

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 5, 6, AND 7, 1978

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on January 5, 6, and 7, 1978.

Present: Howard R. Williams, Chairman
Beatrice P. Lawson, Vice Chairman
Jean C. Love
John N. McLaurin, January 5 and 7
John D. Miller
Thomas E. Stanton, Jr., January 5 and 6
Laurence N. Walker

Absent: George Deukmejian, Member of Senate
Alister McAlister, Member of Assembly
Bion M. Gregory, Ex Officio

Members of Staff Present:

John H. DeMouilly	Nathaniel Sterling
Stan G. Ulrich	Robert J. Murphy III

Consultant Present:

Garrett H. Elmore, Guardianship-Conservatorship,
January 5 and 6

The following person was present as observer on January 5:

Ronald P. Denitz, Tishman West Management Corp., Los Angeles

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ADMINISTRATIVE MATTERS

Minutes of November Meeting Approved

The Minutes of the meeting of November 3 and 4, 1977, were approved as submitted by the staff.

Schedule for Future Meetings

The following schedule for future meetings was approved:

February

February 2 - 7:00 p.m. - 10:00 p.m. San Francisco
February 3 - 9:00 a.m. - 5:00 p.m.
February 4 - 9:00 a.m. - 12:00 noon

Note. This was later changed to omit the meeting on February 4 and the meeting on February 3 was scheduled to end at 4:00 p.m.

March

March 2 - 7:00 p.m. - 10:00 p.m. San Francisco
March 3 - 9:00 a.m. - 5:00 p.m.
March 4 - 9:00 a.m. - 12:00 noon

April

April 6 - 7:00 p.m. - 10:00 p.m. Los Angeles
April 7 - 9:00 a.m. - 5:00 p.m.

May

May 4 - 7:00 p.m. - 12:00 p.m. San Francisco
May 5 - 9:00 a.m. - 5:00 p.m.
May 6 - 9:00 a.m. - 12:00 noon

June

June 8 - 7:00 p.m. - 10:00 p.m. Los Angeles
June 9 - 9:00 a.m. - 5:00 p.m.

July

July 6 - 7:00 p.m. - 10:00 p.m. San Francisco
July 7 - 9:00 a.m. - 5:00 p.m.
July 8 - 9:00 a.m. - 4:00 p.m.

August--No Meeting

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STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP

The Commission considered Memorandum 77-82 and the attached staff draft of provisions relating to powers of a guardian or conservator of the estate which may be exercised without court approval, and the First Supplement to Memorandum 77-82 with attached views of four members of the State Bar Subcommittee of Guardianship and Conservatorship. The Commission concurred with Mr. William Johnstone that powers of guardians and conservators ought to be governed by consolidated provisions with exceptions in certain cases where powers should be limited to guardians only or to conservators only. The Commission also concurred with the view that there should be no distinction in the powers provisions between trust companies and individual fiduciaries and no distinction between large and small estates.

The Commission approved the approach of the staff draft which would allow the guardian or conservator to exercise powers of "ordinary management" without court approval, and would set forth a nonexclusive listing of the matters constituting "ordinary management." The Commission requested the staff to allow time for individual commissioners to submit additional matters for inclusion in the listing of powers constituting ordinary management (for example, the power to receive and endorse checks). The staff should then integrate the revised provisions into a complete draft of the powers and duties chapter and bring the complete chapter back to the Commission for review and approval.

The Commission then considered Memorandum 78-1 and the attached staff draft of the comprehensive statute (major portion), the First Supplement to Memorandum 78-1 discussing the comments contained in the letter from Judge Arthur K. Marshall, and the written comments of the Commission's consultant, Mr. Garrett H. Elmore. The Commission made the following decisions:

§§ 6-11 (general provisions)

The Commission approved the staff recommendation to put the general Probate Code provisions in a bill separate from the guardianship-conservatorship provisions and from the conforming revisions.

§ 1403. Absentee

Either the Comment to Section 1403 or a note thereunder should make cross-reference to the substantive provisions where the definition of "absentee" is used.

§ 1407. Address

The Commission approved the staff recommendation to delete proposed Section 1407 (defining "address" to mean mailing address) and to use the terms "mailing address" or "residence address" in the statute as appropriate.

§ 1409. Bank

The Commission tentatively decided to delete proposed Section 1409 (defining "bank" to mean a bank in this state) and to put "in this state" in the substantive provisions where necessary to continue existing law.

§ 1418. Court

There was some discussion that proposed Section 1418 might be unnecessary. The Commission deferred decision on the section, and requested the staff to identify each section where the word "court" is used in order to determine whether the definition might be useful.

§ 1451. Petitions, accounts, and inventories and appraisements to be verified

The Commission requested the staff to give additional consideration to proposed Section 1451. Does verification include making oaths (see proposed Section 2610)? How is an accounting verified? Is it attached to a verified petition or report, or is the accounting itself verified? What is the form of verification?

§ 1452. Setting petitions for hearing

The staff should reexamine proposed Section 1452 (clerk shall set petition for hearing) to insure that it does not preclude ex parte action on a petition and does not require a hearing on petitions which need not now be heard. See, e.g., existing Section 1506. Also, should proposed Section 1452 be broadened to apply to accounts, reports, and the like? See existing Section 1200.

§ 1453. Guardian ad litem

The Commission requested the staff to consider whether the provisions relating to a guardian ad litem (Code Civ. Proc. §§ 372-373.5) should be revised to require notice to the general guardian or conservator, if any, before appointment of a guardian ad litem. Such notice is not now required although the accepted practice is to disclose the existence of a general guardian in the petition for appointment of a guardian ad litem and to allege that the existing guardian fails to act. 3 B. Witkin, California Procedure Pleading § 58, at 1738 (2d ed. 1971).

§ 1460. Notice of hearing generally

As suggested by Judge Marshall in his letter, the Commission gave further consideration to the requirement in subdivision (b) of proposed Section 1460 that the clerk shall cause notice of hearing to be posted at the courthouse. The Commission decided to leave the posting requirement in Section 1460 for the time being and to call attention to the provision for comment when the tentative recommendation is sent out. The Commission also requested that attention be called to the provisions for notice to the ward if over 12, to the conservatee, and to the spouse of either unless the court dispenses with notice.

The Commission considered the advisability of adding a general provision to the effect that, where mailing of notice is authorized or required by statute and no specific provision is made as to the address to which the mailing is to be made, it shall be mailed to the last known mailing address. However, the Commission decided not to include such a provision for the time being and directed the staff to identify each section where mailing is authorized or required to determine whether such a general provision might be useful. See also Section 2312 (mailing of copy of order of appointment).

The Commission thus tentatively approved Section 1460 as drafted by the staff.

§ 1461. Notice to Director of Mental Health or Director of Developmental Services

The Commission tentatively approved the staff draft of Section 1461, with the caveat that the sections to which cross-reference is made

in paragraph (2) of subdivision (b) need to be carefully reviewed before the tentative recommendation is prepared.

§ 1462. Court may enlarge or shorten time for notice or require additional notice

The Commission tentatively approved the staff draft of Section 1462.

§ 1463. Form of notice

The Commission tentatively approved the staff draft of Section 1463.

§ 1464. Proof of giving of notice

The Commission determined that proposed Section 1464 should be revised substantially as follows:

1464. (a) Proof of the giving of notice under this division shall be made at or before the hearing by to the satisfaction of the court. Such proof may be made by, but is not limited to, the following means, as applicable:

~~(1)~~ Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

~~(2)~~ (1) Proof of notice by personal delivery may be made by the affidavit of the person making such delivery showing the ~~time, place, and manner~~ time and place of delivery, and the name of the person to whom delivery was made.

~~(3)~~ (2) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

~~(4)~~ (3) Proof of posting may be made by the affidavit of the person who posted the notice.

~~(5)~~ (4) Proof of publication may be made by the affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication.

(5) Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

(b) If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order, and such order, when it becomes final, is conclusive on all persons.

§ 1470. Definitions

Proposed Section 1470 was revised as follows:

1470. As used in this chapter:

(a) "Operative date" means the date this division becomes operative pursuant to Section 1471, January 1, 1981.

(b) "Prior law" means the applicable law as in effect prior to the operative date.

§ 1471. Operative date

Proposed Section 1471 was revised as follows:

1471. This division becomes operative on ~~July 1, 1980~~
January 1, 1981.

§ 1500. Appointment of testamentary guardian by parent

The lead line to proposed Section 1500 was revised to read, "Ap-
pointment of general testamentary guardian by parent."

§ 1510. Petition for appointment or confirmation

Subdivision (b) of proposed Section 1510 was revised substantially
as follows:

(b) The petition shall request that a guardian of the person
or estate of the minor, or both, be appointed or confirmed, shall
specify the proposed guardian, and shall state that such appoint-
ment or confirmation is necessary or convenient.

§ 1511. Notice of hearing

Subdivision (g) of proposed Section 1511 was revised as follows:

(g) Notice need not be given to any person if the court so
orders upon a determination that the ~~whereabouts~~ address of the
person is unknown or that for good reason the person cannot with
reasonable diligence be given the notice.

§ 1512. Order for temporary custody

Proposed Section 1512 was revised to shorten the phrase "court or
judge" to "court" in the three places it appears.

§ 1544. Report on suitability of guardian

In subdivision (a) of proposed Section 1544, the phrase "agency to
whom" was changed to "agency to which" The Commission also re-
quested that the Comment make cross-reference to the provisions of the
Health and Safety Code dealing with delegation of foster family home
licensure. See, e.g., Health & Saf. Code § 1511.

§ 1821. Contents of petition

Subdivision (a) of proposed Section 1821 was revised substantially
as follows:

(a) The petition shall request that a conservator be appointed for the person or estate, or both, shall specify the proposed conservator, and shall state the reasons why the appointment is required.

§ 1823. Citation to proposed conservatee

There was sentiment on the Commission for striking out the words "his or her" wherever they appear in the section. The staff was requested to rework the section.

§ 1824. Service on proposed conservatee of citation and petition

Proposed Section 1824 was revised as follows:

1824. The citation and a copy of the petition shall be served on the proposed conservatee at least 10 days before the hearing. Service shall be made in the manner provided in Section ~~415.10 or 415.30~~ 415.10, 415.30, or 415.40 of the Code of Civil Procedure or in such manner as may be authorized by the court.

§ 1829. Persons who may oppose petition

Proposed Section 1829 was revised as follows:

1829. Any officer or agency of this state or of the United States or the authorized delegate thereof, or any relative or friend of the proposed conservatee, or the proposed conservatee, may appear at the hearing and to support or oppose the petition.

The Comment should note that this language is added to make clear that the designated persons may support as well as oppose the petition. The lead line to the section should be revised accordingly.

§ 1831. Adjudication of conservatee's lack of legal capacity; withdrawing power to enter specified transactions

The Commission was of the view that the reference to Section 40 of the Civil Code in paragraph (1) of subdivision (a) of proposed Section 1831 was confusing. The staff was requested to redraft paragraph (1) so that it is consistent with Section 40 of the Civil Code without specifically referring to it.

Subdivision (b) of proposed Section 1831 was revised as follows:

(b) The order referred to in subdivision (a) may be included in the order of appointment of the conservator or may be made subsequently upon a petition filed, noticed, and heard in the same manner as a petition for appointment of a conservator. The terms of the order and of any modification thereof shall be included in the letters of conservatorship.

§§ 1850-1853 (biennial review of conservatorship)

The preliminary part should note that Chapter 2 (biennial review of conservatorship) of Part 3 has not been applied to guardianships since it is the apparent intent of existing Section 1500.1 (on which the chapter is based) to apply to guardianships of incompetent adults but not to guardianships of minors. The preliminary part should further note that the Commission has not made a policy decision as to the desirability of applying or not applying such provisions to guardianships of minors. Special attention should be called to this for comment when the tentative recommendation is sent out.

Proposed Section 1852 was revised as follows:

1852. If the conservatee wishes to petition the court for termination of the proceeding or for removal of the existing conservator, or if based on information contained in the court investigator's report or obtained from any other source, the court determines that a hearing or trial for such termination or removal is in the best interests of the conservatee, the court shall notify the attorney of record for the conservatee, if any, or shall appoint the public defender or other attorney to file the petition and represent the conservatee at the hearing or trial.

§ 1862. Notice of hearing

Proposed Section 1862 was revised substantially as follows:

1862. (a) At least 15 days before the hearing, a copy of the petition and of the notice of the time and place of the hearing shall be mailed ~~to:~~

~~(1) The conservatee if the conservatee is not the petitioner and has not joined in the petition; and~~

~~(2) The to the persons specified in Section 1822.~~

(b) If the conservator is not the petitioner and has not joined in the petition, the conservator shall be served with a copy of the petition and a notice of the time and place of the hearing at least 10 days prior to the hearing.

(c) If the conservatee is not the petitioner and has not joined in the petition, the conservatee shall be served with a copy of the petition and a notice of the time and place of the hearing at least 10 days prior to the hearing.

(d) Service under subdivisions (b) and (c) shall be made in the manner provided in Section ~~415-10 or 415-30~~ 415.10, 415.30, or 415.40 of the Code of Civil Procedure or in such manner as may be authorized by the court. If the conservator or conservatee cannot with reasonable diligence be served with a copy of the petition and notice of hearing, the court may dispense with such service.

§ 1863. Hearing and judgment

Subdivision (a) of proposed Section 1853 was revised as follows:

(a) The court shall hear and determine the matter according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded. The conservator, the conservatee, or any relative or friend of the conservatee may appear and support or oppose the petition.

§ 1864. Termination of conservatorship of "absentee"

The staff should consider whether the Comment to proposed Section 1864 should make cross-reference to other special statutory provisions in Part 3 relating to an "absentee."

§ 1870. Right to counsel

The staff should reexamine subdivision (c) of proposed Section 1870 (which purports to continue existing Section 2007) to ensure that the draft language is sufficiently broad to continue existing law.

§ 2103. Several guardians or conservators

The Commission deleted paragraph (3) ("A guardian or conservator who does not join in or consent to the acts of the majority is not liable for such acts") from subdivision (b) of proposed Section 2103. The staff was requested to give further consideration to the language of paragraph (2) ("They shall act as a unit by a majority"). Some reservations were expressed about the words "as a unit." The thrust of the similar provision applicable to executors and administrators (Prob. Code § 570) appears to concern the validity of acts of the majority vis a vis third persons. The Comment to proposed Section 2103 should also note that (like a trustee but unlike a corporate director) the minority is not per se insulated from liability for acts of the majority.

§§ 2200-2202 (jurisdiction and venue)

The staff was requested to draft a section for Commission consideration which would define the limits of jurisdiction of the California courts to appoint a guardian or conservator of the person for one absent from the state. See, e.g., Grinbaum v. Superior Court, 192 Cal. 566, 221 P. 651 (1923). Probably the rule in guardianship-conservatorship should be the same as in child custody proceedings.

§ 2312. Notice to ward or conservatee

Proposed Section 2312 was revised as follows:

2312. Before letters of guardianship or conservatorship may be issued, a copy of the order appointing the guardian or conservator shall be mailed to the ward if 12 years of age or older and to the conservatee at the last known address of the ward or conservatee.

§ 2406. Setting petitions for hearing

The staff was requested to consider whether the application of proposed Section 2406 ("All petitions filed under this chapter shall be set for hearing within 30 days of the filing of such petitions") might be narrowed without doing violence to the intent of the Lanterman legislation which enacted the provision.

§ 2615. Consequences of failure to file inventory

The Commission deleted subdivision (a) of proposed Section 2615 as recommended by staff since it duplicates provisions found in proposed Sections 2650-2654.

§ 2627. Settlement of accounts by ward; release and discharge of guardian

The staff should give consideration to the possibility of combining the two sentences of subdivision (a) of proposed Section 2627 into one sentence. The fourth sentence of the Comment ("Such a release does not excuse the guardian from filing a final account and obtaining a discharge from the court") should be deleted and the following substituted in its place: "Such a release does not operate to discharge the guardian, however, since the discharge must be granted by the court."

§ 2642. Death of ward or conservatee; disposition of assets

The Commission was concerned that subdivision (a) of proposed Section 2642 (funeral expenses payable from assets other than real property) might change the beneficial rule of Estate of Mason, 62 Cal.2d 213, 42 Cal. Rptr. 13 (1965), to the effect that sale by the guardian of the ward's property which is the subject of a specific gift in the ward's will does not work an ademption of the gift and, on the ward's death, the beneficiary is entitled to the proceeds of sale or other

assets in lieu of the specific gift. The staff was requested to give further consideration to subdivision (a) with the objective of preserving the effect of the Mason case in this context.

§ 2653. Hearing and judgment

The Commission was concerned that the language in subdivision (a) of proposed Section 2653 which says "except that there is no right to trial by jury" might be read to imply that there is a general right to trial by jury in guardianship and conservatorship proceedings. The staff should consider the possibility of a general provision (perhaps in Section 1450?) to the effect that there is no right to trial by jury in guardianship or conservatorship proceedings except where specifically so provided. The right to jury trial would be preserved in proposed Sections 1827 (appointment of conservator) and 1863 (termination of conservatorship).

Subdivision (b) should be revised as follows:

(b) If the court determines that cause for removal of the guardian or conservator exists, the court ~~shall make such a finding;~~ shall revoke the letters of guardianship or conservatorship, and shall enter judgment accordingly and, in the case of a guardianship or conservatorship of the estate, shall order the guardian or conservator to file an accounting and to surrender the estate to the person legally entitled thereto.

§ 2700. Requests for special notice

The Comment to proposed Section 2700 as well as the Comment to proposed Section 1460 should note that, although the court may dispense with notice to the ward or conservatee or to the spouse of the ward or conservatee under Section 1460 (for example, because the person's whereabouts is unknown), the ward, conservatee, or spouse may nonetheless request special notice under Section 2700.

The Commission suggested that the staff put either in the statute or in the Comment a mention that the person requesting special notice may make a general request for all of the matters referred to in Section 2700 without the necessity of a detailed recitation of each matter.

§ 2750. Appealable orders

A subdivision should be added to proposed Section 2750 making an order under Chapter 11 (transfer out of state) of Part 4 appealable.

§§ 2800-2806 (transfer of proceedings out of state)

The Commission decided that Chapter 11 (transfer of proceedings out of state) should be rewritten as a procedure for transferring the assets of the estate rather than for transferring the proceeding itself. As rewritten, the chapter should also provide for transfer of all or a part of the estate. Cf. Prob. Code § 1139.10 (transfer of all or portion of out-of-state trust). In subdivision (f) of proposed Section 2802 (petition shall set forth "[c]ompetent evidence"), the words "[c]ompetent evidence" should be deleted as inappropriate when referring to the contents of a petition.

§ 2913. Purchase of home for ward

The staff should consider broadening subdivision (a) of proposed Section 2913 to authorize the purchase of interests other than the "entire fee simple title to real estate" (e.g., a leasehold or coop) as a home for the ward or family.

§§ 3050-3603 (transactions not requiring guardianship or conservatorship)

Many of the sections in Part 6 apply when there are guardianship or conservatorship proceedings pending. The title for Part 6 ("Transactions Not Requiring Guardianship or Conservatorship") may be misleading in suggesting that the provisions are not related to guardianship or conservatorship proceedings. The staff should give further consideration to an appropriate title for Part 6.

§§ 3200-3202 (compromise of minor's disputed claim not the subject of suit)

Provision should be made in Chapter 3 (compromise of minor's disputed claim not the subject of suit) of Part 6 for notice to the guardian of the minor's estate, if any, of a petition by a parent for compromise of a minor's disputed claim. The guardian of the estate in such a case should also be authorized to appear and support or oppose the petition for court approval of the compromise.

§ 3312. Property value exceeding \$20,000

The staff should develop a proposal for reconciling the inconsistency between proposed Section 3312 (where money from compromise exceeds

\$20,000, court may require money to be deposited or may require appointment of guardian or conservator to receive money) and Sections 3100-3113 (small estates of minors: no authority for deposit of money in excess of \$20,000).

§ 3314. Reservation of jurisdiction where minor

The staff should consider changing the provision in proposed Section 3314 that the court may expressly retain jurisdiction of money paid until the minor reaches 18 to a provision that the court automatically retains jurisdiction unless the court provides otherwise.

STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP REVISION (PLAN FOR DISPOSITION OF ASSETS OF CONSERVATEE--SUBSTITUTED JUDGMENT)

The Commission considered Memorandum 77-75. The Commission decided to codify the doctrine of substituted judgment in a provision giving the court broad discretion in applying the doctrine.

The Commission considered the provision codifying the doctrine of substituted judgment (set out on pages 6 and 7 of the memorandum) and made the following decisions:

There should be added to the Comment a statement that the listing of the factors in subdivision (c) is not exclusive and other relevant circumstances should be considered. For example, where a child has received property with the understanding that the property would ultimately be given to the relatives of the person from whom the child received the property, that understanding would be a relevant factor for the court to take into account in approving an exercise of substituted judgment under the proposed section.

The introductory portion of subdivision (b) was revised to read: "only if the principal and income remaining after the disposition of the assets available to the estate pursuant to the proposed disposition is sufficient to provide for the reasonably foreseeable needs of the conservatee and for the support of those legally entitled to support from

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the conservatee, taking into account age, physical condition, standards of living, and all other relevant circumstances."

The section should be redrafted so that it does not require that the distribution or exercise of substituted judgment be pursuant to a "plan." The court should be able to act even though there is no general plan. In other words, a particular gift to a charity might be approved even where not pursuant to a general plan for distribution of assets. Or the conservator might make a disclaimer on behalf of the conservatee where such disclaimer is not pursuant to a general plan.

The following was added at the end of subdivision (e) of the draft statute: "and the conservator is not liable for failure to propose any action authorized by this section."

The staff is to redraft the draft statute for consideration at a future meeting with a view to approving something for distribution to the State Bar Subcommittee as a separate item for review and comment by the subcommittee.

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STUDY E-36.56 - EMINENT DOMAIN (TAXES)

The Commission considered Memorandum 77-79 and the attached staff draft of a Tentative Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings. The Commission revised the draft to delete footnote 1, to correct the reference to collection of taxes "on the unsecured roll," and to note that taxes in inverse condemnation actions are not dealt with. As so revised, and subject to editorial changes suggested on copies of the draft returned to the staff, the Commission approved distribution of the tentative recommendation to tax collectors and persons interested in eminent domain for comment.

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STUDY D-39.33 - WAGE GARNISHMENT

The Commission considered Memorandum 77-81. The Commission approved the provision set out on page 3 of the memorandum as a possible basis for a compromise solution that would permit passage of Assembly Bill 393.

STUDY D-39.160 - ATTACHMENT (BOND FOR LEVY ON
JOINT BANK ACCOUNT)

The Commission considered Memorandum 78-2 and approved the introduction of a bill to amend Section 489.240 of the Attachment Law to provide that the bond required for levy upon a joint bank account may be in an amount twice that sought to be levied upon where the amount of the levy is less than the amount of the judgment. The intent of this amendment is to conform the attachment provisions to Chapter 42 of the Statutes of 1977 which amended Code of Civil Procedure Section 682a applicable to levies of execution. This proposal should be combined with recommendations concerning the definition of chose in action and attachment in unlawful detainer actions when a bill is introduced.

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STUDY D-39.165 - ATTACHMENT (UNLAWFUL DETAINER)

The Commission considered Memorandum 77-78. The Commission considered a staff suggestion, made at the meeting, that a new section be added to the Attachment Law, based on Section 482.110, to read somewhat along the following lines:

§ 482.115. Unlawful detainer actions

482.115. (a) In an unlawful detainer action, the plaintiff's application for a right to attach order and a writ of attachment pursuant to this title may include, in addition to the rent due and unpaid as of the date of the filing of the complaint and the sums authorized by Section 482.110, an estimate of the value of the use and occupation of the premises from the date of the filing of the complaint to and including the estimated date of trial or such earlier date that possession was or will be delivered to the plaintiff.

(b) Where the plaintiff is entitled to a writ of attachment in an unlawful detainer action, in the discretion of the court, the amount to be secured by the attachment may include an estimated amount for the use and occupation of the premises from the date the complaint was filed to and including the estimated date of trial or such earlier date that possession was or will be delivered to the plaintiff.

The Commission was concerned about the use of the standard "value of the use and occupation of the premises." It was suggested that this standard should be replaced by a provision that the attachment would issue in an amount equal to the sum of (1) the unpaid rent due at the time of the filing of the complaint and (2) in the discretion of the court, an additional amount equal to the amount of the rent that would be payable under the rental agreement under which the premises were held from the date of the filing of the complaint until the estimated date of trial or such earlier date that possession was or will be delivered to the plaintiff.

The staff was directed to prepare a redraft of the proposed provision along the lines determined by the Commission for consideration by the Commission at a future meeting. This provision might be combined with other revisions of the Attachment Law in one tentative recommendation to be presented to the 1978 legislative session.

The staff was requested to write to Mr. Dickerson, Deputy Legislative Counsel, pointing out that the statements relied upon in his

opinion concerning the matter are included in the official Comments to the Attachment Law. The staff also should write to Senator Carpenter that the Commission is working on a draft of legislation to clarify the problems in connection with the use of attachment in an unlawful detainer action.

STUDY D-39.200 - ENFORCEMENT OF JUDGMENTS (COMPREHENSIVE
STATUTE--EXEMPTIONS)

The Commission considered Memorandum 77-55, the attached draft statute, and the First Supplement to Memorandum 77-55, pertaining to exemptions from the enforcement of money judgments. The Commission made the following decisions.

§ 707.170. Adjustments of dollar amounts of exemptions

The staff should check to make sure that the descriptions of the indexes in subdivision (a)(1) are correct.

§ 707.180. Tracing exempt amounts

Section 707.180, set forth on page 2 of the memorandum, was approved for inclusion in the statute to deal with the problem of tracing of exempt amounts from one form of money to another and into and out of deposit accounts.

§ 707.320. Cemetery plots

Only one cemetery plot should be exempt under this section since Section 707.160 grants exemption rights to the spouse of the judgment debtor whether or not the spouse is a debtor. This has the effect of granting a husband and wife an exemption of two cemetery plots.

§ 707.330. Motor vehicle; proceeds

Subdivision (a) should be revised to provide that preference may, rather than shall, be made to the blue book in the determination of the value of a motor vehicle. The exemption of the proceeds in insurance on the motor vehicle for 90 days after receipt, provided in subdivision (b), was approved.

§ 707.370. Tools, etc., used in trade, business, or profession;
proceeds

The exemption of proceeds from the sale of or insurance on tools for 90 days after receipt provided in subdivision (b) was approved.

§ 707.410. Life insurance and death benefits

The policy of subdivision (a)--that a debtor should not be required to cash in an insurance policy--was approved, but the staff should reword this subdivision, perhaps in a manner similar to the exemption in the proposed bankruptch act. It should also be specified in subdivisions (a) and (b), and wherever else necessary, that life insurance includes endowment and annuity policies.

Subdivision (b), providing a \$5,000 exemption for loan value, was approved.

Subdivision (c), proposing a \$5,000 lump-sum exemption, was disapproved. Lump-sum benefits should be exempt in an amount reasonably necessary for the support of the insured or a spouse or dependent of the insured, as against creditors of the insured or the spouse or dependent.

Subdivision (d) should be revised to provide that periodic payments under a life insurance policy are exempt if the payments continue for at least two years.

The life insurance exemption should be tied to the homestead exemption as suggested by Professor Riesenfeld in the First Supplement to Memorandum 77-55.

§ 707.420. Retirement benefits

The substance of existing Section 690.18 should be restored, except that the provision for the exemption of vacation credits of public employees should be deleted as unnecessary (they should be treated as earnings when payable) and the exception to the exemption in the case of a support judgment should apply to all such benefits.

§ 707.440. Disability and health benefits

Disability and health benefits should be completely exempt.

§ 707.460. Aid

The proposal to treat aid from private charitable organizations in the same manner as aid from public entities was approved.

§ 707.480. Vacation credits

This provision should be deleted as unnecessary. Vacation credits should be treated as earnings when payable.

Article 4 (§§ 707.710-707.780)

The exemptions collected in Article 4, primarily applicable to entities, should remain in the other codes. In view of the nature of, and the infrequent application of, these exemptions, it does not appear to be useful to include them in this chapter.

§ 707.730. Fraternal organization funds for sick or unemployment benefits

The \$500 exemption for funds of a fraternal organization used in payment of sick or unemployment benefits should be deleted inasmuch as this exemption is an insignificant amount.

Exception to Exemptions in Case of Support Judgment

In appropriate cases, the exemptions provided by this chapter should be subject to an exception where a judgment for spousal or child support is being enforced. In such cases, the court should be empowered to make an equitable division of the property taking into account the needs of all persons dependent on the judgment debtor.

Exemption of Property of Public Entities

The Commission approved the proposal to make all property of public entities immune from the enforcement procedures of this title. The appropriate remedy for enforcement of a money judgment against a public entity should be by way of a writ of mandate.

STUDY D-39.220 - REDEMPTION FROM EXECUTION SALES

The Commission considered Memorandum 77-80 and the revised staff draft of the Tentative Recommendation Relating to Redemption From Execution and Foreclosure Sales of Real Property. The tentative recommendation was approved for distribution for comment subject to any necessary editorial revision.

Minutes
January 5, 6, and 7, 1978

STUDY K-63.70 - EVIDENCE (MARKET VALUE OF PROPERTY)

The Commission reviewed the letter of the State Bar Condemnation Committee to the Board of Governors advocating opposition to the Commission's Recommendation Relating to Evidence of Market Value of Property, and the staff draft of a response. The Commission approved the substance of the following letter:

January 9, 1978

Garvin F. Shallenberger, Esq.
President, Board of Governors
State Bar of California
601 McAllister Street
San Francisco, California 94102

Dear Mr. Shallenberger:

Enclosed are advance copies of the Law Revision Commission's Recommendation Relating to Evidence of Market Value of Property (October 1977), the subject of a report to you by the State Bar Condemnation Committee dated December 28, 1977. May I take this opportunity to make a few observations about the committee report that may prove useful to you and the Board of Governors in considering the Commission's recommendation.

A major purpose of the Commission's recommendation is to provide clear evidentiary rules for determining market value in cases where at present there are no rules. This would be accomplished by making Evidence Code Sections 810-822 applicable to these cases. The Evidence Code valuation provisions are strictly procedural--they provide rules governing admissibility of evidence in determining the market value of property. They presently govern eminent domain and inverse condemnation cases, but they do not incorporate the substantive law of eminent domain, which is found elsewhere.

With the exception of the two matters discussed below, the reasons for opposition given by your committee are all matters of substantive eminent domain law that are not embodied by Evidence Code Sections 810-822 and would not be applied to other cases by the Commission's recommendation. The Evidence Code provisions merely state who is qualified to express an opinion of value and the appraisal evidence that may go into formulating such an opinion.

Your committee does raise two points which require discussion. The first point is that counsel in other types of cases are unfamiliar with the Evidence Code valuation provisions. This point disregards the fact that the Evidence Code valuation provisions have been drawn upon by

counsel and courts in many other cases. Moreover, counsels' unfamiliarity with the Evidence Code provisions could cause no more problems than counsels' present predicament of having no body of law at all to look to.

The second point is that the Evidence Code provisions limit evidence of value to opinion testimony; all other evidence is admissible only to enable the trier of fact to weigh the opinion. "Direct evidence" of value, such as a comparable sale, must be adjusted and placed in a proper context by a qualified appraisal opinion in order to shed light on the value of the subject property. The rule of the Evidence Code that the trier of fact must determine value within the range of opinion testimony (including the testimony of the property owner) is a sound one that the recommended legislation would extend to other cases.

The Law Revision Commission, prior to making its recommendation, carefully reviewed all matters raised by your committee and was not persuaded the matters had sufficient merit to require a change in the recommendation. The recommendation was distributed widely among general practitioners as well as other committees of the State Bar, including the Subcommittee on Property, Sales, and Local Tax, the Executive Committee of the Estate Planning, Trust, and Probate Law Section, and the Family Law Committee. Although application of the Evidence Code valuation provisions to areas other than eminent domain and inverse condemnation was opposed by the Condemnation Committee, the Commission found a general consensus among practitioners that broader application of the provision would be beneficial. The major exception to this consensus was for property taxation matters, which the Commission has excepted from its recommendation.

Sincerely,

Howard R. Williams
Chairman

APPROVED AS SUBMITTED _____

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

Date

Chairman

Executive Secretary