminary Provisions and Definitions;
4. Non-resident Decedent;

PLEASE NOTE MY NEW ADDRESS as shown on this
letterhead:

Belan M. Wagner, Attorney
15200 Sunset Boulevard, Suite 207
Pacific Palisades, CA 90272

Very truly yours,


BELAN M. WAGNER

BMW:df

CHAMBERS OF
The Superior Court
VENTURA, CALIFORNIA
ROBERT R. WILLARD, Judge

L-1040
L-1033
L-1035
L-800
L-1045

October 10, 1986

California Law Revision Commission
4000 Middlefield Rd.
Suite D-2
Palo Alto, CA 94303-4739


Gentlemen:

I have reviewed the five tentative recommendations relating to probate law and procedure that you mailed October 3, 1986.

In my opinion each change has merit, and I have no additional changes to suggest.

I am sending the tentative recommendation on public guardians and administrators to the Ventura County Public Guardian and Administrator for her comments, if any.

Sincerely,


Robert R. Willard
Judge of the Superior Court

RRW:vm

cc: Catherine E. Johnston
Public Administrator & Guardian

JEROME SAPIRO
ATTORNEY AT LAW
BUTTER PLAZA, SUITE 808
1388 BUTTER STREET
SAN FRANCISCO, CA, 94109-5418
(415) 928-1515

Oct. 10, 1986

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

Re: Tentative Recommendations,
dated September, 1986
Proposed Estate and Trust Code

Hon. Commissioners:

Thank you for the opportunity to review and comment upon
your proposed recommendations concerning the following subjects.

DETERMINING CLASS MEMBERSHIP, #L1033, Sept. 1986

To clarify, why isn't a personal representative of an
estate or a trustee included as one who may commence
proceedings to determine members of a class or to
determine identity of one or more as a member of a
class?

It seems necessary.

In any event, I do appreciate the chance to review these
proposals in advance. It is part of the educational process.

Respectfully,


Jerome Sapiro

JS:mes

HENRY ANGERBAUER, C.P.A.
4401 WILLOW GLEN CT.
CONCORD, CA 94529

L-1040
L-1033
L-1035
L-800
L-1045

10/13/86

Law Revision Commission

I have read the following Tentative Recommendations
Relating to the new estate and trust code

1. NonResident Decedent
2. Preliminary Provisions and Definitions
3. Determining Class membership
4. Administration of Estate of Missing Persons
Presumed Dead
5. Public Guardian and Public Administration

and agree with the Commission's conclusions
and recommendations and that The Commission
should make its views known to The Legislature
herewith. Thanks for permitting me to make
my views known.

Sincerely
H.A.

BURRISS, SUMNER & PALLEY

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

OLD MILL OFFICE CENTER

201 SAN ANTONIO CIRCLE

SUITE 160

MOUNTAIN VIEW, CALIFORNIA 94040

(415) 948-7127

October 14, 1986

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

Gentlemen:

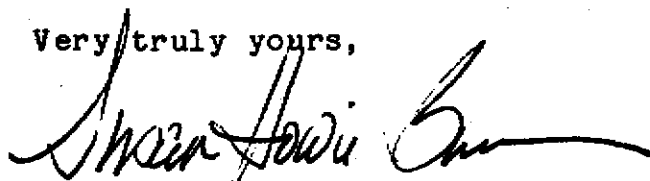
I have no comment with regard to most of the tentative recommendations relating to probate law, as most appear both necessary and useful.

I do object, however, to the change of title. I see no particular purpose in changing the name of the code from Probate Code to Estate and Trust Code, particularly in light of the fact that we are accustomed to dealing with a Uniform Probate Code as is most of the country.

The change of title is unnecessary, expensive, will create confusion, and in the long run will cost a great deal of money in changing the cross-references which currently exist in other California Codes.

My suggestion is that the title remain the same.

Very truly yours,



SUSAN HOWIE BURRISS

SHB:cd

GILBERT MOODY
VERNON JOHNSON
EDWIN MACH

ATTORNEYS AT LAW

THOMAS HOLSINGER

October 15, 1986

250 WEST MAIN, TURLOCK, CA 95380 - (209) 632-1086

California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Probate Law Revision

Gentlemen:

Thank you for sending me your recommendations relating to probate law and procedure. I think there are some very good proposed revisions, and there is only one part that disturbs me and to which I object. This has to do with the Public Guardian and Public Administrator. I think the Public Administrator's powers and reimbursement for expense should be much limited and restricted from their present powers rather than expanded. In fact, I think if there is anyone else available to act as a guardian or administrator, particularly administrator, he should be given precedence over the Public Administrator, and the Public Guardian and Public Administrator should be at the bottom of the list of those who may be appointed.

I think too in a Will contest the law should provide for appointment of a Public Administrator only if requested by all parties to a contest.

Our experience with the PA office has led to this conclusion. Some of the employees seem to run rough-shod over the needs and feelings of people and those interested as friends, relatives, or heirs. I have one probate administration where it was reported to me by a client that she had been told by the Public Administrator's employee that she should not have a private attorney handle the administration; that the Public Administrator's office should do it, and that if it was turned over to a private attorney the time and cost would be much greater than if the Public Administrator handled it.

I had another incidence where a client was in a mental health unit for a short time because of his alcoholism. When he returned home, he found that the Public Guardian had cleaned out his house and sold all of his furnishings for a rather small amount, and including some rather valuable antique ware and furniture.

October 15, 1986

Page 2

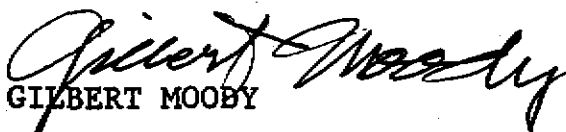
Likewise, I do not think the Public Administrator's fees for conserving an estate should be increased to \$350.00, and I don't think there should be any standard fee; that they should be required to apply to the court for an allowance after proper notice according to the time and trouble they have had in conserving the estate.

I am also enclosing the questionnaire regarding probate practice, and I would strongly object to the proposal relating to changing the fees to a review process. The present system allows for adjustment of the statutory fees and commission which is sufficient protection in my view. I think adoption of the proposal would just promote rabid competition by some offices, with heirs going from office to office to check out the lowest bids.

I do think there should be a minimum fee and commission allowed for estates under \$15,000.00. I have handled estates where there has been real property of a value of \$500.00 or \$1,000.00 or \$2,000.00 or \$3,000.00, and obviously 4% of these values does not begin to pay for the work. Fortunately the courts have been generous in allowing extraordinary fees, but I would suggest a minimum of \$250.00 to \$300.00.

What can happen in relation to fee allowances can be illustrated by what happened in our county a few years ago. Attorneys had normally been asking for \$500.00 extraordinary fees for preparing federal estate tax returns. A couple Judges took the position that the work wasn't worth more than \$250.00, so we and perhaps quite a few other attorneys just quit doing them and the Judges never said a word about payment of \$750.00 to accountants.

Thank you for your consideration.


GILBERT MOOBY

GM/dw

STEPHEN M. CHANDLER
LELAND W. BRUNER
STEPHEN A. RICKS
STEPHEN G. CHANDLER
JOSHUA L. BRIGHT

LAW OFFICES OF
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SAN LEANDRO, CALIFORNIA 94577-4751
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A. W. BRUNER (1901-1982)

October 16, 1986

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

Dear Mr. DeMouilly:

I received the Law Revision Commission's tentative recommendations relating to probate law with your cover letter of October 3, 1986. I reviewed the enclosures and find them to be a very excellent job and really have no particular comment other than my congratulations to the Commission. I would like to receive any future mailings.

Very truly yours,

CHANDLER, BRUNER & RICKS


Leland W. Bruner

LWB/tm

Irving Kellogg
Attorney at Law
821 Monte Leon Drive
Beverly Hills, Ca 90210

October 21, 1986

John H. DeMouilly
Executive Secretary
California Law REvision
4000 Middlefield Road
Palo Alto, Calif. 94303-4739

Re: Tentative REcommendation: Estate and Trust Code -
Determining Class Membership.

Dear John:

My comments deal with drafting improvement:

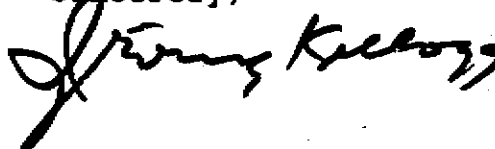
Section 323. Change it to read: " At any time before the hearing, a person interested in the property may file a response to the petition, which denies or supports any of the matters included in the petition. (Or, put a period after first petition and start a new sentence: "That response may deny or support any of the matters included in the petition." The word "that" after the first, "petition" does not clearly refer back to the word, "response". The antecedent procedure is muddy.)

Section 324 (a). The court shall hear the evidence offered by the petitioner and by any contestant, and shall make an order determining whether or not the petitioner is a member of the class. (As stated, it implies the Court determines that the petitioner is a member of the class. At least that is the way I read it. I consider it ambiguous.)

(b) The court order is prima facie evidence of the facts determined and is conclusive in favor of any person who without notice of any conflicting interest acts in good faith and in reliance on the order. (My rearrangement of the phrases puts them in more logical order.

I hope you do not consider my drafting suggestions to be nit-picking. As you know, I am a somewhat student of drafting. If you have the time, I would like to have your comments as to whether I should, when reviewing the Recommendations, continue to suggest drafting changes.

Sincerely,



LAW OFFICES

HOUSER & SANBORN

EVERETT HOUSER
WARREN L. SANBORN

260 ATLANTIC AVENUE
LONG BEACH, CALIFORNIA 90802-3294
(213) 432-8941

October 22, 1986

California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, California 94303-4739

My review of the tentative recommendations of the Estate and Trust Code are as follows:

L-1045 - Useful

L-1035 - Okay

L-1033 - Fine

L-1040 - Okay as far as it goes. My experience has been in Los Angeles County where both of these offices are sadly behind schedule. Some means should be devised to require a more rapid termination of cases, or the use of private attorneys by court appointment when the schedules get more than six months behind.

L-800 - Approved

This is my first shipment of papers, so I may have missed something. I am involved right now with a trust which should be revocable under §2280 of the Civil Code. Husband and wife set up the trust to benefit each other and after the death of the survivor to go to numerous beneficiaries. The wife died first. The husband wishes to revoke the trust, and the defense is that everyone of the contingent beneficiaries has to be notified and given a chance to protect his contingency. I think this point should be settled by statutory authority.

Very truly yours,



EVERETT HOUSER

EH:da

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

October 23, 1986

California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, Ca 94303

Dear Commission Staff:

Comments relate to studies 1033, 1035, 1040, 1045, and 800.

I concur with all changes except as set forth below concerning study 1040.

The term "reasonable fee for service" in referring to fees to be charged for services rendered by the Public Guardian and Public Administrator appear too broad and are going to cause a great deal of non-uniformity throughout the State. Each court will determine the fee according to its "liberal" or "conservative" view of charges for service rendered. It appears to me that the State has an obligation, as it does in setting probate fees, except for extraordinary fees, to state with specificity the range of fee charges. I suggest that a minimum dollar amount be set forth and a percent above that pegged to the dollar value of the property handled be established in the code as the proper fee. I believe it is important to establish specific guidelines rather than the subjective term "reasonable".

Regarding the appraisal of an estate it appears that if an estate consists of real property only or real property and other personal assets not exceeding a value of \$1000.00 or some similar dollar amount the estate should be appraised by the nominated or appointed Guardian or Conservator. Especially onerous for a Guardian or Conservator is the necessity to either borrow money or sell an asset to pay an appraiser when an estate does not have any cash or a minimal amount of cash but may have a valuable piece of real property which may be the residence of the conservatee or the minor.

Thank you for the opportunity to review the proposed changes.

Very truly yours,


Wilbur L. Coats

KILPATRICK, CLAYTON, MEYER & MADDEN
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ATTORNEYS AT LAW

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October 22, 1986

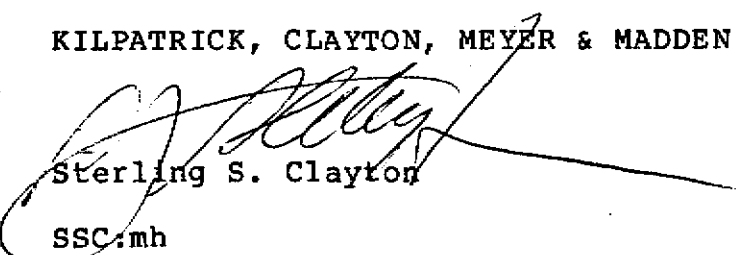
Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4200 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. DeMouilly:

I have reviewed the five tentative recommendations pertaining to probate law and procedure sent to me for review and comment. I think the recommended changes are all improvements in existing law, and the only particular observation I would make pertains to the tentative recommendations regarding the public guardian and public administrator. Apparently, it is now proposed that the public guardian will not be restricted insofar as statutory fees are concerned and that it will be left simply with a "reasonable fee" determination. It would seem to me that the determination of a reasonable fee, or at least its approval, should be subject to court review and authorization.

Yours very truly,

KILPATRICK, CLAYTON, MEYER & MADDEN



Sterling S. Clayton

SSC:mh

EXHIBIT 12
STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

L-1033

ROBERT KINGSLEY
ASSOCIATE JUSTICE

October 30, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

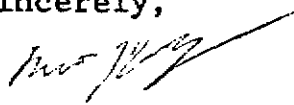
Gentlemen:

I am in receipt of and have read the various tentative recommendations relating to the proposed new estate and trust code.

I commend you for bringing together and reconciling what are currently provisions scattered through at least two present codes.

I am also somewhat concerned about the provisions in two of the proposals relating to the filing of opposition to the petitions. In one proposal relating to class membership, section 323 provides that a "response" may be filed at any time before the hearing, and in the proposed draft no time for filing a response is listed. In either case, it seems to me that some further provision should be included. In both instances, if a response is not filed within a reasonable period prior to the hearing date, the statute should provide for a continuance of a hearing long enough for the petitioner[s] to counter-respond to the responses if they so desire.

Sincerely,



DIETRICH, GLASRUD & JONES

AN ASSOCIATION INCLUDING LAW CORPORATIONS

ATTORNEYS AT LAW

5250 NORTH PALM AVENUE, SUITE 402

FRESNO, CALIFORNIA 93704

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STAN M. CARDENAS
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MICHAEL W. MOSS
KEVIN B. BRIGGS
TRACIE E. DUDLEY
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ROBERT A. MALLEK, JR.
LAW CORPORATION
RICHARD E. AUNE
LAW CORPORATION

October 28, 1986

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations Relating To
Proposed New Estate and Trust Code

Ladies and Gentlemen:

I have completed my review of the tentative recommendations which were forwarded to me. Although my review was not intensive, I believe I have a good overall impression of and feeling for the new code. I would be interested in learning, however, what takes the place of Division 3 (Administration of Estates of Decedents) which has been moved to Division 7 (new).

I commend you on your decision to refer to everyone as "personal representatives". I, for one, will gladly adopt the change. The older practitioners, however, will have a great deal of trouble with this concept; especially those who still refer to multiple, female executors as "co-executrices".

I also am in complete favor of adopting a requirement that the county clerk provide a letter or other document outlining the duties of the personal representative and the addition to the code for the procedure allowing for actual notice to creditors. Your rejection of the proposals to eliminate mandatory publication of notice to creditors, especially in instances where actual notice is given, seems rather close-minded. When you are dealing with an extremely small estate (house, car, a couple of bank accounts, etc.) and the probate has not been established with any thought to foreclosing creditors, could not an affidavit given by the personal representative attesting to the notification of

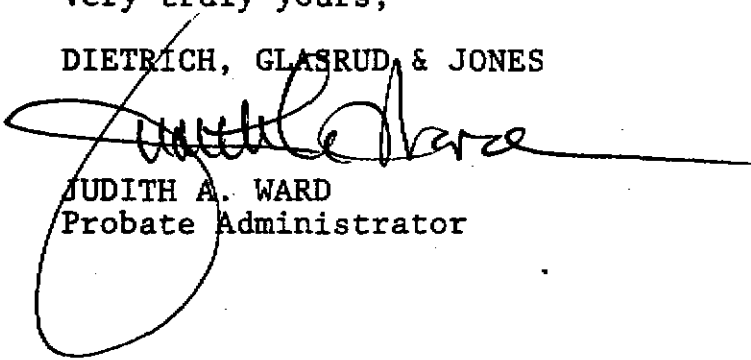
October 28, 1986
Page Two

all known creditors be used in lieu of publication? In my view, actual notice to known creditors far exceeds the effectiveness of publication in a legal newspaper and certainly is much less expensive. Even reducing the number of publication times (perhaps to one in the case of the giving of actual notice) would greatly assist the personal representative who is faced with a liquidity problem.

I look forward to receiving and reviewing your further comments and recommendations.

Very truly yours,

DIETRICH, GLASRUDE & JONES



JUDITH A. WARD
Probate Administrator

LAW OFFICES OF
LEVIN, BALLIN, PLOTKIN & ZIMRING

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12650 RIVERSIDE DRIVE

NORTH HOLLYWOOD, CALIFORNIA 91607-3492

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GIG KYRIACOU

OF COUNSEL
JUSTIN GRAF
MANYA BERTRAM

LEGAL ASSISTANTS
PATRICIA D. FULLERTON
PACITA A. FRANCISCO
ANNE M. CUNNINGHAM

November 4, 1986

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

Re: Tentative Recommendations Relating to Probate Law

Dear Mr. DeMouilly:

Enclosed are my comments regarding the five tentative recommendations recently sent to me for review.

I appreciate this opportunity to assist the Commission and thank you for soliciting my input.

Sincerely,



STUART D. ZIMRING

SDZ:zw
Enclosure

October 31, 1986

COMMENTS ON TENTATIVE RECOMMENDATIONS OF THE CALIFORNIA LAW
REVISION COMMISSION

Determining Class Membership

No comments or recommendations. It is fine as it is.

STANLEY L. HAHN *
 DAVID K. ROBINSON *
 LOREN H. RUSSELL *
 LEONARD M. MARANGI *
 WILLIAM S. JOHNSTONE, JR. *
 GEORGE R. BAFFA *
 DON MIKE ANTHONY *
 ROBERT W. ANDERSON
 WILLIAM K. HENLEY *
 CLARK R. BYAM *
 RICHARD L. HALL *
 SUSAN T. HOUSE
 CARL J. WEST
 DIANNE H. BUKATA
 GENE E. GREGG, JR.
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November 11, 1986

BENJAMIN W. HAHN, 1868-1932
 EDWIN F. HAHN, 1872-1951
 HERBERT L. HAHN, 1893-1982

RETIRED PARTNERS

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

Re: Tentative Recommendations Relating To
 The New Estate and Trust Code

Gentlemen:

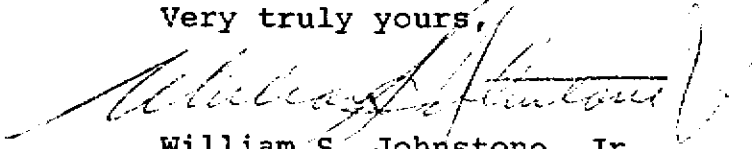
This letter is written with respect to solicited comments on a number of tentative recommendations relating to The New Estate and Gift Tax Code. The following comments are a composite of comments of our office's Probate Department to particular tentative recommendations.

Determining Class Membership:

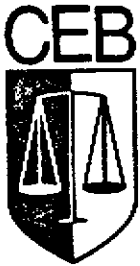
The proposed changes to existing Prob. Code §§1190 - 1192 in new Code §§329 - 325 (application to determination of any class, and including intestate succession) appear satisfactory. However, we would suggest consideration of incorporating such provisions into existing Prob. Code §§1080 - 1082 (determination of heirship). Broadening the scope of existing §1190, et seq., to intestate situations and any class would appear to make it more compatible with the provisions of §1080, et seq., and combining the concepts would, or could, result in adjudicating the right to estate distribution at the same time as determining class membership, and collaterally eliminate duplicatory sections dealing with procedural matters.

Should you wish to discuss any of the foregoing comments, please feel free to call me.

Very truly yours,


 William S. Johnstone, Jr.
 of HAHN & HAHN

WSJ:g



CALIFORNIA CONTINUING EDUCATION OF THE BAR

2300 Shattuck Avenue, Berkeley, CA 94704
(415) 642-3973; Direct Phone: (415) 642-8317

November 12, 1986

California Law Revision Committee
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study L-1040; Tentative Recommendation Relating to
Public Guardian and Public Administrator

Sirs:

I have reviewed the foregoing and am wondering if the judiciary has been consulted to determine whether proposed Probate Code 2921 provides them adequate flexibility to order appointment of the Public Guardian in the situations which the judges face. I also think that the necessity of a determination that no other person is qualified and willing to act may be an undesirable restriction. What if the public guardian is willing to act and the court believes that it is best to appoint the public guardian because of disputes among family members who are technically qualified and willing?

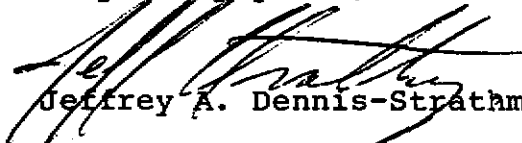
I suspect that the one-fourth of one percent fee bond is much higher than the actual cost to the county.

I don't understand the rationale of having the court determine the clerk's fee in 7680(a)(2).

It should not be necessary for heirs to wait four months to collect an estate under \$60,000 if they could have collected it without administration, if the public administrator had not gotten involved.

I have also made a very cursory review of studies L-800, L-1033, L-1035, and L-1045. The principal proposed changes will improve the Code.

Very truly yours,


Jeffrey A. Dennis-Strathmeyer

JAD-S:kg

The Surety Association of America

100 WOOD AVE. S., ISELIN, NEW JERSEY 08830 (201) 494-7600

LLOYD PROVOST
President

November 12, 1986

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

Re: Law Revision Commission Tentative Recommendation
Relating to Probate Law

Dear Mr. DeMouilly:

This is to acknowledge and thank you for your letter and enclosures of October 3.

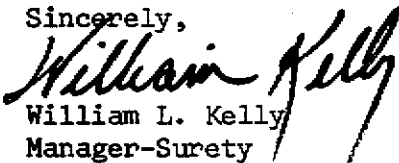
We have reviewed the latest set of recommendations (L-1040, L-800, L-1033, L-1035, L-1045) and are in general support of them.

We would, however, like to echo the comments of the Western Surety Company which had written to you on October 14, 1986.

Please keep us on your mailing list to receive future recommendation studies.

Thank you for your assistance.

Sincerely,


William L. Kelly
Manager-Surety

WLK:poh

Fidelity Department
FRANCIS X. LeMUNYON

Vice President

ROBIN V. WELDY

Director - Legal

Actuarial Department

ROBERT G. HEPBURN, JR.

Vice President

GAETON SACCOCCIO

Senior Statistician

Surety Department

DENNIS E. WINE

Vice President

POST OFFICE BOX 158

RAWLINS COFFMAN
ATTORNEY AT LAW
RED BLUFF, CALIFORNIA 96080

TELEPHONE 527-2021
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November 13, 1986

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

Attn: John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

Thank you for your communication and transmittal
of October 3, 1986.

My comment with respect to tentative recommendation
#L-1033, "Determining Class Membership", is:

As a whole, I approve of this tentative recommendation.
I assume this procedure will be utilized to determine the
validity of the parent-child relationship under Probate Code
6408(b).

* * * * *

Very truly yours,



RAWLINS COFFMAN

RC:tm

P.S. Please keep me on your mailing list.



Writer's Direct Dial Number

OFFICES OF

THE COUNTY COUNSEL COUNTY OF ORANGE

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834-6333

November 14, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Commission:

Thank you for sending me the revised tentative recommendations regarding the Public Guardian/Public Administrator, Determining Class Membership, Preliminary Provisions, Nonresident Decedent, and Administration Of Estates Of Missing Persons Presumed Dead sections of the new Estate and Trust Code.

Due to the birth of my first child, I have had difficulty finding the time to respond before now. I am sending my response before the deadline of November 15, but it may not reach you until after the deadline. I hope you will consider my comments as if timely received.

As before, I note that these are my individual views. I do not write here as a representative of the Orange County Counsel, the Orange County Public Administrator/Public Guardian, or the County of Orange.

Determining Class Membership - I support the general thrust of the changes, expanding the list of those who may commence proceedings.

Please note that I have only commented on proposed changes in the law. My failure to comment on sections that simply renumber and recodify the law should not be construed to necessarily indicate approval or disapproval of the existing law.

I look forward to receiving your further recommendations.

Very truly yours,

Howard Serbin
Deputy County Counsel
Orange County

HS:jp

cc: Carol Gandy, Linda Martinez, Dwight G. Tipping, Chris Salas -
Office of Public Administrator/Public Guardian;
James F. Meade, Nicholas S. Chrisos - Office of County Counsel

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November 17, 1986

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, suite D-2
Palo Alto, CA 94303-4739

Re: Studies # L-800 (Nonresident Decedents), L-1033 (Determining Class Membership), L-1035 (Estates of Missing Persons), L-1040 (Public Guardians/Administrators), and L-1045 (Definitions).

Gentlemen:

Thank you for the September, 1986 versions of the tentative recommendations of the above-referenced proposals. It is helpful to have the latest thinking of the commission regarding the preliminary provisions and definitions while reviewing the other proposals.

I know this will arrive after your November 15th deadline, but computer malfunction has made timely transcription of this letter impossible.

Regarding the proposal for simplification of distribution or administration of California assets of nonresident decedents, I think it is all workable, sensible, and an improvement. Also:

§12522 (validity of foreign will): I especially like the proposed provision conforming the criteria for validity of a nonresident's will to those in Prob C § 6113.

§§12553, 12554 (payment of small accounts): Shouldn't Totten trust accounts be excepted from those which may be delivered to a foreign representative? If there are competing claims by a Californian entitled to distribution without administration and a foreign representative, are they to be resolved in the state where the primary administration is pending or may they be resolved here? The requirement of § 12553(b) and the discharge from liability provisions of Prob C § 13106 seem to favor the California claimant, allowing the institution to pay the California claimant and requiring the foreign representative then to establish a superior claim. Is that your intention?

Regarding the proposal for determination of class membership:

§ 320 (Proceeding authorized): Are there some situations in which both these proposed proceedings and proceedings under Prob C § 1080 will be available?

§ 322(b) (Notice of Hearing): This is not one of the matters listed at Prob C § 1200(a). Given Prob C § 1200(d) and the trend to limit the responsibility of the clerks for posting notices, why not drop subdivision (b)?



Matthew Bender

§ 323 (Response): Answers can support (admit) as well as deny, too. Do you think it might simplify things to require the response/answer be filed sooner than before the hearing? Is earlier filing required in some counties by virtue of local rules? I think that procedurally these proposed proceedings and proceedings under Prob C § 1080 should be substantially similar.


I like all the changes regarding administration of estates of missing persons. I agree that there is no reason to perpetuate different notice, hearing, or distribution waiting-period requirements for estates of missing persons. I also think the changes adopting the new general definition of interested person and charging the costs of any additional required search to the estate are appropriate.

I like all the changes regarding public guardians and administrators. Specifically, I agree:

§ 2921: that domicile is a more workable basis for jurisdiction;
to be drafted (re W & I C § 8011): that appraisals are wasteful and unnecessary in small estates;
§§ 2631, 2942: that the public guardian should have authority to pay expenses of general administration on the same basis that present law provides for payment of funeral and last illness expenses;
§ 2941: that the public guardian should be allowed more flexibility in arranging for legal representation;
§§ 7643, 7683(b): that unclaimed funds in an estate administered by the public administrator are more properly turned over to the county; and
§ 7682-7684: that the new creditor protection provisions are appropriate.

Regarding the current version of preliminary provisions and definitions, generally, they all seem sensible. Specifically, I like the new § 46 definition of insured account because it equalizes the treatment between the three most prevalent types of financial institutions and because it is keyed to the insurance coverage. I think the latter is especially important since representatives under pressure to maximize income to the estate are likely to forget that some of the "investment certificates" are not insured.

Yours very truly,


 Beryl A. Bentucio
 Senior Legal Writer

cc George A. Meier

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November 17, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: John H. D'Moulley, Executive Secretary

Re: Law Revision Commission Tentative
Recommendations Relating to Probate
Law

Dear Mr. D'Moulley:

I am writing to you with my comments on the Tentative Recommendations of the California Law Revision Commission relating to the new Estate and Trust Code and the Public Guardian and Public Administrator.

For your convenience in organizing the comments, I have put my comments for each separate code on separate sheets. If you have any questions, or if I can be of any further assistance, please call.

Very truly yours,

MacCARLEY, PHELPS & ROSEN
A Professional Corporation

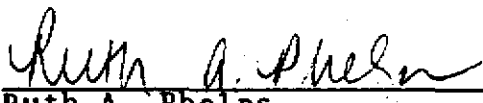
By: Ruth A. Phelps
Ruth A. Phelps

RAP:mr
0612m

Comments on Tentative Recommendations
Related to the New Estate Trust Code
Determining Class Relationship
L-1033
September, 1986

I read this tentative recommendation. I
endorse the expansion for which it provides. I
approve this tentative recommendation.

Respectfully submitted,



Ruth A. Phelps

0612m

Memo 86-205

EXHIBIT 22

J. Earle Norris
Vice President and
Senior Claims Counsel

November 17, 1986

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

Re: California Law Revision Commission
Study L-800 - Nonresident Decedent
Study L-1033 - Determining Class Membership
Study L-1035 - Administration of Estates of Missing Persons
Presumed Dead
Study L-1040 - Public Guardian and Public Administrator
Study L-1045 - Preliminary Provisions and Definitions

Dear Mr. DeMouilly:

I have submitted copies of the above-mentioned studies to the Subcommittee members of our special committee of the CLTA Forms and Practices Committee for review and comment in October, 1986.

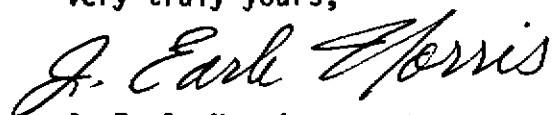
I apologize for the late response since I noticed that you requested comments no later than November 15, 1986. From the responses I have received from the Subcommittee members, it would not appear that there is anything in all of the studies that would cause any concern for the members of our industry.

I would suggest one recommendation with regards to Study L-1035, tentative recommendation relating to the Administration of Estates of Missing Persons Presumed Dead. That comment would concern proposed Section 12408, Recovery of Property by Missing Persons Upon Reappearance. In Sub-Section (a) (2) there is a statute of limitations from the recovery of property from distributees "to the extent that recovery from distributees is equitable in view of all the circumstances . . . ". I would like to suggest that it would be of assistance if there were a third sub-paragraph to indicate that conveyances by distributees to third party bona fide purchasers for value would protect such purchasers and the missing persons recovery would be limited to recovery only from the immediate distributee. This would clarify that the missing person would be left with a monetary cause of action against the distributee but that the title as conveyed to the bona fide purchaser would be protected.

Letter to John H. DeMouilly
November 17, 1986
Page Two

Thank you very much for the opportunity to review the proposed recommendations to the legislature in the Law Revision Commission's continuing work.

Very truly yours,

A handwritten signature in cursive script, reading "J. Earle Norris". The signature is written in dark ink and is positioned above the printed name.

J. Earle Norris

JEN:elm

cc:Gordon Granger
Richard M. Klarin
Robert L. Manuele
Robert Cavallaro
James Wickline
Collyer Church
Clark Staves

EXHIBIT 23
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CA LAW REV. COMM'N

JAN 07 1987

RECEIVED

January 6, 1987

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

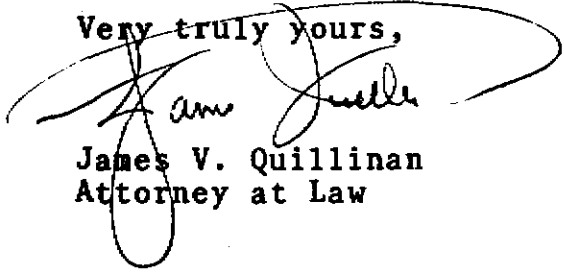
Re: LRC TR - Determining Class Membership

Dear John:

I have enclosed a copy of Study Team 1's technical report on the TR for Determining Class Membership. The report represents the opinions of the team only. The report has not been reviewed by the Executive Committee. I am sending it to you for your information and comment. It is intended to assist in the technical review of those sections involved.

See you in Los Angeles.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/h1
Encls.

cc: Chuck Collier Jim Opel
 Keith Bilter Jim Devine
 Irv Goldring Lloyd Homer

R E P O R T

TO: JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THE EXECUTIVE COMMITTEE IN GENERAL

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

DATE: DECEMBER 31, 1986

SUBJECT: REPORT OF STUDY TEAM NO. 1 on TENTATIVE
RECOMMENDATION (Determining Class Membership);
New Estate and Trust Code §§ 320-325

Study Team No. 1, through its member William V. Schmidt, has reviewed this Tentative Recommendation and has the following comments in regard to it:

Section 320: Existing Probate Code Section 1120 restricts its application to cases where a class is described as "heirs, heirs at law, issue, or children" and specifically excludes heirs who take by the laws of succession. To the best of my knowledge, the reason for this specific exclusion was that existing Probate Code Section 1080 provided for a procedure to determine heirship or to determine those heirs taking by law of succession.

Study Team No. 1 approves of the concept of broadening the scope of new Section 320, but is concerned that confusion may well arise in the minds of petitioners and their attorneys if the new Estate and Trust Code contains a different and separate determination of heirship procedure similar to that in existing Probate Code Section 1080. If such a separate and different

procedure is retained in the new code, then the person desiring a determination of heirs who take by laws of succession would have to choose from two different procedural sections.

Section 321: Satisfactory.

Section 322: Satisfactory.

Section 323: Satisfactory. Study Team No. 1 very much likes the concept of a response to the petition which denies or supports the petition in place of the concept of an answer which primarily contests and denies matters set forth in a petition.

Section 324: We recommend that the word "contestant" be changed to the word "respondent" to tie in with the concept of a response, which is set forth in Section 323. We assume that the word "contestant" came from the word "contesting" in the second sentence of existing Probate Code Section 1192 and referred to the person who would be filing an answer as set forth in the first sentence to Section 1192. Since a response may now be filed and since it may support the petition as well as deny or contest it, it seems appropriate to use the word "respondent." We find the Section is otherwise satisfactory.

Section 325: Satisfactory.

Respectfully submitted,

STUDY TEAM NO. 1

By:


WILLIAM V. SCHMIDT, Captain

WVS:ckt

STATE OF CALIFORNIA
California Law Revision Commission

Staff Draft

RECOMMENDATION

relating to

DETERMINING IDENTITY OF CLASS MEMBERS

June 1987

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

June 26, 1987

To: The Honorable George Deukmejian
Governor of California and
The Legislature of California

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The Commission is preparing a new code to replace the existing Probate Code.

The recommended legislation would replace the existing provisions relating to determining membership in a class, Probate Code Sections 1190-1192.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Arthur K. Marshall
Chairperson

Staff DraftRECOMMENDATION
relating to
DETERMINING IDENTITY OF CLASS MEMBERS

Existing law provides a procedure to determine the identity of members of a class that is described in terms of heirs, heirs of the body, issue, or children.¹ This procedure is not available to determine class membership if the property passes by intestate succession.² The decree of the court is prima facie evidence of the facts determined and protects persons dealing with the petitioner in good faith and without notice of conflicting interests.³

This procedure is continued in the proposed law and broadened so that it is available for determining the identity of members of any class entitled to property, not only classes described as heirs, heirs of the body, issue, or children. The need to obtain a court determination of class membership may be just as great in cases where, for example, the class is described in terms of family membership, such as relatives or next of kin, or by some other general class description. The proposed law also makes the procedure available in cases where the property passes by intestate succession and thus covers a case where a person's right to distribution of property has not been determined during administration.

1. Prob. Code §§ 1190-1192.

2. Prob. Code § 1190. This limitation is presumably due to the existence of a separate procedure for determining heirship in administration of a decedent's estate. See Prob. Code § 1080.

3. Prob. Code § 1192. The proceeding determines a person's identity within the described class; it does not determine the legal right to property and does not appear to provide a forum for determination of conflicting claims to estate property. See Magaram, *Determining Interests in Estate Distribution*, in 2 California Decedent Estate Administration § 24.10, at 1048 (Cal. Cont. Ed. Bar 1975).

PART 10. DETERMINING IDENTITY OF CLASS MEMBERS

§ 320. Proceeding authorized

320. (a) If title to property vests in a class, a person claiming to be a member of the class [or other interested person] may commence proceedings under this part to determine the person's identity as a member of the class.

(b) As used in this section, "person claiming to be a member of the class" includes the successor in interest of the person and the personal representative of the person or successor in interest.

Comment. Subdivision (a) of Section 320 replaces the first part of former Section 1190. Unlike former Sections 1190-1192, the procedure of this part is not limited to cases where the class is described as heirs, heirs of the body, issue, or children. This procedure is available to determine whether a person is a member of any class, whereas former law did not apply where title had vested by the laws of succession. For other procedures to determine class members, see, e.g., Sections 1080-1082 [11700-11705] (determination of right to distribution in proceedings for administration of estate), 17200(b)(4) (determination of trust beneficiaries). See also Section 48 ("interested person" defined).

Subdivision (b) restates part of former Section 1190 without substantive change.

Note. The relation of this procedure to the procedure set out in Probate Code Sections 1080-1082 for determination of heirship in estate proceedings remains a source of confusion. (See the remarks of Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, attached as Exhibit 23.) This confusion presumably exists now since the determination of heirship may be made under both Sections 1080-1082 and 1190-1192. However, the procedure under Section 1080 is tailored to probate proceedings and thus requires 10-days' notice by mail (15 days under AB 708). The procedure to determine membership in a class is an independent proceeding and should probably require a higher degree of notice.

Mr. William S. Johnstone, Jr., also suggests that the two procedures be combined. (See Exhibit 15.) This could easily be done, with the addition of a special provision governing the manner of petitioning when the interest is the subject of a pending probate proceeding as opposed to where it is appropriately the subject of a separate proceeding. This approach is taken in Probate Code Section 202 which provides for the combination of proceedings to establish fact of death with probate proceedings. However, it seems more appropriate to leave the limited procedure for petitioning for distribution from an estate in the part of the code dealing with estate distribution. The procedure under consideration here is intended to function outside the limited context of estate distribution and is appropriate where there is no estate or where the estate has been closed. The staff believes

that it is appropriate to explain the relationship between the two procedures in a comment.

Ms. Beryl A. Bertucio also inquires as to whether these procedures overlap. (See Exhibit 20, p. 1.)

Note. Mr. Jerome Sapiro suggests that the personal representative or trustee should also be able to petition for a determination of class membership under this procedure. The staff agrees that this would be useful and has added the reference "interested person" in subdivision (a). "Interested person" includes any person having priority for appointment as personal representative and a fiduciary representing an interested person.

Note. Mr. Rawlins Coffman approves of the tentative recommendation and assumes that the procedure will be utilized to determine the validity of the parent-child relationship under Probate Code Section 6408(b) (intestate succession through foster parent or stepparent). (See Exhibit 18). This would be an appropriate procedure if a disposition is phrased in terms of "children" on petition of a foster child or stepchild. Of course, if property is subject to probate administration, the appropriate procedure is the petition for distribution.

§ 321. Petition

321. (a) Proceedings under this part shall be commenced in the superior court of the county in which the property or any part of the property is situated.

(b) Proceedings are commenced by filing a petition that includes all of the following information:

(1) The basis of the petitioner's claim of title.

(2) A description of the property.

(3) So far as known to the petitioner, the names, ages, and mailing addresses of the members of the class whose identity is sought to be determined. If any member is dead or if the mailing address of any member is unknown, the petition shall state these facts.

Comment. Section 321 restates the last part of former Section 1190 without substantive change, but applies to members of any class, consistent with Section 320. In addition, the petitioner is required to supply the mailing addresses, rather than the residences, of class members. See also Section 1284 (petition to be verified).

§ 322. Notice of hearing

322. Notice of the hearing on the petition shall be given as provided in Section 1220.

Comment. Section 322 restates the second sentence of former Section 1191 without substantive change. See also Section 1285 (clerk to set matter for hearing).

Note. This section has been revised to conform to the new general notice provisions as set out in AB 708. Ms. Beryl A. Bertucio also suggests this change. (See Exhibit 20, p. 1.)

Note. It appears to the staff that, since this is an independent proceeding that may effectively determine the right to property, a more formal manner of notice for a longer time is desirable. The Commission should consider whether it would be appropriate to substitute the following provision drawn from the procedure for determining adverse claims in probate (see Section 9861 in AB 708):

§ 322. Notice of hearing (alternative)

322. At least 30 days before the day of the hearing, the petitioner shall cause notice of the hearing and a copy of the petition to be served in the same manner as provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure on the following persons known to the petitioner:

- (a) Each member of the class.
- (b) Any fiduciary or other person claiming an interest in, or having title to or possession of, the property.

§ 323. Responsive pleading

323. At any time before the hearing, a person interested in the property may file a response to the petition, denying or supporting any of the matters included in the petition.

Comment. Section 323 replaces the first sentence of former Section 1192. Section 323 provides for the filing of a response instead of an answer and recognizes that the response may support, as well as deny, any matter in the petition.

Note. Justice Robert Kingsley suggests that if a response is not filed within a reasonable period before the hearing date, the statute should provide for a continuance for the petitioner to file a counter-response. (See Exhibit 12.) Ms. Beryl A. Bertucio also raises the issue of the time of filing a response and suggests that this procedure and the petition for distribution procedure under Section 1080 be substantially similar. (See Exhibit 20, p. 2.)

As to the late response, the staff believes that this is a general problem that is dealt with by the general provision specifying the court's power to continue or postpone any hearing in the interest of justice. (See Section 1286 in AB 708, which continues part of existing Section 1205.)

Note. The phrasing of this section has been revised for editorial purposes in response to remarks of Mr. Irving Kellogg. (See Exhibit 8.)

§ 324. Hearing and order

324. (a) The court shall hear the evidence offered by the petitioner and by any respondent and shall make an order determining whether or not the petitioner is a member of the class.

(b) The court order is prima facie evidence of the facts determined and is conclusive in favor of any person who, without notice of any conflicting interest, acts in good faith and in reliance on the order.

Comment. Section 324 restates the second and third sentences of former Section 1192 without substantive change.

Note. The word "respondent" in subdivision (a) of this section has been substituted for the word "contestant" at the urging of Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. (See Exhibit 23, p. 2.)

Note. The phrasing of this section has also been revised for editorial purposes in response to remarks of Mr. Irving Kellogg. (See Exhibit 8.)

§ 325. Appeal

325. The making of or refusal to make an order under Section 324 is appealable.

Comment. Section 325 replaces part of former Section 1297(m) [as proposed in AB 708].

COMMENTS TO REPEALED SECTIONS

Probate Code § 1190 (repealed). Petition to determine members of class

Comment. The first part of former Section 1190 is replaced by subdivision (a) of Section 320 (proceeding authorized) which does not limit the nature of the class description. The last part of former Section 1190 is restated in Section 321 (petition) without substantive change. The requirement that the petition be verified is generalized in Section 1284.

Probate Code § 1191 (repealed). Setting for hearing; notice

Comment. The first sentence of former Section 1191 is generalized in Section 1285 (clerk to set matter for hearing). The second sentence is restated in Section 322 (notice of hearing) without substantive change, except that the notice period is increased from 10 to 15 days.

Probate Code § 1192 (repealed). Hearing; conclusiveness of order

Comment. The first sentence of former Section 1192 is replaced by Section 323 (responsive pleading). The second and third sentences are restated in Section 324 (hearing and order) without substantive change.