

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JANUARY 21-22, 1983
SOUTH SAN FRANCISCO

A meeting of the California Law Revision Commission was held in South San Francisco on January 21-22, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	Roslyn P. Chasan
	Debra S. Frank, Vice Chairperson	Bion M. Gregory
	Robert J. Berton	Beatrice P. Lawson
Absent:	Alister McAlister, Member of Assembly	John B. Emerson
	James H. Davis	

Staff Members Present

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

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law (January 21)
Russell Niles, Property and Probate Law (January 21)

Other Persons Present

George Alexander, Dean, Santa Clara Law School, Santa Clara
(January 21)
Paul W. Avery, American Association of Retired Persons, California
Legislative Committee, Concord (January 21)
Jack Ayer, State Bar, Debtor-Creditor Subcommittee, Davis (January 21)
Edward Howard Bordin, Health Attorney, Castro Valley (January 21)
Phyllis Cardoza, Probate Committee, Beverly Hills Bar Association,
Los Angeles (January 21)
Charles Collier, State Bar, Estate Planning, Trust and Probate Law
Section, Los Angeles (January 21)
James D. Devine, State Bar, Estate Planning, Trust and Probate Law
Section, Monterey (January 21-22)
Frank Freeland, American Association of Retired Persons, Campbell
(January 21)
Louis F. Gianelli, Practicing Attorney, California Probate Referee
Association, Modesto (January 21)
Paul Goda, S.J., Professor, School of Law, University of Santa Clara,
Santa Clara (January 21-22)
William W. Johnson, Sacramento County Superior Court, Sacramento
(January 21)
Kenneth M. Klug, State Bar, Estate Planning, Trust and Probate Law
Section, Fresno (January 21)
Greg Merrill, American Association of Retired Persons, Washington,
D.C. (January 21)

Barry D. Russ, State Bar, Family Law Section, San Francisco
(January 21)
Harley Spitler, Attorney, San Francisco (January 21)
Gordon W. Treharne, Public Administrator of Los Angeles County
(January 21)
Richard V. Wellman, Joint Editorial Board, Uniform Probate Code,
Athens, Georgia (January 21)

ADMINISTRATIVE MATTERS

MINUTES OF NOVEMBER 1982 MEETING

The Minutes of the November 5-6, 1982, meeting of the Law Revision Commission were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETING

The June meeting in San Francisco was rescheduled as follows:

June 2 (Thursday) - 7:00 p.m. - 10:00 p.m.
June 3 (Friday) - 9:00 a.m. - 5:00 p.m.
June 4 (Saturday) - 9:00 a.m. - 12:00 noon

The meeting should be held in downtown San Francisco rather than at the airport.

1983 LEGISLATIVE PROGRAM

The Commission considered Memorandum 83-3 relating to the 1983 legislative program. The Commission adopted as part of its legislative program Assembly Bill 69 (McAlister), making a technical corrective change in the Public Streets, Highways, and Service Easements Vacation Law, previously enacted upon Commission recommendation.

CONSULTANT

The Commission appointed Professor Edward C. Halback, Jr., University of California at Berkeley Law School (Boalt Hall), as a consultant on probate law and procedure. To the extent his time permits, Professor Halback will prepare material that will contain suggested revisions of the rules of construction of wills contained in Assembly Bill 25 and consistent rules to apply to trusts and other instruments. See the discussion infra in these minutes. Because of the limited financial resources available to the Commission, the Commission could not allocate any funds to pay the travel expenses of the consultant in attending Commission meetings.

STUDY D-301 - CREDITORS' REMEDIES (AB 99)

The Commission considered Memorandum 83-11 and the First Supplement thereto concerning amendments to Assembly Bill 99, the Commission's cleanup bill relating to creditors' remedies. The Commission made the following decisions:

Code Civ. Proc. §§ 700.140, 700.160, 700.165, 700.167. Deposit account levies

The amendments to these sections proposed by the staff were approved. (See Exhibit 2, attached to Memorandum 83-11). The amendments permit a levy of execution on a joint bank account in the names of a husband and wife or in a fictitious business name of the judgment debtor without the necessity of giving an undertaking such as is normally required where a joint account is levied upon.

Code Civ. Proc. § 703.110. Application of exemptions to marital property

The clarifying amendment to Section 703.110 (making clear that spouses are entitled to only one exemption unless a specific provision provides otherwise) was approved. (See page 7 of Exhibit 2, attached to Memorandum 83-11). The substance of the Comment on page 2 of Exhibit 3 of Memorandum 83-11 was approved.

Code Civ. Proc. § 704.120. Collection of child support from unemployment insurance benefits

The Commission considered the First Supplement to Memorandum 83-11. Section 704.120 should be amended to make clear that this section does not affect the provisions enacted at the 1982 legislative session permitting withholding of 25% of unemployment benefits upon application of a district attorney enforcing a child support obligation. The procedure provided in the Enforcement of Judgments Law permitting a person to enforce child support against such benefits should be revised so it is consistent with the 1982 legislation and be retained. This will provide a remedy in cases where the district attorney is not involved. Also, Section 704.120 provides an exemption that covers more than the unemployment compensation covered by the 1982 legislation.

Code Civ. Proc. § 708.140. Qualifications of referee

The staff proposal (First Supplement to Memorandum 83-11) to preserve the positions of nonlawyer referees currently in office was approved.

Urgency clause

The Commission approved adding an urgency clause to AB 99 so that it will become operative and amend the relevant provisions in the Enforcement of Judgments Law before July 1, 1983, when it becomes operative. The urgency clause will apply only to sections of AB 99 that reenact provisions that were chaptered out and to other provisions needed to clarify the Enforcement of Judgments Law. The urgency clause will not apply to the provisions that would alter the rules governing the sort of claims that may be offset against an attachment.

STUDY D-312 - LIABILITY OF MARITAL PROPERTY FOR DEBTS

The Commission considered Memorandum 83-8, the staff draft of the recommendation attached thereto, and the First Supplement to Memorandum 83-8, relating to the liability of marital property for debts. The Commission approved the draft of the recommendation for submission to the Legislature, with the following changes.

(1) The amendment to Section 4800 should be revised to read in substance, "In assigning the debts the court shall take into consideration such factors as the earning capacity of, and the exempt character of property received by, the party to whom a debt is assigned so as to protect the rights of the creditors to the extent practical, provided that after deduction of the debts assigned to the parties from the assets awarded to the parties, the division of the property is equal." The Comment should point out that this overrules In re Marriage of Eastis, 47 Cal. App.3d 459, 120 Cal. Rptr. 861 (1975), which permitted an unequal division of debts in the "bankrupt family" situation.

(2) Section 5120.070, governing liability of property after a judgment of nullity, was deleted. Instead, a provision should be added to Section 4452 (putative spouses and division of quasi-marital property) to the effect that if quasi-marital property is divided in the same manner as community property, the rights of creditors are the same as if the property were community property.

(3) A provision should be added to the recommendation making quasi-community property liable to the same extent as community property. In effect, the term "community property" would include quasi-community

property. In this connection, the definition of community property should be expanded to include out-of-state real property. The Commission will review this proposal at a later meeting when it receives comments on it.

STUDY F-660 - AWARDING FAMILY HOME TO SPOUSE HAVING
CUSTODY OF CHILDREN

The Commission considered Memorandum 83-9 and the attached staff draft of a tentative recommendation relating to awarding use of the family home to the spouse having custody of the minor children. The Commission approved the draft to distribute for comment, after deleting the provision authorizing an award of the separate property home of the non-custodial spouse and after directing the staff to add language that in making a decision on modification of the award the court should consider as a factor whether there is a cohabitant in the home with the custodial spouse.

STUDY F-661 - CONTINUATION OF SUPPORT OBLIGATION AFTER
DEATH OF SUPPORT OBLIGOR

The Commission considered Memorandum 83-12 and the attached staff draft of a tentative recommendation relating to continuation of a support obligation after the death of the support obligor. The Commission decided to introduce legislation on the subject in the current legislative session, but not to set the bill for hearing until the Commission has distributed for comment and reviewed the comments on the tentative recommendation. The bill as introduced, and the tentative recommendation distributed for comment, should provide that the amount of the support obligation is fixed at death, subject to the power of the court to modify the obligation in the event of extraordinary circumstances or to take into account testamentary dispositions to the supported spouse. The bill and tentative recommendation should also provide that the spousal support obligation (and a child support obligation as well) is given priority among the other claims against the decedent's estate.

STUDY H-510 - JOINT TENANCY

The Commission considered Memorandum 82-102 and the First Supplement thereto, along with the attached staff draft of a tentative recommendation, relating to joint tenancy and community property. The Commission approved the draft of the tentative recommendation to distribute for comment, with the following changes.

(1) Severance of a joint tenancy in real property by written declaration must be recorded before the death of a joint tenant in order to be effective. A sentence should be added to the provisions governing community property with right of survivorship to make clear that the survivorship right may be terminated by severance.

(2) The provision on rebutting the community property presumption by tracing to a separate property source should be revised to make clear that tracing results in separate property ownership rather than joint tenancy ownership. In making the revision the staff should consider whether the community property presumption should be an ownership presumption rather than an acquisition presumption.

(3) The recommendation should apply only to property acquired after the operative date of the act.

STUDY J-600 - DISMISSAL OF CIVIL ACTIONS

The Commission considered Memorandum 83-7 and a letter from Archie S. Robinson of the Association of Defense Counsel of Northern California (a copy of which is attached to these minutes) relating to dismissal of civil actions for lack of prosecution. The Commission made the following decisions with respect to this matter:

(1) In recognition of the sentiment in the Legislature against accommodating the reality of five-year trial dates, the Commission decided to amend its proposed legislation to preserve the three-year service requirement. (The Commission's printed recommendation as submitted to the Legislature would extend the service requirement to four years.)

(2) The proposed legislation should also be amended to include the provision in Exhibit 1 of the memorandum extending the time to bring an action to trial for six months in a case in which the five-year period is tolled within the last six months of the period. The provision should be revised to extend the time only for six months after the tolling ends.

(3) The proposed legislation should not at this time include provisions expressly to deal with the judicial arbitration problem. The staff should communicate with the Judicial Council and follow their action in this area, with the view to coordinating the efforts of the Commission with those of the Judicial Council.

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January 11, 1983

Mr. Nathaniel Sterling
Assistant Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Dismissal for Lack of Prosecution

Dear Mr. Sterling:

Thank you for your letter of December 27.

The Association of Defense Counsel has for the past several years maintained an active legislative committee, whose reason for being has been to study problems such as dismissal of actions and to make recommendations of the type solicited in your letter.

Your request has been relayed to members of the legislative committee. It is our hope that a definitive response will be in your hands by March 1.

Some random observations leep to mind, however, and while they are still fresh I would like to record them.

First, there seems to be no sound public policy behind extending the period within which plaintiff may serve summons from three to four years. Difficulty serving, which rises to the level of "impossible, impracticable or futile", will defeat a motion to dismiss as per Subsection (d) of 583.240.

Second, why strip the dismissal provisions of their ultimate sanction by not making the requirements of 583.360 jurisdictional, as well as mandatory? If the requirements are not made jurisdictional an open invitation is extended to the appellate courts to carve out so-called exceptions to the "mandatory" provisions of the bill. Hocharian v. Superior Court, 28 C3d 714, is not sufficient authority for stopping short of making dismissal jurisdictional.

Mr. Nathaniel Sterling
Re: Dismissal for Lack of Prosecution
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Hocharian is already disapproved (on other grounds) under Subsection (d) of Section 583.240.

Finally, the "brought to trial" provisions of 583.310, are too lax. If plaintiff's attorney need only answer "ready" to avoid dismissal (and possible malpractice) there is no telling what sort of fiction and games can be hatched to knock the case off calendar (or have a mistrial granted) after threat of dismissal has been eliminated.

These thoughts are merely my own and should not be misconstrued as the committee's. I am sure, too, that the committee will agree with me that your comprehensive approach to the issue of dismissal is well conceived and long overdue.

We look forward to working with you on this project.

Very truly yours,



ARCHIE S. ROBINSON
Chairman, Legislative Committee
Association of Defense Counsel
of Northern California

ASR:lb

cc: Mr. Ed Levy
Mr. Claude Smart
Mr. Anthony Barrett
Mr. Don Walter
Mr. Paul Cyril

STUDY L-601 - PROBATE (NONPROBATE TRANSFERS)

The Commission approved the amendments to Assembly Bill No. 53 (relating to nonprobate transfers) set out as Exhibit 5 to the First Supplement to Memorandum 83-1.

STUDY L-605 - PROBATE CODE (RULES OF CONSTRUCTION)

Professor Edward Halbach addressed the Commission concerning the proposed rules of construction of wills (Sections 6140-6177). Professor Halbrach made the following points:

(1) Proposed Section 6148 provides that when a will makes a gift of a future interest to "heirs," "next of kin," "relatives," "family," or the like, the membership of the class is determined when the gift is to take effect in enjoyment. The problem with this section is that it disinherits the issue of those who fail to survive until the gift takes effect in enjoyment, a result probably contrary to what the testator would have wanted. Professor Halbach suggested a provision similar to the anti-lapse statute to substitute the issue of those who fail to survive in such a case.

(2) Proposed Section 6147 provides that adopted persons and persons born out of wedlock are included within class gifts according to the rules for intestate succession. Professor Halbach suggested that the matter of determining what the testator intended is somewhat different from determining who should take by intestacy. In the wills context, one should not be permitted to affect who takes under the testator's will by adopting someone solely for that purpose. Professor Halbach suggested that adoptees and illegitimates be included in class gift terminology if the adoptee or illegitimate spent a significant period of time during minority in the household of the parent in question. The State of Oregon has enacted a comparable rule.

(3) Proposed Section 6408 treats an adopted person for all purposes as a member of the adopting family, except in the case of a stepparent adoption. In the stepparent adoption case, the adoptee may inherit from or through the natural parent and the adopting parents. Professor Halbach thought that there might be other cases where the right of the adoptee to inherit from natural relatives ought not to be cut off.

(4) Careful consideration should be given to which of the rules of construction may be varied only by the testator's will, and which may be varied by a contrary intent of the testator whether shown from the will or from extrinsic evidence.

Professor Halbach volunteered to try an improved draft of Sections 6147, 6148, 6408, and related problems, and to review the proposed rules of construction generally, as he has time available. If the revised draft can be ready in time, the Commission will consider it at the March meeting. The Commission invited Professor Halbach to attend the meeting when the revised draft is considered, if his schedule permits.

STUDY L-625 - PROBATE LAW (WILLS AND INTESTATE
SUCCESSION RECOMMENDATION)

The Commission considered Memorandum 83-1 and the First Supplement with attached exhibits. The Commission made the following decisions:

EXECUTION OF WITNESSED WILL

The Commission decided to delete from proposed Section 6110 the requirement that when a will is witnessed, both witnesses must be "present at the same time." This will make the proposed section the same in substance as Section 2-502 of the Uniform Probate Code in this respect.

PRETERMISSION

The Commission approved the staff revisions to proposed Section 6571(a) as set out in AB 25. These revisions require that the testator's intent to omit a child from the will be shown from the will. This makes proposed Section 6571 the same as existing California law (Probate Code § 90) and the Uniform Probate Code (§ 2-301) in this respect.

RECAPTURE OF GIFTS OF QUASI-COMMUNITY PROPERTY

The Commission approved and adopted the proposed amendments to Section 102 set forth in Exhibit 2 to Memorandum 83-1. These amendments delete the requirement that recapture of quasi-community property is permitted when the decedent retained a "substantial quantum of ownership or control of the property at death" and substitute more detailed language drawn from the augmented estate provisions of the Uniform Probate Code and from Idaho law (Idaho Code § 15-2-202).

SURVIVING SPOUSE'S WAIVER OF RIGHTS

The Commission approved the proposed amendment to Section 147 set forth in Exhibit 5 to Memorandum 83-1, and proposed Section 5135.5 to be added to the Civil Code (Family Law Act), to make clear that, with respect to the effect of interspousal agreements or waivers on rights at death, the Probate Code provisions will govern.

MISCELLANEOUS TECHNICAL AMENDMENTS

The Commission approved the proposed amendments to AB 25 and AB 68 set forth in Exhibits 2 through 5 to the First Supplement to Memorandum 83-1.

STUDY L-625 - PROBATE LAW (DISCLAIMERS)

The Commission approved the amendments to Assembly Bill No. 28 (relating to disclaimers) set out as Exhibit 4 to the First Supplement to Memorandum 83-1.

STUDY L-640 - TRUSTS

Charles Collier presented the preliminary views of members of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar on trust administration issues raised by Memorandum 83-4 and the First Supplement thereto. (A copy of their written comments is attached to these Minutes as an exhibit.) The Commission did not consider Memorandum 83-4 or the First Supplement but tentatively concluded:

- (1) The statutory provision concerning trust law should be consolidated in the Probate Code.
- (2) The substance of California law dealing with particular aspects of trusts should be retained and changed as necessary.
- (3) Any useful provisions from the trust administration provisions of the Uniform Probate Code should be considered for adoption in California.

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

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JAMES A. WILLETT, SACRAMENTO

January 21, 1983

TO: CALIFORNIA LAW REVISION COMMISSION:

RE: Memorandum 83-4 and First Supplement to
Memorandum 83-4

The following are some preliminary comments from members of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, with reference to the above Memoranda. As these were received only a day before the Executive Committee's last meeting, there was not a chance to review them at the meeting. However, a number of members of the Executive Committee had reviewed the Memoranda individually, and the following represent their comments:

1. It is desirable to consolidate all of the provisions relating to trusts and trustees in one place. They are now scattered throughout the Civil Code and found in several locations in the Probate Code.

2. As a result of AB-3612, enacted in 1982, there is no continuing jurisdiction of a California Probate Court over a Testamentary Trustee. The Probate Court now has jurisdiction over both Testamentary and Inter Vivos Trusts whenever a matter is brought before it by petition.

3. Because of the recent changes relating to Testamentary Trustees (Testamentary Trustees after 1977 have not been subject to continuing Court jurisdiction since then), a consolidation of the basic concepts of Probate Code § 1120 and subsequent (Testamentary Trustees); § 1138 and subsequent (Inter Vivos Trusts) would seem appropriate.

4. Many Trusts and Wills are drafted in California, making reference to, for example, the Trustee powers under § 1120.2, which are incorporated by reference, or conferring Court jurisdiction over the Trustees by making § 1138 and subsequent specifically applicable to the Trust. Either renumbering these sections or repealing them would require extensive revision of existing estate plans.

5. The U.P.C. provisions relating to Trusts are some 18 sections found in Article VII (including five sections relating to registration of Trusts). Therefore, general Trust administration is covered by 13 broadly worded sections. California, based upon the attachments to Memorandum 83-4, has some 71 separate sections dealing with Trust matters in the Civil Code, and an additional 57 sections in the Probate Code.

6. California's law is much more detailed and explicit as to Trusts, the duties and powers of Trustees, the rights of beneficiaries, etc., than are the broadly worded generalized statements of the U.P.C.

7. To substantially adopt the U.P.C. provisions would be to cast aside the judicial precedents which have been built up, as well as the work of commentators on the Trust provisions of California law.

8. It would be better to clarify the existing California Code provisions by any useful additions from the Uniform Probate Code rather than repealing the very detailed California provisions and replacing them with the somewhat general and imprecise U.P.C. provisions.

9. To the extent that there is uncertainty in present California law, it is believed that that uncertainty would be heightened by the lack of specificity in the U.P.C. provisions relating to Trust matters.

10. On the proposals under the U.P.C. for registration of Inter Vivos Trusts, that has been unpopular even in U.P.C. states. No need is seen for the registration. People often use Inter Vivos Trusts for the confidentiality which they provide. Registration would certainly undermine that to some degree. It is not seen that registration provides any useful purpose.

11. As to foreign Trustees having certain limited rights in California, we believe that is a matter that should be discussed with the California Bankers' Association. In general, a

foreign trust company has to qualify in California in order to conduct a trust business in this jurisdiction. Such limitation appears reasonable. For example, a corporate fiduciary does not have to post a bond when qualified in California.

12. Court jurisdiction over Trusts can perhaps be clarified, but the California system is presently much more detailed than the U.P.C. provisions relating to jurisdiction.

13. The staff apparently recommends retaining the California "prudent man" standard.

14. The expert standard of care is recognized in California case law and codification of that would seem reasonable.

15. A Trustee's duty to inform and to account to beneficiaries is a matter that needs further study and clarification. There is no automatic Court Accounting required in California for any Trusts; however, under § 1138(a)(5), a beneficiary has a right to request an Accounting. The Court can order an Accounting whenever appropriate. Often, in small Trusts an annual Accounting is not appropriate. An Accounting every two or three years is quite adequate.

16. As to a Trustee's bond, because of removal of Court jurisdiction over Testamentary Trusts, some relaxation of bonding requirements as they may remain would seem appropriate. In an Estate, all the interested parties can waive bond under present law, although the Court retains discretion to require a bond even if all parties have agreed to waive it.

17. As to liability of the Trust Estate and Trustee to third persons, there perhaps can be some clarification of California law in this area, working with the existing Code Sections relating to third-party liability.

18. Imposing limitations on actions against a Trustee for breach of trust under the U.P.C. appears to relate to only a Final Account of a Trustee. It does not appear to address the matter of interim or annual Accountings, for example, and whether those become final. Some clarification of the area of limitations would seem appropriate, but the U.P.C. provision itself seems of limited utility and of little or no improvement over present California statutory law relating to limitations of action.

19. By way of a general comment, notwithstanding the staff's comments as to apparent shortcomings of the California system, the California statutory system at present is much more explicit, much

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more detailed, and has substantial judicial precedent relating thereto. It is strongly recommended that the staff be directed to utilize existing California law as its base and add such additional provisions from the U.P.C. as may clarify California law.

The Executive Committee will be pleased to work further with the Commission and its staff in connection with this area of Trust law.

CAC:pf

A trustee's duty to report and to account arises as a matter that needs further study. There is an inherent conflict between the duty of any trustee to report and to account to the beneficiaries of the trust and the duty of the trustee to maintain the confidentiality of the trust. An accounting every year is not appropriate. An accounting every year is not appropriate.

As to a trustee's bond because of restriction of jurisdiction over testamentary trusts, the requirements as they may remain, could be amended. Estate. All the interested parties can waive the law, although the court retains discretion to require it if all parties have agreed to waive it.

Under the law of the trust, the trustee is required to report and to account to the beneficiaries of the trust. The trustee is required to report and to account to the beneficiaries of the trust.

The trustee is required to report and to account to the beneficiaries of the trust. The trustee is required to report and to account to the beneficiaries of the trust. The trustee is required to report and to account to the beneficiaries of the trust.

STUDY L-703 - DURABLE POWER OF ATTORNEY FOR
HEALTH CARE DECISIONS

The Commission considered Memorandum 83-2 and the First and Second Supplements thereto concerning the delegation of authority to make health care decisions by means of a durable power of attorney. The Commission also heard the views of several persons who attended the meeting. (A copy of written comments of George J. Alexander are attached to these Minutes as an exhibit.) The Commission decided to submit a bill in the current legislative session based on the staff draft of the tentative recommendation as revised for decisions made at the meeting. The tentative recommendation, as revised, should be distributed for comment and any comments received will be reviewed at the March meeting at which time the Commission will decide upon any needed revisions in the bill. The bill will not be set for hearing before the March meeting.

The Commission made the following changes in the staff draft of the Tentative Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions:

Civil Code §§ 2412, 2421. Judicial review of acts and authority of attorney in fact

Subdivision (b) of Section 2421 of the staff draft should give a conservator of the person authority to obtain only limited judicial review of decisions made by an attorney in fact with authority to make health care decisions:

(1) Subdivision (b) of Section 2412 permitting the court to pass on the acts or proposed acts of the attorney in fact should not apply in the health care context.

(2) Subdivision (d) of Section 2412 permitting the court to terminate the power of attorney should be revised in the health care situation so that the question of termination depends upon the standard of care set out in the power of attorney or otherwise expressed by the principal rather than the court's determination of the "best interests of the principal or the principal's estate" as provided in subdivision (d)(3).

Civil Code § 2431. Application of article

Section 2431 should be revised to make clear that the new statute has no effect on the validity of powers of attorney executed prior to its operative date nor does the new statute have any effect on the

validity of health care decisions made pursuant to such powers of attorney, regardless of whether the decisions are made before or after the operative date of the new statute.

Civil Code § 2432. Formal requirements of power of attorney authorizing health care decisions

Subdivision (a)(2) of Section 2432 should be revised to make clear that the power of attorney is valid where the principal signs it and acknowledges his or her signature before two witnesses. The notice in subdivision (b) should be revised in a consistent manner.

Civil Code § 2434. Availability of medical information to attorney in fact

Section 2434 should be revised as follows:

2434. An attorney in fact authorized to make health care decisions under a durable power of attorney has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

Civil Code § 2435. Protection of health care provider from liability

Section 2435 should be revised by striking out subdivisions (b) through (e) relating to liability for refusal of the health care provider to act. The Commission decided that these provisions are unnecessary. The remainder of this section should be revised as follows to provide a personal standard for determining the best interests of the principal:

2435. A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health care decision and both of the following requirements are satisfied:

(a) The decision is made by an attorney in fact who the health care provider believes in good faith is authorized by a durable power of attorney under this article to make the decision.

(b) The health care provider believes in good faith that the decision is in the best interests of the principal as expressed by the principal in the durable power of attorney or otherwise known to the health care provider.



THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW
OFFICE OF THE DEAN

January 12, 1983

John H. DeMouly, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

I would like to be with you on January 21st when you consider the revised "Durable Power of Attorney to Make Health Care Decisions". Unfortunately, I'll be in Florida at that time. I hope you will invite me to discussions on future drafts.

While I think the act serves a useful purpose in that it allows people to take responsibility for their health care should they later become incompetent, I fear the act has an Achilles' heel that makes it very vulnerable. No new legislation is required to allow the conservator of a person to assume the responsibility for his or her health care. This act is important as an alternative to the management of one's health by a conservator. Two important safeguards bar hasty decisions to appoint attorneys in fact: the warning to be printed on commercial forms and the need for participation by an attorney in order to bar petitions contesting the power of attorney. The drafter having taken care to draft a document, to obtain the advice of counsel and to have considered the possible implications of making such a power of attorney, I am at a loss to understand why third parties may still invalidate the scheme by obtaining a conservatorship. I believe that section 2421 (2) (b) is a mistake.

I could review reasons I have previously given for insisting conservators be denied the power to invalidate durable powers of attorney. Instead, I respectfully suggest that you refer again to my article kindly cited on page 2, footnote 6.

Many thanks for this opportunity to comment. Best wishes.

Cordially,


George J. Alexander
Dean

GJA:jsc

STUDY L-800 - PROBATE LAW (ADMINISTRATION OF
ESTATES OF DECEDENTS)

GENERAL APPROACH TO DIVISION 3

The Commission considered Memorandum 83-5, the First Supplement, and the attached materials. Richard V. Wellman, Educational Director for the Uniform Probate Code, addressed the Commission and described the UPC's flexible system of administration. He read letters from probate practitioners in various UPC states reporting on the generally favorable experience in those states under the UPC system of administration. Professor Wellman concluded that the best approach for California might be to retain the substance of existing Division 3 of the Probate Code as its supervised system of administration, and to engraft on that the UPC alternatives for informal or formal appointment of a personal representative, and for unsupervised administration where supervised administration is not ordered. Professor Wellman cautioned that there are difficulties in such an approach as experienced in Michigan where this approach was used. The result in Michigan was a probate code of extreme complexity, although the Michigan code has been made workable through the efforts of the Michigan bench and bar.

Professor Wellman identified a central issue in such a scheme as developing the criteria for departing from supervised administration, such as small amount of assets, number of survivors, or sole beneficiary as the only heir. Professor Wellman suggested that a model for such an approach can be found in a number of Midwestern states that have adopted such a scheme. See Wellman, Recent Developments in the Struggle for Probate Reform, 79 Mich. L. Rev. 501 (1981). Professor Wellman suggested that there is some advantage to a flexible system package where the alternative informal system adheres closely to the UPC as was done in Michigan, since the concept can be presented to the legislature as representing a tried system with considerable experience in UPC states.

Mr. Frank Freeland of the National Association of Retired Persons addressed the Commission to advocate adoption of the UPC's flexible system of administration and the provisions for succession without administration.

Mr. Charles Collier of the State Bar Estate Planning, Probate and Trust Law Section advocated retention of the existing California administration provisions in Division 3 of the Probate Code, especially in view

of the vast body of case law under those provisions and the ongoing efforts of the State Bar and the legislature to fine-tune those provisions. Mr. Collier discussed some of the recent changes in California's administration provisions to simplify probate procedure, and suggested some additional improvements that could be made. For example, the California provisions for collection by affidavit of personal property estates worth \$30,000 or less (Prob. Code §§ 630-632) could be amended to permit the inclusion of real property and possibly further to increase the dollar limit. Mr. Collier estimated that the affidavit procedure is used in about 20% of decedents' estates in California.

Mr. Collier suggested that the California Independent Administration of Estate Act (Prob. Code §§ 591-591.7) could be improved by eliminating court supervision for sales or exchanges of real property and granting of options to purchase real property (Prob. Code § 591.2). According to Mr. Collier, a majority of the probate petitions now filed in California request independent administration, with the result that there is a formal opening and a formal closing, and generally unsupervised administration between opening and closing.

Mr. Collier and the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section are strongly of the view that any revised system should retain formal opening of the estate, with statutory notice to heirs and creditors and a court order admitting the will to probate. There is less unanimity in the State Bar Section for formal closing, but the prevailing view is that there should be a court order of distribution. There need not be mandatory court involvement between opening and closing, and there is room further to reduce court supervision under the Independent Administration of Estates Act. Mr. Collier pointed out that the fact that the inheritance tax has been repealed in California will speed up the closing of estates.

Mr. Collier urged that in seeking ideas for reform the staff should look carefully at the laws of other states, and not be bound by the UPC.

The Commission decided to defer until the March meeting a decision on the question of what the basic approach should be with respect to administration of estates. The basic policy issue appears to be whether a formal opening and closing of the estate should be required, or whether

informal opening and closing should be permitted as under the UPC. The staff should prepare a memorandum setting out this policy issue, and distribute any additional materials bearing on the issue which Professor Wellman or others may furnish.

A FLEXIBLE SYSTEM FOR ADMINISTERING DECEDENTS' ESTATES

Richard V. Wellman

American probate procedures rest on assumptions inherited from the English that wills must be proved after death in order to be effective and that personal property of a decedent passes to a state appointed personal representative for collection, protection of the decedent's creditors, and eventual distribution to legal successors. Authority to handle these essential steps has been assigned to a special probate court or docket. Over time, procedures in probate have become more and more formal as lawyers and judges have sought to build meaningful protective features into the inherited requirements. Judicial proceedings involving notice to all interested persons have tended to replace procedures that were essentially administrative in origin. Court supervision of executors and administrators via required reports and orders has largely supplanted earlier patterns of administrations that remained unsupervised unless and until disputes arose.

As a result, many state statutes recognize essentially only one way of handling the various steps or problems relating to settlement of decedents' estates. It is that all facets of the required probate of a will and estate administration are part of one continuous court proceeding of which the probate judge has ultimate control. Attorneys counselling executors must take each estate through essentially the same routine without regard for whether the parties are contentious or friendly or whether the estate is worth \$15,000 or \$150,000. The necessity for the routine is hard to explain; and fees, possibly justified by the required work, are not understood or accepted without protest by clients.

Most codes also contain some provisions exempting various categories of small estates from the usual routine of a full probate proceeding, but these statutes are keyed to arbitrary dollar ceilings that tend to become out-dated. Moreover, the typical small estate ceiling was unrealistically low in the first instance. This is not surprising in view of the assumption that fully supervised probate is normal and that small estates' ceilings reflect values which are too small to generate disputes or claims.

The "Flexible System for Administering Decedents' Estates," described by the attached charts, lists and examples, was designed by the draftsmen of the Uniform Probate Code (UPC) to meet the problem of inflexibility of present procedures. It seeks to provide most of the advantages of existing methods of handling decedents' estates. At the same time, by leaving the various procedures available as options, the system is designed to permit great variety in the way particular estates may be handled.

The UPC system also proceeds on the assumption that the state statutes should not attempt to supervise estate successors to prevent persons from taking risks or to protect others who may be injured thereby. Rather, control of succession procedures should rest, as it does with other rules and procedures constituting our private property system, in the ability of interested persons to use clearly stated rights and remedies against persons whose actions imperil or injure them.

But, the system does not leave persons, including fiduciaries who would like a protective court order defining or eliminating risk, from gaining needed court protection in particular instances. It requires only that they petition the court and give notice to interested persons concerning the relief they seek. In short, it transforms what formerly was required into an available option.

In studying these materials, try to put present assumptions about probate procedures to one side. Table I illustrates the conceptual tools that are provided for use by the Uniform Probate Code. Formal proceedings, as you'll see, are lawsuits. But, the methods for securing jurisdiction over interested persons under the Code reduce the problems of initiating a proceeding to the point where beginning a proceeding will resemble existing methods now used to bring a question concerning a supervised estate before a probate judge by motion. Estates may be administered and settled without a formal proceeding, because the other concepts offered by the system are designed to accomplish the goals of probate and administration without any adjudication. But, the UPC system offers more than an option between formal and informal methods of settling estates. Rather, it offers an option between adjudication and private resolution of virtually every point which will be encountered in the process of estate settlement. Hence there are many ways to handle an estate under the Code.

The system also offers, in the form of supervised administration, a remedy permitting persons interested in a particular estate to have all matters relating to the estate resolved in one continuous proceeding in which the court retains supervisory control over a personal representative. Supervised administration is a special kind of formal proceeding. Once it is granted, the options otherwise available as to the need for future judicial orders concerning the activities of a personal representative are substantially reduced.

Tables I and II are considerably expanded by the appendices. Some readers may prefer to work with the appendices at the same time first study is being given to the Tables. Others will prefer to work through all five Tables before getting into the detail offered by the appendices.

FLEXIBLE SYSTEM FOR ADMINISTERING DECEDENTS' ESTATES

TABLE I

Major Procedural Techniques

FORMAL PROCEEDINGS

- . Notice, hearing, order by judge final subject to vacation and appeal
- . Initiated by petition
- . Interested persons determined by question raised

INFORMAL PROCEEDINGS

- . Involves statement under penalty of perjury to registrar
- . Statement and easily proved facts support order of probate and app't. of rep.
- . No notice; no delay; no adjudication

FILING

- . Statement under penalty of perjury
- . No official response except receipt and filing
- . Starts statute of limitations only

TRUSTEE STATUS OF REPRESENTATIVE

- . Follows app't. of executor or administrator
- . Confers power over assets like that of an inter vivos trustee
- . Statute prescribes duties

STATUTES OF LIMITATION

- . May run from death, publication or filing
- . Short periods
- . Integral part of state's system of succession

STATUTORY PROTECTION FOR PURCHASERS OF ESTATE ASSETS

- . Available to purchasers from estate fiduciary, executor and purchasers from residuary distributees
- . Serves to settle titles without adjudication

SUPERVISED ADMINISTRATION

- . Like bankruptcy or today's probate system
- . One continuous proceeding
- . Required reports and closing

As drafted, the Uniform Probate Code contemplates a probate court which will be a court of general jurisdiction, with appeals going to an appellate court for reconsideration on the record. The court may include a clerk or registrar of probate (who need not be a judge or lawyer) to whom the judge can delegate the "Registrar" functions described in the Code. "Formal proceedings" are proceedings before the judge after notice which result in adjudications. "Informal proceedings," handled by the Registrar, are subject to contradiction in formal proceedings and do not involve adjudication. States having constitutional limitations on the power of existing probate courts could use the Code by reorganizing the various provisions so that existing probate judges would handle matters allocated to the Registrar, including maintaining the office where necessary and permitted non-judicial filings occur. Formal proceedings would be routed to the court of general civil jurisdiction in such a state.

FLEXIBLE SYSTEM FOR ADMINISTERING DECEDENTS' ESTATES

Table I - Appendix

(Same Viewpoint and More Detail)

I. Formal proceedings

A. Characteristics

1. Order by judge after notice and hearing. Final order on question raised and decided; subject to appeal or vacation as on judgment.
2. Venue and jurisdiction fixed in probate court where will might be probated. Appointing court has exclusive jurisdiction.
3. Often used proceedings and parties to be joined in each specially described in the Code; others described generally.
4. Several requests, each of which might be occasion for separate proceeding, may be joined provided persons affected by each request involved are also joined and all orders sought may be granted without delay.
5. Personal representatives always subject to proceeding via consent to suit involved in accepting letters. Other interested parties may be joined by notice as described by Code.
6. Appeal to court of appeal on record.

B. Function

1. Not mandatory for any estate as informal alternatives available for required steps of probate and appointment.
2. Initiation occurs on request in petition by heir, devisee, creditor or personal representative.
3. On petition after notice, hearing and showing of necessity, court may order that administration be supervised, meaning that court order or approval of further steps in settlement would become required in that estate. Such order must be requested, however.

II. Informal proceedings

A. Characteristics

1. Available only for probate or appointment.

2. Involves statement under penalty of perjury and request for administrative determination based on statements in application and on matters made evident by the description of the proceeding.
3. No requirement of notice; no requirement of hearing; no requirement that application be handled by judge. Rather, such applications will be addressed to and handled by the probate court, and sections dealing with court structure will enable such matters to be handled by an employee of the court known as probate clerk, or registrar or similar title.
4. Produces an administrative response which is sufficient to make a will effective, subject to contest, or to appoint a representative, subject to suit objecting to such appointment.
5. Registrar has residual discretion to decline application forcing moving party to give notice incident to formal proceeding.
6. Does not bar rights, though if an appointment of personal representative is involved, administration is commenced and rights to particular assets, though not to values, may be affected via administration.

B. Function

1. To permit undisputed matters to be handled simply and quickly, while continuing the useful concepts that some post-death scrutiny of a will is required to make it operative, and that a personal representative should be officially recognized after death before beginning administration. Also, to provide a useful public record.
2. To separate routine matters not involving disputes or finality from the personal responsibility of a judge, and thus to upgrade the role of judge by keeping his function truly judicial.

C. Necessity

1. Either formal or informal probate is required for any will if the will is to be effective. Also, appointment of any personal representative must be accomplished in informal or formal proceedings if an appointment is desired or necessary. No administration is compelled, however. The Code contains no provision regarding public administrators, but is not antagonistic to such provision provided they are concerned with protecting state's interest in escheated property.

III. Filings

A. Characteristics

1. Involves filing documents meeting requirements of statute with probate court.
2. No responsive action by court (clerk or registrar) is called for except receipt and filing.

B. Purpose and effect

1. To permit a public notation that the office established by appointment has completed its main business.
2. Starts statute of limitation running on complaints against administrator.
3. Regularizes and controls administration by subjecting representative to requirement of statement, under penalty of perjury, that he has performed acts designed to assure proper administration.
4. Provides interested persons with method of protecting evidence of claim, demand for bond, and demand for notice of proceeding.

IV. Statutory duties and powers for personal representative

A. Characteristics

1. Uses analogy of trustee.
2. Personal representative has duty to follow code steps re administration. Failure to perform means he may be replaced, held liable for losses or denied protection against later complaints.
3. Representative, through statutory powers, can collect, liquidate, pay claims and distribute without further court order.
4. Purchasers from personal representatives are protected though sale may have been a breach of duty and may make personal representatives liable to distributees.
5. Purchasers from distributee protected, though distribution may subject distributee to liability of restitution.
6. Will may deny power, or party interested in administration may bring proceedings to restrain a particular act. Also, a petition for supervised administration might be appropriate if personal representative is inexperienced or the estate will be unusually complex.

B. Source of power and duties: duration

1. Appointment in formal or informal proceedings.
2. Various events terminate authority, though not liability for past acts.

C. Protection for persons interested in fiduciary conduct

1. Personal liability of fiduciary.
2. Opportunity to prevent appointment.
3. Opportunity, through notice after appointment, to require bond.
4. Personal representative always subject to formal proceeding in appointing court.
5. Supervised administration may be sought at beginning of administration, or later.
6. On application of any interested person to judge, and showing that personal representative has breached duty to administer promptly, or is unable to carry out duties, special administrator may be appointed.

V. Statutes of limitation

A. Characteristics

1. Arbitrary time limit within which rights of successors and rights of creditors must be asserted or otherwise recognized, or be barred.
2. Operates, vis a vis will probate, as a condition on testator's statutory right to make a will, and on devisee's statutory right to take under a will.
3. Time limits used are keyed to death of decedent, or to filing by personal representative.

B. Function

1. To permit non-judicial termination of period of uncertainty as to succession.
2. To implement, by certainty of right, the assumption of the parties in non-contentious situations that "everything is all right."

VI. Statutory protection for purchasers of estate assets

A. Characteristics

1. Protects purchasers from estate fiduciaries, relieving them of concern about power to sell, need to examine probate file beyond determining that fiduciary's letters are genuine, and obviating need for judicial order of sale or confirmation.
2. Distributees who present deeds from estate fiduciaries likewise can protect purchasers against defects of procedure or erroneous determination of heirs or devisees.

B. Function

1. To facilitate transactions involving estate assets.
2. Relieves title examiners and insurers of concerns about title to inherited assets so far as concerns marketability.

VII. Supervised administration

A. Characteristics

1. Results from proceeding, with notice and hearing, requesting one continuing proceeding to settle estate.

B. Purpose

1. To permit one continuous proceeding where a series of controversies is contemplated.

Flexible System for Administering Decedents' Estates

TABLE II

Proceedings Available; Keyed to Steps in Typical Estates

(Formal proceedings listed can be combined where all orders requested may be entered without delay)

INITIATION	ADMINISTRATION (Only after 2 or 3a) <u>Duties and Powers of Rep.</u>	CLOSING (Only after 2 or 3a) <u>Formal Accounting and Closing</u>
<p><u>Informal Probate (1)</u> (Will or No Will?)</p> <ul style="list-style-type: none"> . Makes will effective without delay or notice 	<ul style="list-style-type: none"> . Enables full admin. without further order . Purchasers protected though breach of duty involved . Distributees protected through ability to demand bond, quick restraining order, special admin. 	<ul style="list-style-type: none"> . May be started by rep. or distributee . May be combined with other requests for judicial ruling; e.g., with formal testacy proceeding, or proceeding to construe will
<p><u>Informal Appointment (2)</u></p> <ul style="list-style-type: none"> . Initial Step in intestacy . Second Step, or combined with 1 if there is a will . But, separate from 1 so that may probate will and not appt. a rep. 	<p><u>Statute of Limitations on Claims</u></p> <ul style="list-style-type: none"> . Runs from advertising by rep. . Rejected claims are barred unless proceeding between creditor and rep. started 	<p><u>Closing Via Filing and Statute of Limitations</u></p> <ul style="list-style-type: none"> . Filing statement must be complete and true . If so, questions as to propriety of rep.'s actions must be in suit within 6 mos. . Requirements include copy of acct. to each distributee . Relates only to rights and duties between rep. and persons receiving estate via his administration
<p><u>Formal Testacy (3)</u></p> <ul style="list-style-type: none"> . Adjudicates questions of will or no will and determines heirs if intestacy . Can corroborate informal probate, be original proceeding, or be a contest 	<p><u>Misc. Formal Proceedings</u></p> <ul style="list-style-type: none"> . Include dispute with claimant . Interpret will re whether land should be sold, or as to burden of taxes, for example . Covers any dispute that might arise 	
<p><u>Formal Appointment (3a)</u></p> <ul style="list-style-type: none"> . Same as 3, if intestate, except that an order appointing rep. is also involved . Appropriate if no contest over will, but dispute over appointment priorities 		

Supervised Administration

- . Court assumes control through continuing jurisdiction of personal rep.
- . Supervised rep. has same powers of collection and management as non-supervised rep., but may not distribute without court order after final hearing.
- . Assures full adjudication of all steps, may be requested after independent administration has been commenced or may be original proceeding.

Flexible System for Administering Decedents' Estates

TABLE II - Appendix

Alternatives for Various Requirements of Administration

1. To probate a will
 - a) informal probate proceedings
 - b) formal testacy proceedings
2. To appoint an executor
 - a) informal appointment proceeding
 - b) formal testacy; additional request
3. To appoint an administrator in intestacy
 - a) informal appointment proceeding
 - b) formal testacy proceeding seeking order of intestacy and determination of heirs
4. To contest a will
 - a) executor or contestant may start formal testacy proceedings to corroborate informal probate, contest informal probate, or to secure adjudication of will or intestacy in an original estate proceeding
5. To challenge appointment of personal representative
 - a) if issue is will or no will, formal testacy proceeding
 - b) if issue is qualification of person appointed informally, a formal proceeding to question informal appointment is available
6. To ascertain and bar creditors
 - a) advertise for claims and start four month period of limitations; pay claims after four months
 - b) disputed claims may be settled via fiduciary's power, or may be sued in probate proceeding between claimant and personal representative (either may start), or in a separate action elsewhere
 - c) secured claims, including right against decedent's insurer, not barred but unenforceable against general estate assets
 - d) taxes are the problem of federal and state revenue authority; can't bar as practical matter

TABLE II - Appendix
(continued)

7. To collect assets

- a) appointment gives representative right to possess all assets as needed; option available to leave possession in apparent successor
- b) appointment confers power on representative so that disputes may be sued or settled in probate court if defendant subject to suit in county, or in court of general jurisdiction
- c) for complex question, may bring formal proceeding, joining interested persons, and get court order on this matter separately from other business of estate
- d) duty to insure, pay taxes and repair follows appointment and possession of assets and lasts until sale or distribution

8. To sell, exchange or deal with assets

- a) personal representative has full power by statute
- b) purchasers protected even though sale is wrongful, unless purchasers act collusively with personal representatives

9. To protect heirs or devisees from personal representative's behaviour

- a) demand for notice procedure enables one to demand notice of any proceeding by request filed with court after death, thereby blocking informal proceedings unless notice is given as demanded
- b) any interested person can have bond required via demand
- c) any interested person can bring proceeding to prevent exercise of power and get restraining order on ex parte hearing
- d) personal liability of personal representative for breach made meaningful by requirement that inventory and accounts be furnished to parties

10. To produce good title to realty

- a) purchasers from personal representatives protected
- b) distribution by conveyance of personal representative. Title clear if no complaint within six months if question of will or no will has been litigated and creditors barred; otherwise
- c) purchasers from distributees protected even if distributees subject to liability

11. To gain protection for personal representative

- a) truthful closing statement, no overreaching of relationship, plus six months without complaint
- b) formal accounting proceeding

12. To assure judicial determination of all questions relevant to succession and administration

- a) supervised administration
- b) jurisdiction in probate court to entertain any proceeding initiated by any interested persons at any time

Flexible System for Administering Decedents' Estates

TABLE III

Some Proposed Time Limitations

From death:

1. Three years is time limit for informal or formal probate proceedings to establish will.
2. Three years is time limit on proceedings to secure original appointment of personal representative.
3. Three years is time limit for assertion of unsecured claim, when there is no administration or notice to creditors.

Comment:

- a. A will probated informally becomes incontestable after the later of three years from death or one year from probate.
- b. If no will probated within period, right of heirs becomes incontestable. Proceeding to determine heirs possible any time, as is will construction.
- c. Property descends at death subject to administration so that barring issuance of letters relieves estate assets of possible right of possession by p.r., and bars rights dependent on administration such as family allowance and spouse's election.

From advertisement for claims after appointment:

1. Four months from first published notice to creditors is time limit for proof of claim.

Comment:

- a. Appointment and advertising required.
- b. Expenses of administration subject to special non-claim, secured claims, including claims against decedent's insurer; excepted from non-claim.

From filing of complete closing statement:

1. Six months is time limit for complaint against personal representative by distributees.

Comment:

- a. If distribution is made under a will probated informally, and time limitation of three years has not run, heirs may still challenge will but their recourse is against distributees.
- b. Similarly, if estate distributed as intestate without adjudication of intestacy, a later-discovered will probated within three years from death would give takers under will rights against heirs.
- c. In a case like a. or b., purchaser from duly appointed personal representative, or from distributee, protected.

Flexible System for Administering Decedents' Estates

TABLE III
(continued)

Fraud?

The Code provides that regular time limits would not bar an action in tort or for constructive trust or restitution against one who intentionally misrepresented, or concealed, a material fact to the detriment of another or one who profited from such conduct by another. Rather, two years from discovery of fraud is the limit.

- a. ...
- b. ...
- c. ...

Four months from date of death for proof of claim

1. Four months from date of death for proof of claim.

Comment

- a. Assignment and a ...
- b. ...

...

...

...

...

...

...

Flexible System for Administering Decedents' Estates

TABLE IV

Major Protective Devices and Provisions

1. Fraud in form of misrepresentation in statement required for informal proceeding or filing.
 - a. Person guilty of fraud and persons enriched via fraud liable to persons damaged in tort or restitution for two years from discovery, irrespective of other limits. Innocent distributee safe after 5 years from death in spite of fraud. Also, penalties for perjury attach to person falsely completing petition.
2. Omission of relevant information in statement relating to informal proceeding, or filing.
 - a. In "Informal proceedings", Registrar to check content of statement against statutory list before issuing letters or statement of informal probate.
 - b. Intentional omission of required statement is fraud.
 - c. Normal duty of fiduciary provides additional remedy.
3. Disinheritance of real heir via informal probate of will.
 - a. Cannot happen until at least 3 years have run from death. This period plus the natural notice provided by death of relative, plus the probability that wills meeting check-list are okay, should make risk tolerable.
4. Failure to identify proper heirs in distribution of intestate estate.
 - a. True heirs not barred of right to recover value wrongfully received by distributees, unless there has been a formal proceeding after full notice or until the later of three years from death, or one year from distribution.
5. Appointment as Personal Representative of persons lacking needed business skills in no-notice proceedings.
 - a. Demand for notice permits any interested person to have notice before appointment and opportunity to get judicial determination.
 - b. No appointment possible for 5 days after death.

6. After appointment, protection against bad judgment or other default of personal representative.
 - c. Appointment made informally may be attacked in formal proceedings. Incident to such proceedings, prior appointee loses all but emergency powers. Also, court may appoint a special administrator.
 - a. Any person with substantial interest in estate as creditor or probable distributee can compel bond at any time.
 - b. Also, any such person may move to court for a restraining order which subjects personal representative to penalty of contempt if disregarded.
 - c. Remedy of surcharge for breach of duty available against fiduciary.
 - d. Person interested in specific property may restrain sale, request court order that asset be sold to him or secure other relief.
 - e. Supervised administration may be ordered to supercede informal appointment.
7. Protection for children and other persons under disability.
 - a. Fair representation assured in respect to interests affected by formal proceedings; guardian ad litem if necessary.
 - b. Three year period after death provides chance for questions to be raised in case there is no formal proceedings.
 - c. Registrar has discretion to decline informal appointment and may exercise such discretion in relation to petitions showing some successors to be minors.
 - d. Fiduciary obligation of personal representative remains open in respect to misrepresentation or non-disclosure in accounts furnished to persons who should recover estate.
 - e. Erroneous distribution leaves distributees liable in restitution until the later of one year from distribution or three years from death, except where the distribution is approved by court after hearing featuring fair representation of incompetents.
 - f. Personal representative under practical obligation in regard to distributions to minors and incompetents to get good receipt.

In General

- a. By eliminating much of the need for routine court orders, the matters which are brought before a judge after full notice should be better considered, with attendant increase in the likelihood of ultimate accuracy and fairness.
- b. Interests cut short by a statute of limitations may be seen as not warranting full protection. Persons who do nothing by way of inquiry about the affairs of a relative for more than three years after his death usually will not be the close kindred to whom such decedent's property should pass. A will that is discovered more than three years after death should be suspect, per se.
- c. Acceptance of the concept that a personal representative is a fiduciary with clear lines of responsibility to the interested persons will more surely bring protection cut to fit the interests and inclinations of the property owners involved, than the system of making the court some sort of watchdog to see that total propriety attends each estate. The system focuses responsibility on the personal representatives and assists persons interested in protecting themselves.

Flexible System for Administering Decedents' Estates

TABLE V

Illustrations

Case 1

Hypothetical facts:

Testator's estate consists of personal and intangible property estimated to be worth \$50,000. His survivors are his widow and two adult sons. He left an apparently well executed will of recent date which leaves his entire estate to his widow. His sons want nothing and are willing to cooperate in every way.

A Possible Approach
(Cheap and risky)

1. Informal probate of will

[Available five days after death; no notice; no hearing; original will, death certificate and detailed sworn statement are required].

2. Informal appointment

[Named executor may be appointed as soon as will probated; no bond unless requested; application may be combined with application for probate].

At this point, the executor has accepted responsibility and is liable to all persons interested in estate to complete administration via powers conferred. But, unless a creditor or devisee complains, or unless someone challenges the will, or the executor wants protection, there is no compulsion from the court to do more. Assuming the executor pays all known bills and taxes, and causes estate to be transferred from decedent's name to devisee's name, the matters left open are as follows:

- a. Other possible creditors not barred without advertising. Three years from death is state of limitation on risk of executor and devisee.
- b. Because will probate was informal only, basic period of three years from death is risk period for will contest, later-discovered will, claim by persons who may turn up as prior spouse, forgotten children, or with various claims for service and the like.
- c. Executor takes risk of change of mind by family. Devisee may blame executor for failing to pursue salary claim, etc.

Case 2

Hypothetical fact: [Same as Case 1]

A Better Approach
(One hearing at beginning)

- . Informal probate
[To permit early appointment]
- . Informal appointment
[Takes the place of special administrator; quick sale of assets possible.]
- . Formal probate
[Executor starts formal proceeding to get adjudication on will. Shortens time for question to time for vacation of order or appeal. Notice to known and unknown heirs bars later claim.]

At this point estate is just like first example, except that risk of later will or contest is limited very substantially.

- . Advertisement for claims; payment of all known claims; four months pass.
[Now risk of further claims against decedent is eliminated.]
- . Executor distributes without order and files closing statement prescribed by Code; six months pass without question being raised.
[Filing requires statement under oath that required steps taken and that account was sent to distributees.]

At this point all parties are virtually assured of full protection. The risks still open would include any question as to whether the personal representative made full disclosure, any question as to the competency of distributees to consent and release, and any question about the truth of assertions in the closing statement.

Case 3

Hypothetical facts: [Same as Case 1]

The Best Approach
(One hearing at conclusion)

- . Informal probate
- . Informal appointment
- . Advertisement for claims
- . Formal proceeding to adjudicate validity of will (heirs joined), and to approve accounts (distributees interested)

This approach involves postponing the formal probate proceeding until the end of administration and is indicated only when the risk of successful contest or of a later will being discovered is very small. The hearing at the close of administration should seal off any questions that might come up between representative and distributee.

Case 4

Hypothetical facts:

Testator's estate consists of stocks and notes worth \$50,000. His will, executed on his death bed, leaves everything to his third wife whom testator married six months earlier and nothing to his children by his first and second marriages. Everyone except the third wife is unhappy. It seems clear that some of the children, particularly a daughter who kept house for her father until his third marriage, will cause trouble.

One Approach
(A practical combination)

- . Informal probate
- . Informal appointment
[In combination, these steps enable executor named in last will to get started with administration. If a will contest is started, he ceases to have power to distribute until contest is ended. The angry daughter could sue to prevent his appointment, but she would have to move fast. Also, she could require bond and restrain powers on ex parte hearing.]
- . Formal probate
[If daughter doesn't start contest, executor should precipitate matter or else the question of will or no will remains to impede administration.]
- . Advertises for claims
[Daughter will have to show hand on claim, if she is going to do so.]
- . Executor distributes without order and files closing statement
[This would be feasible only if daughter, having been eliminated on questions she can raise, is the only problem. Leaves executor with risks of settlement with widow.]

Case 5

Hypothetical facts: [Same as Case 4]

Another Approach
(One continuous proceeding)

- . Informal probate
- . Informal appointment
[To start things.]
- . Formal proceeding to:
 - a. secure adjudication of will
 - b. secure order that executor proceed under responsibility to court in supervised administration
[Request for supervised administration can be joined with any proceeding involving all interested parties.]

An order for supervised administration means that the representative, though he has the same powers of collection, sale and management of assets as a non-supervised representative, may not distribute the estate without an order of the judge. Also, if the petitioner requests it, certain administrative powers ordinarily available to a personal representative may be curtailed, provided reference to the limitation is endorsed on the letters.

Supervised administration takes the executor and his attorney off the "hot seat" to a degree. It would reduce the burden of justifying various steps which the estate attorney may feel are inevitable, or desirable.

Case 6

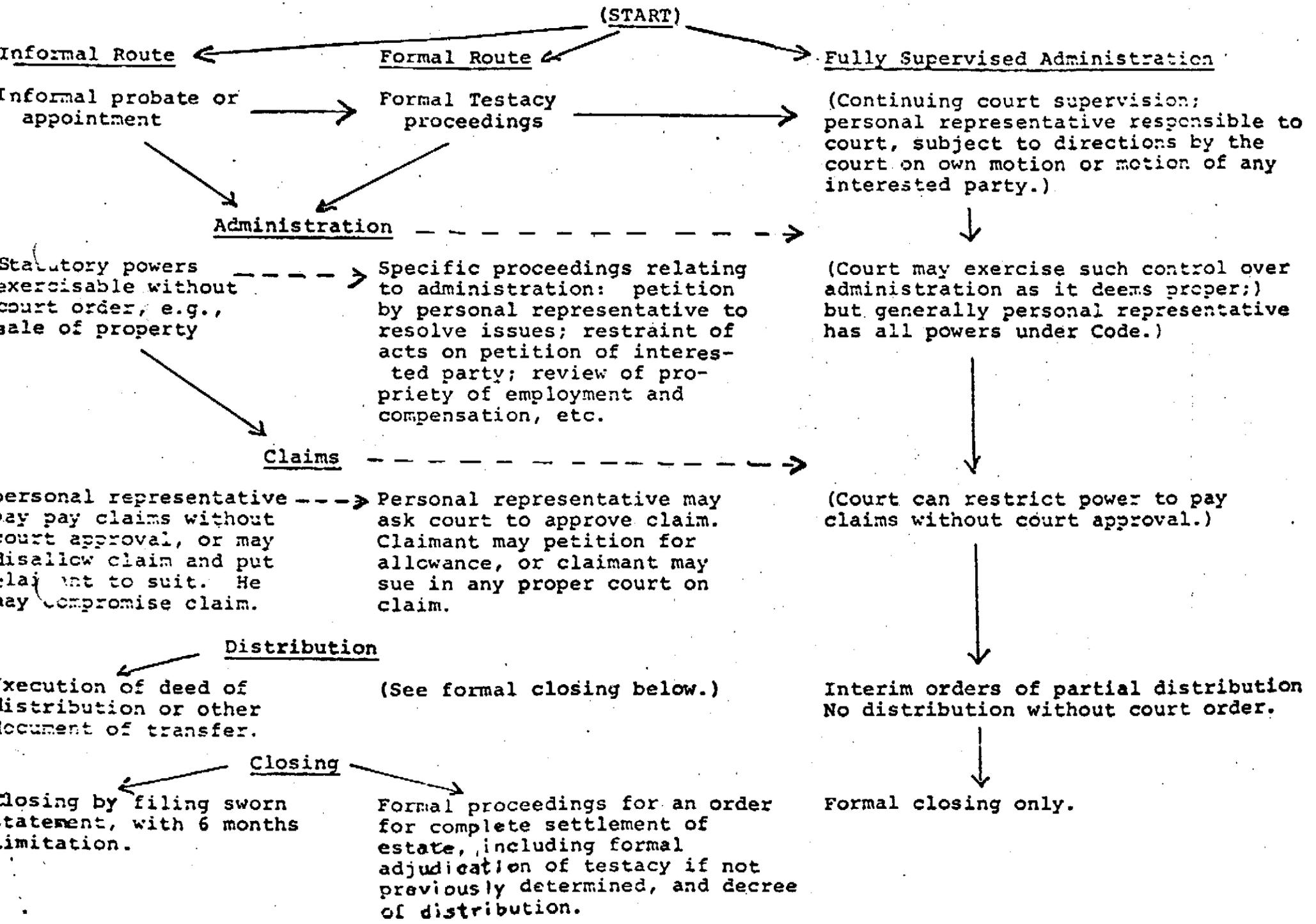
Hypothetical facts:

Decedent dies intestate survived by three minor children, owning farm worth \$75,000.

A Possible Approach
(One hearing at end)

- . Informal appointment
- . Advertisement for claims; four months pass
- . Land sale via power in personal representative
- . Formal proceeding to
 - a. determine that there was no will
 - b. determine who were heirs
 - c. settle all questions that might be raised about sale and distribution
- . Distribution would be made to conservator appointed by court to manage assets of children

FLOW CHART OF FLEXIBLE ADMINISTRATION UNDER CODE



ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

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January 21, 1983

TO: THE CALIFORNIA LAW REVISION COMMISSION

Basic Probate Procedures in California:

Assume an estate with assets of \$200,000:

1) If property is all community or quasi-community property passing outright to surviving spouse, property is transferred by Affidavit and no probate is required (Probate Code § 202(a)).

a) If its nature as community property or quasi-community property is unclear, a petition under Probate Code § 650 can be filed for a Court determination of the nature of the property.

2) If decedent's Will left a \$5,000 bequest to each of four (4) children and the balance outright to the spouse, no probate would be required, as the bequests to children can be handled pursuant to an Affidavit pursuant to § 630 of the Probate Code and the balance can be transferred by Affidavit pursuant to Probate Code § 202(a).

3) When a probate is required, the basic steps are as follows:

1) Petition for Probate and for Appointment of Personal Representative (Judicial Council form).

2) Publish Notice of Death and Notice to Creditors (basis of in rem jurisdiction) and mail notice of hearing to heirs and beneficiaries named in Will.

To: The California Law Revision Commission
January 21, 1983
Page Two

3) Court Order Admitting Will to Probate and Appointing Personal Representative (Judicial Council form).

4) Letters Testamentary issued by Clerk (Judicial Council form).

5) Creditors' Claims (Court form) acted on by Personal Representative. (Claims must be filed within four (4) months of issuance of Letters Testamentary).

6) Inventory (Court form) prepared and sent to Probate Referee for Appraisal (Referee fee 1/10 of 1% of first \$500,000; 1/20 of 1% for amounts in excess of \$500,000.) Fee on \$200,000 is \$200, if all items appraised by Referee.

7) Inventory and Appraisement filed with Court.

8) First and Final Account, Report, Petition for Statutory Executor's Commissions, Statutory Attorney's Fees and for Final Distribution.

- 1) Accounting often waived;
- 2) Notice given to interested parties; and
- 3) Court order of distribution.

9) For a \$200,000 estate, there is no Federal Estate Tax Return required, and no California Estate Tax Return is required.

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS): ATTORNEY FOR (NAME): SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: ESTATE OF (NAME):	TELEPHONE NO	FOR COURT USE ONLY CASE NUMBER: HEARING DATE: DEPT: TIME:
Decedent <input type="checkbox"/> PROBATE OF WILL AND FOR LETTERS TESTAMENTARY <input type="checkbox"/> PROBATE OF WILL AND FOR LETTERS OF ADMINISTRATION WITH WILL ANNEXED <input type="checkbox"/> LETTERS OF ADMINISTRATION <input type="checkbox"/> SPECIAL LETTERS OF ADMINISTRATION <input type="checkbox"/> AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT		

1. Attorney requests publication in (name of newspaper): **THE LOS ANGELES DAILY JOURNAL**

(Type or print name):

(Signature of attorney)

2. Petitioner* (name of each):

requests that

a. decedent's will and codicils, if any, be admitted to probate.

b. (name):

be appointed (1) executor

(3) administrator

(2) administrator with will annexed

(4) special administrator

and Letters issue upon qualification.

c. authority be granted to administer under the Independent Administration of Estates Act.

d. bond not be required for the reasons stated in attachment 2d.

bond be fixed at \$ _____ to be furnished by an authorized surety company or as otherwise provided by law (specify reasons if the amount is different from the minimum required by section 541 of the Probate Code).

deposits at (specify institution):

in the amount of \$ _____ be allowed. Receipts will be filed.

3. a. Decedent died on (date): _____ at (place): _____

a resident of the county named above.

a non-resident of California and left an estate in the county named above located at (specify location permitting publication in the newspaper named in item 1):

b. Street address, city, and county of decedent's residence at time of death:

c. Character and estimated value of the property of the estate

Personal property: \$ _____

Annual gross income from

real property: \$ _____

personal property: \$ _____

Total: \$ _____

Real property: \$ _____

d. Will waives bond.

All beneficiaries have waived bond and the will does not require a bond (affix waiver as attachment 3d).

All heirs at law have waived bond (affix waiver as attachment 3d).

e. Decedent died intestate.

Copy of decedent's will dated:

and codicil dated:

is affixed as attachment 3e.

ESTATE OF (NAME):

CASE NUMBER:

Decedent

PETITION FOR PROBATE

f. Appointment of personal representative

(1) Appointment of executor or administrator with will annexed

- Proposed executor is named as executor in the will.
No executor is named in the will.
Proposed personal representative is a nominee (affix nomination as attachment 3f(1)).
Other named executors will not act because of death declination other reasons (specify in attachment 3f(1)).

(2) Appointment of administrator

- Petitioner is a nominee (affix nomination as attachment 3f(2)).
Petitioner is related to the decedent as:

(3) Appointment of special administrator requested (specify grounds and requested powers in attachment 3f(3)).

g. Proposed personal representative is a resident of California non-resident of California resident of the United States non-resident of the United States.

4. a. (Complete in all cases.) The decedent is survived by

- spouse no spouse.
parent no parent.
child no child.
issue of predeceased child no issue of predeceased child.

b. No surviving child or issue of a predeceased child has been omitted from the list of heirs (item 6).

c. (Complete only if no spouse or issue survived the decedent.) The decedent

- had no predeceased spouse.
had a predeceased spouse whose heirs are named in the list of heirs (item 6).
had a predeceased spouse who had no heirs.

d. (Complete only if no parent or issue survived the decedent.) The decedent is survived by

- a brother or sister or issue of a predeceased brother or sister. None has been omitted from the list of heirs (item 6).
no brother or sister or issue of a predeceased brother or sister.

5. Decedent's will does not preclude independent administration of this estate under sections 591-591.7 of the Probate Code.

6. The names, residence or mailing addresses, relationships, and ages of heirs, devisees, predeceased devisees, legatees, and predeceased legatees so far as known to petitioner are listed below listed in attachment 6.

NAME AND RELATIONSHIP AGE RESIDENCE OR MAILING ADDRESS

7. Number of pages attached:

Dated:

(Signature of petitioner)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on (date): at (place):

(Type or print name)

(Signature of petitioner)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR (Name):		
NAME AND ADDRESS OF COURT, OR BRANCH: SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
IN THE MATTER OF		
NOTICE OF HEARING (PROBATE)		CASE NUMBER:

This notice is required by law. This notice does not require you to appear in court, but you may attend the hearing if you wish. If you are a person interested in the estate, you may file a request with the court to receive special notice of the filing of the inventory of estate assets and of the petitions, accounts, and reports described in section 1200.5 of the California Probate Code.

1. NOTICE is given that (name):
 (representative capacity, if any):
 has filed (specify):

reference to which is made for further particulars.

2. A hearing on the matter will be held

on (date):	at (time):	in <input type="checkbox"/> Dept.:	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:
------------	------------	------------------------------------	--------------------------------	--------------------------------

located at (address of court):

Dated: _____ Clerk, by _____, Deputy

This notice was mailed on (date): _____ at (place): _____, California.

I certify that I am not a party to this cause and that a true copy of the foregoing Notice of Hearing (Probate)

1. was posted at (address):

on (date):

2. was mailed, first class, postage fully prepaid, in a sealed envelope addressed to each person whose name and address is given below and that the notice was mailed and this certificate was executed on (date): at (place):, California.

Clerk, by _____, Deputy

PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is:

I served the foregoing Notice of Hearing (Probate) by enclosing a true copy in a sealed envelope addressed to each person whose name and address is given below and depositing the envelope in the United States mail with the postage fully prepaid.

(1) Date of deposit:

(2) Place of deposit (city and state):

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on (date): at (place):, California.

.....
(Type or print name)

(Signature of declarant)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

NAME AND ADDRESS OF ATTORNEY:	TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR:		
insert name of court, branch court if any, and Post Office and Street Address:		
ESTATE OF:		
LETTERS		Case Number:
<input type="checkbox"/> TESTAMENTARY	<input type="checkbox"/> OF ADMINISTRATION	
<input type="checkbox"/> OF ADMINISTRATION WITH WILL ANNEXED	<input type="checkbox"/> OF SPECIAL ADMINISTRATION	
		DECEDENT

STATE OF CALIFORNIA, COUNTY OF

1. The last will of the above-named decedent having been proved, the court appoints (Name):

- a. Executor.
- b. Administrator with will annexed.

2. The court appoints (Name):

- a. Administrator of the decedent's estate.
- b. Special administrator of decedent's estate
 - (1) with the special powers specified in the Order for Probate
 - (2) with the powers of a general administrator.

3. The personal representative is is not authorized to administer the estate under The Independent Administration of Estates Act.

WITNESS, the clerk of the above-entitled court, with seal of the court affixed.

Dated:

Clerk, by _____, Deputy

[SEAL]

4. **AFFIRMATION**

I solemnly affirm that I will perform the duties of personal representative according to law.

Executed on (Date): at (Place): California.

(Personal Representative)

5. **CERTIFICATION**

I certify that this document is a correct copy of the original on file in my office, and that the letters issued the above-appointed person have not been revoked, annulled, or set aside, and are still in full force and effect.

Dated:

Clerk, by _____, Deputy

[SEAL]

NAME AND ADDRESS OF ATTORNEY: TELEPHONE NO.:		FOR COURT USE ONLY
ATTORNEY FOR: SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
ESTATE OF: <input type="checkbox"/> DECEDENT <input type="checkbox"/> CONSERVATEE <input type="checkbox"/> WARD		CASE NUMBER:
INVENTORY AND APPRAISEMENT* <input type="checkbox"/> FINAL <input type="checkbox"/> PARTIAL NO.: <input type="checkbox"/> SUPPLEMENTAL <input type="checkbox"/> REAPPRAISAL FOR SALE		Date of Death or of Appointment of Guardian or Conservator:

APPRAISALS

1. Total appraisal by representative (Attachment 1) \$
2. Total appraisal by referee (Attachment 2) \$
TOTAL: \$

DECLARATION OF REPRESENTATIVE

3. Attachment 1 & 2 together with all prior inventories filed herein contain a true statement of all a portion of the estate that has come to my knowledge or possession, including particularly all money and just claims against me. I have truly, honestly and impartially appraised each item as set forth in Attachment 1 to the best of my ability.

I certify (declare) under penalty of perjury that the foregoing is true and correct and that this declaration is executed on (Date): _____ at (Place): _____, California.

(Type or print name of representative including title of corporate officer)

(Signature of representative)

STATEMENT OF ATTORNEY REGARDING BOND
(Complete if required by local court rule)

4. Bond is waived
5. Bond filed in the amount of: \$ _____ Sufficient Insufficient

Date: _____

(Signature of attorney for estate)

DECLARATION OF INHERITANCE TAX REFEREE

6. I have truly, honestly, and impartially appraised to the best of my ability each item set forth in Attachment 2.
7. A true account of my commission and expenses actually and necessarily incurred pursuant to my appointment is
Statutory commission: \$ _____
Expenses (Specify): \$ _____

Total: \$ _____

8. I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed on (Date): _____ at (Place): _____, California.

(Type or print name of referee)

(Signature of referee)

(Continued on Reverse Side)

* See reverse side for instructions before completing. The declaration must be signed in California (CCP 2015.5); affidavit required when signed outside California. No attachment permitted less than on a full page (California Rule of Court 201 (b)).

INSTRUCTIONS

See Prob. C. 601, 604, 608, 609, 611, 1550, 1606, 1702, and 1901 for additional instructions.

See Prob. C. 600-602 for items to be included.

If ward or conservatee is or has been confined in a state hospital during the guardianship or conservatorship, mail a copy to Director of State Department of Health at Sacramento. (Prob C. 1550, 1554.1, 1901)

The representative shall list on Attachment 1 and appraise as of the date of death or date of appointment of guardian or conservator at fair market value moneys, currency, cash items, bank accounts and amounts on deposit with any financial institution (as defined in Probate Code Section 605), and the proceeds of life and accident insurance policies and retirement plans payable upon death in lump sum amounts to the estate, excepting therefrom such items whose fair market value is, in the opinion of the representative, an amount different from the ostensible value or specified amount.

The representative shall list on Attachment 2 all other assets of the estate which shall be appraised by the Referee.

If joint tenancy and other assets are listed for appraisal purposes only and not as part of the probate estate, they must be separately listed on additional attachments and their value excluded from the total valuation of Attachments 1 and 2.

Each attachment should conform to the format approved by the Judicial Council.

STUDY L-825 - PROBATE LAW (SUCCESSION WITHOUT ADMINISTRATION)

The Commission considered Memorandum 83-6 and the attached UPC amendments for succession without administration. Professor Wellman noted that a free-standing Uniform Succession Without Administration Act is being developed, but it may be difficult or impossible to adapt a free-standing act to the particularized law of each state. An issue is whether proceedings for succession without administration should be accomplished by informal proceeding or whether it should be a fully-noticed proceeding. As drafted, the UPC provisions permit commencement by affidavit (informal). If the UPC provisions were engrafted on existing California law, Professor Wellman thought it might be difficult to persuade the legislature to adopt the scheme as an exception to the general California scheme of supervised administration with a formal opening and closing.

Mr. Collier expressed the view of the Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section that the UPC provisions for succession without administration are worthy of further study. He expressed concern about the unlimited potential liability of universal successors for debts of the decedent, and pointed out that other California provisions for transfer of assets without administration or with summary administration do limit such liability. See Prob. Code §§ 205, 645.3. Professor Wellman responded that if liability is to be limited, the estate should be administered so that estate assets may be marshalled and creditors may be paid, whether fully or pro rata. Mr. Collier thought that perhaps the succession without administration provisions should be brought into play only when estate beneficiaries are limited to the decedent's spouse and children, or should be subject to a dollar limit on the size of the estate.

There was some sentiment on the Commission to require that the estate be opened formally, that notice be given to creditors, and after the four-month period for filing creditors' claims has elapsed, then the succession without administration provisions could be brought into play.

The Commission asked the staff to draft provisions for succession without administration for Commission consideration. The staff should look at existing California provisions for passing of community property

outside probate (Prob. Code §§ 202, 205, 650-655) to see if they can be adapted for this purpose. These provisions could be expanded to permit children of the decedent to obtain the estate in this manner.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary