

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

February 13, 1985

Time

Place

March 21 (Thursday) - 3:00 p.m. - 10:00 p.m.
March 22 (Friday) - 9:00 a.m. - 6:00 p.m.

State Capitol, Room 125
Sacramento

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

March 21-22, 1985

March 21 (Thursday Afternoon)

1. Minutes of January 24-25, 1985, Meeting (enclosed)
2. Study L-1000 - Probate Code (Jurisdiction; Probate of Wills; Contest of Wills)
 Memorandum 85-11 (sent 1/11/85)
 Draft Statute (attached to Memorandum)
 First Supplement to Memorandum 85-11 (to be sent)
3. Study L-1010 - Probate Code (Personal Representative; Appointment; Letters; Termination of Authority; Oath and Bond)
 Memorandum 85-12 (sent 1/11/85)
 Draft Statute (attached to Memorandum)
 First Supplement to Memorandum 85-12 (to be sent)

Break for dinner

March 21 (Thursday Evening)

4. Administrative Matters
 Legislative Program
 Memorandum 85-28 (to be sent)
 Probate Code Study Schedule
 Memorandum 85-29 (to be sent)
 Annual Report
 Memorandum 85-30 (to be sent)
 Draft of Annual Report (attached to Memorandum)
5. Study F-633 - Division of Pensions
 Memorandum 85-39 (to be sent)
 Memorandum 85-15 (sent 1/9/85)
 Draft of Recommendation (attached to Memorandum)
6. Study L-811 - Form for Advice of Proposed Action
 Memorandum 85-38 (enclosed)
 Draft Statute (attached to Memorandum)

7. Study L-1020 - Probate Code (Powers and Duties of Personal Representative)

Generally

Memorandum 85-13 (sent 1/9/85)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-13 (to be sent)
Second Supplement to Memorandum 85-13 (to be sent)

Sales

Memorandum 85-31 (to be sent)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-31 (to be sent)

March 22 (Friday)

8. Study L-640 - Trusts

Approve Comprehensive Trust Statute for Introduction as
Preprint Bill

Memorandum 85-32 (enclosed)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-32 (to be sent)

Proof of Oral Trust

Memorandum 85-21 (sent 12/26/84)
Consultant's Memorandum (attached to Memorandum)

Spendthrift Trusts

Memorandum 85-33 (to be sent)
Consultant's Memorandum (attached to Memorandum)

Consideration of matters scheduled for March 21 that were not
considered on that date

9. Study L-1025 - Probate Code (Presentation of Claims)

Memorandum 85-34 (to be sent)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-34 (to be sent)

10. Study L-1026 - Probate Code (Payment of Claims)

Memorandum 85-35 (to be sent)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-35 (to be sent)

11. Study L-1027 - Probate Code (Accountings)

Memorandum 85-36 (to be sent)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 85-36 (to be sent)

12. Study L-1050 - Probate Code (Guardianship-Conservatorship)

Memorandum 85-7 (sent 12/4/84)
First Supplement to Memorandum 85-7 (sent 12/26/84)
Second Supplement to Memorandum 85-7 (sent 1/9/85)

MINUTES OF MEETING
OF
CALIFORNIA LAW REVISION COMMISSION
MARCH 21-22, 1985
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on March 21-22, 1985.

Law Revision Commission

Present:	Edwin K. Marzec, Chairperson	Arthur K. Marshall
	Roger Arnebergh	David Rosenberg
	John B. Emerson	Ann E. Stodden
	Bion M. Gregory	

Absent:	Barry Keene, Member of Senate	James H. Davis
	Alister McAlister, Member of Assembly	

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
Russell Niles, Property and Probate Law (March 22)

Other Persons Present

Michael D. Belote, California Association of Realtors, Sacramento
Edward Brennan, California Probate Referees, San Diego
Ted Cranston, State Bar Estate Planning, Trust and Probate Law Section,
San Diego
Alex Creel, California Association of Realtors, Los Angeles
Beverly Jean Gassner, State Bar Family Law Section, Ontario (March 21)
Dugald Gillies, California Association of Realtors, Sacramento
Sandra Kass, California Bankers Association, Los Angeles
Paulette Leahy, California Bankers Association, San Diego (March 22)
James Quillinan, State Bar Estate Planning, Trust and Probate Law
Section, Mountain View
Richard L. Stack, Executive Committee, Los Angeles County Bar Probate
and Trust Section, Los Angeles

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY 24-25, 1985, MEETING

The Minutes of the January 24-25, 1985, meeting were approved after paragraph (2) of Study L (Probate Code publication requirements) on page 6 was revised to read:

(2) Newspaper published in city or county. The Commission decided not to make any change in the existing law governing the place of publication of notice of opening probate.

SEARCH FOR PROBATE LAWYER TO BE LOANED TO COMMISSION

The Chairman reported that the Commission's effort to find an experienced probate attorney to assist the Commission temporarily with the Probate Code revision has been unsuccessful so far.

EXCUSE FOR ABSENCE OF COMMISSIONER DAVIS

Commissioner Davis was in trial at the time of the Commission meeting and was therefore unable to attend. The Commission excused Commissioner Davis' absence.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 85-28 and noted the contents of the attached report on the 1985 legislative program.

ASSEMBLY BILL 97 - URGENCY PROBATE BILL

The Commission considered the Second Supplement to Memorandum 85-12 and attached exhibits concerning the urgency bill on probate (AB 97). The Commission approved the proposed amendments to AB 97.

ASSEMBLY BILL 195 - REVISION OF STATUTE GOVERNING LAW REVISION
COMMISSION

The Commission considered the First Supplement to Memorandum 85-28 concerning revision of the statute governing the Law Revision Commission. The Executive Secretary handed out the latest amended

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version of AB 195 (amended in Senate March 20, 1985) containing the amendment suggested by the Governor's Office. A copy of this version of AB 195 is attached to these Minutes as Exhibit 1. The most recent amendment permits the Governor to remove from office a member of the Commission who has three consecutive unexcused absences. Formerly the bill declared the office automatically vacant. The Commission approved AB 195 with this amendment.

PROBATE STUDY SCHEDULE

The Commission considered Memorandum 85-29 and attached exhibits concerning the Probate Code study schedule. The Commission approved the proposed schedule.

ANNUAL REPORT

The Commission considered Memorandum 85-30 and the attached draft of the annual report. The Commission approved the annual report as submitted.

MEETING SCHEDULE

The Commission considered Memorandum 85-37 concerning the Commission's meeting schedule. The Executive Secretary handed out the control language put in the budget bill by Assembly Member Maxine Waters, to become operative on July 1, 1985, which reads: "The Commission shall not limit its scheduled meetings to Sacramento. Rather, meetings shall be held, on a periodic basis, at other sites in the state as determined by the Commission." The Commission decided to reschedule the October 1985 meeting for Orange County instead of Sacramento, and to write to Assembly Member Waters to thank her for her interest.

In order to maintain the Probate Code study on schedule, the Commission decided to schedule an additional meeting for April 18 and 19, 1985. As thus revised, the schedule for future meetings is as follows:

April (Sacramento)

April 18 (Thursday) 3:00 p.m. - 10:00 p.m.
April 19 (Friday) 9:00 a.m. - 4:00 p.m.

May (Sacramento)

May 16 (Thursday) 3:00 p.m. - 10:00 p.m.
May 17 (Friday) 9:00 a.m. - 6:00 p.m.

June (Sacramento)

June 27 (Thursday) 3:00 p.m. - 10:00 p.m.
June 28 (Friday) 9:00 a.m. - 6:00 p.m.

September (Sacramento)

September 12 (Thursday) 3:00 p.m. - 10:00 p.m.
September 13 (Friday) 9:00 a.m. - 6:00 p.m.

October (Orange County)

October 10 (Thursday) 3:00 p.m. - 10:00 p.m.
October 11 (Friday) 9:00 a.m. - 6:00 p.m.

December (Sacramento)

December 5 (Thursday) 3:00 p.m. - 10:00 p.m.
December 6 (Friday) 9:00 a.m. - 6:00 p.m.

STUDY F-633 - DIVISION OF PENSIONS

The Commission considered Memorandum 85-15 and Memorandum 85-39, relating to division of pensions upon dissolution of marriage. The Commission decided not to submit the present tentative recommendation to the Legislature, but to devote more resources to this study upon receipt of the State Bar Family Law Section report and upon completion of the probate law study.

STUDY F-670 - LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS

The Commission considered Memorandum 85-42 presenting a staff revision of the recommendation relating to litigation expenses in family law proceedings. The staff read a letter from Jan Gabrielson in support of the revised draft; a copy of the letter is attached to these Minutes as Exhibit 3. The Commission approved adding the revised draft to Assembly Bill 150 if Assembly Member McAlister is willing to do so.

STUDY L-640 - TRUSTS

The Commission began its consideration of Memorandum 85-32 and the comprehensive draft trust statute, and also considered Memorandum 85-33 relating to spendthrift trusts and Memorandum 85-21 relating to proof of oral trusts. The Commission made the following decisions:

Memorandum 85-21 (Proof of Oral Trusts)

Draft § 607. Oral trusts of personal property. The Commission approved the policy proposed by Professor Russell Niles in his memorandum attached to the Memorandum as Exhibit 1. This policy would require some objective evidence of an intent to create a trust in order to uphold an oral trust of personal property declared by the trustor. This policy would be accomplished in draft Section 607 by revising subdivision (b) to read substantially as follows:

(b) The oral declaration of the trustor, standing alone, is not sufficient evidence of creation of the a trust unless trust property was transferred, actually or constructively, at the time of the declaration or thereafter of personal property.

Memorandum 85-32 (Comprehensive Statute)

Draft § 602. Trust property. The last sentence of the comment to this section should refer to additional "comments" in the Restatement rather than additional "rules".

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Draft § 607. Oral trusts of personal property. See the discussion of Memorandum 85-21 supra.

Draft § 609. Matters included in declaration of trust. This section which would continue Civil Code Section 2254 should be deleted since it is an inadequate and incomplete statement of the parol evidence rule.

Draft § 641. Manner of termination of revocable trust; disposition of property. Subdivision (a) should be revised to provide that a trust may be revoked in whole or in part by compliance with the method provided in the trust or with the statutory method, unless the trust excludes the statutory method. The section should also provide that a total revocation is a termination. It might be useful to discuss the matter of withdrawal of assets from the trust by the trustor of a revocable trust in the comment to this section.

Draft § 643. Termination by all beneficiaries. The first sentence of subdivision (b) of this section should be revised as follows:

If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination, unless the court, in its discretion, determines that the ~~need to terminate~~ reason for terminating the trust under the circumstances ~~is greater than~~ outweighs the interest in accomplishing a material purpose of the trust.

Draft § 644. Modification or termination by trustor and all beneficiaries. Subdivision (b) should be revised to provide that a modification or partial termination may take place only with the approval of the court if some beneficiaries do not consent. Court approval would not be required under subdivision (a) where the trustor and all beneficiaries agree.

Draft § 645. Guardian ad litem. This section providing special rules governing the giving of consent to a modification or termination by a guardian ad litem should make clear that such consent may only be given in proceedings before a court. The staff should also consider whether this should also be made clear in Section 502, the general guardian ad litem provision.

Draft § 647. Effect of disposition in favor of "heirs" or "next of kin" of trustor. The staff is to examine the New York statute on this subject to see if a better provision can be drafted. The suggestion was made that this section might require the consent of too many persons since all persons who would be heirs if the trustor had died at the date of the attempted modification or termination would be required to consent under this section.

Draft § 648. Termination of trust. A provision should be added to this section providing for the disposition of property upon the termination of a trust, as is provided in draft Section 650(c). It might be best to treat this matter in a separate section.

Draft § 650. Trust with uneconomically low principal. Subdivisions (a) and (b) should be combined. Some of the procedural detail in this section should be left to the general procedural provisions appearing in draft Section 1100 et seq.

Draft § 652. Combination of trusts. This section should be revised to permit combination of trusts where there may be some impairment of an interest of a beneficiary but not if the impairment would be substantial or material.

Draft § 653. Division of trusts. This section should be revised for consistency with draft Section 652 on combination of trusts. This revision might read substantially as follows:

653. On petition of a trustee or beneficiary, the court, for good cause shown ~~and with the consent of all interested parties and beneficiaries~~, may divide a trust into two or more separate trusts if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purpose or the interests of the beneficiaries.

Draft § 700. Duty to administer trust. Subdivision (a) of this section should be revised to reflect the deletion of draft Sections 701-713 which provided a statutory list of duties. This section or some other section should make clear that the trustee is subject to the duties of the common law. Such a provision is necessary because the new trust statute will involve the repeal of several sections in the old Field Code providing trustees' duties.

Draft §§ 701-713. Trustees' duties in general. After considering a number of the statements of general duties of trustees, the Commission decided to delete the statutory list of duties. Several of the duties were found to be overbroad or potentially misleading. In some cases, trustees might be confused because of a perceived conflict between a duty and a power. In other areas, it was felt that a duty could not be stated simply in a statute because there are too many exceptions or special applications depending upon the circumstances.

Draft § 720. Trustee's standard of care in administering trust. Subdivision (c) should be revised as follows to remove surplus language:

(c) The trustor may expand or restrict the standard set forth in subdivision (a) ~~by express provisions in a trust instrument. A trustee acting for the benefit of another under a trust may expand or restrict such standards as to liability to a beneficiary under the trust for the trustee's good faith reliance on such express provisions.~~

The removal of the language as indicated will not result in any substantive change since it is clear from draft Section 700 that the trustee has a duty to administer the trust according to the instrument.

Draft § 970. Accountability for profits in absence of breach of trust. This section should be revised to make trustees accountable for excessive profits. This limitation needs to be inserted in this section so that institutional trustees are not thought liable for amounts received for regular services offered at reasonable compensation. The comment to this section should be expanded to provide more guidance.

Memorandum 85-33 (Spendthrift Trusts)

The Commission discussed the area of spendthrift trusts and heard the views of Professors Niles and Halbach. The staff, with the assistance of Professor Halbach, will prepare a draft of a provision to give creditors the same right to reach the trust as the

beneficiary. Thus, if the beneficiary can compel the trustee to exercise discretion by appropriate proceedings, the creditor should also be able to compel the exercise of discretion for the benefit of the creditor. The sentiment was expressed that beneficiaries of spendthrift, support, and discretionary trusts should not be treated better than wage earners insofar as creditors are concerned. The Commission postponed consideration of other issues in this area.

Note. The Commission considered draft Sections 500-720 and 970. Consideration of the transitional provisions in Sections 520-530 was deferred until review of the rest of the draft is completed.

STUDY L-811 - INDEPENDENT ADMINISTRATION

The Commission considered Memorandum 85-38 (and the attached draft statute), the First, Second, and Third Supplements to Memorandum 85-38, and a draft of amendments to Assembly Bill 196 designed to implement the staff recommendations made in the meeting materials relating to independent administration.

The Commission made the following revisions in the amendments considered at the meeting:

(1) The independent administration statute is to be revised so that the petition can request complete independent administration authority as under existing law or can request independent administration authority without authority to sell or exchange real property or to grant an option to purchase real property.

(2) The advice of proposed action is to include information concerning "the amount of or manner of calculating any commission or compensation paid or to be paid in connection with the transaction" if the transaction concerns real property.

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(3) Deleted was the sentence in the staff draft of the form for advice of proposed action that stated that objecting could cause delay and expense to the estate.

(4) The following is to be all capital letters in the form:

7. IF YOU DO NOT OBJECT, YOU WILL BE TREATED AS IF YOU CONSENTED TO THE PROPOSED ACTION. YOU MAY NOT OBJECT AFTER THE PROPOSED ACTION IS TAKEN.

The Commission considered a staff suggestion to delay until July 1, 1986, the requirement that the statutory form for proposed action be used, so that lawyers would have an opportunity to become aware of the requirement that the form be used. The Commission decided not to delay the date for use of the required form beyond the normal effective date of the statute--January 1, 1985. The Commission concluded that the form would most likely be one promulgated by the Judicial Council and that no problem would be created by requirement that the form be used on and after January 1, 1986.

The Commission approved the amendments and determined that they should be included in the Commission recommended probate bill--Assembly Bill 196. The revised amendments are set out as Exhibit 2 to these Minutes. [Note. The amendment to Section 1134.5 of the Civil Code which is included in Exhibit 2 is a technical amendment not approved by the Commission, since the need for this amendment was brought to the attention of the Commission after its March meeting. This technical amendment was suggested by Valerie J. Merritt, Los Angeles lawyer, and is necessary and not controversial.]

STUDY L-1000 - PROBATE CODE (JURISDICTION; PROBATE OF WILLS;
CONTEST OF WILLS)

The Commission considered Memorandum 85-11 and the First Supplement to Memorandum 85-11, presenting a draft of the first part of the administration provisions of the new Probate Code. The

Commission approved the draft for inclusion in the general Probate Code revision, subject to the following changes:

§ 7110. Application of chapter

This section was deleted from the draft.

§ 7111. Passage of decedent's property

The phrase, "subject to Section 7112" was added at the beginning of this section.

§ 7113. Property subject to administration

The Comment to this section should be expanded to include reference to such property that passes without probate as joint tenancy, pay-on-death accounts, and trust assets.

§ 7120. Jurisdiction in superior court

This section was unchanged, but it was noted that a parallel provision in the draft trust statute refers to the court "sitting in probate." The Commission will review the trust provision again in the future and make a determination whether the trust provision should be conformed to Section 7120.

§ 7121. Venue

The staff was directed to review subdivision (c) of this section to ascertain the propriety of the terminology used, and its consonance with the Commercial Code.

§ 7122. Authority of court or judge

This section should be revised to parallel the exclusive/concurrent jurisdiction provisions of the trust statute. Consideration should be given to incorporating Code of Civil Procedure § 128 expressly. The section should be redrafted for clarity and coordinated with Section 7120.

§ 7124. Disqualification of judge

Subdivision (a)(3) of this section should be clear that a judge who is a creditor is an interested person and subject to disqualification; provisions in the Code that imply the contrary should be repealed.

Subdivision (b) should be revised to provide that a judge who in any manner participates in the drafting or execution of a will is disqualified from acting in any manner with respect to the will.

§ 7130. Grounds for transfer

Subdivisions (b) and (c) should be deleted from this section, with the result that the only ground for change of venue is that there is no judge qualified.

§ 7132. Retransfer

Subdivision (b) was deleted from this section, subject to further staff research on whether it serves a useful function.

§ 7134. Effect of transfer on personal representative

This section was deleted from the draft.

§ 7140. General rules of practice govern

A sentence should be added to this section to the effect that the general rules of civil practice do not apply where the Probate Code provides its own procedure. Consideration should also be given to relocating this section to the front of the Code, in coordination with similar provisions governing trusts and guardianships and conservatorships.

§ 7143. Verification required

A section was added providing in substance:

§ 7143. Verification required

7143. Except as otherwise specifically provided, all of the following shall be verified:

(a) A petition, report, or account filed pursuant to this division.

(b) An objection or response filed pursuant to this division to a petition, report, or account.

Comment. Section 7143 is the same in substance as Section 1450 (guardianship-conservatorship). It generalizes the following provisions: _____.

§ 7145. Trial by jury

In subdivision (b) of this section, the term "when" should be replaced by the phrase "In proceedings where a party." Subdivision (b)(1) should be reviewed and revised for clarity, and general law should be checked to see whether a special provision is really necessary; possible substitute language such as "The jury shall determine issues of fact as presented to the jury by the court" should also be considered. In subdivision (b)(2), the bracketed material should be deleted.

§ 7150. Mailing

This section should be compared with comparable provisions in the Code of Civil Procedure for consistency, and to determine whether it is necessary or whether general provisions may be relied upon.

§ 7210. Petition

The reference in this section to an order "establishing the fact of the decedent's death" should be reviewed and either eliminated in reliance on the court's order granting probate as establishing the jurisdictional facts, or rephrased to refer to a procedure such as a "determination" of the fact of death rather than implying incorporation of the establishment procedure.

The provision for probate of a will "at any time" should be qualified by the principle that a will may not be probated after a decree of final distribution.

§ 7211. Failure of person named executor to petition

The term "renounced" should be replaced by the term "waived."

§ 7212. Contents of petition

In subdivision (b)(1) the jurisdictional facts should include "the fact of the decedent's death." Subdivision (b)(4) should be retained in brackets pending further information on grounds for appointment of a referee or setting the amount of a bond.

§ 7213. Setting and notice of hearing

This section should be revised to provide that the petitioner gives notice of hearing, and perhaps to include specific references to the service provisions. The petition should be set for hearing not less than 15, rather than 10, days after filing, and not more than 45 days in the case of delayed publication.

§ 7214. Opposition

The opposition must be verified, and should be made by "filing objections setting forth written grounds of opposition or by oral objections made at the hearing."

§ 7215. Hearing

The introductory portion of subdivision (c) should read--"The following matters shall be established:".

§ 7216. Court order

The phrase "establishing the fact of the decedent's death" should be replaced with another appropriate phrase, such as "determining the date of death."

§ 7217. Determination of jurisdiction conclusive

The erroneous "assumption" of death referred to in this section should be an erroneous "determination" of death.

§ 7230. Form of notice

The introductory reference to notice of hearing should state that the hearing is "on a petition filed under this part" or similar language. The notice should contain a sentence that "If Independent

Administration of Estates authority is granted, the personal representative may administer the estate without court supervision." The reference to the decedent's will should omit the date of the will. The section might be reorganized to conform to existing law, since each notice will be published as a whole.

§ 7240. Persons on whom notice served

This section should be revised to make clear that the persons on whom notice is served have at least 10 days actual notice, after allowing for mailing time. Notice should be served on heirs "so far as known to the petitioner." A new subdivision (c) should be added to require "such other notice as the court may authorize." The State Bar is giving further study to the question whether known creditors should receive actual notice, and the Commission will take up this question when the State Bar report is received. The staff should investigate to whom notice is given where the State is named as devisee.

§ 7242. Service on alleged decedent

This section was deleted from the draft.

§ 7244. Claim by Director of Health Services

Consideration should be given to locating at this point existing Section 700.1, relating to service on and claims by the director of health services.

§ 7245. Publication or posting of notice

Existing law relating to publication of notice of hearing should be restored to this section, pursuant to the Commission decisions made at the January 1985 meeting.

§ 7246. Contents of published or posted notice

This section was deleted from the draft. [Note. Subdivision (b) should be preserved somewhere in the draft.]

§ 7263. Proof of holographic will

The staff is to research the meaning of proof "in the same manner as other private writings."

§ 7264. Proof of lost or destroyed will

The phrase "and the order shall be entered at length in the minutes" was deleted from this section.

§ 7266. Admission of will to probate

This section was revised to read in substance:

7266. (a) When the court admits a will to probate, that fact shall be recorded in the minutes by the clerk and the will shall be filed.

(b) If the will is in a foreign language, the court shall certify to a correct translation into English, and the certified translation shall be filed with the will.

§ 7267. Effect of admission of will to probate

Subdivision (a) of this section should be revised to allow a minor or incompetent to contest a will admitted to probate at any time before final distribution, just as a subsequent will may be admitted to probate at any time before final distribution. As with probate of a subsequent will, prior acts of the executor should be protected.

The first sentence of subdivision (b) should be stated affirmatively rather than negatively. The second sentence should be moved from the statute to the Comment.

§ 7270. Opposition to will

This section was deleted from the draft.

§ 7271. Summons

This section should begin with the phrase, "When objection is made pursuant to Section 7214." The reference to the summons "directing" persons to plead should be revised to more accurately state what the summons does. The section and Comment should be revised to clarify the persons to be served and the manner of service.

§ 7272. Responsive pleading

The reference to answering or demurring to a contest should be replaced by a reference to answering or demurring to an objection.

§ 7273. Trial

The first sentence of this section should be replaced by a provision that makes clear the order and burden of proof in a will contest. The second sentence should be amplified by commentary that justifies elimination of jury trial. The commentary should include the fact that jury trial is not constitutionally required, that there is a high percentage of reversals on appeal of jury verdicts, that the whole jury trial-appeal process postpones enjoyment of the estate for several years, which in turn enables contestants to obtain compromise settlements to which they should not be entitled.

§ 7275. Judgment

This section should be revised to recognize intermediate orders between admitting or rejecting a will in toto, as well as other types of orders sustaining or denying objections.

§ 7280. Petition for revocation

This section should be revised to restore existing law by deleting the reference to actual notice of the petition for probate, and by restoring the concept that a person without actual notice of a will contest may petition for revocation.

The staff should check on the availability of studies on no-contest clauses, and present material for Commission consideration of this subject. The material should include whether offering a subsequent will or codicil for probate triggers operation of a no-contest clause.

§ 7282. Service and trial

Subdivision (a) of Section 7282 should be combined with Section 7281. The staff should review the burdens of proof in a petition for

revocation of probate to determine whether the same burdens as for an initial will contest are appropriate.

In connection with subdivision (b), the staff should investigate adding protection for bona fide purchasers from the personal representative.

§ 7283. Costs and attorney's fees

If probate is revoked, costs and fees should be paid out of the estate, and not by the respondent in the court's discretion.

STUDY L-1020 - ESTATE SALES

The Commission considered Memorandum 85-31, the attached draft of new Probate Code provisions, and the First and Second Supplements, relating to sales of estate property. The Commission approved the staff recommendation not to continue the special provisions relating to sale of mining property (Prob. Code §§ 810-814). There should be a general provision making clear that the sales provisions are subject to the Independent Administration of Estates Act for estates being administered under that act. The Commission asked the staff to include in the draft new provisions to require that bids be responsive to terms and conditions specified in the notice of sale, and to make clear that the personal representative has the duty to select the highest and best bid.

The Commission considered the draft section by section and made the following decisions:

§ 8242. Rapidly depreciating property

The staff should consider whether there is a better term than "rapidly depreciating property" to describe what the term is intended to mean.

§ 8244. When estate property must or may be sold

The staff should consider the interrelationship between this section and the abatement rules, especially with respect to sales of specifically devised property. The Commission was concerned that this section might undercut a specific devisee's right to get the specifically devised property. Perhaps this section should be referred to in the Comment to the section that provides that title to the decedent's property passes at death to devisees or heirs (proposed Section 7111).

§ 8245. Discretion of personal representative

The staff should consider the interrelationship between paragraph (2) of subdivision (a) (personal representative may use his or her discretion as to which property to sell first) and the abatement rules. Perhaps the introductory clause should make clear that this section is subject to the abatement rules.

The Commission approved the provision for sale of intangible personal property at public auction.

§ 8246. Sale of real and personal property as a unit

It was reported that in Los Angeles County a unit appraisal is required when real and personal property is to be sold as a unit. The Commission decided not to put such a requirement in Section 8246.

§ 8260. Contract with agent or broker

The staff should give further thought to the reference in subdivision (b) to "ex parte application" when the general provisions on judicial powers exercisable in chambers are drawn.

§ 8261. Contract with auctioneer

Mr. Dugald Gillies of the California Association of Realtors pointed out that under recent legislation, auctioneers are limited to selling "goods." See Bus. & Prof. Code § 5701(d). It is the view of the California Department of Real Estate that only a licensed real

estate broker or salesman may sell real property. See Bus. & Prof. Code § 10139. For this reason, Mr. Gillies suggested that Section 8261 be split into two sections, one to deal with auctions of real property and the other to deal with auctions of personal property. Mr. Gillies will communicate with the staff concerning this, and will consider whether a real property auction might include incidental sales of personal property.

The Commission approved the staff recommendation to authorize an auctioneer to sell intangible personal property.

§ 8262. No personal liability of personal representative

The staff should consider whether the nonliability provisions of this section should be limited to contracts which show the representative capacity of the personal representative.

§ 8263. Compensation of agent, broker, or auctioneer

The staff should give further thought to the language of subdivision (a). What do the words "sale is made" mean? If the buyer defaults, the broker nonetheless gets a commission in the usual private transaction.

The Comment should note that this section applies both to real and personal property sales.

§ 8264. Allocation of commission among competing agents or brokers

§ 8265. Allocation of commission among cooperating agents or brokers

Mr. Gillies said that the rules need to be clarified concerning how the commission is to be divided among the broker holding the contract, the broker whose bid was returned to the court, and the cooperating broker. Courts apparently take varying views of the extent of their discretion under the statute. Mr. Gillies will communicate with the staff to develop a consistent set of rules. The total amount of the commission should not be increased. The commission should be allocated according to the agreement between the brokers. If there is no agreement, the commission should be divided equally.

§ 8270. Notice of sale

Where the word "notice" is used in the section, it should be revised to read "notice of sale." This change should be made throughout the draft where appropriate. The Commission approved the staff recommendation to dispense with posted or published notice of sale of subscription rights.

§ 8272. Sales at public auction

Authority should be added to subdivision (a) to permit personal property to be sold "at the auction house." The requirement that personal property be present at the auction should be limited to tangible personal property. The court should be authorized to permit the property to be sent out of the country for sale when necessary (e.g., rare art works). The staff should consider whether there might be special requirements for the notice of sale in such a case.

§ 8274. Terms of sale

It should be made clear in this section or in the Comment that rapidly depreciating property may be sold for credit.

§ 8276. Passage of title without court confirmation

It should be made clear, perhaps in a general provision, that this section is subject to the abatement rules.

§ 8280. Necessity of court confirmation of sale

The cross-reference in subdivision (a) should read "8276 to 8279." The second sentence of subdivision (b) ("[t]he report shall be verified") may be put in a general provision.

§ 8281. Confirmation hearing

In subdivision (a), "having the sale made" should be revised to read "making the sale." Subdivision (c) ("[t]he court shall examine the report of sale and witnesses in relation to the sale") was deleted.

The Commission approved the staff recommendation not to add a requirement that personal property be sold at a price "not disproportionate to the value of the property." This is adequately covered under subdivision (b) ("advantage, benefit, and interest of the estate").

§ 8290. Notice of sale

"Notice" in this section should be revised to read "notice of sale." The Commission decided to keep the rule that if the will directs or authorizes the sale, the personal representative may determine whether or not notice of sale should be given. It is not necessary that the will specifically authorize sale without notice. The reference to the Los Angeles County Probate Policy Memorandum should be deleted from the Comment.

§ 8291. Contents of notice

The property should be described by street address or other common designation. The legal description should be required only if there is no street address or common designation. The staff should check the foreclosure statutes for possibly useful language. See, e.g., Civil Code § 2924f(b). The staff should consider whether this section should authorize the notice to specify terms of sale, such as cash only.

§ 8292. Sales at public auction

Subdivision (b) was revised to provide that sales at public auction shall be made between the hours of 10 o'clock in the morning and 10 o'clock in the evening.

§ 8293. Private sales

Paragraph (3) of subdivision (b), permitting bids to be filed in the office of the clerk of the court, was deleted.

§ 8294. Necessity of court confirmation of sale

This section will be made subject to a general provision, to provide that this chapter is subject to the Independent Administration of Estates Act for estates being administered under that act.

The provision in subdivision (b), that the report shall be verified, will probably be put in a general provision.

§ 8295. Minimum price for private sales of real property

The Commission decided to keep the requirement that the property have been appraised within one year preceding sale. The reference in subdivision (b) to "[a] new appraisalment" should be changed to "[a]n appraisalment."

§ 8296. Confirmation of hearing

Subdivision (d) ("[t]he court shall examine the report of sale and witnesses in relation to the sale") was deleted. The Comment should note that the matter is covered by subdivision (b).

§ 8297. Overbid

The Commission decided to keep the existing scheme for overbids as set out in proposed Section 8297. The staff should consider whether under existing law the sale must be made according to any terms specified in the notice of sale. For example, if the notice specifies that the sale is to be for cash only, is that binding? Commission sentiment was that that should be the rule.

§ 8298. Order confirming or vacating sale

The staff should give further thought to paragraph (7) of subdivision (a). Usually the bond is furnished after the order is made. Probably paragraph (7) should be deleted from the conditions which must precede the order, and be recast to require the order to specify the amount of the bond to be furnished.

§ 8310. Order vacating sale and directing resale

Subdivision (e) should be broadened to make a defaulting purchaser liable for all consequential damages, including any deficiency, in the absence of a liquidated damages provision in the contract. This could include insurance, taxes, utilities, security costs, storage costs, pool and gardening expenses, extraordinary fees and commissions, and lease payments. The staff should look at the law relating to defaults on purchases of real property generally.

§ 8330. Neglect or misconduct of personal representative

Section 8330 should be revised to say that "the court shall order a surcharge against the personal representative," instead of "the party aggrieved may recover the damage by enforcing the liability on the bond of the personal representative, or otherwise." After a surcharge is ordered, the aggrieved party may be able to enforce the surcharge by proceeding against the bond.

§ 8332. Limitation of actions for recovery of property

The Commission decided that subdivision (b) should be revised so that there is no tolling period for minority, consistent with the Commission's decision under Memorandum 85-11 in these Minutes.

§ 8880. Abatement

The Commission deferred consideration of Section 8880. The staff will redraft the section and bring it back to the Commission.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

EXHIBIT 1

AMENDED IN SENATE MARCH 20, 1985
AMENDED IN ASSEMBLY MARCH 5, 1985
AMENDED IN ASSEMBLY FEBRUARY 14, 1985

CALIFORNIA LEGISLATURE—1985-86 REGULAR SESSION

ASSEMBLY BILL

No. 195

Introduced by Assembly Member McAlister

January 8, 1985

An act to amend Section 8288 of, and to add Section 8281.5 to, the Government Code, relating to the California Law Revision Commission.

LEGISLATIVE COUNSEL'S DIGEST

AB 195, as amended, McAlister. California Law Revision Commission.

(1) Under existing law, there is a California Law Revision Commission, with specified composition, duties, and authority.

This bill would provide that the ~~office of Governor may remove from office~~ a member of the commission appointed by the Governor ~~would become vacant~~ if the member is absent, without having been excused, from three consecutive regular meetings of the commission. The bill would also define, for the purposes of this provision, the excuse of such a member from attendance at a regular meeting of the commission.

(2) Existing law prohibits employees of the commission and members of the commission appointed by the Governor from advocating the passage or defeat by the Legislature or approval or veto by the Governor of legislation, as specified.

This bill would permit employees of the commission and members of the commission appointed by the Governor to

advocate the passage or approval of legislation recommended by the commission, and would specify that these employees and members of the commission are not precluded by this provision from advocating the passage or defeat of legislation, or the approval or veto of legislation by the Governor, in an individual capacity or in an ~~official~~ *official* capacity not associated with the commission.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 8281.5 is added to the
2 Government Code, to read:
3 8281.5. The ~~office of Governor~~ *may remove from*
4 *office* a member of the commission appointed by the
5 Governor ~~becomes vacant~~ if the member is absent,
6 without having been excused, from three consecutive
7 regular meetings of the commission. For the purposes of
8 this section, a member is excused from attending a
9 meeting only if (1) the commission, acting at the meeting
10 the member failed to attend or at the next meeting of the
11 commission, determines that the member is excused
12 from attending the meeting and (2) the commission's
13 action is entered in the minutes of the meeting at which
14 the action was taken. ~~When the office of a member of the~~
15 ~~commission becomes vacant under this section, the~~
16 ~~chairperson of the commission shall give notice of the~~
17 ~~vacancy to the Governor. If a member of the commission~~
18 ~~appointed by the Governor is absent, without having~~
19 ~~been excused, from three consecutive regular meetings~~
20 ~~of the commission, the chairperson of the commission~~
21 ~~shall give written notice of that fact to the Governor.~~
22 *Nothing in this section limits or restricts the power of the*
23 *Governor, conferred by any other provision of law, to*
24 *remove a member of the commission.*

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

27 8288. Except for advocating the passage or approval
28 of legislation recommended by the commission, no

1 employee of the commission and no member appointed
2 by the Governor shall advocate the passage or defeat of
3 any legislation, or the approval or veto of any legislation
4 by the Governor, in his or her official capacity as an
5 employee or member.

6 Nothing in this section precludes an employee of the
7 commission or a member of the commission appointed by
8 the Governor from advocating the passage or defeat of
9 legislation, or the approval or veto of legislation by the
10 Governor, in an individual capacity or in an official
11 capacity not associated with the commission.

AMENDMENTS TO ASSEMBLY BILL NO. 196
AS AMENDED IN ASSEMBLY MARCH 18, 1985

Amendment 1

In line 1 of the title, strike out "Section" and
insert:

Sections 1134.5 and

Amendment 2

In line 3 of the title, after "240," insert:

591.2, 591.4, 591.5,

Amendment 3

In line 5 of the title, after the comma insert:

to add Sections 591.8 and 591.9 to,

Amendment 4

In line 6 of the title, strike out "and"

Amendment 5

In line 8 of the title, after "of," insert:

and to repeal and add Section 591.1 of,

Amendment 6

On page 5, line 1, after "SECTION 1." insert:

Section 1134.5 of the Civil Code is amended to read:

1134.5. (a) Except as provided in this section, the transferor of any real property containing at least one but not more than four residential units, whether the transfer is made by sale, exchange, or real property sales contract as defined in Section 2985, shall deliver to the prospective transferee a written statement by the transferor of whether any structural additions or alterations or the installation, alteration, repair, or replacement of significant components of the structures upon the property, completed during the term of ownership of the transferor or of which the transferor has knowledge, were or were not completed under an appropriate permit or other authority for construction issued in accordance with an ordinance or regulation adopted pursuant to Section 38660 of the Government Code, Section 17921 of the Health and Safety Code, or Section 30600 of the Public Resources

Code, or were subsequently validated by the public agency having jurisdiction.

(b) This section does not apply to any of the following:

(1) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code.

(2) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by a trustee in bankruptcy, transfers by eminent domain, or transfers resulting from a decree for specific performance.

(3) Transfers to a mortgagee by a mortgagor in default, transfers to a beneficiary of a deed of trust by a trustor in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, or transfers by a sale under a power of sale after a default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale.

(4) Transfers by a fiduciary in the course of the administration of a probate estate, guardianship, conservatorship, or trust.

(5) Transfers from one coowner to one or more coowners.

(6) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(7) Transfers between spouses resulting from a decree of dissolution of a marriage or a decree of legal separation or from a property settlement agreement incidental to such decrees.

(8) Transfers by the Controller in the course of administering the Unclaimed Property Law (Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure).

(9) Transfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code.

(10) Transfers to or from any governmental entity.

(c) (1) The transferor shall deliver the statement as soon as practicable before the transfer of title in the case of a sale or exchange, or prior to execution of the contract where the transfer is by a real

property sales contract as defined in Section 2985. For purposes of this section, "delivery" means delivery in person or by mail to the transferee or transferor, himself or herself, or any person authorized to act for him or her in the transaction or to such additional transferees who have requested delivery from the transferor in writing. Delivery to the spouse of a transferee or transferor shall be deemed delivery to a transferee or transferor, unless the contract states otherwise.

(2) If the statement required to be made by this section is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of written notice of the termination to the transferor. However, the right of the transferee to terminate his or her offer shall be extinguished upon the close of escrow or recordation of the conveyance document, whichever occurs first.

(d) (1) Neither the transferor nor his or her agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section, provided that the error, inaccuracy, or omission was not within the personal knowledge of the transferor or the transferor's agent, was based on information timely provided by public agencies or other persons providing information required to be disclosed pursuant to this section, and ordinary care was exercised in obtaining and transmitting the information.

(2) The delivery of any information required to be disclosed by this section to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to this section shall be deemed to comply with the requirements of this section and shall relieve the transferor of any further duty under this section with respect to that item of information.

(3) The delivery of a preliminary title report issued by a title insurer or underwritten title company admitted to do business in this state, or the delivery of a report or opinion of a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or person of like or related capacity when dealing with knowledge or skills conventionally attributed to such person, shall be deemed information by "other persons providing information required to be disclosed" as contemplated in paragraphs (1) and (2), provided such "other persons" furnish or deliver the information

pursuant to a request therefor, whether written or oral, by the transferor. In responding to such a request, the "other persons" may indicate, in writing, their understanding that the information they undertake to provide will be used in fulfilling the requirements of this section, and shall indicate those items of information, or parts thereof, which are required to be disclosed to which the information being furnished is applicable. Where such a statement is furnished, the "other person" shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

(e) If information disclosed in accordance with this section is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom shall not constitute a violation of this section. If at the time disclosure is to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or the transferor's agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the best information available to the transferor or the transferor's agent, and is not used for the purpose of circumventing or evading the provisions of this section.

(f) The specification of items for disclosure in this section does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

(g) No transfer of title subject to the provisions of this section shall be invalidated solely because of the failure of any person to comply with this section. However, any person who willfully violates any provision of this section shall be liable in the amount of actual damages suffered by a transferee including attorney's fees. The remedy provided by this section is not exclusive and shall not preclude the transferee from pursuing any other remedy which he or she may have under any other provision of law.

(h) No person or entity conducting an escrow on behalf of the parties to a transfer of real property shall incur liability for the consequences of any act or omission of any act pursuant to this section, and no action may be brought or maintained against any such

person or entity as a result of such act or omission.
SEC. 2.

Amendment 7
insert: On page 5, line 21, strike out "SEC. 2." and
SEC. 3.

Amendment 8
insert: On page 6, line 32, strike out "SEC. 3." and
SEC. 4.

Amendment 9
insert: On page 6, line 40, strike out "SEC. 4." and
SEC. 5.

Amendment 10
insert: On page 7, line 5, strike out "SEC. 5." and
SEC. 6.

Amendment 11
insert: On page 7, line 24, strike out "SEC. 6." and
SEC. 7.

Amendment 12
insert: On page 8, line 40, strike out "amanner" and
manner

Amendment 13
insert: On page 9, line 27, strike out "SEC. 7." and

SEC. 8. Section 591.1 of the Probate Code is
repealed.

~~591.1. Unless the decedent's will provides that
his estate shall not be administered under the provisions~~

of this article, an executor or administrator desiring to administer the estate under this article shall petition the court for such authority either in the petition for his appointment or by separate petition. If such authority is requested in the petition for appointment, notice of the hearing of such petition shall be given for the period and in the manner applicable to the petition for appointment. If such authority is requested by separate petition, the clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200, and at least 10 days before the date set for the hearing of such petition by the court, the petitioner shall cause notice of the hearing thereof to be mailed to all legatees and devisees and to all known heirs of the decedent and to all persons who have requested notice as provided in Section 1202. The notice of the hearing of the petition for authority to administer the estate under this article, whether included in the petition for appointment, or in a separate petition, shall specify that such authority is being requested. Any person interested in the estate may appear and object to the granting of authority to administer the estate under this article by filing a written statement setting forth his objections. Unless the court shall determine that the objecting party has shown good cause why such authority should not be granted, the court shall grant such authority and the letters testamentary or of administration shall be endorsed to the effect that such letters are issued pursuant to this article. The provisions of this article shall not apply to special administrators.

SEC. 9. Section 591.1 is added to the Probate Code, to read:

591.1. (a) To obtain authority to administer the estate under this article, the executor or administrator shall petition the court for that authority either in the petition for his or her appointment or in a separate petition. The executor or administrator may not be authorized to administer the estate under this article if the decedent's will provides that the estate shall not be administered under this article. The provisions of this article do not apply to a special administrator.

(b) A petition under this section may request either of the following:

(1) Authority to administer the estate under this article.

(2) Authority to administer the estate under

this article without authority to do either of the following under the authority of this article:

(A) Sell or exchange real property.

(B) Grant an option to purchase real property.

(C) If the authority is requested in a petition for appointment, notice of the hearing of the petition shall be given for the period and in the manner applicable to the petition for appointment.

(d) If the authority is requested in a separate petition, the clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200. At least 10 days before the date set for hearing of the petition by the court, the petitioner shall cause notice of the hearing to be mailed to all legatees and devisees and to all known heirs of the decedent and to all persons who have requested notice as provided in Section 1202.

(e) The notice of the hearing of the petition for authority to administer the estate under this article, whether included in the petition for appointment, or in a separate petition, shall specify that authority to administer the estate under the Independent Administration of Estates Act is being requested.

(f) Any person interested in the estate may appear and object to the granting of authority to administer the estate under this article by filing a written statement setting forth the person's objections.

(g) Unless the court determines that the objecting party has shown good cause why the authority requested in the petition should not be granted, the court shall grant the requested authority, and the letters testamentary or of administration shall be endorsed to the effect that the letters are issued pursuant to this article and, if the authority granted does not include the authority to sell or exchange real property or grant options to purchase real property under this article, that limitation shall be included in the endorsement.

SEC. 10. Section 591.2 of the Probate Code is amended to read:

591.2. (a) Upon obtaining authority to administer the estate under this article, the executor or administrator shall proceed to administer the estate in the same manner as provided in this code with respect to executors or administrators who have not been granted such authority. However, the executor or administrator is not required to obtain judicial authorization, approval, confirmation, or instructions, which shall be known and

referred to in this article as "court supervision", supervision," with respect to any actions during the course of the administration of the estate, except that the executor or administrator is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(1) Allowance of executor's and administrator's commissions and attorney's fees.

(2) Settlement of accountings.

(3) Preliminary and final distributions and discharge.

(4) Sale or exchange of real property and grant of options to purchase real property if the authority of the executor or administrator granted under this article specifically excludes the authority to take those actions under the authority of this article.

(b) Notwithstanding subdivision (a), the executor or administrator may obtain court supervision as provided in this code of any action taken by him or her during the administration of the estate. All publications of notice required by this code shall continue to be given except, when no hearing is required because the executor or administrator does not seek court supervision of an action or proposed action, ~~no publication of the notice of hearing is required.~~

SEC. 11. Section 591.4 of the Probate Code is amended to read:

591.4. (a) The advice of proposed action shall be delivered personally or sent by first-class mail, or sent by airmail to any person residing outside the jurisdiction of the United States, to each person described in Section 591.3 at his or her last known address. The advice of proposed action shall be in substantially the form set out in Section 591.8 and shall state the name and mailing address of the executor or administrator, the person and telephone number to call to get additional information, and the action proposed to be taken, with a reasonably specific description of such action, and the date on or after which the proposed action is to be taken. Such date shall not be less than 15 days after the personal delivery, or not less than 20 days after the mailing, of the advice. When the proposed action involves the sale or exchange of real property, or the granting of an option to purchase real property, the advice of proposed action shall state the material terms of the transaction, including, if applicable, the sale price and the amount of, or method of calculating, any

commission or compensation paid or to be paid in connection with the transaction.

(b) The failure of the executor or administrator to comply with the provisions of this section shall not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with the executor or administrator who changed their position in reliance on the action, conveyance, or transfer without actual notice of the failure of the executor or administrator to comply with such provisions. No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not the executor or administrator has complied with the provisions of this section.

SEC. 12. Section 591.5 of the Probate Code is amended to read:

591.5. (a) Any person described in Section 591.3 who objects to the taking of any proposed action described in Section 591.3 without court supervision, may do either or both of the following:

(1) The person may apply to the court having jurisdiction over the proceeding for an order restraining the executor or administrator from taking the proposed action without court supervision under the provisions of this code dealing with the court supervision of such action, which order the court shall grant without requiring notice to the executor or administrator and without cause being shown therefor. Such order may be served by the person so objecting upon the executor or administrator in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

(2) The person may deliver or mail a written objection to the executor or administrator at the address stated in the advice of proposed action, so that the objection is received before the date specified on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is later.

(b) If the executor or administrator has notice of the issuance of the restraining order or of the written objection of a person described in Section 591.3, the executor or administrator shall, if he or she desires to consummate such action, submit it to the court for approval following the provisions of this code dealing with the court supervision of such action and may consummate such action under such order as may be entered

by the court. Failure to comply with this subdivision is a violation of the fiduciary duty of the executor or administrator and is grounds for his or her removal.

(c) The failure of the executor or administrator to comply with subdivision (b) and the consummation of the action by the executor or administrator without complying with subdivision (b) shall not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with the executor or administrator who changed their position in reliance on the action, conveyance, or transfer without actual notice of the failure of the executor or administrator to comply with subdivision (b). No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not the executor or administrator has complied with subdivision (b).

(d) All persons described in Section 591.3 who have been given an advice of proposed action as provided in Section 591.4 may object only in the manner provided in this section. The failure to object is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired. The court may, however, review actions of the executor or administrator on its own motion or on motion of an interested person who did not receive an advice of proposed action before the time to object expired.

SEC. 13. Section 591.8 is added to the Probate Code, to read:

591.8. Unless the Judicial Council prescribes a form for advice of a proposed action under Sections 591.3 and 591.4, the advice of a proposed action shall be in substantially the following form:

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

Estate of _____

No. _____

(deceased)

ADVICE OF PROPOSED ACTION
(Probate Code Sections 591.3, 591.4)

1. The executor or administrator of the estate of the deceased is:

(Name)

(Street or post office box)

(City, state, ZIP)

2. The executor or administrator has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 591-591.8).

3. On or after _____, 19____, the executor or administrator will take the following action:
[Describe proposed action in reasonably specific terms. If the proposed action involves a sale or exchange of real property or an option to purchase real property, include the material terms of the transaction, including any sale price and the amount of or method of calculating any compensation paid or to be paid in connection with the transaction.]

4. If you need more information, you may call:

(Name)

(Telephone number)

5. If you object to the proposed action, you may deliver or mail a written objection to the executor or administrator at the address stated above. Your objection can be simply stated. All you need to do is state that you object to the proposed action (specifying the action you object to) and sign your name. You may also apply to the court for an order preventing the executor or administrator from taking the proposed action without court supervision.

6. Your objection must be received before the date specified above, or before the proposed action is taken, whichever is later. If you object, the executor or administrator may take the proposed action only under court supervision.

7. IF YOU DO NOT OBJECT. YOU WILL BE TREATED AS IF YOU CONSENTED TO THE PROPOSED ACTION. YOU MAY NOT OBJECT AFTER THE PROPOSED ACTION IS TAKEN.

Dated: _____

(Signature of executor or
administrator or attorney
for executor or administrator)

SEC. 14. Section 591.9 is added to the Probate Code, to read:

591.9. (a) Subject to Sections 591.3 to 591.5, inclusive, an executor or administrator who has been granted authority to administer the estate without court supervision under this article may sell property of the estate either at public auction or private sale, and with or without notice, for such price and upon such terms and conditions as the executor or administrator may determine, and need not obtain court approval of the compensation for the services to the estate of the agent, if any, used for the sale. This subdivision applies to any sale made under authority of this article on or after January 1, 1985.

(b) The information in the advice of proposed action shall include the amount of, or method of calculating, any compensation or commission paid or to be paid in connections with the transaction.

(c) If the executor or administrator is otherwise required to file a bond and the court determines that real property of the estate will be sold without court supervision under this article, the court, in its discretion, may fix the amount of the bond at not less than the value of the personal property, the estimated proceeds of the real property that will be sold under this article, and the value of the probable annual gross income of all of the property belonging to the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount.

SEC. 15.

Amendment 14

insert: On page 11, line 22, strike out "SEC. 8." and

SEC. 16.

Amendment 15

insert: On page 12, line 7, strike out "SEC. 9." and

SEC. 17.

Amendment 16

insert: On page 13, line 4, strike out "SEC. 10." and

SEC. 18.

Amendment 17
insert: On page 13, line 13, strike out "SEC. 11." and
SEC. 19.

Amendment 18
insert: On page 14, line 26, strike out "SEC. 12." and
SEC. 20.

Amendment 19
insert: On page 16, line 14, strike out "SEC. 13." and
SEC. 21.

Amendment 20
insert: On page 17, line 20, strike out "SEC. 14." and
SEC. 22.

Amendment 21
insert: On page 18, line 15, strike out "SEC. 15." and
SEC. 23.

Amendment 22
insert: On page 18, line 17, strike out "SEC. 16." and
SEC. 24.

Amendment 23
On page 18, line 19, strike out "If 40 days have
elapsed since" and insert:
Upon

Amendment 24
insert: On page 19, line 21, strike out "SEC. 17." and

SEC. 25.

Amendment 25
insert: On page 20, line 21, strike out "SEC. 18." and

~~SEC. 26.~~

Amendment 26
insert: On page 20, line 23, strike out "SEC. 19." and

SEC. 27.

- 0 -

WALZER AND GABRIELSON

STUART B. WALZER*
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March 11, 1985

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

Re: Memorandum 85-42, Study F-670-Litigation Expenses
in Family Law Proceedings

Dear Nat:

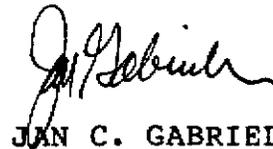
I have reviewed Memorandum 85-42 containing your new proposed Civil Code Section 4370.5.

It is clear and to the point, contains a clear statement of policy and some workable criteria.

I support its passage.

Best regards.

Sincerely,



JAN C. GABRIELSON

JCG:b