

Note. Changes may be made in this
Agenda. For meeting information,
please call John H. DeMouilly
(415) 494-1335

October 25, 1984

Time

November 9 (Friday) - 10:00 a.m. - 5:00 p.m.
November 10 (Saturday) - 9:00 a.m. - 5:00 p.m.

Place

State Capitol
Sacramento, CA

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

November 9-10, 1984

1. Minutes of September 27-29, 1984, Meeting (enclosed)
2. Administrative Matters
 - Revision of Statute Governing Law Revision Commission
Memorandum 84-97 (enclosed)
 - Finances
Memorandum 84-91 (to be sent)
 - Schedule for Preparing Recommendation for New Probate Code
Memorandum 84-95 (to be sent)
3. Study L-658 - Transfer of Title to Certain Personal Property Without Probate
 - Memorandum 84-90 (enclosed)
 - Draft of Recommendation (attached to Memorandum)
4. Study L-629 - Item vs. Aggregate Theory of Community Property
Memorandum 84-61 (sent 9/6/84)
5. Study L-603 - Wills (Testamentary Capacity)
Memorandum 84-94 (enclosed)
6. Study L-640 - Trusts
 - Comments on Staff Materials
Memorandum 84-58 (sent 7/23/84)
 - Liability of Trust and Trustee to Nonbeneficiaries
Memorandum 84-24 (sent 4/17/84; another copy sent 5/16/84)
First Supplement to Memorandum 84-24 (sent 8/1/84)
Memorandum 84-80 (sent 9/17/84)
Memorandum 84-81 (sent 9/19/84)
 - Office of Trustee
Memorandum 84-26 (sent 4/17/84; another copy sent 5/16/84)
First Supplement to Memorandum 84-26 (sent 8/16/84)
Memorandum 84-80 (sent 9/17/84)
Memorandum 84-81 (sent 9/19/84)

Judicial Administration

Memorandum 84-29 (sent 4/10/84; another copy sent 5/16/84)
First Supplement to Memorandum 84-29 (sent 9/11/84)

Transfer of Trusts To and From California

Memorandum 84-30 (sent 3/21/84; another copy sent 5/16/84)
First Supplement to Memorandum 84-30 (sent 7/23/84)
Memorandum 84-81 (sent 9/19/84)

Revised Uniform Principal and Income Act

Memorandum 84-32 (sent 3/2/84; another copy sent 5/16/84)
First Supplement to Memorandum 84-32 (sent 7/23/84)
Memorandum 84-80 (sent 9/17/84)
Memorandum 84-81 (sent 9/19/84)

Presumption of Revocability as to Foreign Trusts

Memorandum 84-34 (sent 6/6/84; another copy sent 7/17/84)
First Supplement to Memorandum 84-34 (sent 7/23/84)
Memorandum 84-81 (sent 9/19/84)

Conduct of Trust Business and Qualification by Foreign Trustees

Memorandum 84-27 (sent 6/1/84; another copy sent 7/17/84)
First Supplement to Memorandum 84-27 (sent 8/9/84)
Memorandum 84-80 (sent 9/17/84)
Memorandum 84-81 (sent 9/19/84)

Validity of Trusts for Indefinite Beneficiaries or Purposes

Memorandum 84-31 (sent 6/4/84; another copy sent 7/17/84)
Memorandum 84-19 (attached to Memorandum)
Memorandum 84-81 (sent 9/19/84)

Modification and Termination of Trusts

Memorandum 84-88 (sent 10/22/84)
Draft Statute (attached to Memorandum)
Background Study (attached to Memorandum)

Trustee's Duties and Powers

Memorandum 84-92 (to be sent)
Draft Statute (attached to Memorandum)

Breach of Trust

Memorandum 84-93 (to be sent)
Draft Statute (attached to Memorandum)

7. Study F-601 - Division of Joint Tenancy and Tenancy in Common
Property at Dissolution of Marriage
Memorandum 84-89 (sent 10/11/84)
Draft of Tentative Recommendation (attached to Memorandum)
8. Study H-406 - Abandoned Easements
Memorandum 84-63 (sent 8/9/84; another copy enclosed)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 84-63 (enclosed)

9. New Topic

Memorandum 84-96 (enclosed)

10. Study D-303 - Creditor's Remedies

Memorandum 84-87 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 9, 1984

SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on November 9, 1984.

Law Revision Commission

Present:	David Rosenberg, Chairperson	Arthur K. Marshall
	Roger Arnebergh	Edwin K. Marzec
	Bion M. Gregory	Ann E. Stodden
Absent:	James H. Davis, Vice Chairperson	Alister McAlister, Member of Assembly
	Barry Keene, Member of Senate	John B. Emerson

Staff Members Present

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

Consultants Present

Gail B. Bird, Property and Probate Law
Susan French, Property and Probate Law
Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Edward V. Brennan, California Probate Referee Association,
San Diego
Charles Collier, State Bar Estate Planning, Trust and Probate
Law Section, Los Angeles
Melodie Kleiman, Attorney, Ventura
Paulette Leahy, California Bankers Association, San Diego
Valerie J. Merritt, Probate and Trust Law Section, Los Angeles
County Bar Association, Los Angeles
James Quillinan, State Bar Estate Planning, Trust and Probate
Law Section, Mountain View
James Willett, State Bar Estate Planning, Trust and Probate Law
Section, Sacramento

ADMINISTRATIVE MATTERS

MINUTES OF SEPTEMBER 27-29, 1984, MEETING

The minutes of the September 27-29, 1984, meeting as submitted by the staff were approved after the following was added to the minutes:

STUDY F-661 - PROVISION FOR SUPPORT IF SUPPORT
OBLIGOR DIES

The Commission considered Memorandum 84-73 and attached exhibits. The Commission decided to recommend legislation to the 1985 legislative session to amend the second sentence of paragraph (9) of subdivision (a) of Section 4801 of the Civil Code as follows:

Where it is just and reasonable in view of the circumstances of the respective parties, the court, in determining the needs of the supported spouse, may include an amount sufficient to purchase an annuity for the supported spouse or to maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support, or may require the spouse required to make the payment of support to establish a trust to provide for the support of the supported spouse, so that the supported spouse will not be left without means for support in the event that the order for support is terminated by the death of the party required to make the payment of support.

Representatives of the State Bar Family Law Section suggested that the Comment should describe the problem dealt with by the amendment, possibly drawing from the letters attached to the memorandum. The State Bar section representatives will furnish suggested language to the staff.

REVISION OF STATUTE GOVERNING LAW REVISION COMMISSION

The Commission considered Memorandum 84-97 containing a staff draft of a statute to permit replacement of a member of the Commission who consistently fails to attend meetings and to permit members and employees of the Commission to support Commission recommended legislation.

The Commission approved the substance of the draft, revised as set out below, for introduction at the 1985 legislative session.

SECTION 1. Section 8281.5 is added to the Government Code, to read:

8281.5. The office of a member of the commission appointed by the Governor becomes vacant if the member is absent for three consecutive regular meetings of the commission unless the member is excused from attending. For the purposes of this section, a member is excused from attending a meeting only if (1) the commission, acting at the meeting the member failed to attend or at the next meeting of the commission, determines the member is excused from attending the meeting and (2) the commission's action is entered in the minutes of the meeting at which the action was taken. When the office of a member of the commission becomes vacant under this section, the chairperson of the commission shall give notice of the vacancy to the Governor.

SEC. 2. Section 8288 of the Government Code is amended to read:

8288. ~~No~~ Except for legislation recommended by the commission, no employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters

assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation, or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

FINANCES

The Commission considered Memorandum 84-91 concerning the Commission's financial situation. Commissioner Marshall agreed to contact the Haines Foundation to try to obtain funds to make a down payment on new word processing equipment needed to produce the new Probate Code and to pay an experienced probate attorney to augment the staff temporarily for the period from January 1 to July 1, 1985. The Executive Secretary was authorized to make any necessary agreements to obtain additional funds and to secure the services of an experienced probate attorney on a temporary basis.

SCHEDULE FOR PREPARING RECOMMENDATION FOR NEW PROBATE CODE

The Commission considered Memorandum 84-95 concerning the schedule for preparing the new Probate Code. The Commission approved the proposed schedule. Charles Collier of the State Bar Estate Planning, Trust and Probate Law Section handed out a letter containing suggestions for revision of the probate administration provisions of the Probate Code (Division 3), a copy of which is attached as Exhibit 1 to these minutes.

NOTICE IN PROBATE TO STEPCHILDREN AND FOSTER CHILDREN

Charles Collier of the State Bar Estate Planning, Trust and Probate Law Section pointed out a problem under the new wills and intestate succession law: Notice may be required to be given to stepchildren and foster children because of the possibility they may be heirs under Section 6408. The Commission agreed that an urgency bill should be introduced in December to provide that notice need not be given to a stepchild or foster child that was not legally adopted unless the person has actual knowledge that the relationship between the stepchild or foster child and the stepparent or foster parent began during the child's minority, continued throughout the parties' joint lifetimes, and the stepparent or foster parent would have adopted the child but for a

legal barrier. The staff should draft the legislation and mail it out to the Commission and to the State Bar. If any Commissioner or State Bar representative has a problem with the proposed legislation, he or she should expeditiously advise the staff.

SUGGESTED NEW TOPIC - LITIGATION COSTS

The Commission considered Memorandum 84-96 and the attached letter from the California Judges Association concerning litigation costs. The Commission decided that it is not in a position to study this matter because the Commission has decided to devote its time and resources to the preparation of a new Probate Code for 1986. In addition, this matter is one that is appropriate for study by the Judicial Council. The Executive Secretary should write to the Judicial Council and the California Judges Association to inform them of this decision.

NONPROFIT CORPORATION AS ATTORNEY IN FACT UNDER DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The Executive Secretary orally reported that there is some question whether a nonprofit corporation may serve as attorney in fact under a durable power of attorney for health care. He recommended a statute to make clear that a nonprofit corporation may serve as the attorney in fact, similar to the statute which permits a nonprofit corporation to act as a guardian or conservator (Prob. Code § 2104). The Commission decided that this proposal should not be included in cleanup legislation to be submitted to the 1985 session. Legislation on this matter should be considered when work on the new Probate Code is completed.

STUDY D-303 - CREDITORS' REMEDIES

The Commission considered Memorandum 84-87 relating to follow-up creditors' remedies legislation and approved the technical amendment to Code of Civil Procedure Section 701.680 as set out in the letter attached to the memorandum. Consideration of the problem of whether liens of junior creditors should be reinstated where an execution sale is set aside was postponed in light of the priority being given to the Probate Code study.

STUDY F-601 - DIVISION OF JOINT TENANCY AND TENANCY
IN COMMON PROPERTY AT DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 84-89 and a letter from the State Bar Family Law Section (copies distributed at the meeting and attached to these Minutes as Exhibit 2) relating to the court jurisdiction to divide joint tenancy and tenancy in common property at dissolution of marriage. The Commission approved the draft recommendation attached to the memorandum for printing and submission to the 1985 legislative session.

STUDY H-406 - ABANDONED EASEMENTS

The Commission considered Memorandum 84-63 and the First Supplement thereto, relating to clearing title to real property of abandoned easements. The draft tentative recommendation should point out that an easement holder may record a notice of intent to preserve the easement that is effective for all easements in the county in which notice is recorded. The tentative recommendation should also make reference to the general provisions exempting public entities and other special circumstances from the operation of the statute. As so revised, the Commission approved the draft for distribution for comment.

STUDY L-603 - TESTAMENTARY CAPACITY

The Commission considered Memorandum 84-94 and the attached letter from attorney Melodie Kleiman. Ms. Kleiman made an oral presentation to the Commission. She also distributed a letter from Robert E. Moebius, M.D., a copy of which is attached as Exhibit 3 to these minutes. The Commission decided not to study this matter at this time.

STUDY L-629 - ITEM VS. AGGREGATE THEORY OF COMMUNITY PROPERTY

The Commission considered Memorandum 84-61 relating to the consequences of Carlston v. Coss, 153 Cal. App.3d 1069, 200 Cal. Rptr. 416 (1984). The Commission decided to defer consideration of this matter until after drafting of the Probate Code is completed. At that time the

Commission will review the subsequent development of the law and determine whether legislation is appropriate.

STUDY L-640 - TRUSTS

The Commission finished its consideration of Memorandum 84-26 relating to the office of trustee, considered the First Supplement thereto, and considered Memorandum 84-26 and the First Supplement thereto relating to liability of the trust and trustee to third persons, Memorandum 84-29 and the First Supplement thereto relating to judicial administration, Memorandum 84-34 and the First Supplement thereto relating to the presumption of revocability of trusts as applied to nonresidents, Memorandum 84-27 and the First Supplement thereto relating to foreign trustees, and Memorandum 84-88 relating to modification and termination of trusts. The Commission made the following decisions:

Memorandum 84-24 (Liability of Trust and Trustee to Third persons) and Supplement

Draft § 4520. Personal liability of trustee to third persons on contracts. In order to avoid liability on contracts, the trustee should be required both to reveal the trustee's representative capacity and to identify the trust in the contract.

Draft § 4521. Personal liability of trustee arising from ownership or control of trust estate. The comment should explain what is meant by "personally at fault" in this section, and should cross-refer to draft Sections 4523 (assertion of claims against trust) and 4524 (liability as between trustee and trust estate).

Draft § 4522. Personal liability of trustee for torts. The comment to this section should be revised in the same manner as the comment to draft Section 4521.

Draft § 4531. Trustee's lien. The trustee's lien should be retained, but the statute should make clear that it is an "equitable" lien. The comment to the section should discuss the effect of an equitable lien in this context.

Draft § 4542. Protection of third person dealing with former trustee. This section should be redrafted in terms expressing the protection of the third person rather than in terms of the binding effect of the transaction.

Draft § 4543. Effect on purchaser of omission of trust from grant of real property. This section should be retained as a protection of reliability of land titles.

Draft § 4544. Effect on real property transactions where beneficiary undisclosed. This section should be retained in the draft in an appropriate location and the drafting should be reviewed to make sure that the substance of existing law is kept.

Creditors' rights. A decision on codifying a procedure for submission of creditors' claims was deferred until the experience in other states can be analyzed. The statute should make clear that creditors may reach the interest of a trustor in the trust to the extent that the trustor has retained powers over trust property exercisable in the trustor's own favor.

Memorandum 84-26 (Office of Trustee) and Supplement

Draft § 4500. Trustee's compensation provided under trust terms; greater compensation. The authority given the court to approve a greater amount of compensation should be expanded to permit the court to order a lesser amount of compensation in situations where the duties of the trustee are substantially less than those contemplated when the trust was created. The word "other" in subdivision (b)(3) should be stricken. The section should also make clear that the court has authority to set future periodic compensation.

Draft § 4550. Certificate of trustee. This section providing for a certificate of incumbency should be retained.

Draft § 4551. Trustee's bond. It should be made clear that this section does not apply to corporate trustees since they must satisfy reserve requirements and provide a bond equivalent as a precondition to doing trust business. Subdivision (b) should be revised to replace "other interested person" with "beneficiary." This change should be made elsewhere in the draft where "interested person" is used so as to avoid the implication that creditors may interfere in the internal affairs of trusts. Subdivision (b) should also recognize the power of the court to increase the amount of the bond. The incorporation of the law relating to bonds of personal representatives in subdivisions (c) and (d) should be replaced by a reference to the requirements ordered by the court.

Draft § 4552. Trustee's office not transferable. This provision relating to the duty not to delegate the entire administration of the trust should be moved and combined with a related provision in the part of the trust statute dealing with trustee's duties. (See draft § 711 in Exhibit 1 attached to Memorandum 84-92).

Draft § 4560. Actions by cotrustees. Subdivision (b) should be revised to read: "A power vested in two trustees may only be exercised by their unanimous action."

Draft § 4561. Inability of cotrustee to act. The phrase reading "becomes legally incapable of acting" should be revised to read "is legally incapable of acting." The Commission decided not to include absence of a cotrustee as a ground for permitting the remaining cotrustees to act.

Draft § 4570. Resignation of trustee. The comment to this section should note that the resignation or removal of a trustee will generally not be effective until the appointment of a successor. The suggestion to permit a majority of the beneficiaries to consent to the resignation of a trustee was rejected. The authority of the court to appoint a temporary trustee should be provided in a section of general application.

Draft § 4573. Occurrence of vacancy in office of trustee. Subdivision (c) should be revised to permit appointment of a successor trustee where the revocation of a corporate charter or suspension of powers is ordered and would be in effect for 30 days or more. This will avoid the implication that 30 days must pass before the trustee's office is considered vacant.

Draft § 4580. Appointment of new trustee. Subdivision (a)(1) should be revised to make clear that the successor trustee may be a person named in the trust or selected by a method specified in the trust.

Memorandum 84-29 (Judicial Administration) and Supplement

Draft § 4600. Principal place of administration of trust. The Commission expressed some dissatisfaction with the formulation of the "principal place of administration of a trust," specifically with the standard relating to the location of the day-to-day records pertaining to the trust. The staff will investigate whether a better formulation might be codified. As a general matter, the draft should seek to maximize

California jurisdiction over trusts and trustees. Concern was also expressed concerning the situation where a trustee moves to another state with the records of the trust and the extent to which this might affect jurisdiction under the standards codified in the draft statute.

Draft § 4601. Jurisdiction. The draft should make clear that the exclusive jurisdiction over internal matters of the trust is in the superior court sitting in probate. However, it should also make clear that the superior court sitting in probate has all the powers of the superior court in proceedings brought before it. This would eliminate the rule that the probate courts sit in exercise of a limited jurisdiction.

Draft § 4614. Proof of giving notice. The phrase "the foreman or principal clerk of the publisher or printer" in subdivision (a)(4) should be replaced by "authorized agent of the publisher or printer."

Draft § 4630. Petitioners; grounds for petition. Additional grounds for a petition should include compelling redress of breach of trust and approval of modification or termination of a trust. Subdivision (b)(9) relating to fixing compensation should include compensation of agents and attorneys.

Draft § 4635. Appeal. This section should be revised to be consistent with the revision of draft Section 4630. The staff should consider whether subdivision (1) ("dismissing a petition under this article") should be deleted since it may be surplus in light of the introductory clause of the section.

Draft § 4636. Cumulative remedies. This section providing that the remedies are cumulative should be deleted in light of the changes in draft Section 4601.

Supervised trusts. The separate scheme for judicial intervention in the administration of "supervised" trusts should be retained.

Jury trial. The availability of a jury trial should be limited within its constitutional bounds, as suggested on page 12 of the First Supplement to Memorandum 84-29. The staff should give further consideration to the question of whether there is any constitutional objection to making clear that there is no right to a jury determination of questions of fact in trust cases. In conjunction with this issue, the statute should provide that the remedies of a beneficiary against a trustee are exclusively equitable.

Memorandum 84-34 (Presumption of Revocability as to Foreign Trusts) and Supplement

Draft § 4201. Presumption of revocability. Subdivision (b) should be revised substantially as follows:

(b) ~~If~~ Unless the trust provides otherwise, if a trust was created when the trustor was a resident of another state ~~and the intention of the trustor can not be determined,~~ the revocability of the trust is governed by the law of the other state and not by subdivision (a).

If "resident" is to be used in this context, the comment should make clear that it is synonymous with "domiciliary."

Memorandum 84-27 (Conduct of Trust Business and Qualification by Foreign Trustees) and Supplement

The trust law should retain existing law precluding the conduct of trust business by foreign corporate trustees. The alternatives to the existing scheme were discussed and rejected.

STUDY L-658 - TRANSFER OF TITLE TO CERTAIN PERSONAL
PROPERTY WITHOUT PROBATE

The Commission considered Memorandum 84-90 and the attached staff draft of a Recommendation Relating to Transfer of Title to Vehicles, Undocumented Vessels, Manufactured Homes, Mobilehomes, and Commercial Coaches Without Probate. The Commission approved the Recommendation for printing and for introduction in bill form.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

Chair
KENNETH M. KLUG, Fresno
Vice-Chair
JAMES A. WILLETT, Sacramento

Advisors
COLLEEN M. CLAIRE, Newport Beach
CHARLES A. COLLIER, JR., Los Angeles
JAMES D. DEVINE, Monterey
K. BRUCE FRIEDMAN, San Francisco
JAMES R. GOODWIN, San Diego
JOHN L. McDONNELL, JR., Oakland
WILLIAM H. FLAGEMAN, JR., Oakland
JAMES F. ROGERS, Los Angeles
HARLEY J. SPITLER, San Francisco
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THEODORE J. CRANSTON, La Jolla
JOHN S. HARTWELL, Livermore
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ROBERT A. SCHLESINGER, Palm Springs
WILLIAM V. SCHMIDT, Costa Mesa
CLARE H. SPRINGS, San Francisco
H. NEAL WELLS, III, Costa Mesa
JAMES A. WILLETT, Sacramento

November 5, 1984

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

Re: Division III, Probate Administration

Dear John:

We have previously forwarded to you the names and addresses of at least two persons from the Section's Executive Committee and Advisors to work with staff members on Division III. Those assignments are reflected in an attachment to Memorandum 84-95.

The persons assigned to work with you and other staff members on particular portions of Division III have been requested to provide preliminary comments on possible language changes, technical corrections, procedural changes, etc., dealing with those sections. The purpose of this letter is to set forth comments received from those persons and others. The listing of possible changes, of course, is not complete but may provide a starting point for review of many of these sections. We hope that this will be helpful in commencing work on Division III and, also, provide the basis for discussions with the members of our Executive Committee or Advisors who will be working with staff.

Most of the comments which follow represent the views of one or more members of our Executive Committee or advisors. Time did not permit a review of each of these points with the full Executive Committee and with the Advisors.

Where a comment relates to a number of sections, it will be so indicated by simply indicating a section number and subsequent sections.

1. §§ 300, et seq. The Code refers to an executor or an administrator; in some cases it refers to an administrator-with-will-annexed; in other cases it refers to an executor or executrix, etc. A number of the Judicial Council forms refer to a personal representative. QUERY: Whether it would not be appropriate to define a personal representative as being the executor, executrix, administrator, administratrix, administrator-with-will-annexed, administratrix-with-will-annexed, etc., as the context may require and then use the reference to personal representative in as many sections as appropriate. Obviously, there are some sections where it would not be applicable, and the term "executor" or "administrator" should be used. Use of "him," "her" Etc. should be standardized in the Code.

2. § 303. This now refers to a "legatee". Perhaps that should be deleted if the word "devisee" is utilized throughout the Code.

3. § 320. The requirement that the custodian of the will deliver the will to the Clerk of the Superior Court or to the executor is often not observed. Perhaps this section should be clarified to provide that it will be delivered to the Clerk of the Court for safekeeping.

4. § 322. This provides a four-year statute of limitations on property transferred within four years after death by an heir to a third party. QUERY: Whether the four-year statute is an appropriate statute in this context.

5. § 326. This section requires a petition for probate to list the character and estimated value of the property of the estate. That may be necessary for appointment of a referee; but where, as in Los Angeles County, the referee is appointed by a separate petition, this requirement is not followed, especially if the bond is waived. Perhaps this language should be clarified to cover that situation.

6. § 327. The last sentence was added to cover the situation where publication was required in a newspaper of general circulation in the city in which the decedent resided (§333), but that newspaper was not published frequently enough to meet the publication requirements and have the matter set within 30 days. If the publication requirements are modified in § 333, this last sentence may no longer be appropriate.

John H. DeMouilly, Esq.
November 5, 1984
Page Three

7. § 329. This section refers to proving a will and, near the end thereof, refers to evidence "either of a writing at the end of the document offered as a will bearing the purported signatures of all subscribing witnesses". The modifications relating to execution of wills no longer make this language necessary as to the writing being at the end of the document.

8. § 333. This section previously provided for publication in a newspaper of general circulation in the county in which the decedent died. The newspaper lobby was able to have this modified to change it to the newspaper of general circulation in the "city" where the decedent resided. It is often difficult to arrange for publication in a particular city. In Los Angeles County, for example, there are, I believe, at least 76 incorporated cities. Publication is often difficult because of the number of cities involved, trying to locate local newspapers, etc. It simplifies notice if § 333 can revert to its prior form of allowing publication in the county. The specification of typeset size could be eliminated.

9. § 351. This section requires that the testimony of each witness to a lost witness "must be reduced to writing, signed by him and filed". If the proceedings are reported by the court reporter, is it not appropriate to have that transcript used in lieu of the witness signing and filing his written statement? As a practical matter, it is often necessary to have the testimony taken by the reporter, transcribed into booklet form and then reviewed and signed by the witness. QUERY: Whether this additional step and expense is appropriate.

10. § 372. This section refers to all subscribing witnesses who are present in the "county". QUERY: Whether that limitation is appropriate since we understand that a witness, for example, can be required to attend a hearing with certain mileage limitations, even if that person lives outside the county.

11. § 401. This section and § 405 refer to the duties of the "trust" in reference to an estate. QUERY: Whether that word should be changed to "estate". Should a conservatee be disqualified? Is an infamous crime a felony? The grounds of disqualification can be clarified.

12. §§ 405.1 - 405.6. These sections deal with a nonresident executor, administrator, or administrator-with-will-annexed. The sections appear misplaced because they are by their captions dealing essentially with executors but in their text deal also with administrators. The language could obviously be simplified by referring to all such persons as personal representatives.

13. § 406. Reference should be to the executor of a deceased executor. The word "incompetent" can be replaced with "conservatee".

14. § 410. This section states that the administrator-with-will-annexed "must" give bond as required of administrators. Since bonds can be waived in many situations, perhaps this word "must" should be modified.

15. § 426. Reference to an incompetent can be deleted.

16. § 422. This section lists the priority of persons entitled to letters of administration. QUERY: Whether that listing should be reviewed in light of the changes in intestate law under §§ 6401 and 6402.

17. § 440. This section states that a petition for letters of administration must be in writing signed by the applicant or his counsel. Most documents in probate must be signed by the personal representative, not by counsel. QUERY: Why counsel can sign in this particular application for letters and cannot sign other documents filed with the court. Neither §§ 326-328 nor §§ 440-441 deal with requirements of a petition or notice for an administrator-with-will-annexed.

18. § 452. This section gives the surviving spouse certain rights to obtain letters of administration in situations where they have already been granted to children, grandchildren, etc. QUERY: Whether that should not be limited to a spouse where there is no action for dissolution, annulment or separate maintenance pending. You will note the change in Probate Code § 422 in 1984 which lowered the priority of a spouse in such situations to letters. This section and § 450 both refer to "sister" and "him".

19. § 465. Apparently a special administrator is not eligible to exercise powers under the Independent Administration of Estates Act (§ 591, et seq.). QUERY: Whether the court should have the discretion to grant such independent powers to a special administrator with general powers under § 465.

20. § 469. This provides that an attorney can seek fees six months from the issuance of special letters. In contrast, § 911 allows such a petition four months after issuance of letters of general administration or letters testamentary. QUERY: Why this time difference.

21. § 480. This section seems misplaced as it deals with executors, administrators, guardians or conservators as well as trustees. It should perhaps be in another part of the Code. The word "ward" should be changed to "minor".

22. §§ 501 and 502. These sections might be modified to refer to the personal representative, conformed to judicial council forms and combined.

23. § 511. This section might be modified to refer to the situation where a conservator is appointed for a personal representative.

24. § 521. This section refers to a personal representative who has "permanently removed from this state". That would not seem to be a ground for removal at present. At one time, an administrator could only be appointed if a resident of California. That was changed some years ago, and this language perhaps should be deleted from § 521. Also, § 521 apparently does not list all grounds for removal as apparently a court can remove an executor or administrator for having an adverse interest or engaging in hostile acts where removal is necessary for the protection of the estate. See 7 Witkin, Wills & Probate, §312.

25. § 541.5. This section specifies the maximum cost of a bond. QUERY: Whether those dollar limits are appropriate.

26. § 553.5. This section could be clarified as to the procedure for releasing one surety company and having another surety company substituted in its place.

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27. § 570. This section perhaps should refer to a personal representative who is "temporarily" absent from the state. The section does not define one who is "legally disqualified from serving". Would this be, for example, a person who is subject to a conservatorship as provided in § 401?

28. § 579. This section, which deals generally with transfers in fraud of creditors, also refers to a gift of property in contemplation of death. QUERY: Whether that gift language is limited to the defrauding of creditors or is more general. Obviously, many gifts are made in contemplation of death for tax purposes.

29. § 581 (also, see § 570). This section provides that the executor or administrator shall take possession of all property in the estate pending administration. However, this is limited by property not needed apparently to satisfy creditor's claims. Delivery of possession of real property under § 582 can be made when the income is no longer needed for payment of debts. These sections might be clarified somewhat as to the rights of an heir or beneficiary to retain property under certain circumstances, including possession of real property.

30. § 583. This section prohibits an executor or administrator from purchasing any property of the estate or any claim against the estate directly or indirectly. Would it not be appropriate to allow such a personal representative, if all heirs or beneficiaries consent, to the terms of the purchase and it is approved by the court to purchase estate assets.

We believe that this section is interpreted to prohibit the executor's or administrator's attorneys and agents from purchasing estate property. Perhaps a similar waiver and court approval would be appropriate. For example, if there is a 100-lawyer law firm representing the administrator, is each person employed by that firm prohibited from purchasing the property, even with the consent of all beneficiaries?

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31. § 584.3. This section, dealing with the power of an executor to grant an option to buy real property, should be transferred over to the chapter dealing with sales of property rather than retained in this location.

32. § 585. This section allows deposit of estate funds in a bank or insured savings and loan association. The reference to § 1406 of the Probate Code refers to an account with an insured savings and loan as meaning shares issued by a federal savings and loan, investment certificates issued by a state-chartered building and loan association, or shares issued by a state-chartered building and loan association or savings and loan association. QUERY: Whether this language is broad enough to allow investments, for example, in certificates of deposit. The definitions could be somewhat clearer. Also, the section does not limit bank deposits to the amount insured by the Federal Deposit Insurance Corporation. Apparently the word "insured" dealing with savings and loan associations would so limit the deposits in a savings and loan association. Is it appropriate to invest estate funds in a money market account operated by a bank, savings and loan association, or a brokerage firm? In short, the provisions for investment of estate funds should be re-examined and perhaps updated.

33. § 588. This section might be modified to allow a petition for instructions in any situation in which the court deems it appropriate. The present language allows it only where there is no other or different procedure provided by the statute.

34. § 591.1. This section specifically makes the Independent Administration of Estates Act inapplicable to special administrators. QUERY: Whether this limitation is required where the special administrator is given general powers.

35. § 593.3. This section allows investment of estate funds in mutual funds. QUERY: Whether this should also apply to investments under § 585.

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36. §§ 591.3 and 591.6. There appears to be some duplication and inconsistency between items requiring advice under § 591.3 and those powers of the personal representative which can be exercised without court order or advice. For example, § 591.3(b) refers to leasing property for a term in excess of one year, but § 591.6(a) refers to power to lease without time limit. Section 591.3 refers to borrowing money or executing a mortgage or deed of trust or giving other security in subparagraph (h). The same power seems to be granted under § 591.6(c) without an advice. Section 591.3(e) provides for advice of certain payments of family allowance, but § 591.6(m) provides a reasonable family allowance without limitation. Perhaps this refers only to payment at times other than those covered by the advice, but this could be clarified.

37. § 600. The three-month period within which to file inventory after appointment is unrealistic and should be replaced either with a reasonable period of time or perhaps within nine months from date of death, that is, the time when a federal estate tax return is normally due. The section speaks of inventorying of the estate which has come "to the possession or knowledge" of the executor. Section 604 also speaks of "knowledge". In contrast, Section 920, dealing with accounts limits accountings to assets in the "possession" of the personal representative. Generally, if a person inventories an item he presumably would account for it. This may be a trap and perhaps there should be some separate discussion of assets of which the personal representative has "knowledge" but not possession, so that those items can be clearly differentiated and not be part of the list of assets in possession for which an accounting must be filed.

The change of ownership form being filed at the time that the inventory is filed is inappropriate since the change of ownership does not in fact take place until distribution. The provision dealing with filing a copy of the inventory and appraisal with the County Assessor is believed to no longer be applicable.

Perhaps quasi-community property should also be identified on an inventory.

38. § 602. This section charges an executor who is indebted to the decedent to include the indebtedness in the inventory and treat it as cash on hand when the debt or demand becomes due. This rule interestingly does not apply to an administrator under current law. QUERY: Whether it should apply to an administrator who is indebted to the decedent.

39. § 604. This section, again, refers to "possession or knowledge". (See comment with reference to § 600).

40. § 605. Paragraph (a)(3) refers to petitioning for waiver of appointment of a probate referee at the time of filing the inventory and appraisal. The actual practice is to file a petition at the commencement of the estate to not have the referee appointed and attach to it a copy of the proposed inventory and appraisal by the personal representative. If the court grants the petition, then the inventory can be filed. This can be clarified in the language.

41. § 608. This section refers to "him" or "her" on several occasions. This could be clarified by simply referring to the personal representative.

42. § 608.5. This section, as added by 1984 statute, gives an unlimited time prior to final distribution to object to valuation of assets in an inventory. A more limited time to object may be appropriate. Attached hereto is a draft of some language that might accomplish this result.

43. § 609. This section refers to appraisals by the referee and uses the masculine pronoun throughout. This is inconsistent with § 608. This section also provides upon application to the referee the court may allow a fee in excess of the maximum of \$10,000. Presumably, notice would be given to at least the personal representative of such an application. The section, however, does not provide for notice.

44. § 611. The two-month time limit is unrealistic. A much longer time or a reasonable time is more appropriate.

A reference to "attachment" is perhaps not necessary.

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45. § 613. The last sentence refers to the person being examined as being found "innocent". This would appear to relate only to situations of embezzlement, concealment, smuggling or fraudulently disposing of property, but obviously not apply to the person who has possession or knowledge of assets that may belong to the estate. The word "innocent" seems out of context.

46. § 644. This refers to an "inheritance tax referee" this should be changed to probate referee. Also, it is unclear whether self-appraisal could be used under the § 640 series.

47. § 645 (Operative January 1, 1985). This refers to hearing on a petition for distribution to the child or children "as may then be minors." Does this refer to the date of death or the date of the court hearing. If a child has reached majority after the decedent's death but prior to the hearing, can property be set aside for the minor?

48. § 646. This section contemplates the situation where a petition for probate has also been filed. If no petition has been filed, then presumably the court would deny the petition. Section 646 might be clarified in this regard.

49. § 650. Paragraph (a)(2) refers to legatees. If all beneficiaries under a will are to be known as devisees, the language should be corrected. The same comment applies to § 653 which again refers to "legatees".

50. § 654. The last sentence provides that a copy of the petition described in § 650 should be personally served or mailed to all persons entitled to notice under the sections dealing with a petition for probate or a petition for letters of administration. If contrasted with § 653, there is some difference in the notice requirements where the petition is filed separately because § 653(b) provides situations where a copy need not be served. These should be examined for consistency.

51. § 657. This section provides for filing of an inventory. The three-month period is unrealistic and generally unobserved. It should be replaced by a reasonable period or perhaps nine months. The language of § 657 is unclear as to whether the court can waive the requirement of the appointment of a referee pursuant to § 605(c).

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52. §§ 660 - 664. These sections perhaps require revision to refer only to devise and devisees.

53. § 700, et seq. A claim should be defined.

54. § 708. This section provides that no claim which has been allowed is affected by the statute of limitations pending the administration of the estate. Apparently, however, if a claim is filed the statute continues to run on that claim until acted upon by the personal representative. This can create a trap for the creditor. Consideration should be given to providing that whenever a claim is filed it tolls the statute of limitations on that claim pending the administration of the estate, except in the case of rejection.

55. § 709. The various claim barring §§ 707, 707.5, 708, 709, 709.1, 720 and 721 should be integrated.

56. § 712. This allows the creditor to treat a claim as rejected if not acted upon within 10 days of filing. Perhaps a longer period of time such as 30 days is more realistic.

57. § 718. This section in Paragraph (2) provides for a hearing by a Commissioner or referee without "discovery". QUERY: Whether this limitation is necessary. The section is misplaced, as are §§ 718.6, 718.7 and 719.

58. §§ 750 - 754. These sections, dealing with property liable for debts, seem misplaced; perhaps they should be placed with the sections dealing with legacies and priorities.

59. §§ 754 and 754.5. These can probably be combined. The language "except as provided by § 750 and § 751" could be changed to "subject to §§ 750 and 751."

60. §§ 755, et seq. The general sections, the sections relating to sales of personal property and the sections as to real property sales could be reorganized for consistency and simplification.

61. § 756.5. The overbid procedure on personal property is different as to percentage than for real property. See § 785. Should these percentages of overbid be consistent? Also, should the discretion referred to in § 756.5 rest with the executor or administrator rather than with the court?

62. § 760.5. The language of the second to the last sentence referring to a "reserve" might be clarified.

63. § 772. Section 755 requires that all sales shall be reported to the court and confirmed by the court before title passes. QUERY: Whether there should not be a de minimis rule for personal property. For example, the executor could be authorized to sell personal property without court confirmation, if independently appraised, with a value of less than, for example, \$1,000.

64. § 782. This requires that the sale must be within one year of the published notice of private sale. Section 785 required an appraisal or reappraisal within one year from the date of sale. When real estate values are fluctuating perhaps the appraisal should be within six months from date of sale rather than one year.

65. § 784. This section specifies the minimum amount of overbid at 10% of the first \$10,000 and 5% of the excess. In a sale of a piece of property for \$500,000, for example, this means that the minimum overbid is \$25,500. QUERY: Whether the minimum overbid should be that high on parcels of property with greater value. Perhaps the 5% should relate only to the next \$100,000 or \$200,000 of value and thereafter the percentage should drop to a much lower percent such as 2%.

66. § 785. There is no specific provision relating to sales of a fractional interest as to whether the other interests are to be sold on the same terms. Often a sale is submitted to court for a fractional interest contingent upon the buyer's buying the rest of the property on the same terms, including any overbid. Perhaps this could be given statutory recognition, though the court would not technically have jurisdiction over the other interests.

67. § 844. The reference to rent not to exceed \$250 is not realistic for a lease not to exceed one year. The time period and dollar amount can be increased substantially.

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68. § 920.5. The language in this section could be greatly simplified if it referred to a personal representative. The reference to the rate of interest prevailing among banks perhaps should be modified to refer to money market rates or other higher rates rather than the normal passbook rate.

69. § 922. The first sentence would appear to be more properly set forth in a separate section.

70. §§ 921, 922 and 924. These sections all refer to an "attachment"; this presumably is a body attachment and essentially involves the ability to place the party in jail. This procedure should perhaps be set forth in a single section as to the nature and procedure for an attachment if it is any longer appropriate or utilized.

71. § 925. This refers to vouchers. This procedure generally is not used. Perhaps the term should be "receipts".

72. § 927. The reference to the order fixing the state inheritance tax should be deleted. The provision for objecting to appraisal values should be coordinated with § 608.5.

73. § 930. The reference to vouchers should again be clarified. Generally, vouchers are no longer filed with the court.

74. § 950. Debts having preference by the laws of the United States have preference over all other debts. The list of priorities should be changed accordingly. The taxes due the State of California also have a high priority, probably immediately after the debts due the United States, and should be recognized accordingly in § 950.

75. § 980. This section which is rarely if ever used is difficult to follow. Its language could be clarified.

76. § 1000. The reference to two months after first issuance of letters might be deleted so that distribution can be made at any time with or without bond as the court

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determines. The notice provision should be made consistent with § 1200.5. There might also be some provision for allowing distribution of personal property such as furniture, furnishings, clothing and automobiles by an ex parte order at any time.

77. § 1004. The definition of the net value of estate refers only to creditor's claims and liens or encumbrances. Is this appropriate?

78. § 1020. The notice provision should be coordinated with § 1200.5; reference to § 1202 should also refer to § 1202.5.

79. § 1020.5. This section is seldom observed. QUERY: Whether it needs to be retained? A statement that the executor or administrator is accountable for transactions after the end of its formal court accounting until such time as distribution is made to the beneficiaries would suffice.

80. § 1022. This apparently is confined to the situation where the issue of a decedent who is entitled to a share of the estate dies before the decedent's administration is completed and allows direct distribution to the decedent's deceased issue's heirs. This is not a very understandable section and needs clarification.

81. § 1023. The reference to requiring survivorship under the terms of the will until distribution might be limited to the six-month period of time recognized under the Internal Revenue Code for the vesting of a valid marital deduction.

82. § 1024. This section might be deleted. It does not seem to be the function of the probate court to enforce collection of personal property taxes.

83. § 1027. The introductory language should also perhaps be incorporated in § 1020. There should be some cross-reference.

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The section provides for 10 days' notice to all persons other than the State Controller who is entitled to 30 days' notice. Since this only involves a distribution is the 30-day notice for the State Controller necessary? The reference in this section to no deposit of property with the county treasurer is perhaps no longer necessary.

84. §§ 1030 - 1039. These sections which were sponsored by the State Bar several years ago refer to provisions in the will. QUERY: Whether there should be some cross-reference to trust law to make the same provisions applicable to inter vivos trust which contains marital deduction provisions.

85. § 1043. This provides for publication of notice to creditors in the case of a nonresident decedent. It provides for three months' notice. QUERY: Whether this should be coordinated with the general notice to creditors provisions which provide for four months. The reference in Paragraph (3) to the consent of the State Controller is no longer applicable.

86. § 1064. This provides that a copy of the petition must be served on the Attorney General at least 20 days before the hearing. QUERY: Whether this notice should not be consistent with other times, such as 10 days' notice. As noted earlier, there is at least one situation that calls for a 30-day notice.

87. § 1065. QUERY: Whether this section is necessary if the decree of distribution itself lists those items being distributed to the life tenant in some detail. If it merely refers to furniture and furnishings, for example, a further receipt is perhaps appropriate. Perhaps this can be clarified.

88. § 1066. The reference to vouchers no longer seems appropriate.

89. § 1080. The language as to notice should be clarified to give notice to the executor or administrators and to all legatees or devisees whose interest in the estate is affected by such petition or to the heirs of the decedent in intestate estates. The present language requiring notice to all heirs even if there is a will and the heirs have no interest.

90. § 1143. The \$3,000 item might be increased to \$5,000. The section specifically excludes from the \$20,000 a motor vehicle owned by the decedent. This might be made consistent with the various exceptions under § 630 as to vehicles and vessels. Consideration might also be given to increasing the dollar amount above \$20,000. That amount has not been tied previously to the amounts under § 630 but some increase may be appropriate.

A new subsection (d) might be added to § 1143 to allow the public administrator to self-certify letters and to also provide a statutory indemnification for those who are relying upon the transfer made by the public administrator.

91. § 1200. A 1982 statute minimized the requirements for posting in an estate. QUERY: Whether this limited posting still satisfies the requirements for in rem jurisdiction.

92. § 1200.5. The notice provisions are scattered throughout the Code. Comments have been made on certain notice provisions in earlier sections. If it is possible to standardize all notice provisions under one section and refer to that section throughout the Code, it would obviously simplify administration and eliminate a lot of the errors which are made because of special notice provisions in other sections.

93. § 1207. This provides that a citation must be served at least five days before the return date. Since most other notices are at least 10 days, perhaps this should be increased to 10 days.

94. § 1230. This section contains broad language about issues of fact that may be tried by a jury. It does not specifically limit it to those Probate Code sections which otherwise specifically provide for a jury. If so limited, it would eliminate the contention that there are many issues of fact in probate that may be subject to jury trials.

95. § 1231. The same problem exists as to issues of fact which could have been tried by a jury.

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96. § 1233. Probate pleadings generally have to be signed and verified by the personal representative rather than by the attorney. QUERY: Whether it is appropriate to have the attorney sign papers as is the case in civil proceedings so long as they are verified, where verifications are necessary, by the personal representative. This section might also be clarified as to the self-proving will where the subscribing witnesses at the time they sign the will declare under penalty of perjury that the will was signed in their presence, that the party appeared to be of sound mind, etc. Section 1233 might be modified slightly to refer to this. Also, the situations in probate where a response to a petition is appropriate are very unclear. See, e.g., the chart which is published by the CEB in connection with its program on probate and trust litigation. Some clarification in this area would seem appropriate.

97. § 1240. The provisions therein relating to trustees such as removal of a trustee, settlement of accounts of the trustee, instructing the trustee, fixing the trustee's compensation, etc., probably should be removed from this series and placed in the new 9000 series dealing with trust administration. Section (r) relating to inheritance tax should be deleted. Section (q) should be modified to refer to community property, quasi-community property, or separate property. The separate property would not belong to the surviving spouse but only pass, so the language should be modified accordingly.

98. § 1308. The last sentence of that section can be deleted.

99. § 1313. That section can be deleted.

100. § 1355. This provides for a three-month notice of hearing. QUERY: Whether this delayed notice and delayed hearing date is appropriate.

The comments above are obviously not exhaustive. They tend to be technical. The particular consultants from our Executive Committee and Advisors who are assigned to each portion of the Code will be glad to discuss them further.

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As you will recall from prior presentations on behalf of the Estate Planning, Trust and Probate Law Section, there are more than 15,000 reported cases in California which refer to sections in Division III. In order to preserve and continue to utilize that vast body of case law, it is hoped that sections will not be drastically rewritten but only clarified or modified as appropriate for better administration.

Thank you for the opportunity to comment on the Code sections at this early stage of the review. We look forward to working with you and the other staff members and with the Commission on Division III.

Sincerely,



Charles A. Collier, Jr.
IRELL & MANELLA
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Los Angeles, California 90067

CAC:shk

cc: Executive Committee and
Advisors

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November 6, 1984

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Memorandum 84-59
Study F-601 - Jurisdiction Over Joint Tenancy
and Tenancy in Common Property at
Dissolution of Marriage (Staff
Draft of Recommendation)

Dear Nat:

The State Bar Family Law Section discussed this recommendation at its October meeting. In principle, it approves the recommendation in its present form. The Section agrees that its earlier concern regarding the triggering of a tax liability under federal law is no longer a problem due to enactment of the Domestic Relations Tax Reform Act.

Some members of the Executive Committee expressed some concern about any erosion whatsoever into the area of community property and wished to maintain all distinctions between joint tenancy property and community property. However, the majority of the Committee agrees that for simplicity's sake, the family court should have jurisdiction to divide separate property held jointly or as tenants in common, as well as community property.

Sincerely,


BEVERLY JEAN GASSNER
Attorney at Law

BJG:mw

cc: Diana Richmond
Felicia Williams

DEPARTMENT OF DEVELOPMENTAL SERVICES

CAMARILLO STATE HOSPITAL

BOX 'A', CAMARILLO 93011

PUBLIC NO. 805-464-3661

ATSS NO. 644-0011



November 6, 1984

California Law Revision Commission
State Capitol
Sacramento, California

Dear Sirs:

I understand that your commission will be considering whether to study a proposal to change the law with regard to testamentary capacity and mentally ill persons. There is one area of the law that needs attention in this regard. The law presently provides that persons who know only that they are making a will, have assets, and have heirs, can make a valid will. This provision of the law does not reflect current medical knowledge. There are many persons who have a mental illness that poisons their affections for their family members, and these persons cannot rationally view the natural objects of their bounty. The law should allow these natural heirs to challenge the disposition of such mentally ill person's estates. I would appreciate you giving serious consideration to this proposal.

Very truly yours,

A handwritten signature in cursive script that reads "Robert E. Moebius MD".

Robert E. Moebius, M.D.
Chief of Professional Education
Director of Residency Training

REM/pb

cc: Mrs. Melodie Kleiman