

Memorandum 86-206

Subject: Study L-1035 - Administration of Estates of Missing Persons
Presumed Dead (Comments on Tentative Recommendation)

This memorandum considers comments we have received on the *Tentative Recommendation Relating to Administration of Estates of Missing Persons Presumed Dead* which was distributed for comment last fall. A copy of the recommendation is attached, as well as a copy of each letter that we have received in response to its distribution.

For the most part, those commenting approved the recommendation as it stands. The remainder of this memorandum will deal with the suggestions for improvement that we have received.

Letter of Transmittal

The letter of transmittal that follows the cover of the tentative recommendation will be revised to conform to similar letters that have been revised since last fall. For example, references to the "Estate and Trust Code" will be revised.

§ 12401. Presumption of death for purposes of estate administration

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section suggests that the first sentence of this section be revised. (See Exhibit 23, item 1.) Team 4 would make two changes in this sentence. First, Team 4 would revise the reference to "division" to read "part." This is not a matter of great consequence, and Team 4 does not suggest why the reference to "division" should be changed. It is not an inadvertent usage in the tentative recommendation. Existing Section 1351, which is part of a chapter, also refers to "this division," meaning Division 3 of the Probate Code governing administration of decedents' estates. However, we have no objection to revising it to read "part" because Section 12402 makes clear that the estate is to be administered under the general provisions governing administration of estates of decedents.

Second, Team 4 would revise the basic standard for determining who

is a missing person for the purposes of this statute. Under the existing standard, a missing person is one who is absent and has not been heard from, whereas Team 4 would say that a missing person is one who has not been seen or heard from by the person most likely to have seen or heard from that person. This standard is apparently drawn from the showing required by the petitioner in Section 12404(c)(3). In other respects, the standards are the same. The change is the elimination of the concept of absence and the specification of the person from whose perspective the lack of contact is to be judged. The staff has no objection to this revision, since it makes the statute internally consistent. We wonder, however, if there may be some difficulty in determining and locating the person most likely to have seen or heard from the missing person. This standard, while more definite, may also be impractical in some cases. Perhaps it would be better to eliminate the word "most" from the proposed standard. The staff would revise Section 12401 as follows:

12401. In proceedings under this division part, a person who ~~is absent~~ has not been seen or heard from by the persons most likely to have seen or heard from that person for a continuous period of five years, ~~during which time the person has not been heard from,~~ and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

Mr. Paul Gordon Hoffman discusses the problem of determining whether someone has died without waiting for the five-year period under this section to elapse. (See Exhibit 11.) This is a different issue. The missing person statute is intended to provide a rule where there is no evidence upon which a finding of death can be based. It does not impose its requirements on administration of an estate where there is sufficient evidence of death. The staff is thus not clear what revisions should be made in this section or in Section 12404(c)(3), as suggested by Mr. Hoffman. It might be useful to note that the procedure in this part is distinct from other proceedings to establish the fact of death, e.g., Probate Code Sections 200-204.

§ 12402. Manner of administration of missing person's estate

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section suggests that Section 12402 be revised as follows (see Exhibit 23, item 2):

12402. The Subject to the provisions of this part, the estate of a missing person may be administered,~~as though the person were dead,~~ in the manner provided generally for the administration of estates of deceased persons,~~subject to the provisions of this part.~~

The staff thinks that this revision improves the readability of Section 12402. The elimination of the concept of administration "as though the person were dead" is no loss, and we do not believe that this results in any substantive change.

§ 12403. Jurisdiction of court

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section suggests two changes in this section to conform to the revision of the standard in Section 12401. The staff agrees with these changes and would revise Section 12403 as follows:

12403. (a) If the missing person was a resident of this state ~~at the time of the person's disappearance when last seen or heard from,~~ the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state ~~at the time of the person's disappearance when last seen or heard from,~~ the superior court of a county where real property of the missing person is located, or of a county where personal property is located if the missing person has no real property in this state, has jurisdiction for the purposes of this part.

§ 12404. Petition for administration

Mr. E. Burdette Boileau requests that the term "relative" of a missing person be further clarified. (See Exhibit 14.) He asks specifically whether this would include relatives by marriage. As noted in the comment to this section, the tentative recommendation proposed to substitute "relative" for "member of the family" of the

missing person. The comment asserts that this is a nonsubstantive change. Of course, the same doubts may plague "relative" as "member of the family." The meaning of "relative" could be pinned down by providing that it means a person who could take by intestate succession or a person who is entitled to priority in appointment as a personal representative. The last standard makes sense because the missing person procedure is part of the procedure to administer the person's estate, and the staff would implement this alternative directly as set out in the draft below.

Mr. Jerome Sapiro suggests that this section specifically permit the public administrator to petition for administration of the estate of a missing person. (See Exhibit 3.) The staff agrees with this suggestion. As revised below, public administrators are included.

Mr. William S. Johnstone, Jr., suggests that creditors be specifically mentioned as petitioners. (See Exhibit 15.) Creditors are interested persons, and thus are included in subdivision (b)(3). See Section 48 ("interested person" defined). As revised below, however, creditors are included by incorporating the list of persons who may be appointed as personal representative.

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section suggests additional changes to conform with the revision in Section 12401. (Exhibit 23, item 4.) In addition, Team 4 would limit the duty to provide the information listed in subdivision (c) to such information known or available to the petitioner. The draft below implements these suggestions. Team 4 would also replace "place" of residence in subdivision (c)(1) with "state and county" of residence. The staff does not believe that this change is needed. Furthermore, the last known place of residence may not have been in a state or county but in a territory of the United States or a foreign country.

To deal with these proposed revisions, the staff would revise Section 12404 as follows:

12404. (a) A petition may be filed in the court having jurisdiction under Section 12403 for the administration of the estate of a missing person.

(b) The petition may be filed by any ~~one or more of the following:~~

- ~~(1) The spouse of the missing person.~~
- ~~(2) A relative of the missing person.~~

~~(3) A person interested in the estate of the missing person who is entitled to appointment as a personal representative.~~

(c) In addition to the matters otherwise required in a petition for administration of the estate, the petition shall state all of the following, so far as known or available to the petitioner:

(1) The last known place of residence and the last known address of the missing person.

(2) The time and circumstances ~~of the person's disappearance~~ when the missing person was last seen or heard from.

(3) That the missing person has not been seen or heard from by the persons [most] likely to ~~hear~~ have seen or heard from the missing person (naming them and their relationship to the missing person) for a period of five years and that the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any the search or the inquiry made concerning the whereabouts of the missing person.

§ 12405. Notice of hearing

Mr. Stuart D. Zimring finds fault with the manner in which registered and certified mail are dealt with in this section and the Probate Code. (Exhibit 13, second page.) This is a general problem that we will flag for further consideration when we have the whole Probate Code before us.

§ 12406. Determination whether person is person presumed to be dead; search for missing person

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section proposes to delete "reasonably" from subdivision (b). (Exhibit 23, item 5.) This does not appear to be a substantive change, and probably makes more sense. As revised, the first part of subdivision (b) would read:

12406.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a ~~reasonably~~ diligent search and to report the results of the search. The court may order the search to be made in any manner that seems advisable, including any or all of the following methods:

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§ 12408. Recovery of property by missing person upon reappearance

Mr. J. Earle Norris, writing on behalf of Ticor Title Insurance, proposes that bona fide purchasers for value be protected from the reach of a reappearing missing person. (Exhibit 22.) The staff believes that this is the law. This matter should be handled either by a comment or in the same manner as other provisions where there is distributee liability.

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section suggests the elimination of the language relating to fraud and intentional wrongdoing in subdivision (b). (See Exhibit 23, item 6.) Team 4 would also add language to subdivision (c). The staff would implement these suggestions as follows:

12408. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that recovery from distributees is equitable in view of all the circumstances, but an action under this paragraph is forever barred five years after the time the distribution was made.

(b) The remedies available to the missing person under subdivision (a) are in addition to any remedies available to the missing person by ~~reason of fraud or intentional wrongdoing~~.

(c) Except as provided in subdivisions (a) and (b), the order for final distribution, when it becomes final, is conclusive as to the rights of the missing person and the rights of the heirs and devisees of the missing person, and the rights of all other persons interested in the estate.

(d) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under [Probate Code Section 1080], notwithstanding the limitations of time prescribed in [Probate Code Section 1080], for the determination of the identity of the person claiming to be the reappearing missing person.

§ 12409. Application of part

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section states that it does not understand the reference to December

31, 1983, in this section governing the application of the statute. As noted in the comment:

The reference to December 31, 1983, continues the operative date provision applicable to former Probate Code Sections 1350-1359, because this part continues the substance of the former provisions and makes no substantive change that would require a separate operative date.

By the time this revised statute becomes operative, it will probably not be important to retain this transitional provision. However, we will need to consider whether this revised statute should be limited to a prospective effect, if it is sufficiently different from its predecessor.

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

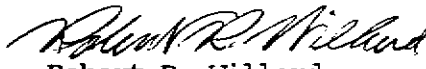
Gentlemen:

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
SUTTER PLAZA, SUITE 605
1300 SUTTER STREET
SAN FRANCISCO, CA. 94109-5416
(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.

ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD,
#L-1035, Sept. 1986

It is recommended that there be added to §12404 Petition
for Administration a paragraph (4) to subdivision (b) as
follows:

(4) A Public Administrator.

Where others do not petition to establish one as a missing
person, the Public Administrator should be authorized to do
so, all other things being appropriate. The Public
Administrator is not a person interested in the estate
and would not be authorized under paragraph (3).

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 94521

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:

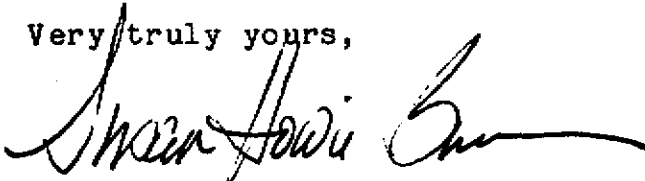
I have no comment with regard to most of the tentative recommendations relating to probate law, as most appear both necessary and useful.

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

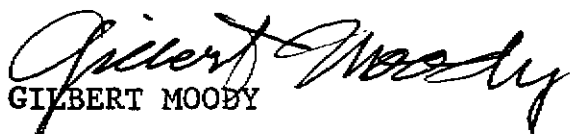
Likewise, I do not think the Public Administrator's fees for conserving an estate should be increased to \$350.00, and I don't think there should be any standard fee; that they should be required to apply to the court for an allowance after proper notice according to the time and trouble they have had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

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

LAW OFFICES OF
CHANDLER, BRUNER & RICKS
PROFESSIONAL CORPORATION
BEST BUILDING, 1330 EAST 14TH STREET
SAN LEANDRO, CALIFORNIA 94577-4751
(415) 483-1444

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

A. W. BRUNER (1901-1962)

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

LAW OFFICES

HOUSER & SANBORN

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

EVERETT HOUSER
WARREN L. SANBORN

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 "resasonable 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
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

R. J. KILPATRICK
STERLING S. CLAYTON
DONALD W. MEYER
PHILIP M. MADDEN
STEVEN A. JONES
MONTGOMERY COLE
SCOTT M. KOPPEL
TERENCE KILPATRICK

200 PINE AVENUE, SUITE 606
POST OFFICE BOX 2210
LONG BEACH, CALIFORNIA 90801-2210
(213) 435-6565
(213) 775-3206

October 22, 1986

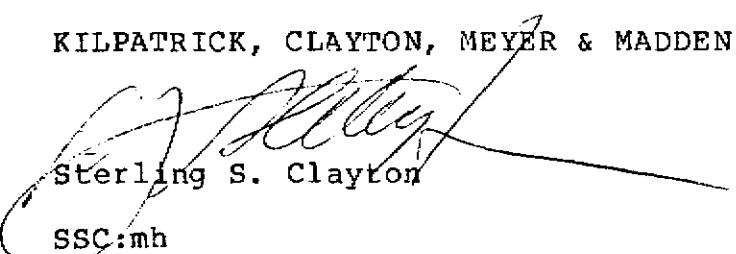
Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4200 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

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

HOFFMAN
SABBAN &
BRUCKER

LAWYERS

450 North
Roxbury Drive
Suite 606
Beverly Hills
California 90210
(213) 274-1152

October 28, 1986

Mr. John De Mouilly
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendations Relating to Probate Law

Dear Mr. De Mouilly:

I have several comments relating to the newly released tentative recommendations.

Study L-1035 (Missing Persons):

The provisions deal only with a person who is not heard from for five years. My only experience with this section has been a couple who mysteriously disappeared on the day before they were to testify before a grand jury. The court issued an order approximately six months later determining that the couple had died on the date of their disappearance, despite the fact that the bodies were never located. I have heard of other incidents of a similar nature. Also, I expect that there are other comparable situations (such as where a person takes a private plane or small boat on a trip, and a portion of the wreckage is discovered but the bodies are never found).

It appears that in appropriate circumstances, the courts are willing to make a finding of death (based on adequate evidence) before the end of the five-year period mentioned in the statute. These cases should be taken into account in such provisions as Section 12404(c)(3) and, in particular, Section 12401.



Mr. John De Mouilly
October 28, 1986
Page 2

Study L-800 - Non-resident Decedents.

Recognition should be given to the fact that non-U.S. persons often have multiple wills, one for their U.S. property and another for their foreign property.

Study L-1045 - Preliminary Provisions.

Section 28 (dealing with community property) should be amended to deal with the "bicoastal marriage," where one spouse lives in California and the other spouse lives in another state. Under current law, the non-resident spouse receives a half interest in the resident spouse's earnings, while the non-resident spouse's property remains separate property under the laws of that spouse's domicile. This could create a problem if the spouses later move to a separate property state which does not recognize quasi-community property. Also, if the non-resident spouse dies, or if the parties acquire joint property, or upon a divorce, an unequal result could obtain.

Very truly yours,

Paul Gordon Hoffman

PGH:bd

DIETRICH, GLASRUUD & JONES

AN ASSOCIATION INCLUDING LAW CORPORATIONS

ATTORNEYS AT LAW

5250 NORTH PALM AVENUE, SUITE 402

FRESNO, CALIFORNIA 93704

TELEPHONE (209) 435-5250

October 28, 1986

RICHARD W. DIETRICH
DONALD H. GLASRUUD
VREELAND O. JONES
ROBERT A. MALLEK, JR.
RICHARD E. AUNE
PHILIP J. NORGAAARD
MYRON F. SMITH
STAN M. CARDENAS
TIMOTHY J. BUCHANAN
MICHAEL W. MOSS
KEVIN B. BRIGGS
TRACIE E. DUDLEY
BRUCE A. OWDOM
JOHN D. HAMES

R. W. DIETRICH
LAW CORPORATION
DONALD H. GLASRUUD
LAW CORPORATION
VREELAND O. JONES
LAW CORPORATION
ROBERT A. MALLEK, JR.
LAW CORPORATION
RICHARD E. AUNE
LAW CORPORATION

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

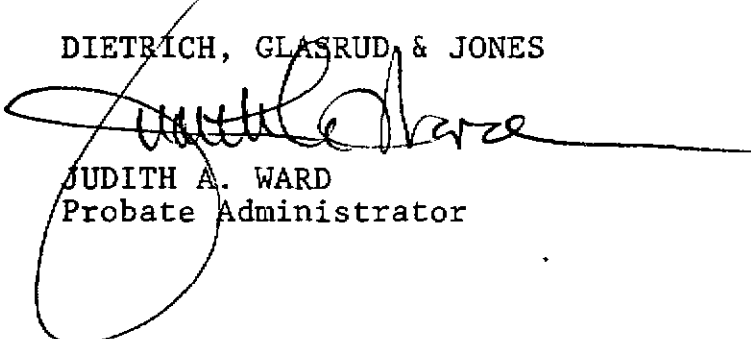
October 28, 1986
Page Two

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

A PROFESSIONAL CORPORATION

12650 RIVERSIDE DRIVE

NORTH HOLLYWOOD, CALIFORNIA 91607-3492

(213) 877-0683 • (818) 984-3950

OF COUNSEL
JUSTIN GRAF
MANYA BERTRAM

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

WILLIAM LEVIN
HARMON R. BALLIN
JAY J. PLOTKIN
STUART D. ZIMRING
NANCY O. MARUTANI
GIG KYRIACOU

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

Administration of Estates of Missing Persons Presumed Dead

1. Section 12405. There must be a more intelligent way to cross-reference registered and certified mail than to use the word "registered" throughout the Code and then have another section which says "registered mail", includes "certified". Perhaps simply providing that notices are to be sent by mail "as provided in this Code" and then mandating in Section 5 that all notices must be sent by certified mail will solve the problem.

NICHOLS, STEAD, BOILEAU & LAMB

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

THE FIRST INTERSTATE BANK OF CALIFORNIA

315 POMONA MALL WEST, SUITE 400

POMONA, CALIFORNIA 91766

TELEPHONE (714) 623-1441

E. BURDETTE BOILEAU
RAYMOND G. LAMB
JAMES R. KOSTOFF
DONALD E. BOLLINGER
CURTIS W. MORRIS
MICHAEL D. SMITH
JAMES MORRIS
JUDITH OLSON LASKER
SANDRA R. RILEY
M. DANIEL SAYLOR
ROBIN WEEKS TROZPER

OF COUNSEL
ROBERT S. HICKSON

DONALD P. NICHOLS
(1901-1978)
CHARLES R. STEAD
(1901-1968)

TWX 910 581 1479

PLEASE REPLY TO:
P. O. BOX 2829
POMONA, CALIFORNIA 91769

November 10, 1986

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


Gentlemen:

We have been most appreciative of receiving drafts of tentative recommendations relating to the new Estate and Trust Code.

I feel the commission has done an outstanding job in clarifying and restating our Estate and Trust Law, but there are two questions that I would raise. With respect to provisions for missing persons, I would suggest that Section 12404(a)(2) "a relative of the missing person" be further identified as to who is to be construed as a "relative". Does this mean in-laws, "relatives by marriage", etc.?

Also, with respect to preliminary provisions and definitions, may I inquire as to whether Section 28(a) "acquired during the marriage" is meant to include assets received by inheritance which has heretofore always been treated as separate property of the receiving party.

Sincerely yours,


E. Burdette Boileau
NICHOLS, STEAD, BOILEAU & LAMB
A Professional Corporation

EBB/jh

STANLEY L. HAHN *
DAVID K. ROBINSON *
LOREN H. RUSSELL *
LEONARD M. MARANGI *
WILLIAM S. JOHNSTONE, JR. *
GEORGE R. BAFFA *
DON MIKE ANTHONY *
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WILLIAM K. HENLEY *
CLARK R. BYAM *
RICHARD L. HALL *
SUSAN T. HOUSE
CARL J. WEST
DIANNE H. BUKATA
GENE E. GREGG, JR.
R. SCOTT JENKINS
CHARLES J. GREAVES
DALE R. PELCH
WILLIAM S. GARR

*PROFESSIONAL CORPORATION

HAHN & HAHN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS
SUITE 900
301 EAST COLORADO BOULEVARD
POST OFFICE BIN B
PASADENA, CALIFORNIA 91109

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

RETIRED PARTNERS

EDWIN F. HAHN, JR.
A. HALE DINSMOOR
RICHARD G. HAHN

TELEPHONES

(818) 796-9123
(213) 681-6948

CABLE ADDRESS

HAHNLAU

TELECOPIER

(818) 449-7357

November 11, 1986

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:

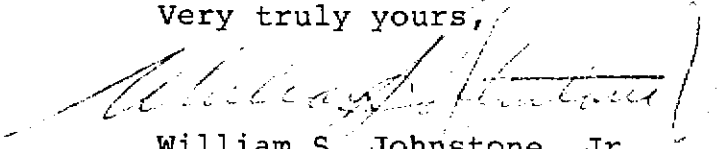
This letter is written with respect to solicited comments on a number of tentative recommendations relating to The New Estate and Gift Tax Code. The following comments are a composite of comments of our office's Probate Department to particular tentative recommendations.

Administration of Estates of Missing Persons Presumed Dead:

The proposed §12404 - Petition for Administration permits a petition to be filed for the administration of the estate of a missing person by any one or more of: the spouse of the missing person, a relative of the missing person, or a person interested in the estate of the missing person. We recommend that "a creditor of the missing person" be added as §12404(b)(3) to make it clear that a creditor may also file such a petition.

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?

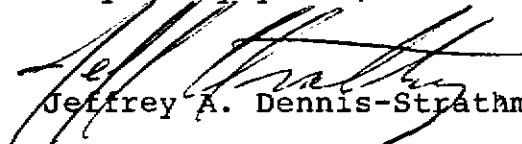
I suspect that the one-fourth of one percent fee bond is much higher than the actual cost to the county.

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.

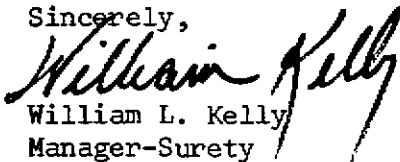
We have reviewed the latest set of recommendations (L-1040, L-800, L-1033, L-1035, L-1045) and are in general support of them.

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
AREA CODE 916

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-1035, "Administration of Estates of Missing Persons Presumed
Dead", is:

As a whole, I approve of this tentative recommendation.

* * * * *

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

10 CIVIC CENTER PLAZA
 MAILING ADDRESS: P.O. BOX 1379
 SANTA ANA, CALIFORNIA 92702-1379

714/834-3300

ADRIAN KUYPER
 COUNTY COUNSEL

WILLIAM J. McCOURT
 CHIEF ASSISTANT

ARTHUR C. WAHLSTEDT, JR.
LAURENCE M. WATSON
 ASSISTANTS

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.

Administration Of Estates Of Missing Persons Presumed Dead -
 No comments.

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

VICTOR T. BELLERUE	BARBARA L. STOCKER
JOHN R. GRISET	JAMES F. MEADE
EDWARD N. DURAN	STEFEN H. WEISS
IRYNE C. BLACK	SUSAN STROM
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R. DONALD MCINTYRE	PETER L. COHON
HOWARD SERBIN	NICHOLAS S. CHRISOS
DANIEL J. DIDIER	DAVID G. EPSTEIN
GENE AXELROD	THOMAS F. MORSE
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DONALD H. RUBIN	HOPE E. SNYDER
DAVID R. CHAFFEE	BRIAN PETRABORG
CAROL D. BROWN	

DEPUTIES

**Matthew Bender****Matthew Bender
& Company, Inc.**
2101 Webster Street
Post Office Box 2077
Oakland, CA 94604
(415) 446-7100

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.

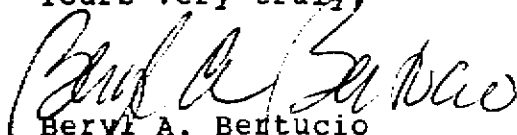
I like all the changes regarding administration of estates of missing persons. I agree that there is no reason to perpetuate different notice, hearing, or distribution waiting-period requirements for estates of missing persons. I also think the changes adopting the new general definition of interested 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. Bertucio
 Senior Legal Writer

cc George A. Meier

MACCARLEY, PHELPS & ROSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

MARK MACCARLEY
EDWARD M. PHELPS
WALTER K. ROSEN
RUTH A. PHELPS
DEBORAH BALLINS SCHWARZ
HARLAN L. BRANSKY

3800 ALAMEDA AVENUE, SUITE 1150
BURBANK, CALIFORNIA 91505-4331

TELEPHONES
(818) 841-2900
(213) 384-1234

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

MACCARLEY, PHELPS & ROSEN
A PROFESSIONAL CORPORATION

Comments to Tentative Recommendation
Relating to the New Estate and Trust Code
Administration of Estates of Missing
Persons Presumed Dead
L-1035
September, 1986

I read this tentative recommendation. I heartily endorse it as simplifying the handling of estates of missing persons. I approve this tentative recommendation.

Respectfully submitted,



Ruth A. Phelps

0612m

Memo 86-206

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.

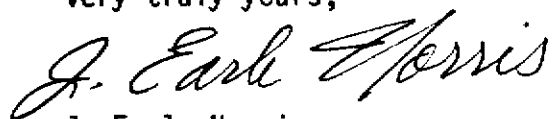
I apologize for the late response since I noticed that you requested comments no later than November 15, 1986. From the responses I have received from the Subcommittee members, it would not appear that there is anything in all of the studies that would cause any concern for the members of our industry.

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 that reads "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

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PROBATE LAW SECTION
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LLOYD W. HOMER, *Campbell*
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HUGH NEAL WELLS III, *Irvine*



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

Executive Committee
KATHRYN A. BALLSUN, *Los Angeles*
D. KEITH BILTER, *San Francisco*
OWEN C. FIORE, *San Jose*
JOHN A. GROMALA, *Eureka*
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CLARE H. SPRINGS, *San Francisco*
ANN E. STODDEN, *Los Angeles*
JAMES A. WILLETT, *Sacramento*
JANET L. WRIGHT, *Davis*
DIANE C. YU, *Oakland*

February 3, 1987

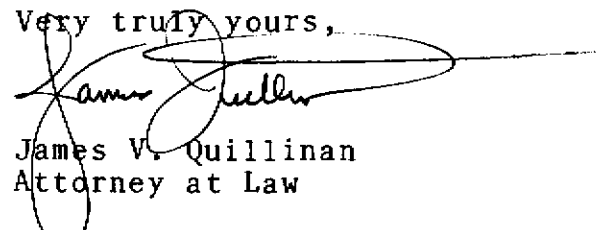
Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: LRC TR - Admin. of Estates of Missing Persons

Dear John:

I have enclosed a copy of Study Team 4's technical report on the TR for Administration of Estates of Missing Persons. 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.

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

STANTON AND BALLSUN

KATHRYN A. BALLSUN
PAUL L. STANTON
LESLIE K. STUART

A LAW CORPORATION
AVCO CENTER, SIXTH FLOOR
10860 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90024-4318
(213) 474-6257
TELEX/FAX (213) 474-1246

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January 30, 1987

FEB - 3 1987

Dinner, Schneider, Jeffers,
Lee & Quillman

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: LRC TR: Administration of Estates of Missing Persons

Dear Jim:

On January 22, 1987, Team 4 (Harley Spitler, William Hoisington, James Willett, Chuck Collier, Janet Wright and I) discussed LRC TR: Administration of Estates of Missing Persons. Team 4's comments about the above-referenced tentative documentation are as follows:

1. Section 12401.

Team 4 suggests that the first sentence of Section 12401 be restated as follows:

In a proceeding under this part, a person who has not been seen or heard from by the person most likely to have seen or heard from that person for a continuous period of five years and whose absence is not satisfactorily explained after diligent search or inquiry is presumed dead.

2. Section 12402.

Team 4 suggests that Section 12402 be restated as follows:

Subject to the provisions of this part, the estate of a missing person may be administered in the manner provided generally for the administration of estates of deceased persons.

3. Section 12403.

3.1 Team 4 suggests that Section 12403(a) be restated as follows:

(a) If the missing person was a resident of this state when last seen or heard from, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

3.2 Team 4 suggests that the first clause of Section 12403(b) be restated as follows:

(b) If the missing person was a nonresident of this state when last seen or heard from

4. Section 12404(c).

4.1 Team 4 suggests Section 12404(c)(1) be restated as follows:

(c)(1) The last known state and county of residence of the missing person and the last known address of the missing person.

4.2 Team 4 suggests that the petitioner's duty to provide the information required by Section 12404(c) be limited to the extent that such information is known by or available to the petitioner.

4.3 Team 4 suggests that the word "disappearance" be deleted from Section 12404(c)(2) and that "when the missing person was last heard from or seen" be substituted therefor.

4.4 Team 4 suggests that the first two lines of Section 12404(c)(3) be restated as follows:

(c)(3) That the missing person has not been seen or heard from by the persons most likely to have seen or heard from the missing person

James Quillinan, Esq.

Page 3

January 30, 1987

4.5 Team 4 suggests that Section 12404(c)(4) be restated as follows:

(c)(4) A description of the search or the inquiry made concerning the whereabouts of the missing person.

5. Section 12406.

Team 4 suggests that the word "reasonably" be deleted from the third line of Section 12406(b).

6. Section 12408.

6.1 Team 4 suggests the Section 12408(b) be restated as follows:

(b) The remedies available to the missing person under subdivision (a) are in addition to any other remedies available to the missing person.

6.2 Team 4 believes that the words "and all other persons interested in the property or estate" should be added after the word "devisees" in Section 12408(c).

7. Section 12409.

Team 4 does not understand the reference to December 31, 1983.

If Team 4 may be of further assistance, please do not hesitate to contact us.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN,
A Member of
STANTON and BALLSUN
A Law Corporation

KAB/kf

c: Richard Polse, Esq.
Harley Spitler, Esq.
Janet Wright, Esq.
Clare Springs, Esq.
William Hoisington, Esq.
Lloyd Homer, Esq.
Chuck Collier, Esq.
James Willett, Esq.
Irv Goldring, Esq.

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

THE NEW ESTATE AND TRUST CODE

ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

September 1986

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1987. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 15, 1986.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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

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09/05/86

LETTER OF TRANSMITTAL

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The ultimate goal is to submit a new Estate and Trust Code to the Legislature. The new code will replace the existing Probate Code.

Pending preparation of the entire new code, however, some revisions will be proposed in the existing Probate Code. This tentative recommendation sets forth the Commission's tentative conclusions relating to administration of estates of missing persons presumed dead, which would supersede Probate Code Sections 1350-1359.

The explanatory text of this tentative recommendation indicates the background of this proposal and indicates the principal revisions it would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other parts of the new code that are still being prepared and are not yet available.

A comment follows each section of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this tentative recommendation.

TENTATIVE RECOMMENDATION
relating to
ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

Existing law provides that a person who has been missing for five years is presumed dead,¹ and provides a procedure for administration of the missing person's estate.²

The new code continues this procedure with a few minor changes:

- The new code adopts the general four-month limitation on preliminary distribution of the estate³ in place of the one-year delay of distribution applicable under existing law.⁴ This change is made in the interest of uniformity. In view of the length of time that must pass before the missing person's property can be distributed, the additional eight months' delay provided by existing law is not a necessary protection. In addition, a missing person who reappears may recover his or her property or its value from distributees to the extent it would be equitable at any time until five years after the distribution.

- Existing law permits the spouse, a member of the missing person's family, an interested person, or a friend of the missing person to petition for administration.⁵ The new code requires that friends show that they have a right in or claim against the estate.⁶ This is consistent with the general approach of granting persons with an interest in a matter the right to petition.

1. Prob. Code § 1351.

2. Prob. Code §§ 1350-1359. These sections were enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982).

3. See the discussion under [] *supra*.

4. Prob. Code § 1352.

5. Prob. Code § 1354.

6. See Prob. Code § 48.

- The three-month hearing date and 90-day publication provision of existing law⁷ are not continued in the new code. Hearing dates and notices are governed by general provisions.⁸

- Under existing law, the petitioner is liable for the cost of a search for the missing person where there is no administration; the estate is liable if there is administration.⁹ The new code makes the estate presumptively liable, but permits the court in its discretion to order the petitioner to pay the costs of a search if there is no administration. This rule recognizes that the person whose status as a missing person has necessitated the search should be liable for the cost of the search in the normal case.

7. See Prob. Code § 1355.

8. See the discussion under [] *supra*.

9. Prob. Code § 1356(c).

OUTLINE OF STATUTE

PART 12. ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

- § 12400. "Missing person" defined
- § 12401. Presumption of death for purposes of administration
- § 12402. Manner of administration of missing person's estate
- § 12403. Jurisdiction of court
- § 12404. Petition for administration
- § 12405. Notice of hearing
- § 12406. Determination whether person is person presumed to be dead;
search for missing person
- § 12407. Appointment of personal representative and determination of
date of disappearance
- § 12408. Recovery of property by missing person upon reappearance
- § 12409. Application of part

PART 12. ADMINISTRATION OF ESTATES OF MISSING
PERSONS PRESUMED DEAD

§ 12400. "Missing person" defined

12400. Unless the provision or context otherwise requires, as used in this part, "missing person" means a person who is presumed to be dead under Section 12401.

Comment. Section 12400 continues former Probate Code Section 1350 without substantive change.

§ 12401. Presumption of death for purposes of administration

12401. In proceedings under this division, a person who is absent for a continuous period of five years, during which time the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

Comment. Section 12401 continues former Probate Code Section 1351 without change. Section 12401 is the same in substance as Uniform Probate Code Section 1-107(3) (1977). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

§ 12402. Manner of administration of missing person's estate

12402. The estate of a missing person may be administered, as though the person were dead, in the manner provided generally for the administration of estates of deceased persons, subject to the provisions of this part.

Comment. Section 12402 continues former Probate Code Section 1352 without substantive change, except that the former provision delaying distribution of property until one year after appointment and qualification of the personal representative is not continued. The general four-month limitation on preliminary distribution applies to distribution under this part. See Section []. In addition, the reference to distribution of the estate is omitted; administration of the estate includes distribution. See Section []. See also Section 12408 (recovery of property by missing person upon reappearance).

CROSS-REFERENCES

Definitions

Missing person § 12400
Personal representative § 58

§ 12403. Jurisdiction of court

12403. (a) If the missing person was a resident of this state at the time of the person's disappearance, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state at the time of the person's disappearance, the superior court of a county where real property of the missing person is located, or of a county where personal property is located if the missing person has no real property in this state, has jurisdiction for the purposes of this part.

Comment. Section 12403 restates former Probate Code Section 1353 without substantive change.

CROSS-REFERENCES

Definitions

Missing person § 12400
Personal property § 57
Real property § 68

Note. The general venue rules will be reviewed to see whether they should be made consistent with this section.

§ 12404. Petition for administration

12404. (a) A petition may be filed in the court having jurisdiction under Section 12403 for the administration of the estate of a missing person.

(b) The petition may be filed by any one or more of the following:

- (1) The spouse of the missing person.
- (2) A relative of the missing person.
- (3) A person interested in the estate of the missing person.

(c) In addition to the matters otherwise required in a petition for administration of the estate, the petition shall state all of the following:

- (1) The last known place of residence of the missing person.
- (2) The time and circumstances of the person's disappearance.

(3) That the missing person has not been heard from by the persons most likely to hear (naming them and their relationship to the missing person) for a period of five years and the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any search or inquiry made concerning the whereabouts of the missing person.

Comment. Section 12404 restates former Probate Code 1354(a)-(c) without substantive change, except as noted. The reference to probate of the will in former Probate Code Section 1354(a) is eliminated as surplusage in light of Section 8000 (petition for administration). The list of persons who may petition under former Probate Code Section 1354(b) has been revised by referring to a "relative" instead of "member of the family" and deleting the reference to a friend of the missing person. The first change is not substantive; the second change means that a friend may petition only if he or she is an interested person. Pursuant to subdivision (c) and Section 12402, the general requirements for a petition for administration of the estate (see Section 8002) are applicable. Subdivision (b) does not affect the order of priority of appointment of an administrator; this is controlled by provisions governing administration generally. See, e.g., Sections 8441 (priority for appointment of administrator with will annexed), 8446 (priority for appointment of administrator).

CROSS-REFERENCES

Definitions

Interested person § 48

Missing person § 12400

Verification required § 7203

§ 12405. Notice of hearing

12405. Notice of hearing shall be served and published, and proof made, in the same manner as in proceedings for administration of the estate of a decedent, except that notice of hearing on the petition shall also be sent by registered mail to the missing person at his or her last known address.

Comment. Section 12405 supersedes former Probate Code Section 1355. Section 12405 no longer provides for a three-month hearing date or a 90-day publication provision.

CROSS-REFERENCES

Certified mail equivalent of registered mail § 5

Clerk to set matter for hearing § 7202

Definition

Missing person § 12400

§ 12406. Determination whether person is person presumed to be dead;
search for missing person

12406. (a) At the hearing, the court shall determine whether the alleged missing person is a person who is presumed to be dead under Section 12401. The court may receive evidence and consider the affidavits and depositions of persons likely to have heard from or know the whereabouts of the alleged missing person.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a reasonably diligent search and to report the results of the search. The court may order the search to be made in any manner that seems advisable, including any or all of the following methods:

(1) Inserting in one or more suitable newspapers or other periodicals a notice requesting information from any person having knowledge of the whereabouts of the missing person.

(2) Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person.

(3) Engaging the services of an investigator.

(c) The costs of a search ordered by the court pursuant to subdivision (b) shall be paid by the estate of the missing person, but if there is no administration, the court in its discretion may order the petitioner to pay the costs.

Comment. Subdivisions (a) and (b) of Section 12406 restate former Probate Code Section 1356(a) and (b) without substantive change. The reference in subdivision (b)(1) to newspapers is new; this is not a substantive change. Subdivision (c) replaces former Probate Code Section 1356(c) which required that costs be paid by the petitioner, if there was no administration, or by the estate, if there was administration. The new rule makes the estate presumptively liable for costs, but gives the court discretion to order the petitioner to pay costs if there is no administration.

CROSS-REFERENCES

Definition

Missing person § 12400

§ 12407. Appointment of personal representative and determination of date of disappearance

12407. (a) If the court finds that the alleged missing person is a person presumed to be dead under Section 12401, the court shall do both of the following:

(1) Appoint a personal representative for the estate of the missing person in the manner provided for the estates of deceased persons.

(2) Determine the date of the missing person's death.

(b) The personal representative shall administer the estate of the missing person in the same general manner and method of procedure, and with the same force and effect, as provided for the administration of the estates of deceased persons, except as otherwise provided in this part.

Comment. Section 12407 restates former Probate Code 1357 without substantive change. See also Sections 12401 (death presumed at end of five-year period unless sufficient evidence of earlier death), 12402 (manner of administration and distribution).

CROSS-REFERENCES

Definitions

Missing person § 12400

Personal representative § 58

§ 12408. Recovery of property by missing person upon reappearance

12408. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that recovery from distributees is equitable in view of all the circumstances, but an action under this paragraph is forever barred five years after the time the distribution was made.

(b) The remedies available to the missing person under subdivision (a) are in addition to any remedies available to the missing person by reason of fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the order for final distribution, when it becomes final, is conclusive as to the

rights of the missing person and the rights of the heirs and devisees of the missing person.

(d) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under [Probate Code Section 1080], notwithstanding the limitations of time prescribed in [Probate Code Section 1080], for the determination of the identity of the person claiming to be the reappearing missing person.

Comment. Section 12408 restates former Probate Code 1358 without substantive change, except that the five-year period for recovery of property under subdivision (a)(2) runs from the date of distribution rather than the date the petition was filed. In addition, the term "beneficiaries" is substituted for "heirs and devisees" in subdivision (c). This is a nonsubstantive change.

Subdivisions (a) and (b) are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code (1977), which was revised to add a provision barring an action under paragraph (a)(2) five years after distribution under Section 12404. This additional provision continues the general effect of the parts of former Probate Code Sections 287-292 (the statute in effect before former Probate Code Sections 1350-1359) that gave a distribution conclusive effect after the missing person had been missing 10 years.

Subdivision (c) is consistent with Section [] (effect of an order for final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey good title to property of the missing person before the time an action by the missing person against the distributee would be barred under subdivision (a)(2). This is because subdivision (c) provides a rule that the order for final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a)(2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a)(2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a)(2), the reappearing missing person might recover from the distributee the property subject to the encumbrance.

Subdivision (d) was drawn from a portion of former Probate Code Section 287, the predecessor of former Probate Code Section 1358(d).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Devisee § 34

Heirs § 44

Missing person § 12400

Personal representative § 58

Property § 62

§ 12409. Application of part

12409. (a) This part applies only to cases where a petition is filed under Section 12404 of this code, or under former Section 1354 of the Probate Code, after December 31, 1983. If a petition is filed under Section 12404 of this code, or under former Section 1354 of the Probate Code, the required period of absence of the alleged missing person may include a period of absence that commenced to run before the operative date of the section.

(b) This part does not apply to any proceeding under former Sections 280 to 294, inclusive, of the Probate Code that was pending on December 31, 1983, and the law that applied to that proceeding on December 31, 1983, continues to apply after that date.

Comment. Subdivision (a) of Section 12409 restates former Probate Code 1359 without substantive change, but also makes clear that this part applies to petitions filed pursuant to former Probate Code Sections 1350-1359.

Subdivision (b) has the same effect as subdivision (b) of former Probate Code Section 1359.

The reference to December 31, 1983, continues the operative date provision applicable to former Probate Code Sections 1350-1359, because this part continues the substance of the former provisions and makes no substantive change that would require a separate operative date.

CROSS-REFERENCES

Definition

Missing person § 12400

COMMENTS TO REPEALED SECTIONS

CHAPTER 24. ADMINISTRATION OF MISSING PERSONS PRESUMED DEAD

Probate Code § 1350 (repealed). "Missing person" defined

Comment. Former Section 1350 is restated in Estate and Trust Code Section 12400 ("missing person" defined) without substantive change.

Probate Code § 1351 (repealed). Presumption of death for purposes of administration

Comment. Former Section 1351 is continued in Estate and Trust Code Section 12401 (presumption of death for purposes of administration) without change.

Probate Code § 1352 (repealed). Manner of administration and distribution

Comment. Former Section 1352 is restated without substantive change in Estate and Trust Code Section 12402 (manner of administration and distribution of missing person's estate), except that the one-year delay of distribution is not continued. Under Estate and Trust Code Section 12402, the general four-month limitation on preliminary distribution applies. The reference to distribution of the estate is also omitted; distribution is continued in administration under Estate and Trust Code Section 12402.

Probate Code § 1353 (repealed). Jurisdiction of court

Comment. Former Section 1353 is restated in Estate and Trust Code Section 12403 (jurisdiction of court) without substantive change.

Probate Code § 1354 (repealed). Petition for administration or probate

Comment. Subdivisions (a)-(c) of former Section 1354 are restated in Estate and Trust Code Section 12404 (petition for administration) without substantive change, except that (1) the reference to probate of the missing person's will is omitted as unnecessary in light of Estate and Trust Code Section 8000 (petition for administration), (2) "relative" is substituted for "member of the family", and (3) the reference to a friend of the missing person is not continued. Subdivision (d) is restated and generalized in Estate and Trust Code Section 7203 (verification required).

Probate Code § 1355 (repealed). Time for hearing; notice of hearing

Comment. Former Section 1355 is replaced by Estate and Trust Code Section 12405 (notice of hearing). Section 12405 no longer provides for a three-month hearing date or a 90-day publication provision.

Probate Code § 1356 (repealed). Determination whether person is person presumed to be dead; search for missing person

Comment. Subdivisions (a) and (b) of former Section 1356 are restated in Estate and Trust Code Section 12406(a) and (b) (determination whether person is person presumed to be dead; search for

missing person) without substantive change. Subdivision (c) is replaced by Estate and Trust Code Section 12406(c).

Probate Code § 1357 (repealed). Appointment of executor or administrator and determination of date of disappearance

Comment. Former Section 1357 is restated in Estate and Trust Code Section 12407 (appointment of personal representative and determination of date of disappearance) without substantive change.

Probate Code § 1358 (repealed). Recovery of property by missing person upon reappearance

Comment. Former Section 1358 is restated in Estate and Trust Code Section 12408 (recovery of property by missing person upon reappearance) without substantive change, except that the five-year period runs from the time of distribution rather than the time of the petition and the term "beneficiaries" is substituted for "heirs and devisees."

Probate Code § 1359 (repealed). Application of chapter

Comment. Former Section 1359 is restated in Estate and Trust Code Section 12409 (application of part) without substantive change.