MINUTES OF MEETING

CALIFORNIA LAW REVISION COMMISSION

APRIL 10, 2008

SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 10, 2008.

Commission:

Present: Sidney Greathouse, Chairperson

Diane F. Boyer-Vine, Legislative Counsel

Susan Duncan Lee Edmund L. Regalia William E. Weinberger

Absent: Pamela L. Hemminger, Vice Chairperson

Ellen Corbett, Senate Member Noreen Evans, Assembly Member

Frank Kaplan

Staff: Brian Hebert, Executive Secretary

Barbara S. Gaal, Chief Deputy Counsel

Catherine Bidart, Staff Counsel Steve Cohen, Staff Counsel

Consultants: None

Other Persons:

David Baer, State Bar Trusts and Estates Section Jason Davis, National Rifle Association

Neil I. Horton, State Bar Trusts and Estates Section

Paul S. Levine, Venice

Lindsay Nichols, Legal Community Against Violence

Sean Rashkis, Protection & Advocacy, Inc.

Andrew Slade, Davis

Mary Pat Toups, Laguna Woods

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MINUTES OF FEBRUARY 14, 2008, COMMISSION MEETING

The Commission approved the Minutes of the February 14, 2008, Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

Report of Executive Secretary

The Executive Secretary reported that the Commission's proposed budget for Fiscal Year 2008-09 was approved by the Senate Budget Subcommittee #4 on April 9, 2008.

Mary Pat Toups addressed the Commission, describing her recent efforts on behalf of AB 250 (DeVore), which would implement the Commission's recommendation on *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006).

The Executive Secretary recognized Andrew Slade, a student at the U.C. Davis School of Law, who is assisting the Commission as part of an academic externship.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 2008-11 and its First Supplement, discussing the Commission's 2008 Legislative Program. The Commission also considered an email from John Raniseski, of Sun City Roseville, which is attached to the Second Supplement to Memorandum 2008-11.

The Commission ratified the changes to AB 1921 (Saldaña), SB 1264 (Harman), and SB 1691 (Lowenthal) described in the materials, and approved the recommended changes to Commission Comments.

STUDY L-622 — DONATIVE TRANSFER RESTRICTIONS

The Commission considered Memorandums 2008-13 and its First Supplement, 2008-14, 2008-15 and its First Supplement, and 2008-18, relating to donative transfer restrictions under Probate Code Sections 21350-21356.

The Commission directed the staff to prepare a draft tentative recommendation, for consideration at a future meeting, based on prior decisions made in connection with this study and the following new decisions:

Definition of "Care Custodian"

The term "care custodian" should be limited to a person who provides care services professionally or occupationally, for compensation. The compensation need not be paid by the recipient of the services. The staff will explore whether the type of services provided should be limited to health-related services or should also include "social" services, such as cleaning or transportation.

The proposed law should make clear that a for-profit legal entity can be a "care custodian."

Definition of "Dependent Adult"

The term "dependent adult" should mean a person who is eligible for appointment of a conservator under the standard provided in Probate Code Section 1801(a)-(b).

Timing of Care Custodian Relationship

The care custodian provision of the proposed law should only affect a gift executed during the existence of a care custodian relationship. A gift to a care custodian that is executed before commencement of the care custodian relationship or after termination of the care custodian relationship should not be affected by the care custodian provision.

The duration of a care custodian relationship should not affect the operation of the proposed law. The proximity of the date of the transferor's death to the date on which a donative instrument is executed should not affect the operation of the proposed law.

Derivative Disqualification of Business Associates

The derivative disqualification of a business entity in which a disqualified person has an economic interest should not be expanded beyond the scope of existing Probate Code Section 21350(a)(3).

Persons Related by Blood or Marriage

The draft will include a single definition of "blood or marriage" along the lines recommended by the staff, while preserving the existing distinction between the scope of derivative disaqualification of a relative of a disqualified person (third degree of kinship) and the exemption of a relative of the transferor (fifth degree of kinship). The draft tentative recommendation will solicit comment on whether those scope rules should be adjusted.

In drafting the definition, the staff will consider whether special rules should be stated for former spouses and domestic partners and predeceased spouses and domestic partners.

The term "heir" will not be used in defining "related by blood or marriage."

The exception for an instrument drafted by a relative will be extended to include an instrument transcribed by a relative who is also a fiduciary of the transferor.

Provisions defining the meaning of "degree of kinship" will be added to the proposed law as general provisions of the Probate Code, along the lines recommended by the staff.

Cohabitant

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The proposed law will make clear that the definition of "cohabitant" applies to all uses of the term in the proposed law.

Gift by Conservator

The proposed law will continue the existing exception for a gift made by a conservator.

Gift to Nonprofit

The proposed law will continue the existing exception for a gift made to a nonprofit.

Small Gift

The proposed law will continue the existing exception for a small gift. The provision will be clarified and the small gift amount will be increased to \$5,000.

Instrument Drafted Outside of California by Nonresident

The proposed law will continue the existing exception for an instrument drafted outside of California by a nonresident.

Interested Witness

The proposed law will incorporate the substance of Probate Code Section 6112. Section 6112 will be replaced with a provision cross-referring to Section 21350.

Independent Attorney Certification

The proposed law will authorize an attorney who drafts a donative instrument making a gift to a care custodian, who is independent of any interest in the beneficiary, to certify that the gift is not the product of fraud or undue influence.

The meaning of "independence" from the interests of a beneficiary will be defined using language borrowed from California Rules of Professional Conduct 3-310(b)(1) & (3).

Rebuttal of Statutory Presumption of Fraud or Undue Influence

The burden of proof to rebut the statutory presumption of fraud or undue influence will be changed, from clear and convincing evidence to a preponderance of the evidence.

The proposed law will not continue the rule precluding rebuttal when the only evidence is the testimony of the beneficiary.

The proposed law will not continue the existing limitations on who may rebut the presumption.

STUDY M-300 – NONSUBSTANTIVE REORGANIZATION OF DEADLY WEAPON STATUTES

The Commission considered Memorandums 2007-59, 2008-16, and 2008-17, relating to nonsubstantive reorganization of the deadly weapon statutes. The Commission made the following decisions:

Judicial Decisions Interpreting or Determining the Constitutionality of Provisions in Title 2

The Commission continues to agree with the approach it adopted in April 2007. If a provision has been invalidated by the court of last resort, then it should not be continued in the Commission's proposed nonsubstantive reorganization of the deadly weapon statutes. Short of that, the provision should be included in the proposed legislation but (1) the Commission's report should make clear that the Commission has not passed judgment on its constitutionality or the

- 1 correctness of any judicial decision interpreting it, and (2) the proposed
- 2 legislation should include an uncodified provision to similar effect.

Penal Code Section 12131

- As detailed at pages 6-7 of Memorandum 2008-17, the Commission would appreciate input from knowledgeable persons regarding the status of the two versions of Penal Code Section 12131 shown in West's 2008 Desktop Edition of
- 7 the Penal Code.

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References to "Pistol, Revolver, or Firearm Capable of Being Concealed Upon the Person"

In the nonsubstantive reorganization, references to "pistol, revolver, or firearm capable of being concealed upon the person" should be left as is. The possibility of replacing such references with the term "handgun" should be included in the list of "Minor Clean-up Issues for Possible Future Legislative Attention."

Placement of Definitions

In general, definitions should be placed in "Division 2. Definitions" of "Title 1. Preliminary Provisions" of new Part 6 of the Penal Code. Some deviations from this rule may be appropriate, particularly when a commonplace word is defined only for purposes of a particular provision. The staff should use its discretion in determining where to place each definition, subject to subsequent review by the Commission. Statutory cross-references may be useful in some instances.

The staff should discuss with Legislative Counsel the possibility of putting each defined term in quotes every time it is used in the statutes to which the definition applies. If Legislative Counsel is open to that approach, the staff should experiment with it in future drafts for the Commission.

Definitions of "Pistol" and "Revolver"

The possibility of defining "pistol" and "revolver" should be added to the list of "Minor Clean-up Issues for Possible Future Legislative Attention." At present, the terms are not separately defined in Title 2 of Part 4 of the Penal Code. Section

1 12001(a)(1) specifies characteristics of any "pistol, revolver, or firearm capable of
2 being concealed upon the person," but it does not differentiate a "pistol" from a
3 "revolver."

Date

APPROVED AS SUBMITTED

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

Executive Secretary