

0001W
April 11, 1985

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

Time

Place

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

Room 127, State Capitol
Sacramento

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

April 18-19, 1985

April 18 (Thursday)

1. Minutes of March 21-22 Meeting (enclosed)
2. Administrative Matters

Legislative Program

Memorandum 85-45 (enclosed)

Memorandum 85-46 (enclosed)

3. Study L-1010 - Probate Code (Personal Representative; Appointment; Letters; Termination of Authority; Oath and Bond)

Memorandum 85-12 (sent 1/11/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-12 (sent 3/8/85; another copy sent 4/1/85)

Third Supplement to Memorandum 85-12 (sent 3/13/85; another copy sent 4/1/85)

Fourth Supplement to Memorandum 85-12 (sent 4/1/85)

Fifth Supplement to Memorandum 85-12 (enclosed)

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

Memorandum 85-7 (sent 12/8/84; another copy sent 4/1/85)

First Supplement to Memorandum 85-7 (sent 12/26/84; another copy sent 4/1/85)

Second Supplement to Memorandum 85-7 (sent 1/9/85; another copy sent 4/1/85)

Third Supplement to Memorandum 85-7 (sent 4/1/85)

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

Memorandum 85-13 (sent 1/9/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-13 (sent 2/22/85; another copy sent 4/1/85)

Second Supplement to Memorandum 85-13 (sent 3/13/85; another copy sent 4/1/85)

Third Supplement to Memorandum 85-13 (sent 4/1/85)

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

Memorandum 85-34 (sent 2/28/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

Revised First Supplement to Memorandum 85-34 (sent 4/1/85)

7. Study L-1026 - Probate Code (Payment of Demands)

Memorandum 85-35 (sent 2/22/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

Revised First Supplement to Memorandum 85-35 (sent 4/1/85)

April 19 (Friday)

8. Study L-640 - Probate Code (Trusts)

Approve Trust Portion of New Probate Code for Introduction as
Preprint Bill

Memorandum 85-32 (sent 2/13/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-32 (sent 3/13/85; another
copy sent 4/1/85)

Transitional Provisions

Memorandum 85-40 (sent 2/28/85; another copy sent 4/1/85)

Conforming Revisions

Memorandum 85-41 (sent 3/1/85; another copy sent 4/1/85)

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

Memorandum 85-36 (sent 2/28/85; another copy sent 4/1/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-36 (sent 3/8/85; another
copy sent 4/1/85)

Revised Second Supplement to Memorandum 85-36 (sent 4/1/85)

- Continuation of consideration of items scheduled for April 18 if
consideration not completed on that date.

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
APRIL 18-19, 1985
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 18-19, 1985.

Law Revision Commission

Present:	Edwin K. Marzec, Chairperson Arthur K. Marshall David Rosenberg (April 18)	Bion M. Gregory Ann E. Stodden
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Absent:	Barry Keene, Member of Senate Alister McAlister, Member of Assembly James H. Davis, Vice Chairperson	John B. Emerson Roger Arnebergh
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Staff Members Present

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

Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Marika A. Barszcz, American Association of Retired Persons, Sacramento (April 18)
Phyllis Cardoza, Beverly Hills Bar Association Probate Section, Los Angeles
Ted Cranston, State Bar Estate Planning, Trust and Probate Law Section, San Diego
Paulette Leahy, California Bankers Association, San Diego
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
Jeffrey A. Dennis-Strathmeyer, California Continuing Education of the Bar, Berkeley (April 18)

ADMINISTRATIVE MATTERS

MINUTES OF MARCH 21-22, 1985, MEETING

The Minutes of the March 21-22, 1985, meeting were approved as submitted.

EXCUSE FOR ABSENCE OF COMMISSIONER ARNEBERGH

The Commission excused the absence of Commissioner Arnebergh, who was in Washington, D.C., and therefore unable to attend the meeting.

SCHEDULE FOR FUTURE MEETINGS

The Commission changed the place of the June meeting from Sacramento to San Francisco. The following is the schedule for future meetings of the Law Revision Commission.

CALIFORNIA LAW REVISION COMMISSION
SCHEDULE FOR FUTURE MEETINGS

MAY

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

JUNE

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

SEPTEMBER

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

OCTOBER

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

DECEMBER

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

CONTRACT WITH PROFESSOR HALBACH

The Executive Secretary reported that the amount available in the contract made with Professor Halbach will be insufficient to permit payment for his expenses in attending the June meeting of the Commission. The Commission approved adding an amount not exceeding \$200 to the amount available under the contract. The Executive Secretary was directed to execute the necessary addendum to the existing contract to make the additional amount available. The Commission also requested that a copy of the contract now in effect with Professor Halbach be sent to each member of the Commission.

LEGISLATIVE PROGRAM GENERALLY

The Executive Secretary made the following report, updating Memorandum 85-45, concerning the 1985 legislative program.

Sent to Floor in Second House

Assembly Bill 97 - Probate (Urgency Bill on Notices)
Assembly Bill 98 - Creditors' Remedies
Assembly Concurrent Resolution 4 - Continues Authority to Study
Previously Authorized Topics

Sent to Fiscal Committee in Second House

Assembly Bill 195 - California Law Revision Commission

Passed First House

Assembly Bill 150 - Family Law (Support After Support Obligor Dies; Dividing Jointly Owned Property)
Assembly Bill 690 - Uniform Transfers to Minors

Sent to Floor in First House

Assembly Bill 96 - Property Law (Recording Severance of Joint Tenancy; Abandoned Easements)
Assembly Bill 1030 - Protection of Mediation Communications

Set for Hearing in First House

Assembly Bill 196 - Probate Law (Transfer of State Registered Property Without Probate; Effect of Adoption or

Minutes
April 18-19, 1985

Out-Of-Wedlock Birth on Rights at Death; Distribution Under Will or Trust; Independent Administration) (Set for hearing on April 30)
Senate Bill 1270 - Durable Powers of Attorney (Set for Hearing on May 14)

ASSEMBLY BILL 195

The Commission discussed the progress of Assembly Bill 195, which amends the Commission's enabling statute. The Commission noted the changes that have been made in the bill, including replacement of the provision creating a vacancy in the office of a Commissioner with three unexcused absences by a provision authorizing the Governor to remove such a Commissioner from office. The Executive Secretary also reported an amendment, set out below, made by the Senate Judiciary Committee, that permits the legislative members of the Commission to designate an alternate.

AMENDMENTS TO ASSEMBLY BILL NO. 195
(As amended in Senate March 20, 1985)

Amendment 1

In line 1 of the title, strike out the second "Section" and insert:
Sections 8281.3 and

Amendment 2

On page 2, strike out line 1 and insert:
SECTION 1. Section 8281.3 is added to the Government Code, to read:

8281.3. Each of the members of the Legislature appointed to the commission pursuant to Section 8281 may designate an alternate who, in the absence of the member appointed to the commission, shall be counted toward a quorum, may vote, and may receive the compensation and expenses specified in Section 8282 for attending meetings of the commission.

SEC. 2. Section 8281.5 is added to the

Amendment 3

On page 2, line 25, strike out "SEC. 1." and insert:
SEC. 3

Note. New Section 8281.3 is drawn from the last sentence of Section 8893 of the Government Code (Seismic Safety Commission Act).

ASSEMBLY BILL 196

The Commission considered Memorandum 85-46 and a letter to Assembly Member McAlister from Charles Collier on behalf of the Estate Planning, Trust and Probate Law Section of the State Bar. A copy of the letter is attached as Exhibit 1 to these Minutes. The letter contains comments and suggestions concerning Assembly Bill 196. The Commission decided to defer consideration of most of the comments and suggestions until the next meeting. This will give the Executive Committee of the Estate Planning, Trust and Probate Law Section time to consider the comments and suggestions and determine the position of the Executive Committee on those matters. However, the Commission did consider some of the comments and suggestions contained in the Memorandum and letter and determined to make the amendments set out below. The amendments are intended primarily to eliminate the opposition of the Section at the April 30 hearing on the bill, and the Commission may give further consideration to these amendments before the bill is heard in the Senate. The State Bar Section will make a further study of the bill and will submit additional comments and suggestions to be considered at the Commission's May meeting.

AMENDMENTS TO ASSEMBLY BILL No. 196
(as amended in Assembly April 8, 1985)

Amendment 1

On page 14, strike out lines 3 to 22, inclusive

Amendment 2

On page 17, between lines 23 and 24, insert:

SEC. 10.5. Section 591.3 of the Probate Code is amended to read:

591.3. (a) Except as provided in subdivisions (c) and (d):

(1) Prior to the consummation of any of the actions described in subdivision (b) without court supervision, the executor or administrator to whom authority has been granted to act without court supervision shall advise the persons affected by the proposed action of his or her intention to take such action.

(2) The advice, known and referred to in this article as "advice of proposed action," shall be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the States of California if any portion of the estate is to escheat to it; and to persons who have filed a request for special notice pursuant to Section 1202.

(b) The actions requiring such advice are all of the following:

(1) Selling or exchanging real property.

(2) Granting options to purchase real property.

(3) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in Sections 770 and 771.5 when sold for cash.

(4) Leasing real property for a term in excess of one year.

(5) Entering into any contract, other than a lease of real property, not to be performed within two years.

(6) Continuing for a period of more than six months from the date of appointment of the executor or administrator of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death, or the sale or incorporation of such business.

(7) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(8) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan association accounts, in units of a common trust fund described in Section 585.1, in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of (A) those obligations, or (B) repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest.

(9) Completing a contract entered into by the decedent to convey real or personal property.

(10) Borrowing money or executing a mortgage or deed of trust or giving other security.

(11) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, such property, or determining decedent's claim to real or personal property title to or possession of which is held by another.

(c) The advice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(d) The advice of proposed action need not be given to any person who waives in writing advice of proposed action with respect to the particular proposed action. The waiver may be executed at any time before or after the proposed action is taken. The waiver shall describe the particular proposed action and may waive particular aspects of the advice, such as the service, mailing, or time requirements of Section 591.4, or the giving of the advice in its entirety for the particular proposed action.

Amendment 3

On page 20, line 1, after "expired" insert:
unless the person was not required to be given advice of proposed action because the person consented to the proposed action or waived advice of proposed action with respect to the proposed action as provided in subdivision (c) or (d) of Section 591.3.

Amendment 4

On page 20, line 30, strike out "591-591.8" and insert:
591-591.9

Amendment 5

On page 24, line 31, strike out "related to" and insert:
measured from

Amendment 6

On page 24, line 31, strike out the second "to"

Amendment 7

On page 25, strike out lines 21 to 24, inclusive

Amendment 8

On page 25, line 25, strike out "(d)" and insert:
(c)

STUDY L-640 - TRUSTS

The Commission continued its consideration of Memorandum 85-32 and the comprehensive draft trust statute. The Commission made the following decisions:

Draft § 721. Expert trustee's duty to use skills. This section should be omitted since it repeats in a different form a principle

inherent in draft Section 720 relating to the trustee's standard of care in administering the trust. Section 720 provides in relevant part, as does existing Civil Code Section 2261, that the trustee is to be judged as would a prudent person "acting in like capacity . . . in the conduct of an enterprise of like character and with like aims." The material relating to the standard of care applicable to an expert trustee in the comment to Section 721 should be moved to the comment to Section 720.

Draft § 730. Trustee's general duty to inform and account to beneficiaries. This section stating the duty to keep beneficiaries informed of the trust and its administration should probably not apply to beneficiaries of revocable living trusts during the time that the trustor is able to control the trust, i.e., while the trustor is alive and not incompetent. This would tend to harmonize this provision with the general expectations of trustors under revocable living trusts and with Financial Code Section 1582.

Draft § 731. Duty to account annually to income beneficiary. The reference to "each income beneficiary, as defined in subdivision (a) of Section 901" should be revised to read "each beneficiary to whom income is required or authorized to be currently distributed". Subdivision (c) should excuse the duty to account at termination of a trust and upon a change of trustees, as well as annually. This change will allow the trust to excuse all duties to account. It will also excuse all duties to account in the case of revocable living trusts while the trustor is competent, and as to any beneficiary who waives the right to the accounting.

Draft § 755. Jurisdiction as to private foundations, charitable trusts, and split-interest trusts. This section should make clear that the court with jurisdiction is the superior court sitting in probate, to be consistent with draft Section 1100.

Draft § 803. Conflict of interest in exercise of power. The reference to "ancillary services by a regulated financial institution or its affiliate" in subdivision (c) should be revised to read

"services of a regulated financial institution or its affiliate in the ordinary course of business". The comment to this section should provide some background on the meaning of "affiliate" as it is used in this provision. The Commission discussed the possibility of providing for rules of estoppel or consent in this section but decided these matters were best left to general principles.

Draft § 804. Incorporation of powers. This section should be moved to the transitional provisions in draft Section 520 et seq.

Draft § 826. Participation in business. This section should be revised to permit the trustee to continue to participate in a business for a reasonable time pending a court hearing on whether the business may be further continued.

Draft § 828. Investments. Subdivision (b) of this section relating to mutual funds should be revised for clarity.

Draft § 830. Deposits. Subdivisions (a)(2) and (a)(3) of this section should be revised to recognize that a deposit in savings and loan association and credit union accounts is appropriate only to the extent that such accounts are insured or collateralized. This will make these provisions consistent with the provision governing bank deposits. Subdivision (b) should be revised to refer to "a financial institution operated by or affiliated with the trustee". The comment to this section should include the same explanation of the meaning of "affiliated" as is to be included in the comment to draft Section 803.

Draft § 848. Voting rights with respect to corporate shares, memberships, or property. This section should include some language to deal with the problem arising where the trust corpus includes stock in the corporate trustee itself. The staff is to work with the California Bankers Association in arriving at appropriate language.

Draft § 864. Payment and settlement of claims. The power to release a claim belonging to the trust in whole or in part should be revised to eliminate the qualification "to the extent that the claim is uncollectible". The comment to this section should indicate that a claim should be released to the extent that it would not be economical to pursue it.

Draft § 872. Nature and value of distributions. The second sentence of this provision should be revised to read: "The distribution in kind may be made pro rata or non-pro rata."

Draft § 874. Hiring persons. Subdivision (b) of this section should be deleted because it is a source of confusion to persons who have reviewed the statute and does not appear necessary. Subdivision (b) recognizes the power of a trustee to "[a]ct without independent investigation upon the recommendations of persons hired."

Note. The Commission considered the material through draft Section 909. Consideration of the remainder of the draft statute and the transitional provisions in Sections 520-530 will continue at a future meeting.

STUDY L-1010 - PROBATE CODE (PERSONAL REPRESENTATIVE;
APPOINTMENT; LETTERS; TERMINATION OF AUTHORITY; OATH AND BOND)

The Commission considered Memorandum 85-12 and the attached draft statute relating to appointment of personal representatives, along with the First, Third, Fourth, and Fifth Supplements thereto. The Commission made the following determinations with respect to the draft statute:

§ 7310. Appointment necessary

The last line of this section should read "take necessary measures for the maintenance and preservation of the estate."

§ 7311. Qualifications

Subdivision (a)(2) of this section was revised to provide that a person is not qualified for appointment as a personal representative if the person is "incapable of properly executing, or is otherwise not qualified to execute, the duties of the office." The staff is to see whether other language might be more suitable than "otherwise not qualified", and the Commission will review the language in the future.

The Commission added a subdivision (a)(5) to provide that a person is not qualified if "The person would be removed from office

pursuant to Section 7382." The Comment should note that this covers the conflict of interest situation.

§ 7312. Nominee of person entitled to appointment

A few technical changes were made as follows: "The court may appoint a person nominated by ~~request~~//~~of~~ a person otherwise entitled to appointment as personal representative, or by ~~request~~ ~~of~~ the guardian or conservator of the estate of such a person. The ~~request~~ nomination shall be made in writing and filed in court."

§ 7313. Oath

The staff was directed to draft a listing of duties and liabilities of the personal representative, to be delivered at the time of signing the oath of office. Commissioner Stodden offered to provide the staff with a copy of the material used by the Los Angeles County Superior Court. Other lists mentioned were those of San Diego County, San Mateo County, and Santa Clara County.

§ 7314. Form of letters

The form of letters should be modified to reflect partial grants of independent administration authority.

§ 7315. Restraining personal representative

This section should be revised to permit a restraining order to prevent the personal representative from performing "specific" acts or exercising "specific" powers. The staff should investigate sanctions, such as attorney's fees, for improper attempts to restrain the personal representative.

§ 7324. Successor corporation as executor

The statute should include a citation to the Bank Act. The staff should investigate whether or not the specific sections in the Bank Act that are being incorporated can be easily referred to.

§ 7325. Minor named as executor

The staff is to research whether an emancipated minor may serve as an executor, and whether a minor (whether or not emancipated) might not be qualified as an executor under the law of agency.

§ 7326. When fewer than all executors appointed

The words "effectually as" in the last line of this section should be replaced by the word "if".

§ 7331. Priority for appointment

The last sentence of subdivision (b) was moved to the Comment.

§ 7332. Authority of administrator with will annexed

The last portion of subdivision (a) was moved to the Comment. A sentence was added to subdivision (b) to give the court the ability to authorize exercise of a discretionary power by the administrator with the will annexed.

§ 7341. Priority for appointment

Two additional classes were inserted between subdivisions (c) and (d):

(x) Issue.

(xx) Parents.

§ 7342. Priority of relatives

The phrase "ancestor or descendant of the decedent" should replace the listing of relatives in subdivision (b). The staff is to do further research on the purpose of this subdivision, and the reasons why it is limited to certain relatives of the decedent.

§ 7343. Estranged spouse

The staff is to research the reasons this section is tied in with Section 650. The staff should also consider the possibility of giving the court discretion in this area.

§ 7344. Minors and incompetent persons

This section was revised to read, "If a person otherwise entitled to appointment as administrator is a minor or person for whom a guardian or conservator of the estate has been appointed, the court in its discretion may appoint the guardian or conservator or another person entitled to appointment."

§ 7345. Priority of nominee

This section should be compared with Section 7341 (priority for appointment) for consistency.

§ 7346. Priority of creditor

The phrase "at the request of another creditor" was deleted.

§ 7347. Equal priority

The word "independent" was replaced by the word "disinterested". The Comment should indicate that this might include the public administrator.

§ 7360. Bond required

In connection with this section, the Executive Secretary reported that the effort to obtain premium and claim experience from surety companies was not proving profitable, and recommended that the Commission abandon the effort to gather data. The Commission was of the view that the existing bond requirements are an inexpensive means of insuring interested persons, and was not inclined to make major changes in the law in this area.

Subdivision (b) was revised to delete the reference to the State of California and insert a reference to a bond given "for the benefit of interested persons."

Subdivision (c) should be split into two sentences, one dealing with cause for nonissuance of letters and the other dealing with cause for removal from office.

§ 7361. Waiver of bond

The word "expectancy" was replaced by "interest" in subdivision (c).

§ 7362. Amount of bond

The amount of the bond should be not less than the "estimated" value of the personal property and the probable annual gross income of the estate. A provision should be added authorizing the court to set a minimum bond.

§ 7363. Reduction of bond by deposit of assets

The Commission expressed concern about the situation where property of the estate will be deposited in a controlled account or safe deposit box and a reduced bond is given to reflect the deposit, but a loss occurs in the interim. The California Bankers Association agreed to investigate how this situation is handled in practice.

Also, the staff is to investigate the exclusion of lending institutions such as insured credit unions.

§ 7364. Excessive bond

This section should refer to a petition rather than a motion.

§ 7365. Release or substitution of sureties

This section should refer to a petition rather than an application.

§ 7366. Cost of bond

This section was revised to read: "The personal representative shall be allowed the reasonable cost of the bond for every year it remains in force."

§ 7367. Law governing bond

The words "prescribes a different rule or" were deleted from this section.

§ 7380. Procedure for removal

The staff should review this section with an eye to elimination of unnecessary procedural detail. In particular, comparable provisions of the guardianship and conservatorship law should be examined.

§ 7382. Grounds for removal

Subdivision (a) was revised to read: "The personal representative has wasted, embezzled, mismanaged, or committed a fraud upon the estate, or is about to do so."

Subdivision (b) was revised to delete the phrase "incompetent to execute" and insert the phrase "incapable of properly executing."

§ 7383. Removal at request of person with higher priority

Language along the following lines was added to subdivision (a): "The court may refuse to grant the petition where to do so would be contrary to the sound administration of the estate." The concept here was that administration could be nearly complete and replacement of the administrator inappropriate.

§ 7384. Subsequent probate of will

The phrase "after appointment of an administrator on the ground of intestacy" should be moved to the beginning of this section.

§ 7385. Contempt

Subdivision (a) was revised to read: "A personal representative may be removed from office if the personal representative is found in contempt for disobeying an order of the court."

§ 7386. Insufficient bond

This section was deleted; it duplicates general provisions governing bonds.

§ 7390. Vacancy in office

The 15-day notice requirement of subdivision (b) should be replaced by a provision to the effect that upon resignation the liability of a personal representative continues until a successor is appointed, including a temporary administrator during the interim.

§ 7391. Vacancy where other personal representatives remain

This section should be subject to a contrary provision in a will or subject to a court order to the contrary. The provision for verification should be replaced by general provisions on the subject.

§ 7392. Vacancy where no personal representatives remain

This section should incorporate general notice procedures. The general notice procedures need to be reviewed to ascertain the adequacy of notice to creditors and late notices to interested persons.

§ 7393. Interim protection of estate

Provision should be made for appointment of a temporary personal representative.

§ 7394. Successor personal representative

Subdivision (c) should be coordinated with Section 7332 (authority of administrator with will annexed).

§ 7412. Statement of address

The word "acknowledge" should be deleted from this section. The court should have discretion to require a bond of a nonresident personal representative. The staff should investigate other remedies available against a personal representative who is removed.

§ 7413. Manner of service

The staff was directed to check with the Secretary of State regarding the history, purpose, practical application, and experience under this section.

§ 7430. Grounds for appointment

Subdivision (a) was revised to read: "If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise such powers as may be appropriate under the circumstances for the preservation of the estate." The remainder of the subdivision should be included in the Comment.

§ 7432. Issuance of letters

The provisions of subdivision (a)(1) relating to the bond of the special administrator should be relocated, and the section should simply provide for "such bond as may be required by the court in Section ____."

§ 7433. Waiver of bond

The introductory phrase of Section 7433 should be relocated following the words "the court shall".

§ 7434. Special powers, duties, and obligations

The introductory clause of subdivision (a) was revised to read: "Except to the extent the order appointing a special administrator prescribes duties, the special administrator has the power to: ". Whether the powers of the special administrator should include power to act under the Independent Administration of Estates Act should be considered in the context of that Act generally. A court order made under subdivision (b)(4) should remain in effect until appointment of a successor.

§ 7435. General powers, duties, and obligations

The authority of the court to grant general powers under this section should be permissive, rather than mandatory, and should be available in any proper case; the instances listed in the statute should be included in the Comment as illustrative but not exclusive.

§ 7436. Termination of authority

This section should provide for a consolidated account where the special administrator and his or her successor are the same person. The staff should also investigate the possibility of allowing the

special administrator to complete a transaction upon court authorization.

§ 7437. Fees and commissions

A provision should be added that the fees and commissions of the special administrator shall not be allowed until the close of administration unless the personal representative joins in the petition for allowance of the special administrator's fees and commissions.

Probate Code §§ 300, 301. Trust company as fiduciary

The staff was directed to research the total reserve and other security requirements of trust companies, along with historical data concerning the change in monetary values since enactment of the requirements. The staff was also directed to research the meaning of "association" as used in these statutes. The California Bankers Association should be consulted in this connection.

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**

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H. NEAL WELLS III, Costa Mesa
Vice-Chair
KENNETH M. KLUG, Fresno

Advisors
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JAMES A. WILLETT, Sacramento

April 15, 1985

Honorable Alister McAlister
California State Assembly
Capitol Building
Sacramento, California 95814

Re: AB 196, As Amended

Dear Mr. McAlister:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California has on a preliminary basis reviewed certain aspects of Assembly Bill 196 and certain further amendments proposed by the California Law Revision Commission by letter of March 27, 1985, addressed to Lettie Young, Assembly Judiciary Committee. At this time the Executive Committee has not had an opportunity to review all of the proposed amendments.

As a consequence, no position is taken on certain proposed amendments at this time. The Executive Committee reserves the right to take a position on these amendments at an appropriate future time.

BACKGROUND

AB 196 is in part a modification of sections enacted through AB 25 in 1983 or AB 2270 or AB 2290 in 1984, all of which became effective January 1, 1985. In addition, it seeks to clarify certain other areas of law that relate to the changes brought about by the bills mentioned above.

SUMMARY OF PROPOSED LEGISLATION

This bill including the proposed amendments of March 27, 1985, would do the following:

Honorable Alister McAlister
April 15, 1985
Page Two

1. The bill would provide for nonexclusive statutory options for distribution of class gifts under a will or trust.

2. The bill would make certain changes in the class gifts under Section 6152.

3. The bill would expand certain rules of construction relating to wills and a class gift to include a natural child who lived during minority with the named person's spouse.

4. The bill would limit the rights of inheritance by a child from the foster parent or step-parent and would preserve the doctrine of equitable adoption.

5. This bill would preserve the relationship of a natural parent and an adopted child in certain situations.

6. The bill would modify the provisions relating to the right to inherit from a child born out of wedlock.

7. The bill would standarize the certification requirements for transfer of vehicles from the Department of Motor Vehicles where no probate is involved and require a 40-day delay for such transfers in most instances.

8. The bill would exclude from inclusion under a Section 630 affidavit all vehicles and undocumented vessels as specified.

9. The bill would adopt provisions for registration of undocumented vessels that would parallel registration provisions for other types of vehicles where there is co-ownership.

10. Section 1134.5 of the Civil Code would be amended to recognize the ability to transfer real property without court sale under independent administration.

11. Sections 591.1 through 591.9 would be modified to allow a person to have independent administration for all purposes except sale of real property, exchange of real property or granting of options on real property.

12. Section 591.5 would limit the ability of a fiduciary to proceed with independent administration if there are objections.

13. A statutory form of advice of proposed action is proposed for Section 591.8 to be used unless the Judicial Council adopts its own form.

Honorable Alister McAlister
April 15, 1985
Page Three

SECTION POSITION ON VARIOUS
PROVISIONS OF AB 196, AS AMENDED

The Executive Committee supports the bill as to those aspects mentioned below. It would support the bill generally if amended subject to reserving its rights as to certain matters which have not yet been considered by the Executive Committee but will be considered at its meeting on April 26-28.

For the assistance of the author and the Assembly Judiciary Committee, the comments which follow first refer to AB 196 as amended March 18, 1985, and then discuss the proposed further amendments in the letter of March 27, 1985, from John DeMouilly, California Law Revision Commission. The comments are as follows:

1. Section 1: Section 1389.4 of the Civil Code. The proposed amendment is approved.

2. Section 2: Section 18102 of the Health and Safety Code. The proposed change to 40 days is approved. The reference to "unsecured creditors" (page 6, line 24) is apparently a clarification of existing law to limit the declaration to unsecured creditors. As such it is supported.

3. Section 3, Section 4, and Section 5: These proposed technical changes and wording changes are approved.

4. Section 6: Section 245 (b)(1), page 7, line 39, dealing with "per capita" is believed to be confusing in light of Section 248 (page 9, line 6). It involves using the same term "per capita" to have different meanings depending upon whether the members of the designated class are in the same generation or not. This is deemed confusing. It is believed that subparagraph (1) should be deleted from Section 245. Sections 246 and 247 are satisfactory. The wording of these sections and of Section 245 (other than is noted above) were reviewed by the Executive Committee of the Section when they were being drafted by the Staff of the Law Revision Commission.

5. Section 248: It is believed that this section again creates confusion as it limits the normal meaning of "per capita" and is contrary to the common understanding of what "per capita" means. It is believed that this section should be deleted. The earlier version worked out with the Executive Committee did not limit "per capita" to a single generation as does Section 248. Therefore, this section is opposed.

Honorable Alister McAlister
April 15, 1985
Page Four

6. Section 7: The changes in this section are approved.

7. Section 8: The change at line 32 at page 11 is approved. The language at page 11, line 37, through page 12, line 3, is confusing and seems to be inherently self-contradictory, at least as to the reference to periods of time related to the death of the testator. In its present wording the Executive Committee opposes this proposed additional language. It is believed that the purpose of the language was to exempt from the anti-lapse statute periods of time that may relate to probate of the will or administration of the estate. The language, however, is not clear.

8. Section 9: The proposed addition at lines 30 through 33 at page 12 is opposed. Many wills in California limit descendants or issue to legal issue or legal descendants or lawful issue or lawful descendants and differentiate those descendants from children born out of wedlock and possibly adopted children. The proposed addition to this section would presumably change the meaning of those wills and would be contrary to the intent of many testators and it would necessitate reviewing and probably revising many existing wills. The Executive Committee opposes this proposed additional language.

9. Section 10: This is believed to be a technical change. However, the Executive Committee has taken no position on this change.

10. Section 11: The proposed changes are approved.

11. Section 12: The proposed changes are approved.

12. Section 13: The reference on line 29 at page 16 to "descendants" is questioned as the word "descendants" has been used in the revised Probate Code sections only under the statutory will provisions, not generally. It would seem the word "issue" is appropriate. The same comment also applies to the word "descendants" on page 17 at line 19.

13. Section 14: The additional provisions in paragraph (a)(1) are approved. As to the additional language on page 18 at lines 3 through 6 no position has been taken on that by the Executive Committee nor has any position been taken on the additional language at lines 9 through 13. As a matter of clarification on line 12, perhaps the word "that" should be inserted before the word "relative".

14. Sections 15 and 16: Section 5910 of the Vehicle Code as modified by Amendment 25 of the letter of March 27, 1985, is approved, that is, deleting the 40-day time delay.

15. Section 17: Although the Executive Committee has not yet discussed this issue, the section seems appropriate to make ownership of a vessel consistent with the provisions for ownership of other types of vehicles.

16. Sections 18 and 19: The proposed 40-day delay is satisfactory.

LETTER OF MARCH 27, 1985

The various technical amendments as set forth in the letter of March 27, 1985 are not commented upon herein. Only the substantive amendments are discussed.

1. Amendment 6: The proposed additional language for Section 1134.5 of the Civil Code is approved.

2. Amendment 14: The Executive Committee has not discussed the proposed change in §591.1 which is the addition of paragraph (b)(2)(A) and (B). However, the Executive Committee recognizes that there has been a problem raised by the courts in some counties requiring a bond for the value of real property that could be sold under independent administration where bond was not otherwise waived. The proposed amendment to this section and other sections reflect what is the practice in Los Angeles County as far as limiting the scope of independent administration and so indicating on the letters granted by the court.

The proposed changes in Section 591.2(a)(4) have not yet been considered by the Executive Committee and no position is taken on that proposal at this time which relates to the same matter discussed above with reference to 591.1. With reference to subparagraph (b), that change is supported by the Executive Committee.

Section 591.4(a) would read more satisfactorily if the language suggested on page 2 of the transmittal letter were incorporated in this section, that is, referring both to the statutory form and to the Judicial Council form. The further language added at the end of Section 591.4(a) appears appropriate.

Section 591.5 is amended in section (b). The language added in that section is inconsistent with the explanation of its meaning on page 2 of the transmittal letter and the explanation on the transmittal letter indicates that the personal representative cannot proceed

Honorable Alister McAlister
April 15, 1985
Page Six

if an objection is filed to the proposed action. We do not believe this is the law. If he does proceed, he does so at his own risk. The language added to 591.5(b) simply provides that failure to seek court approval of the proposed action if an objection is filed constitutes a breach of fiduciary duty. The Executive Committee has not considered this concept. It does not seem consistent, however, with the explanation and probably is an unnecessary provision because we believe if the executor proceeds contrary to either a written objection or a court order he is either in contempt of court for violation of the court order or is certainly proceeding at his own risk if he proceeds with the transaction notwithstanding the written objections.

Section 591.8: While the Executive Committee supports a statutory form of advice of proposed action, it is believed the form itself has not been finalized. The introductory language should be modified to state that the advice of proposed action shall be in substantially the following form or in such form as may be prescribed by the Judicial Council.

The form is perhaps deficient because it appears to refer only to a single executor or administrator under paragraph (1) although in many estates there are multiple executors and administrators. In paragraph (5) the last sentence would be clarified by inserting after the word "may" the following: "in the alternative". Paragraph (6) could be clarified by inserting the word "written" after the word "your" in the first line and further clarified by inserting the following words "or the court order served" after the word "received" on the first line. It is also believed that the last sentence of paragraph (6) is inaccurate and should either be deleted or modified to reflect that if the executor or administrator proceeds, he does so at his own risk and is subject to later court review.

Section 591.9: Proposed subparagraph (b) seems unnecessary as similar language is found in 591.4.

Subparagraph (c) would be more accurate if the word "will" at the beginning at the third line be replaced with the word "may" and if the word "net" is inserted after the word "estimated" in the fifth line of paragraph (c).

3. Amendment 25: This amendment is supported and is made at the suggestion of the Executive Committee.

Honorable Alister McAlister
April 15, 1985
Page Seven

It is hoped that these comments will be of assistance to the Committee in considering the bill at this time.

Sincerely,



Charles A. Collier, Jr., for
the Executive Committee,
Estate Planning, Trust and
Probate Law Section, State
Bar of California

cc: John DeMouilly ✓
Stanley Wieg
Kenneth Klug
James Willett
Matthew S. Rae, Jr.