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June 16, 1986

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

<u>Time</u>	<u>Place</u>
June 26 (Thursday) 3:00 p.m. - 7:00 p.m.	Doubletree at Fisherman's Wharf
June 27 (Friday) 9:00 a.m. - 4:00 p.m.	Two Portola Plaza Monterey (408) 649-4511

REVISED
TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Monterey

June 26-27, 1986

1. **Minutes of May 15-16, 1986, Meeting (sent 5/28/86)**
2. **Administrative Matters**
Election of Officers
Memorandum 86-67 (enclosed)
Consultants Contracts
Memorandum 86-68 (enclosed)
3. **1986 Legislative Program**
Memorandum 86-62 (to be sent)
4. **Study L- Assembly Bill 2625 - Comprehensive Probate Bill**
Memorandum 86-63 (sent 6/10/86)
Amended AB 2625 (attached to Memorandum)
5. **Study L - Assembly Bill 2652 - Comprehensive Trust Bill**
Memorandum 86-64 (to be sent)
Amended AB 2652 (attached to Memorandum)
6. **Study L-1010 - Estate and Trust Code (No Contest Clauses)**
Memorandum 86-66 (sent 5/22/86)
Consultant's Report (attached to Memorandum)

7. **Study L-655 - Estate and Trust Code (Inventory and Appraisal
—including Probate Referees)**

Memorandum 86-58 (sent 5/22/86)
Draft Statute (attached to Memorandum)
8. **Study L-1037 - Estate and Trust Code (Estate Management)**

Preliminary Portion of Tentative Recommendation

Memorandum 86-69 (to be sent)
Preliminary Portion (attached to Memorandum)

Draft Statute Portion of Tentative Recommendation

Memorandum 86-55 (enclosed)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-55 (enclosed)
9. **Study L-1045 - Estate and Trust Code (Definitions)**

Memorandum 86-53 (sent 6/10/86)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 86-53 (sent 6/10/86)
10. **Study L-1040 - Estate and Trust Code (Public Guardians and
Public Administrators)**

Memorandum 86-54 (sent 6/4/86)
Draft of Tentative Recommendation (attached to Memorandum)
11. **Study L-1033 - Estate and Trust Code (Establishing Identity
of Heirs)**

Memorandum 86-56 (sent 5/19/86)
Draft of Tentative Recommendation (attached to Memorandum)
12. **Study L-1035 - Estate and Trust Code (Administration of
Estates of Missing Persons)**

Memorandum 86-57 (sent 5/19/86)
Draft of Tentative Recommendation (attached to Memorandum)
13. **Study L - Terminology Used in Comments to Indicate How New
Section Compares With Existing Law**

Memorandum 85-113 (sent 3/21/86)
First Supplement to Memorandum 85-113 (sent 5/12/86)
14. **Study L-1038 - Estate and Trust Code (Abatement)**

Memorandum 86-59 (sent 6/4/86)
Draft Statute (attached to Memorandum)

15. **Study L-1039 - Estate and Trust Code (Distribution of Interest and Income)**

Memorandum 86-60 (enclosed)
Draft Statute (attached to Memorandum)
16. **Study L-1030 - Estate and Trust Code (Distribution Without Administration)**

Memorandum 86-41 (sent 3/18/86)
First Supplement to Memorandum 86-41 (sent 5/6/86)
Second Supplement to Memorandum 86-41 (sent 5/7/86)
Third Supplement to Memorandum 86-41 (enclosed)
17. **Study L-1046 - Estate and Trust Code (Nonresident Decedent)**

Memorandum 86-61 (to be sent)
Draft Statute (attached to Memorandum)
18. **Study L-1027 - Estate and Trust Code (Pending Litigation Against Decedent)**

Memorandum 86-65 (to be sent)
Draft Statute (attached to Memorandum)
19. **Handbook of Practices and Procedures**

Memorandum 85-107 (sent 4/7/86)
Draft of Revised Handbook (attached to Memorandum)

MEETING SCHEDULE

June 1986

26 (Thursday)	3:00 p.m. - 7:00 p.m.	Monterey
27 (Friday)	9:00 a.m. - 4:00 p.m.	

Meeting Place: Doubletree at Fisherman's Wharf
Two Portola Plaza
Monterey
(408) 649-4511

Hotel Where Commissioners are Staying:
Sheraton
350 Calle Principal
(408) 649-4234

July 1986

17 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
18 (Friday)	9:00 a.m. - 12:00 noon	

Meeting Place (Tentative)
Sheraton Harbor Island West
1590 Harbor Island Drive
San Diego
(619) 291-6400

September 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
5 (Friday)	9:00 a.m. - 3:30 p.m.	

November 1986

13 (Thursday)	3:00 p.m. - 8:00 p.m.	Orange County
14 (Friday)	9:00 a.m. - 4:00 p.m.	

December 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles
5 (Friday)	9:00 a.m. - 4:00 p.m.	

SCHEDULE FOR WORK ON ESTATE AND TRUST CODE

PORTIONS APPROVED FOR DISTRIBUTION FOR REVIEW AND COMMENT

Sent Out for Review and Comment 4/15/86

Opening Estate Administration
Independent Administration

Sent Out for Review and Comment 5/10/86

Probate Practice Questionnaire

Sent Out for Review and Comment 7/17/86

Distribution
Closing Estate Administration

JUNE MEETING

Approve Tentative Recommendations for Distribution for Comment

Definitions (information for commentators) (Stan/Staff)
Public Administrators and Public Guardians(Nat)
Establishing Identity of Heirs (Stan/Nat)
Administration of Estates of Missing Persons Presumed Dead (Stan/Nat)
Estate Management (John/Bob)

Preliminary Consideration of New Material

Inventory and Appraisal (including Probate Referees) (Nat/John)
Abatement (Bob/Nat)
Distribution of Interest and Income (Bob/Nat)
Ancillary Administration (Stan/Nat)

JULY MEETING

Approve Tentative Recommendation for Distribution for Comment

Inventory and Appraisal (including Probate Referees) (Nat/John)
Ancillary Administration (Stan/Nat)
Presentation and Payment of Claims (Nat/John)

Preliminary Consideration of New Material

Rules of Procedure (Nat)
Orders (Nat)
Appeals (Stan)
Compensation, Commission, and Fees (John)

SEPTEMBER MEETING

Approve Tentative Recommendations for Distribution for Comment

Accountings (Nat)
Abatement (Bob)
Distribution of Interest and Income (Bob)
Rules of Procedure (Nat)
Orders (Nat)
Appeals (Stan)

Preliminary Consideration of New Material

Compensation, Commissions, and Fees (John)
Notices (John)
Anti-Lapse Statute (Stan)
Multiple-Party Accounts (Bob)

OCTOBER MEETING

Approve Tentative Recommendation for Distribution for Comment

Compensation, Commissions, and Fees (John)
Anti-Lapse Statute (Stan)
Multiple-Party Accounts (Bob)

Preliminary Consideration of New Material

Operative Date of New Code
Conforming Revisions of Sections in Other Codes
Review Comments on Tentative Recommendations Sent Out for Comment

NOVEMBER MEETING

Review for technical and substantive changes and prepare Comments

Preliminary Provisions
General Provisions
Disclaimers
Guardianship-Conservatorship Law
Management of Disposition of Community Property Where Spouse
Lacks Legal Capacity
Authorization of Medical Treatment for Adult Without Conservator
Other Protective Proceedings
California Uniform Transfers to Minors Act
Wills
Intestate Succession
Family Protection
Escheat of Decedent's Property
Disposition Without Administration
Trusts

Approve Text of New Estates and Trusts Code for Introduction

Arrange for introduction as preprinted bill

Approve Printing of Recommendation for Estates and Trusts Code

DECEMBER AND JANUARY

Staff prepares Recommendation for Printing

FEBRUARY 1987 MEETING

Printed Bill Available for Review and Distribution

APRIL 1987 MEETING

Printed Commission Recommendation Available for Distribution

JUNE 1987 MEETING

Review Comments from Interested Persons on Bill Proposing New Code

NEW PROBATE STUDIES TO BE COMMENCED IN 1987

Prepare Statutory 630 Affidavit Form (for inclusion in new code) (John)
Uniform Transfers to Minors Act
 Make possible to make outright gift to remain in custody until age 25
 Co-custodians
Draft new Division 3 (Powers of Attorney; Powers of Appointment)
Claims Procedure for Trusts
Rights of Estranged Spouse
Anti-lapse and Construction of Instruments
Trustee's use of Section 650 Procedure
Ancestral Property Doctrine
Directive to Physicians (Uniform Act)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JUNE 26-27, 1986
MONTEREY

A meeting of the California Law Revision Commission was held in Monterey on June 26-27, 1986. Lacking a quorum, the members of the Commission present acted as a subcommittee.

Law Revision Commission

Present:	Arthur K. Marshall, Vice Chairperson Roger Arnebergh	Tim Paone Ann E. Stodden
Absent:	Edwin K. Marzec, Chairperson Bill Lockyer, Member of Senate Alister McAlister, Member of Assembly	Bion M. Gregory

Staff Members

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

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

Other Persons Present

Edward V. Brennan, California Probate Referees' Association,
San Diego
Alex Creel, California Association of Realtors, Sacramento,
(June 27)
James D. Devine, State Bar Estate Planning, Trust and Probate
Law Section, Monterey
Nancy E. Ferguson, California Probate Referees' Association,
Chico
Irwin D. Goldring, State Bar Estate Planning, Trust and
Probate Law Section, Beverly Hills
Lloyd W. Homer, State Bar Estate Planning, Trust and Probate
Law Section, Los Gatos (June 27)
Al Nicora, California Probate Referees' Association, Albany
Barbara Penaluna, Attorney, San Mateo (June 26)
William W. Penaluna, California Probate Referees'
Association, San Mateo (June 26)

James R. Scannell, Public Guardian and Administrator, San
Francisco
Dent E. Snider, California Probate Referees' Association,
Santa Cruz (June 26)
Lucinda Surber, Menlo Park
Shirley Yawitz, California Probate Referees' Association, San
Francisco

ADMINISTRATIVE MATTERS

MEETING OF SUBCOMMITTEE

Lacking a quorum, the Commission functioned as a subcommittee. The actions reported in these Minutes are the actions of the subcommittee.

MINUTES OF MAY 15-16, 1986, MEETING

The Minutes of the May 15-16, 1986, Meeting were approved after the following corrections were made:

(1) On page 25, the last word on the page was changed from "sellers" to "buyers."

(2) On page 26, third line from the bottom of the page, the word "operate" was substituted for "operative."

FUTURE MEETINGS

July 1986

17 (Thursday) 3:00 p.m. - 8:00 p.m. San Diego
18 (Friday) 9:00 a.m. - 12:00 noon

Meeting Place (Tentative)
Sheraton Harbor Island West
1590 Harbor Island Drive
San Diego
(619) 291-6400

September 1986

4 (Thursday) 3:00 p.m. - 8:00 p.m. Sacramento
5 (Friday) 9:00 a.m. - 3:30 p.m.

November 1986

13 (Thursday) 3:00 p.m. - 8:00 p.m. Orange County
14 (Friday) 9:00 a.m. - 4:00 p.m.

Commissioner Arnebergh suggested that the Orange County meeting be held at the Newport Beach Countryside Inn where rates of \$49 a night are available. The staff was asked to investigate the possibility of holding the meeting at that place.

December 1986

4 (Thursday) 3:00 p.m. - 8:00 p.m. Los Angeles
5 (Friday) 9:00 a.m. - 4:00 p.m.

ELECTION OF OFFICERS

The Commission decided to defer the election of officers to the July meeting so that more members will be present when officers are elected.

CONSULTANT CONTRACTS

The Commission considered Memorandum 86-68 concerning contracts with consultants.

The Commission approved contracts with the following consultants in the amounts indicated:

Russell D. Niles, Hastings College of Law	-----	\$1,000
Susan F. French, School of Law U.C. Davis	-----	1,000
Edward C. Halbach, Jr. Boalt Hall	-----	1,500
Paul E. Basye, Hastings College of Law	-----	500
Gail B. Bird, Hastings College of Law	-----	500
Jesse Dukeminier, U.C.L.A. Law School	-----	500

The contracts are to be in the usual form of Law Revision Commission contracts with consultants and are to provide for payment of travel expenses only subject to the same limitations that apply to members of the Law Revision Commission. The contracts cover the period from July 1, 1986, to June 1, 1989.

The Executive Secretary was directed to execute the contracts on behalf of the Commission.

1986 LEGISLATIVE PROGRAM

The Commission considered Memorandum 86-62 which contained the following report on the 1986 Legislative Program.

Enacted

Statutes of 1986, Ch. 49 -Assembly Bill 625 - Buol case urgency bill - provides that 1983 statute applies only to proceedings commenced after January 1, 1984

Assembly Concurrent Resolution 93 - Continues Commission Authority to Study Topics Previously Authorized for Study

Approved by Policy Committee in Second House; Sent to Fiscal Committee
Assembly Bill 2625 - Comprehensive Probate Bill (Disposition of
Estate Without Administration; Small Estate Set-Aside; Proration
of Estate Taxes; Technical and Clarifying Revisions)
Assembly Bill 2652 - Comprehensive Trust Statute

Dead

Assembly Bill 2626 - Reservation of Legislative Power for Disposition
of Property in Marriage Dissolution Cases (Heard by Assembly
Judiciary Committee on February 25 and not sufficient votes in
favor of bill to approve it)

Referred to Inactive File

Assembly Bill 195 - Law Revision Commission Statute

The Commission reviewed Memorandum 86-63 relating to Assembly
Bill 2625 which is the bill introduced to effectuate the Commission's
recommendations relating to probate law.

The Commission reviewed Memorandum 86-64 relating to Assembly
Bill 2652 which is the bill introduced to effectuate the Commission's
recommendation relating to The Trust Law.

STUDY L-655 - ESTATE AND TRUST CODE (INVENTORY AND APPRAISAL)

The Commission considered Memorandum 86-58, together with
comments of the California Referees Association and State Bar,
presented at the meeting and attached as Exhibits 1 and 2. The
Commission made the following decisions concerning the draft statute.

"Probate referee." The question whether the term "probate
referee" should be changed to "estate appraiser" was discussed but not
resolved. The Commission requested the State Bar for other possible
names that could be used.

§ 403. Term of office of probate referee. A person appointed as
probate referee should be eligible for reappointment for a period of
five years after expiration of the referee's last term of office. The
Probate Referees Association representatives agreed to send the staff
a copy of the Controller's continuing education regulations for
reference in the preliminary portion of the recommendation.

§ 405. Revocation of appointment of probate referee. This section should be omitted. The authority of the Controller to remove 10% of the probate referees in a county has not been used in modern times. Moreover, in a large county the terms of the probate referees are staggered so that the Controller will be able to replace probate referees continuously.

§ 406. Termination of authority. The pending cases of a referee whose authority is terminated should be reassigned by the court.

§ 407. Political activities of probate referee. Subdivision (a) should apply to a person seeking reappointment as well as to a person seeking appointment. Subdivision (a)(2) should be revised to make clear that it precludes contributions to a person serving in public office as well as to a candidate for public office.

Subdivision (c) should be recast to provide that a person is ineligible for appointment who (1) has made a contribution while seeking appointment as a probate referee, or who (2) has made a contribution in excess of \$200 within two years before, whether or not seeking appointment at that time. This rule would apply to appointment and, through Section 404, to removal.

This section and other sections should be reviewed for consistency of usage of "termination of appointment", "revocation of appointment", and "removal from office".

§ 453. Contempt. This section should be replaced by a provision to the effect that a person compelled to appear before the probate referee may seek a protective order, and that the probate referee may enforce the referee's powers through application to the court for an order to show cause.

§ 8800. Inventory and appraisal required. The three month period should be changed to four months in recognition of the practical difficulty of satisfying the three month requirement and for procedural compatibility with the three months allowed the probate referee. The property to be inventoried and appraised should be limited to the property "being administered", or "subject to administration", or some such limiting phrase. In this connection, the staff should consult the definitions of the decedent's estate

found in the Uniform Probate Code and in Section 649.3, taking into account property not in the possession of the personal representative, including real property located in another jurisdiction.

§ 8801. Supplemental inventory and appraisal. The introductory clause of this section should refer to property that comes to the possession or knowledge of the personal representative "after the inventory is filed", in which case the personal representative should file a "supplemental" inventory and appraisal. Four months should be allowed for the filing.

§ 8802. Form of inventory and appraisal. The appraisal may be rounded off to the nearest dollar. The Comment should note the applicable tax rule for rounding up or down.

§ 8803. Notice of filing of inventory and appraisal. The inventory and appraisal should not be given to each beneficiary, but only to persons who have requested special notice.

§ 8804. Objection to inventory and appraisal. A provision should be added, adapted from Section 927 (accounting), that charges a person with the probate referee's expenses in defending an appraisal against a frivolous objection. This could be tied with language relating to awarding the probate referee extra compensation pursuant to Section 8906, which should be revised to make clear that the probate referee "may" be entitled to extra compensation, in recognition of the fact that the court may take into account the quality of the appraisal in making a decision on extra compensation.

§ 8805. Failure to timely file inventory and appraisal. This section should apply where the personal representative's failure is negligent or intentional. The Comment should note that this is not intended to apply where the personal representative was unable to file the appraisal due to the probate referee's delay, or where the personal representative made a good faith effort to file but was unable to due to circumstances beyond the personal representative's control.

§ 8851. Debts and demands against personal representative. The references to debts and demands in this section should be changed to claims.

§ 8852. Discharge or devise of debts and demands. The references to debts and demands in this section should be changed to claims.

§ 8853. Oath of personal representative. This section should be conformed to whatever decisions are made with respect to property in the "possession or knowledge" of the personal representative.

§ 8870. Subpoena to appear and be examined concerning decedent's property. This section should be recast in terms of allegations in the petition. The references to "smuggling" should be deleted. The staff should review the listing of terms to ensure that all types of wrongful or unlawful removal are covered.

§ 8871. Examination. Subdivision (c) should be revised to provide that expenses may be allowed out of the estate or charged against the petitioner in the discretion of the court.

§ 8873. Embezzlement, concealment, smuggling, or fraudulent disposition of property in estate. The references in this section to "smuggling" and "therewith" should be deleted. The staff should review the listing of terms to ensure that all types of wrongful or unlawful removal are covered.

§ 8901. Appraisal by personal representative. Subdivision (a)(3) should refer to "accounts in financial institutions (as defined in Section ____)". A note should be added to the Comment to Section 20 that inclusion of a specific statutory cross-reference to a definition in one place does not imply that the definition is inapplicable in other places absent a specific statutory cross-reference.

The reference to brokerage accounts should be deleted from subdivision (a)(4), and the Comment should note that money market funds in a brokerage account are included within the subdivision.

Subdivision (b) should be generalized to preclude an appraisal fee for the personal representative any time the personal representative is appraising estate assets, cash or otherwise.

§ 8902. Appraisal by probate referee. This section should be prefaced by the phrase, "except as otherwise provided by statute".

§ 8903. Waiver of appraisal by probate referee. Subdivision (a) should be limited to the procedure provided in the remainder of the section.

Under subdivision (b), the petition for waiver should not be made once the inventory has been delivered to the probate referee, and in any event not later than four months after letters are first issued to a general personal representative. The petition should have attached to it a copy of the proposed inventory and appraisal. The reference to "all property in the estate" should be reexamined in light of any policies adopted concerning property that must be included in the inventory.

The Commission will reexamine the waiver procedure (and any other relevant provisions) if Assembly Bill 2896 (Harris) is enacted.

§ 8904. Appraisal by independent expert. This section should be limited to tangible personal property.

§ 8905. Verification of appraisal. Reference should be added in the Comment to declaration under penalty of perjury.

§ 8906. Appraisal report, backup data, and justification of appraisal. The demand for support of an appraisal should be limited to the personal representative and persons who are beneficiaries of the property in question, and the data provided should be limited to that property. Information is not required to be disclosed which is acquired by the probate referee subject to statutory provision for confidentiality. The fee is to be agreed upon by the probate referee and personal representative or beneficiary. The probate referee should retain files for three years, after which time the files should be offered to the beneficiaries, and any files not desired by the beneficiaries may be destroyed.

§ 8920. Designation by court. Subdivision (b) should be deleted.

§ 8922. Discretion not to designate person as probate referee. The court should have discretion not to designate a "particular" person as probate referee.

§ 8923. Disqualification of probate referee. Reference should be made in this section to the "judge who orders" the appointment.

§ 8924. Removal of probate referee. A new paragraph (3) should be added to subdivision (a) to allow removal for any other cause provided by statute (this could include failure to make a report as required by Section 8940). In subdivision (b), the phrase "person to act as" was deleted. The Comment to this section (or perhaps to Section 8922) should note that the court may take into account the

fact that several referees share the same staff in making a determination of whether there is cause to not appoint or to remove a referee.

§ 8940. Time required for appraisal or status report. The personal representative should be required to deliver to the probate referee an inventory with necessary supporting data; this could be a separate section, occurring earlier in the statute, e.g. Section 8902. The probate referee should be required to appraise the property included in the inventory promptly or with reasonable diligence, or some such standard. The 90 day period should not be viewed as a standard time for appraisal, but only as an unduly long time after which a report must be made.

§ 8941. Report of status of appraisal. The report should not be heard automatically but only on motion of the personal representative or probate referee, or on the court's own motion. Subdivision (b) might be relocated to Section 8940. Paragraph (3) should be added to subdivision (c) to enable the court to remove the personal representative if the personal representative's failure to supply necessary information is hindering completion of the appraisal.

§ 8942. Failure to make appraisal or report. A provision should be added for the court on its own motion to cite the probate referee. The phrase "person to act as" should be deleted from subdivision (b)(2).

§ 8943. Sanction for failure to timely appraise property. The substance of this section should be incorporated in Section 8941 as one of the possible sanctions against the probate referee. A provision should be added that the probate referee may not withhold an appraisal, but must be paid in due course of administration. The law should be clear that the referee appraisal is a cost of administration entitled to priority, and that no distributions may be made or lower priority creditors paid until the administration costs are satisfied. The liability of the personal representative for failing to observe these rules should be clear.

§ 8960. Payment of commission and expenses. The second sentence of this section should be deleted; it is a relic from inheritance tax days.

§ 8961. Amount of commission and expenses. The reference in subdivision (b) to disbursements should be revised to refer to expenses. If Assembly Bill 2896 (Harris) passes, the Commission will review the small estate exception included in the bill.

§ 8962. Maximum and minimum commissions. Notice under subdivision (b) should be limited to the personal representative and persons who have requested special notice.

§ 8963. Division of commission between referees. This section should be revised to provide that where there is more than one referee, whether or not in different counties, the fee is to be divided as the referees agree or, absent an agreement, as the court determines.

STUDY L-1010 - ESTATE AND TRUST CODE (NO CONTEST CLAUSES)

The Commission considered Memorandum 86-66, together with a letter from one of the State Bar study teams distributed at the meeting (Exhibit 3), relating to no contest clauses. After discussion of the issues with Professor Niles, the Commission requested Professor Niles to work with the State Bar to resolve the following issues in the draft:

(1) The potential for two trials--one on the will contest and one on the forfeiture. Perhaps this could be cured by a bifurcated trial, with the same judge who presides in the will contest making the forfeiture determination upon failure of the will contest. In this connection, it was noted that the provisions would apply to contests of other instruments besides wills.

(2) The possibility of defining what acts amount to a will contest. This could be done by statutorily including or excluding certain acts (e.g., Section 588 and 1088 proceedings are not a contest), or by providing for an advisory opinion whether certain acts amount to a contest.

STUDY L-1037 - ESTATE AND TRUST CODE
(ESTATE MANAGEMENT - AGENTS AND BROKERS)

The Commission considered the portion of Memorandum 86-55 relating to agents and brokers (draft Sections 10150-10166), and the First Supplement to Memorandum 86-55. The Commission made the following decisions:

Inclusion of Examples in Comments

The Commission asked the staff to give examples in the Comments to Sections 10162 to 10165 as to how commissions are computed in various fact situations.

§ 10150. Contract with agent or broker

A sentence was added to Section 10150 to read substantially as follows: "The contract shall be one that is legally enforceable under the law of the jurisdiction where it is made." With that change, the Commission approved Section 10150 as set out in the staff draft attached to Memorandum 86-55.

The Commission decided not to extend the present 90-day period for an exclusive listing in a probate sale. The Commission noted that if the estate is being administered under the Independent Administration of Estates Act, court approval is not needed for an exclusive listing, even when the sale itself is not included within the independent powers granted under the act.

§ 10151. Contract with auctioneer

Section 10151 was approved as set out in the staff draft.

§ 10160. Limitation on liability of estate

Subdivision (b) was deleted Section 10160. Subdivision (a) is to be revised to reflect the deletion of subdivision (a).

§ 10161. Compensation and fees to be reasonable amount determined by court

Section 10161 was approved as set out in the staff draft.

§ 10162. Limitation on compensation of agent or broker producing successful overbidder

This section was revised to read in substance:

10162. (a) The compensation of the agent or broker who produces the successful overbidder shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful overbid.

(b) Subdivision (a) does not limit the compensation of either of the following:

(1) The agent or broker who produced the original bid which was returned to the court for confirmation.

(2) The agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property.

§ 10163. Compensation where original bid made by purchaser direct to estate and sale made on increased bid

The Commission revised Section 10163 to read substantially as follows:

10163. (a) This section applies if all of the following circumstances exist:

(1) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The original bid was made direct to the estate by a purchaser who was not procured by an agent or broker.

(3) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker.

(b) Subject to Section 10162, if all of the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed to the agent or broker who procured the purchaser to whom the sale is confirmed.

§ 10164. Compensation where sale made on increased bid by purchaser not procured by agent or broker

Section 10164 was approved as set out in the staff draft attached to Memorandum 86-55.

The Commission determined not to revise Section 10164 to codify the rule of the Simonini case and did not adopt the language set out in the First Supplement to Memorandum 86-55 which would have codified the rule of that case.

§ 10165. Compensation where sale made on increased bid by purchaser represented by agent or broker and another agent or broker holds exclusive right to sell contract

Section 10165 was approved as set out in the staff draft.

§ 10166. Condition of bid that certain amount of bid be paid to agent or broker

Section 10166 was approved as set out in the staff draft.

§ 10167. Compensation and expenses of auctioneer

Section 10167 was approved as set out in the staff draft.

STUDY L-1045 - ESTATE AND TRUST CODE (DEFINITIONS)

The Commission considered Memorandum 86-53 and the First Supplement thereto relating to definitions in the Estate and Trust Code. The Commission also considered a memorandum from Study Team 1 of the State Bar Estate Planning, Trust and Probate Law Section which was distributed at the meeting. (Copy attached as Exhibit 4.)

The Commission made the following decisions:

§ 20. Application of definitions

The comment to this section should include the following statement:

Some sections in this code contain a specific cross-reference to a definition in this part where the cross-reference is considered useful to deal with an issue arising in the relevant section. See, e.g., Section 8901 ("account" used in provision relating to appraisal by personal representative). However, the lack of a specific definitional cross-reference in a section does not mean that the relevant definition is not applicable since, as provided in this section, the definitions are applicable unless the provision itself or the context otherwise requires.

§ 21. Account

The word "municipal" in the comment should be "mutual."

§ 22. Account in an insured savings and loan association

The comment to this section should note that it continues Probate Code Section 1406 as amended by AB 2625. Similarly, wherever reference is made to a provision as it would be revised by legislation during the current year, a bracketed note should indicate the source of the language.

§ 23. Annulment of marriage

This staff should give consideration to whether this section should be revised to define "adjudication of nullity" to include "annulment of marriage." This is consistent with the approach reflected in Section 36 which defines the California terminology "dissolution of marriage" to include "divorce." The desirability of this revision depends upon whether it would be awkward to use "adjudication of nullity" in other provisions.

§ 24. Beneficiary

Subdivision (b) should be revised, as suggested by the State Bar Team, to read as follows:

24. "Beneficiary:"

. . . .

(b) In the case of a trust, means a beneficiary of the trust, ~~and includes a person~~ who has any present or future interest, vested or contingent, and or an owner of an interest by assignment or by other transfer.

§ 26. Child

The word "includes" in this definition should be changed to "means."

§ 27. Clerk

The definition of "clerk" should be deleted. The meaning of "clerk" should be clear from the context of a particular section. If a situation arises where there is doubt about the meaning of "clerk," any necessary clarification can be added to the section in question.

§ 28. Community property

The staff should consider how to deal with the problem of separate property acquired in another state that is transmuted under the law of a state other than the state of acquisition. The Commission will also consider the various suggestions of the State Bar Team after the staff has had time to analyze them.

§ 34. Devisee

Subdivision (b) should be checked against the latest edition of the Uniform Probate Code. Professor Halbach pointed out a potential problem of interpreting the anti-lapse statute in the case of a trust in light of this definition which excludes beneficiaries of a trust from the definition of "devisee." The staff will analyze this problem.

§ 44. Heirs

This section should be revised as follows:

44. "Heirs" means the persons, including the surviving spouse, who are would be entitled under the statutes of intestate succession to the property of a decedent.

§ 46. Insured account in a financial institution

The phrase "insured account a bank" should be corrected to read "insured account in a bank."

§ 48. Interested person

Subdivision (a)(2) should be revised as follows:

(a) Subject to subdivision (b), "interested person" includes any of the following:

(2) A ~~personal representative or~~ any person having priority for appointment as personal representative.

The reference to the personal representative is not needed because relevant sections refer specifically to the personal representative rather than rely on the definition of interested person. The staff will check to make sure that the personal representative is consistently referred to when needed.

§ 52. Letters

This section should be revised to include letters of guardianship and of conservatorship as follows:

52. "Letters" includes:

(a) As used in Division 4 (commencing with Section 1400), means letters of guardianship and letters of conservatorship.

(b) As used in Division 7 (commencing with Section 7000), means letters testamentary, letters of administration, letters of administration with the will annexed, and letters of special administration with general powers.

§ 53. Order

This section should be omitted. The staff should also search for all uses of "decree" and replace them with "order."

§ 57. Personal property

This definition should be deleted because it is not needed in light of the definition of real property. At some point, it might be possible to make a study of appropriate definitions of personal property and real property.

§ 58. Personal representative

Subdivision (a) of this section should be revised as follows:

58. (a) "Personal representative" means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status.

§ 59. Predeceased spouse

The staff should consider how this section can be revised to make its meaning clearer and to deal with the concerns expressed by the State Bar Team.

§ 70. Security

The staff will consider whether any other items need to be added to the definition of "security." See, e.g., Prob. Code § 771 for additional types of instruments that might be included in this definition.

§ 74. State

The staff will give further consideration to whether this definition is used in the defined sense and whether it is needed.

§ 78. Surviving spouse

This section should be revised to pick up any changes made in the definition of predeceased spouse.

§ 80. Totten trust account

The first sentence of this section should be revised substantially as follows:

80. "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries, or an account in trust for one or more beneficiaries, where the account is established by one or more of the trustees, the relationship is established by the form of the account and the deposit agreement with the financial institution, and there is no subject of the trust other than the sums on deposit in the account.

§ 82. Trust

Subdivisions (a) and (b) should be combined.

The concern was expressed that the repeal of the Civil Code trust provisions may leave the entities and relationships excluded from the definition of "trust" by subdivision (c) without any governing fiduciary principles. It was also suggested that any problems might be solved by making the principles of the new Trust Law available for application by the courts to entities and relationships that are not within the definition of "trust" provided in this section. This might

be done by a statement in the comment to the definition. It was noted that AB 2652 (Trust Law) preserves the common law, except to the extent that it is modified by statute, and also provides that the repeal of the Civil Code trust provisions is not intended to alter the rules applied by the courts to fiduciary and confidential relationships, except for trusts falling within the definition in Section 82. The staff should prepare a memorandum on this problem.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

California Probate Referees Association

June 20, 1986

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4000 Middlefield Road
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Attention: Nathaniel Sterling

Re: Memorandum 86-58

Provisions Regarding Inventory and Appraisal

Dear Nat:

On behalf of the California Probate Referees, I have the following comments with reference to memorandum 86-58 and the proposed code sections and chapters discussed therein.

1. It is our preference to leave the designation Probate Referee unchanged.

2. Section 403: A Probate Referee is eligible for reappointment prior to the time his term expires. After his term expires, he is no longer a probate referee and would not be eligible for reappointment. This section should be clarified to make a Probate Referee eligible for reappointment without examination within five years after expiration of his term. Section 406 sets forth the termination provisions.

3. Chapter Two, Powers of Probate Referee: You ask whether the powers of the Referee are actually used or merely a relic from the Inheritance Tax Function of the Probate Referee. In practice the powers are rarely used. Nevertheless, there are many occasions when personal representatives and others who have access to information necessary for the Referee to make his appraisal refuse to cooperate. In such cases, the Referees should have the powers set forth in Chapter Two.

4. Section 8800: It is true that the three month period is very often not observed, but without a deadline, some personal representatives would never submit the inventory in a timely manner. Procrastination by attorneys or representatives is a constant problem. With reference to the note following Section 8800, we believe that there should never be a waiver of the inventory.

5. Section 8801: Once again, we believe that the filing should be required within a specific time period.

6. Section 8803: We do not believe that the inventory and appraisal should be mailed to each beneficiary. [Those who are interested can file special notice. Mailing to those requesting special notice should be adequate.] If any mailing is to be required to persons who request special notice, such mailing should be done by the personal representative.

7. Section 8805: We believe that the sanctions should continue.

8. Section 8850: The language should make it clear that the inventory should include only property subject to administration and not all property of the decedent. Moreover, "possession" may be immaterial to whether or not an asset should be included.

9. Section 8853: Once again, we believe that the inventory should contain a statement of all property subject to administration in the decedent's estate.

10. Section 8901(a)(3) should read "Cash accounts in financial institutions."

11. Section 8901(a)(4), Money Markets (and Brokerage) Accounts: We have no objection to self appraisal of "Money Market Accounts," but the words "and brokerage" should be eliminated. The description is subject to misinterpretation. Subsection 4 should read, "Money Market Accounts."

We also object to any fee for extraordinary appraisal services when the referee is waived.

12. Section 8903: Subparagraph (b) states that in no event shall the petition be made later than the time the

inventory and appraisal is filed pursuant to section 8800. We believe that no waiver should be allowed after an inventory has been delivered to the Referee. Delivery to the Referee should be considered a waiver of the right to waive a Referee appraisal. A substantial injustice can result where the Referee has been given assets to appraise, commences work on the appraisals and then is later waived.

13. Section 8903: Notice to the Referee may be required by pending legislation. If so, we recommend following the legislation.

14. Section 8904, Appraisal by Independent Expert: The Referee's Association opposes independent appraisal of real property. It is the Referee's position that 8904(a) should read "notwithstanding Section 8902, a unique or unusual item of tangible personal property may, at the election of the personal representative, be appraised by an independent expert qualified to appraise that item."

Real estate is always unique and this section as proposed would totally undermine the role of the Referee. The concession of the Probate Referee's Association to appraisal by independent experts was directed at special collections, antiques and other unique items of tangible personal property.

15. We recommend omitting the words "or any interested person." Our duty should be to deal only with the personal representatives and the court. We are not a discovery tool of purported beneficiaries. Section 8906(a) gives the personal representative access to material data in the Referee's file. It should read "access to material information in the Referee's file." We object to blanket access. Subparagraph (a) should read, "provide access to any material data in the Referee's file." This section should, therefore, read, "Provide access to material data in the possession of the Probate Referee . . . The Referee may charge a reasonable cost for copying any material data and such shall be allowed as an extra expense of the appraisal."

16. 8924(b) should read: "(b) Upon removal . . . the court shall designate another Probate Referee . . ."

17. Section 8940 should read "The Probate Referee shall, no later than ninety (90) days after the personal

representative delivers the inventory to the Referee, either return the appraisal to the personal representative or make a report of the status of appraisal to the representative." It should be made clear that the Probate Referee may justify the delay to the personal representative. Unless a request is made by the personal representative under 8941 following, the Referee need not submit a status report to the court.

18. Section 8941(b) should be permissive, i.e., the report shall be delivered to the personal representative who may file such report with the court if he deems it appropriate. Subparagraph (c) should be changed to read, "If the personal representative deems it appropriate, he may request a hearing on the status report." Subparagraph (d) should then read, "Upon such hearing of the report, the court may order either of the following: (1) that the appraisal of the property be completed within a time that appears reasonable, and (2) that the Probate Referee be removed. Upon removal of the Probate Referee, the court shall designate another Probate Referee to act as Probate Referee in the manner prescribed in Section 8920.

18. Section 8942(2) should read: "Upon removal . . . designate another Probate Referee."

20. Section 8960: The second sentence does not seem necessary. There may be an occasion when for some reason the State may wish to obtain the services of a Probate Referee and to provide compensation.

21. Section 8962(b) requires notice pursuant to Section 1200.5. It is the position of the Referees that notice to the personal representative of any request for extra compensation by the Referee is adequate. The notice required by proposed Section 1200.5 seems excessive. Moreover, in most cases, the Referee does not have in his file the names and addresses of all persons to whom notice should be given under 1200.5. The only person with whom the Referee deals is the personal representative and notice to the personal representative should be adequate.

22. We agree with the final "note" on age 28.

REVISED MEMORANDUM

DATE: JUNE 16, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLET
IRV GOLDRING
JAMES DEVINE
JAMES OPEL
LLOYD HOMER
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN
STUDY TEAM NO.1

RE: REPORT OF STUDY TEAM NO. 1 ON LRC MEMO 86-58
STUDY L-665 - Estate and Trust Code (Inventory
and Appraisal -- Draft Statute)
New Estate and Trust Code §§400 through 453 and
8800 through 8963

Conference Call: A conference call was held on Monday, June 9, 1986, Robert Schlessinger did not participate, but the other three members, Charles Collier, W. S. "Gus" McClanahan, Richard S. Kinyon and William V. Schmidt participated.

This is a Revised Memorandum to an earlier Memorandum dated June 10, 1986. It was revised after review by the Executive Committee at its meeting on June 14, 1986.

Study Team No. 1 reviewed the proposed sections of the new code set forth above in numerical order and have the following comments in regard to them.

Sections 400, 401 and 402: These sections are satisfactory. This study team agrees with the State Bar Executive Committee's recommendation that probate referees now be called "Estate Appraisers," a name that more accurately reflects their current function and which would also correspond with the name change of the Probate Code to the Estates and Trust Code.

Section 403: The last sentence of the second paragraph of existing Probate Code §1305 reads: "Once appointed, the probate referee remains eligible for reappointment." The last sentence of proposed subsection (a) of Section 403 reads "A probate referee is eligible for reappointment." The Note following the section asks

the question of whether this means that a referee is only eligible for reappointment while still serving as a referee or is also eligible after his term expires. We feel that the referee should only be eligible for reappointment while still serving as referee and that such reappointment should be for a successive term to begin at the expiration of his existing term. If the Commission agrees, perhaps the section can be modified to more clearly state this concept.

Sections 404, 405 and 406: Satisfactory.

Section 407: We suggest that you consider adding the words "other than the office of State Controller." to the end of subsection (a)(2).

We feel that subsection (c) needs to be clarified. Does it prohibit the State Controller from "reappointing" as well as "appointing"? Does it mean that the State Controller may remove a probate referee who has already been appointed and who is found to have violated this section within the two year period? The last sentence uses the words "termination of appointment." Is this the same as removal from office? To us the word "appointment" generally means the designation of a particular person to serve in a particular capacity prior to the time that he or she actually begins to serve in that capacity. This is, perhaps, only a matter of semantics, but lawyers and judges pay very close attention to the precise meaning of words and we feel that subsection (c) could be clarified.

Sections 450 through 453: We question whether or not the probate referee really needs all of the powers of a referee of the superior court and whether the powers given are too broad now that the referee no longer acts as an Inheritance Tax Referee.

We also suggest that the words "without substantive change" be included in the comment to Section 451 as proposed Section 451

does not precisely restate existing subdivision (a) of former Probate Code Section 1301 and former Probate Code Section 1302 even with the addition to the reference to a guardian, conservator or other fiduciary.

Section 8800: This section is satisfactory. The three month time limitation was discussed by the Executive Committee as a whole at its June 14, 1986 meeting in San Francisco. Its members agreed that this time period is ignored much more often than it is observed. In spite of this fact, the three month time limitation is worthwhile. As a practical matter it does no harm to those attorneys who are working with reasonable diligence, but are unable to file their inventory and appraisal within the three month period. The section is worthwhile in those situations where the attorney and/or the personal representative is not diligently working on the inventory, it provides a legal ground upon which an objection can be made to remove or to reprimand the personal representative. For these reasons the Executive Committee as a whole favors its retention. However, the Executive Committee feels strongly that the reference to the time set forth in Section 8800 must be removed from Section 8903 as in many cases it would be an impossible burden on the personal representative to not only complete the Inventory and Appraisal, but also prepare a Petition for Waiver within the three month period. If the personal representative were to file a petition under proposed Section 8903 more than three months after letters are issued to him or her, such personal representative would never know whether the petition was timely because the three month period would not have been met and he or she would have no idea at that time what further time, if any, the court for reasonable cause may allow.

Section 8801: Satisfactory.

Section 8802: Satisfactory.

Section 8803: We have serious concern in regard to this new section. We see many instances where beneficiaries under a will take only a relatively small cash bequest in a specific amount. Assuming the estate is solvent, these people are really not affected by the character and value of the estate. Personal representatives often do not wish that a copy of the inventory be sent to such a beneficiary. In spite of the fact that an inventory and appraisal filed with the court is a public record, it is, as a practical matter, a semi-private document because very few beneficiaries of an estate or other persons will go to the trouble to see it by either going to court or by ordering a copy of it.

If one of the objectives of the new Probate Code is to encourage persons doing estate planning to use the probate process, this new section will certainly work against this objective. Those advisors who advise against probate will now, with the enactment of this new proposed section, have another argument because of the requirement of mandatory disclosure of all assets to every beneficiary in the estate. We feel that existing law under Probate Code Section 333 (which requires that the Notice of Death inform all beneficiaries of their right to examine the file and to request special notice) is sufficient protection for the beneficiaries. We therefore favor retention of the existing law. In the event that the Commission decides to change existing law, we recommend that Section 8803 be modified to provide that the personal representative is obligated to mail a copy of the inventory and appraisal to each beneficiary whose interest in the estate is affected by the character or value of the estate. This would normally exclude a devisee of a specific cash amount, but what would normally include residuary beneficiaries and

beneficiaries who take an undivided interest in the overall estate.

Section 8804: Satisfactory.

Section 8805: This section is perhaps moot if the "reasonable time" concept is adopted for Section 8800. Even if such concept is adopted, it may still be worthwhile.

In the collective experience of our study team we have seen both good and bad personal representative and both good and bad attorneys advising personal representatives. The best attorney may well have a good reason for not filing the inventory and appraisal quickly with the court. On the other hand, the worst attorney and/or personal representative may not have a good reason for not filing the inventory and appraisal with the court within a reasonable time and it may be desirable to provide for the removal of such a personal representative or for his liability for injury to the estate or to others. We therefore suggest that this section be preserved even if the "reasonable time" concept is adopted for Section 8800.

Section 8850: We recommend that the words "subject to administration" be added to the last sentence of subsection (a). This would answer the question of "nonprobate" assets asked in the last paragraph of the note.

Generally, we feel that this section is satisfactory and have no objection to it.

We would now like to discuss the question raised in the note which also pertains to Section 8800. If the question concerns the language both in proposed Section 8800 and existing §600 which refers to property that has "come into the possession or knowledge of the personal representative." This section is inconsistent with Probate Code Section 920 which requires an accounting only as to the items in the possession of the personal representative. It is made more awkward by the concept in existing Code Section 901

which allows commissions based upon the "estate accounted for" by the personal representative. With one exception, our study team have had no practical difficulty with this language as it has existed over the years in Section 600. Nevertheless, if read literally, a personal representative must account only for those assets of the decedent which comes into his possession, but must inventory assets which come into his knowledge (assuming this is good grammar). We have no solution to this problem, but we feel that it deserves further thought. Personal representatives with the advice of their attorneys inventory assets every day which they do not actually take into their possession, but of which they have knowledge. Perhaps the test should be assets which are subject to administration and may be distributed upon final distribution if they still exist at that time. We feel that this area deserves more thought.

Section 8851: We feel that the comment is wrong when it states that §8851 restates former Probate Code §602. Existing Code §602 refers to "any just claim" where proposed §8851 refers to "any debt or demand." We prefer the words "any just claim." The word "just" indicates that the personal representative may raise any just and rightful defenses. The word "claim" is broader in its scope than "debt or demand" and in our opinion is preferable. We agree that the application of this section should be extended from executors to all personal representatives. We are not sure that the last sentence of this section is necessary and suggest that it be deleted.

Section 8852: The last three words in the second to last sentence of this section should be changed to read "of the testator."

Section 8853: This section is satisfactory. However, we note that this section once again makes reference to property which has "come into the possession or knowledge" of the personal representative.

Sections 8870 through 8873: The members of our study team have had some experience from time to time with the predecessors of these sections in the existing Probate Code. Although there are pros and cons as the introductory note to the article points out, we feel that these sections do serve a useful purpose and should be retained. We share the concern of Commission Stodden that they may be a burden upon the court. We would therefore like to suggest that subsection (a) of Section 8870 be modified to permit the examination under oath to be either before the court or before another person designated by the court. Such a person might be a judge pro tem or a commissioner. Perhaps they could be conducted as an examination of Judgment Debtor is conducted.

Section 8900: This section is satisfactory. We feel the concept of an independent appraiser is a good one.

Section 8901: This section is basically satisfactory. We question whether or not "brokerage accounts" in subsection (a)(4) could include stocks and bonds which are normally appraised by the referee. We feel that the words should be changed to "brokerage cash account."

We feel that subsection (b) is good, but we would like to suggest that the staff and commission consider setting it forth under those sections pertaining to the compensation of the personal representative and of the personal representative's attorney. At least there should be a cross-reference.

The reference to Section 600(c) in the last sentence should be changed to Section 605(c). The question asked in the Note is answered no. We feel to permit extraordinary compensation for self-appraisals would be unnecessarily encouraging self-appraisals and waivers of the referee.

Section 8902: Satisfactory.

Section 8903: See comments under Section 8800. The reference to the time limit set forth in Section 8800 must be removed from proposed Section 8903 as long as the three month time

limitation continues to be part of proposed Section 8800, otherwise the personal representative would never know whether his or her petition for waiver of a referee is timely when it is filed more than three months after the issuance of letters to him or her. In the great majority of situation, we would contemplate that such a petition would be filed more than three months after the issuance of letters.

We suggest that the last sentence to subsection (b) be amended to read "The petition shall include an appraisal of all property in the estate, or have a copy of the proposed inventory and appraisement attached to it, and a statement that sets forth good cause that justifies the waiver." We also suggest that the second sentence in subparagraph (c) be modified to read "a copy of the petition, together with a copy of the proposed inventory and appraisement, and notice of the date of hearing shall be. . ."

Section 8904: This section refers to "a unique, unusual or special item" of property. It is our understanding that this section may well have been intended to refer to unique or unusual personal property such as an art collection. However, the word "unique" can also refer to real property. We feel that the intention should be spelled out clearly. Is the section to be restricted to personal property or is it also to include real property? We recommend that it include real property. Attorneys often have situations where the appraised value of property is very important for tax purposes. For example, the personal representative may wish to hire an MAI to get an expert appraisal of real property in those situations where the particular MAI has a good reputation with the Internal Revenue Service and where his or her appraisal is not as likely to be challenged as the appraisal of the probate referee. In these situations, we feel that the personal representative should have the opportunity to have the property appraised by an independent expert. The MAI appraisal can then be given to the probate referee who would then have less work to do. Hopefully, a reduced

commission of the referee could theñ be reached by an agreement. We realize that the referees may object to this proposal, but we do not feel that it would be abused to their detriment. An expert appraisal of real property is expensive. We feel we will only be used in those limited situations where the potential tax consequences justify the higher expense to the estate. This higher expense of the expert appraisal of real property should discourage its widespread use and should preserve the great majority of the real property appraisals for the referees.

Section 8905: This section is satisfactory. We would like to see, however, the declaration under penalty of perjury language in existing Section 608 incorporated into this section unless it is already included within the definition of the word "oath." Declarations of penalty of perjury are so common in California probate practice that we would be turning our back on reality if some other procedure was described in this section to their exclusion.

Section 8906: This section is basically satisfactory. We do, however, believe that the last portion of the second sentence in subsection (b) should be modified to read . . . "to be agreed upon by the referee and the personal representative or the interested person." We further suggest that the last sentence of subparagraph (b) be modified to read as follows: "If the probate referee and the personal representative or the interested person are unable to agree, the court shall determine what fee is appropriate. We trust what we are proposing here is clear. The introductory portion of the section allows a demand by either the personal representative or by any interested person. If such a demand is made pursuant to subsection (b), the additional fee for the services provided need to be agreed upon between the referee and such interested person. The personal representative would have nothing to do with the demand and should take no part in any

agreement as to the additional fee. In such an event, there may well may be no personal representative. We always need to remember in these situations that the referee may be appraising property in a proceeding to set aside community property or in some other situation where there is no formal probate. In these situations there would be no personal representative.

Sections 8920, 8921 and 8922: Satisfactory.

Section 8923: We feel this section is basically good. In some counties, a person other than a judge such as a pro tem or a court commissioner, may designate the probate referee. In such a situation the designating person should also be precluded from appointing his partner or employee or a person to whom he or his spouse is related within the third degree. We submit this suggestion for your consideration.

Section 8924: Satisfactory.

Section 8940: We suggest that the words "to the court" be inserted after the word "report."

Some members of our section feel that the 90 day period is too long.

Section 8941: This section is not clear whether the court hearing that it contemplates is automatic or takes place only at the request of the personal representative. Certainly the referee does not wish to take his time to go to a court hearing if his report of the status of the appraisal is satisfactory to the personal representative. It is also clear to us that the judge does not wish to take his time for a hearing if the personal representative is unhappy with the report and requests the hearing.

Section 8942: This section is satisfactory. Its language is consistent with our suggestions above in regard to Section 8941.

Note that the only time that the referee is cited to appear before the court is when the personal representative files a petition.

Section 8943: Satisfactory.

Sections 8960, 8961 and 8962: Satisfactory.

Section 8963: The Note to the section refers to the fact that the fee splitting provision only applies by its terms where there are referees acting in two different counties. It asks the question whether or not it makes sense to apply the provision any time two different referees are designated. We would answer the question in the affirmative. We would also suggest that the language "pursuant to subdivision (b) of Section 8920" either be deleted or modified in such a way as to indicate that Section 8963 has a broader application than the Section 8920 two county situations.

Respectfully submitted,

STUDY TEAM NO. 1

By:


WILLIAM V. SCHMIDT

Captain

MINUTES

June 26-27, 1986

EXHIBIT 3

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H. NEAL WELLS III
PARTNER

June 24, 1986

James D. Devine, Esq.
337 El Dorado Street
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Monterey, California 93942

Re: LRC Memorandum 86-66
No-Contest Clauses

Dear Jim:

A study team comprised of Kathryn A. Ballsun, Hermione K. Brown, Andrew S. Garb, Janet L. Wright and I have studied Memorandum 86-17 dated 02/04/86 (Professor Niles' February 2, 1986 recommendations) and Memorandum 86-66 dated 05/22/86 (Professor Niles' current recommendations).

Professor Niles proposes no-contest legislation to the following limited extent:

1. Recognize the validity of no-contest clauses insofar as they pertain to transfers pursuant to the instrument containing the no-contest clause except for:

- a. A contest based upon forgery or revocation brought with probable cause; or
- b. A contest of a particular provision of the instrument based upon violation of public policy brought with probable cause;

2. Allow relief to a contestant who has brought an unsuccessful contest "in good faith with a substantial likelihood of success" by means of a petition addressed to the discretion of the court which heard the contest; and

3. Exempt conditional transfers from the no-contest rules.

Professor Niles' proposal does not address indirect contests such as those encountered in the Estate of Kazian, 59 Cal. App. 3d 797 (1976).

Both the study team and the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California concluded that:

1. The most needed "no-contest" legislation is that providing judicial declaratory relief to any beneficiary who wishes court instructions as to whether specified contemplated proceedings will violate a no-contest clause;

2. Legislation exempting from the application of no-contest clauses a contest based upon forgery or revocation brought with probable cause would also be beneficial;

3. Legislation exempting from the application of no-contest clauses a contest based upon violation of public policy brought with probable cause would not be beneficial;

4. Legislation permitting the court to grant relief to a contestant who has brought an unsuccessful

James D. Devine, Esq.
Page Three
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contest in good faith and with substantial likelihood of success would not be beneficial;

5. Exemption of conditional transfers from no-contest exemptions would make other no-contest exemptions meaningless in attorney-drawn Wills; and

6. The study team and the Executive Committee would be most pleased to work with Professor Niles on the legislation recommended above.

"In view of the drastic consequences flowing from the violation of an interrorem clause, it would be highly desirable to know - prior to initiating contemplated action - whether it may be violative of such a clause". Garb - The Interrorem Clause Challenging California Wills. To this end, the study team and the Executive Committee recommend the drafting of legislation pursuant to which a beneficiary may obtain advance declaratory relief as to whether prospective action will violate a no-contest clause. Declaratory relief is particularly important to surviving spouses who wish a determination as to the ownership and character of the decedent's property (eg. separate, community or joint tenancy property and the extent thereof), or a set aside of exempt property, or a family allowance, or reimbursement via a creditor's claim, or an accounting, or a myriad of other things which, after the fact, may be determined to be an indirect contest. Declaratory relief could be granted less

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expensively than a contest or a later petition for relief from a no-contest clause after a contest has been tried and lost. Also, after receiving the declaration from the court, it is reasonable to permit the beneficiary to go forward with the contemplated proceeding (if it is held not to violate the no-contest clause) or to put the beneficiary at peril in proceeding further (if it is held to violate the no-contest clause).

The study team and the Executive Committee are of the opinion that it is appropriately permissible for a testator to require beneficiaries to accord the testator's estate a peaceful administration with forfeiture penalties for breach of that peace. However, because forfeitures themselves are not favored, the beneficiary should be entitled to know in advance whether specific conduct will cause the forfeiture.

The only exceptions to the foregoing are good faith contests based upon forgery or revocation. Such contests are in furtherance of the intent of the testator rather than in contravention of it and should not be discouraged. For instance, the beneficiary of a Will containing a no-contest clause may offer to probate a later instrument containing a revocation of the earlier Will, because the beneficiary wants the true last Will to be admitted to probate and considers it his moral duty to offer the later

instrument to the court. Also, a beneficiary may challenge all or part of a document as a forgery so that the decedent's true intent will prevail.

The same may not be said of most other contests. They are usually brought because the beneficiary of an earlier Will (or an intestate heir) believes that a beneficiary of a later Will achieved an advantage by undue influence of one sort or another. Such contests may be justified because elderly testators in a weakened condition often lose perspective as to the natural objects of their bounty and are prone to unduly favor the person or persons who last did something for them. However, testators must retain the right to change their Wills, even at the last, and to enforce the final Will by an interrorem clause. Moreover, it is not uncommon for a testator to leave a bequest to a relative, whom the testator would just as soon disinherit, in order to buy peace, and to enforce the peace by use of a no-contest clause.

Few contests are successful if viewed from the standpoint of victory at trial sustained upon appeal. Many contests are successful if viewed from the standpoint of a settlement pursuant to which the contestant improves his or her share of the estate. Neither the contests nor the use of no-contest clauses should be discouraged. Instead, the

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present balance should be preserved.

It is the opinion of the study team, the Executive Committee and many other probate attorneys that the general probable cause exception formulated by the U.P.C. will unduly shift power to contestants by permitting them to hold an estate hostage by prolonged expensive litigation, in the hopes of winning a settlement, and of being relieved from their actions by a compassionate court should the contest fail. For this reason, the study team and the Executive Committee do not favor adopting the general Probable Cause Exemption in California. Moreover, the Probable Cause Exemption cannot go hand in hand with recognition of the validity of conditional gifts. Were both to be adopted in California, the following year CEB course on Will drafting would concentrate on "How to Prepare No-Contest Clauses By Use of Conditional Gifts".

Memorandum 86-66 also has a number of technical questions to be addressed.

1. The memorandum envisions only attacks upon the validity of the document containing the no-contest clause. It does not address the situation where a document, such as a Will, has a no-contest clause which would disinherit a beneficiary if the beneficiary challenges the validity of a companion inter vivos trust or visa versa. Cross-over no-contest clauses are an intregal part of

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estate planning and should be considered in any legislative scheme.

2. The term "violates the public policy of the state" is so broad that any court which seeks to give relief to an unsuccessful contestant could use it as a basis for its decision and create a hodge-podge in the law. As noted above, the phrase "substantial likelihood of success" could be defined quite differently in the context of settlement, trial or appeal.

3. It is unclear under 86-66 whether an unsuccessful contestant who is brought within the ambit of paragraphs 1 and 2 of the initial section, merely raises the paragraphs as a defense against forfeiture or must petition for relief to keep a forfeiture from being imposed.

4. It is unclear why Professor Niles limited a public policy contest under paragraph (b) to only a particular provision of any instrument rather than allowing it to be brought against the instrument as a whole if the entire instrument was violative of public policy.

As you know, the Probate Litigation Subcommittee of the Estate Planning, Trust and Probate Law Section of the State Bar studied no-contest problems for a year. The U.P.C. commissioners and other probate attorneys have also reflected upon them for countless hours. After it all, the

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study team and the Executive Committee are of the view that a beneficiary should be permitted an advance ruling as to whether specified conduct will violate a no-contest clause, but that after receiving that ruling, there should be no relief to an unsuccessful contestant unless the contest was based upon probable cause forgery or revocation.

Respectfully submitted,



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MEMORANDUM

DATE: JUNE 24, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLETT
IRV GOLDRING
JAMES DEVINE
JAMES OPEL
LLOYD HOMER
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN
STUDY TEAM NO.1

RE: REPORT OF STUDY TEAM NO. 1 on LRC Memo 86-53 and First Supplement to Memo 86-53
L-1045-Estates and Trust Code (Definitions) New Estate and Trust Code Sections 20 through 88

Conference Call: A conference call was held on Monday, June 23, 1986. Robert Schlessinger did not participate, but the other four members, Charles Collier, W. S. "Gus" McClanahan, Richard S. Kinyon and William V. Schmidt participated.

These proposed Code Sections were first reviewed by Study Team No. 1 in reviewing Memo 86-51. Our response was in the form of a Memorandum dated May 14, 1986. We see no reason to restate all of our comments contained in that May 14, 1986, Memorandum Report. We will therefore limit our comments to those matters which we feel deserve special and extra attention.

Study Team No. 1 reviewed the proposed sections of the new code set forth above in numerical order and has the following comments in regard to them:

Section 20: Satisfactory.

Section 21: The word "municipal" in the second line of the comment is in error. The word should be "mutual." We also feel that the word "an" should precede the word "insured" in the fourth line of the comment.

Section 22: We refer to our May 14, 1986, Memorandum Report.

Section 23: Satisfactory.

Section 24: Richard S. Kinyon of our study group suggested that subsection (b) be rewritten to read as follows: "In the case of a trust, means a beneficiary of a trust who has any present or future interest, vested or contingent, or an owner of an interest by assignment or by other transfer." This definition would preclude a creditor or a lien holder who has an interest in the trust from being included within the definition of a "beneficiary". Mr. Kinyon also raises the question whether or not the definition should be expanded to include the holder of a power, such as the holder of a power of appointment as well as the holder or owner of an interest.

Sections 25-27: Satisfactory.

Section 28: Gus McClanahan, has written a letter dated June 4, 1986 to John H. DeMouilly in regard to this section. As the result of this letter, the staff has prepared its first supplement to Memorandum 86-53 dated June 10, 1986. Mr. McClanahan is in the process of writing a letter to Mr. DeMouilly which we understand will be received by him and all recipients of this memo no later than their receipt of this Memorandum. Our study team therefore refers to that letter of Mr. McClanahan.

We understand that, among other things, he will most likely recommend that all of the words in subsection (b) beginning with

the word "elsewhere" to the end of said subsection (b) be deleted and be replaced by the words "in a jurisdiction whose laws do not include the community property system and which has not adopted the Uniform Marital Property Act." We also understand in regard to subsection (c) that he recommend the deletion of all words after the words "in exchange for" and the substitution therefor the words "any of the property described in subsection (a)."

Sections 29-46: Satisfactory.

Section 48: In regard to subsection (a)(2), Charles Collier of our team points out that a personal representative may, find in some situations, be in a neutral position. This would be the case, for example, in a will contest or in a proceeding under existing code section 1080 to determine entitlement to estate distribution. Is it desirable to treat the personal representative in these neutral situations as an "interested person?"

Section 57: We agree with the proposal of the staff to delete this definition. We are concerned that the definitions of real and personal property do not make it clear whether security interest in real property is real or personal property. We would like to point out to the staff and the commission that this question has greater application than just its application to existing Probate Code Section 630. Its application extends to areas such as ancillary administration. Is it necessary, for example, to open an ancillary administration to clear the title to a security interest in real property in the state where the real property is located? The answer to this question depends on whether or not that security interest is real property or personal property. Since this is a practical problem that practitioners face frequently, we would like to suggest that staff on the commission consider including it in the code.

Section 59: We do not understand the reasoning behind section (b). Where the decedent obtains a judgment of dissolution or annulment of marriage from the predeceased spouse during their joint lifetimes, no marriage between the two of them would exist as of the date of the death of the predeceased spouse and such "predeceased spouse" could not have died while married to the decedent. This would seemingly be taken care of in the first sentence to section 59 and would not be needed under subsection (b) regardless of whether the predeceased spouse participated in a marriage ceremony purporting to marry a third person.

Also see section 78 defining a "surviving spouse." Subsection (c) also seems inappropriate to us. We also feel that the first portion of section 78 should be parallel with the first portion of section 59 and should read as follows: "'Surviving spouse' means a person who was married to the decedent at the time of the death of the decedent and does not include any of the following:"

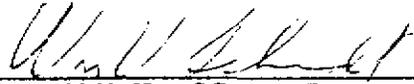
Section 70: Our study team raises the question of whether the term "security" is defined in the Uniform Commercial Code. If so, should it be cross-referenced here and is it needed in the new Estates and Trust Code?

Section 80: We raise the question of whether the second sentence in this section is necessary. It seems to us to be awkward. It seems to us to simply state what all of us have assumed is basic law. In most of the "Totten Trust Accounts" that we have seen, payment to the beneficiary is not mentioned in the

deposit agreement and there is no question that the absence of such is not essential to the validity of the agreement.

Respectfully submitted,

STUDY TEAM NO. 1

By: 
WILLIAM V. SCHMIDT,
Captain