

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

jd10
July 11, 1986

<u>Time</u>	<u>Place</u>
July 17 (Thursday) 3:00 p.m. - 8:00 p.m.	Sheraton Harbor Island West
July 18 (Friday) 9:00 a.m. - 12:00 noon	1590 Harbor Island Drive San Diego (619) 291-6400

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Diego

July 17-18, 1986

1. **Minutes of June 26-27, 1986, Meeting (sent 7/10/86)**
2. **Administrative Matters**
Election of Officers
Memorandum 86-67 (sent 6/16/86)
3. **1986 Legislative Program**
Memorandum 86-72 (enclosed)
4. **Study H-111 - Commercial Lease Law**
Memorandum 86-71 (sent 7/7/86)
Oral Presentation by Consultant
5. **Study L-1025 - Estate and Trust Code (Creditor Claims)**
Memorandum 86-69 (sent 7/8/86)
Draft of Tentative Recommendation (attached to Memorandum)
6. **Study L-1037 - Estate and Trust Code (Estate Management)**
Memorandum 86-55 (sent 6/16/86)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-55 (sent 6/16/86)
Second Supplement to Memorandum 86-55 (sent 7/7/86)

7. **Study L-1033 - Estate and Trust Code (Determining Class Membership)**

Memorandum 86-56 (sent 5/19/86)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 86-56 (sent 7/7/86)

8. **Study F-603 - Retroactive Application of Property Division Legislation**

Special
Order of
Business
9:00 a.m.
Friday

Memorandum 86-70 (sent 7/7/86)
Background Study (attached to Memorandum)
Oral Presentation by Consultant

9. **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)
First Supplement to Memorandum 86-54 (sent 7/7/86)

10. **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 (sent 6/16/86)

11. **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)

12. **Study L-1038 - Estate and Trust Code (Abatement)**

Memorandum 86-59 (sent 6/4/86)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-59 (sent 6/18/86)

13. **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)

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

Memorandum 86-60 (sent 6/16/86)
Draft Statute (attached to Memorandum)

15. Study L-1046 - Estate and Trust Code (Nonresident Decedent)

Memorandum 86-61 (sent 6/18/86)
Draft Statute (attached to Memorandum)

MEETING SCHEDULE

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
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 6/17/86

Distribution and Discharge

JULY MEETING

Approve Tentative Recommendations for Distribution for Comment

Public Administrators and Public Guardians (Nat)
Determining Class Membership (Stan/Nat)
Administration of Estates of Missing Persons (Stan/Nat)
Creditor Claims (Nat)

Preliminary Consideration of New Material

Abatement (Bob/Nat)
Distribution of Interest and Income (Bob/Nat)
Nonresident Decedent (Bob/Nat)
Pending Litigation Against Decedent

SEPTEMBER MEETING

Approve Tentative Recommendation for Distribution for Comment

Inventory and Appraisal (including Probate Referees) (Nat/John)
Abatement (Bob/Nat)
Distribution of Interest and Income (Bob/Nat)
Nonresident Decedent (Bob/Nat)
Estate Management (John/Bob)
Definitions (information for commentators) (Stan/Staff)

Preliminary Consideration of New Material

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

JANUARY AND FEBRUARY

Staff prepares Recommendation for Printing

MARCH 1987 MEETING

Printed Bill Available for Review and Distribution

JUNE 1987 MEETING

Printed Commission Recommendation Available for Distribution

SEPTEMBER 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)

Ralph Palmieri, Beverly Hills Bar Association, Probate Trust, and Estate Planning Section, Beverly Hills (July 18)
Leonard W. Pollard II, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Diego
William V. Schmidt, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Costa Mesa
Shirley Yavitz, California Probate Referees' Association, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF JUNE 26-27, 1986, MEETING

The Minutes of the June 26-27, 1986, Meeting were approved without change.

FUTURE MEETINGS

September 1986

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

October 1986

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

November 1986

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

ELECTION OF OFFICERS

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

1986 LEGISLATIVE PROGRAM

The Commission considered Memorandum 86-72 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)

Statutes of 1986, Res. Ch. 65 - Assembly Concurrent Resolution 93 - Continues Commission Authority to Study Topics Previously Authorized for Study

Sent to Floor in Second House

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

SUBJECT: STUDY F-603 - RETROACTIVE APPLICATION OF PROPERTY DIVISION

The Commission considered Memorandum 86-70 and the attached background study relating to retroactive application of property division legislation. The Commission's consultant, Professor William A. Reppy, Jr., also gave an oral presentation and distributed a more complete version of the background study. Because of the length of the more complete version, a copy is not attached to the Minutes but will be attached to the next memorandum distributed on this subject.

Professor Reppy noted that the key problem caused by the recent Buol and Fabian decisions is the discrepancy in treatment of the same property depending on the date of its acquisition. In other words, there are now two types of property, pre-January 1, 1984 property and post-January 1, 1984 property. The objective is to come up with a constitutional statute that will eliminate this disparity. Professor Reppy traced the history of California community property law with respect to the inception of title concept and reimbursement rights and interest and ownership "buy-ins" for community and separate mixes.

Professor Reppy noted that Civil Code Sections 4800.1 and 4800.2 create discrimination in treatment of different types of marital property, depending on the title form, but that currently pending legislation would cure this problem. Even though the equal protection problem would be cured, the due process problem would not be, since the Supreme Court does not appear to be viewing these statutes as property division statutes. Every court in the country allows the

Legislature great leeway in structuring property division legislation notwithstanding "vested" rights of the spouses, and the California statutes should be recast so they are more clearly property division legislation.

Professor Reppy would convert Section 4800.1 to a property division statute by allowing both oral and written agreements to rebut the community property presumption but providing that jointly titled property creates an equity in both spouses mandating a division that awards the separate share to the contributor spouse and splits the remainder equally between the spouses. Section 4800.2 would be converted to a property division statute by providing that unequal contributions to a community asset create an equity in the contributor spouse, mandating a division that awards the contributor spouse the value of the contribution and splits the remainder equally between the spouses.

The Commission requested the staff to prepare a draft of Professor Reppy's proposal for consideration at the September 1986 Commission meeting. The Commission also requested the State Bar Family Law Section to comment on (1) whether the existing law state of the law is livable, and (2) whether recasting the law as proposed by Professor Reppy is desirable. The Commission intends to give careful consideration to the more complete version of the background study, and taking all the information into account, hopes to be in a position to make policy decisions at the September meeting.

SUBJECT: STUDY H-111 - COMMERCIAL LEASE LAW

The Commission considered Memorandum 86-71, together with a supplement distributed at the meeting (attached to Minutes as Exhibit 1), and heard a presentation by its consultant, Professor William G. Coskran, relating to the status of the study of commercial lease law.

Professor Coskran noted his intention to make issues surrounding assignment and sublease a major segment of the study, and to exclude issues (1) that must be solved by federal rather than state legislation, (2) that are procedural in nature, (3) that are minor problems, easily resolved by the average lease drafter, or (4) that involve rent control.

The Commission agreed with Professor Coskran's approach, noting particularly that rent control should not be within the scope of the study. The Commission requested Professor Coskran to include procedural issues, except for those that are fairly minor.

SUBJECT: STUDY L-1025 - ESTATE AND TRUST CODE (CREDITOR CLAIMS)

The Commission considered Memorandum 86-69 and the attached draft of a tentative recommendation relating to creditor claims, together with a letter from State Bar Team 3 distributed at the meeting (attached to Minutes as Exhibit 2). The Commission approved the tentative recommendation to distribute for comment, subject to the following revisions.

§ 9000. "Claim" defined. Subdivision (a) was revised to provide that "claim" as used in the division "means" rather than "includes". "Creditor" should be defined to mean a person who has demanded payment by the decedent or the estate. The staff should make sure this definition works for the various uses of "creditor" in the statute.

§ 9050. Notice required. The second sentence of subdivision (a), relating to a personal representative deemed to have notice if a demand for payment is made, was deleted.

§ 9052. Form of notice. The notice should inform the creditor of the 30 day period running from the date of mailing or delivery of the notice. The form should include an affidavit of service.

§ 9053. Immunity of personal representative and attorney. The staff should work on the drafting of this section to make more clear that the personal representative is excused for giving more than the required notice, but is not excused for giving less than the required notice, where the personal representative has a reasonable belief that a person is a creditor. The Comment should be expanded to illustrate the situation the statute is concerned with.

§ 9054. When notice not required. This section should be rephrased to refer to service of notice on a creditor "of which the personal representative has actual knowledge in any of the following cases"

§ 9100. Claim period. The second sentence of subdivision (a)(2), relating to a creditor deemed to have knowledge of administration 90 days after submitting an unpaid bill, was deleted.

§ 9103. Late claims. This section should apply "if it appears to the satisfaction of the court"

§ 9150. How claim is made. This section was revised so that the claimant is not required to serve a copy of the claim on the personal representative. The court clerk is to notify the attorney of record that a claim or claims have been filed.

§ 9153. Form of claim. This section should be conformed to the changes in Section 9150.

§§ 9200 and 9201. Claim by surviving spouse. The Comments to these sections should be clarified as suggested by the State Bar.

§§ 9251 and 9254. Claim by public entity. These sections should be cross-referenced in, and not relocated to, the general notice provisions. The staff is to make inquiry of the relevant public entities as to whether the new general notice provisions will be adequate for their purposes.

§ 9300. Procedure by personal representative. The second sentence of subdivision (a), relating to waiver of formal defects in a claim, should be relocated to another place in the statute with the following changes:

(1) The procedure should be limited to demands not exceeding \$500 per demand.

(2) The procedure should be permissible only if payment is made within four months after issuance of letters to the personal representative.

(3) Conforming changes should be made in Section 9054 (when notice not required).

Paragraph (5) of subdivision (b) was deleted.

The first sentence of subdivision (c) was revised to read: "The Judicial Council may prescribe an allowance or rejection form."

§ 9307. Action on rejected claim. Subdivision (d) should be revised to provide that the claimant must pay costs and, in the court's discretion, reasonable litigation expenses (including attorney's fees).

§ 9351. Money judgment against personal representative. This section should be revised to make clear that it relates to a judgment against the personal representative in a representative capacity that is payable out of the funds in the estate.

§ 11423. Interest. The phrase "and interest thereupon ceases to accrue on the amount paid" was deleted from the section. The comment should state that "The legal rate of interest on judgments is provided in Code of Civil Procedure Section 685.010."

SUBJECT: STUDY L-1030 - ESTATE AND TRUST CODE (DISTRIBUTION
WITHOUT ADMINISTRATION)

The Commission considered Memorandum 86-41, and the First, Second, and Third Supplements thereto, relating to community property in joint tenancy form and transfer on death designations for real property. The Commission will make inquiry of states that have hybrid community property/joint tenancy title forms (Nevada, Washington, Wisconsin) and gather information concerning IRS tax treatment, and at that point decide whether to invest more of its resources in this topic.

The concept of real property transfer on death designations the Commission will look into after it has completed work on the Estate and Trust Code; in so doing, the Commission will take into account problems raised by the various bar sections that have reviewed this proposal.

The Commission directed the staff to inform Assemblyman Harris of its intentions on these issues.

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

The Commission considered Memorandum 86-55, the attached draft of provisions concerning estate management, and the Second Supplement to Memo 86-55 with comments from State Bar study teams. (The Commission did not consider the First Supplement to Memo 86-55, since that was considered at the June meeting.) The Commission made the following decisions:

§ 9602. Measure of liability

The last sentence of the Comment uses the term "trust company." The staff should add to the Comment the following: "For a definition of 'trust company,' see Fin. Code § 107."

§ 9610. Extent of court supervision

The last sentence of the Comment referring to Section 9600 should be expanded to make clear that, if the personal representative acts without court authorization under Section 9610, the personal representative must use ordinary care and diligence in carrying out his or her duties.

§ 9611. Instructions from or confirmation by court

The Commission deleted the words "or no different" from subdivision (a). As revised, subdivision (a) will read: "In all cases where no other procedure is provided by statute"

The Commission decided to delete from the Comment to Section 9611, and from the Comments to all other sections where it appears, the statement that if the personal representative refuses to act, the remedy is a petition for removal. The suggestion was made that heirs, devisees, and interested persons should be allowed to petition for instructions once during the estate proceeding, but this was rejected because, under case law, the court on petition for instructions authorizes but does not direct the personal representative to act.

There was disagreement whether some intermediate remedy should be provided, such as an order to show cause why the personal representative should not be required to act or not to act. The Commission asked the staff to draft such an intermediate remedy for Commission consideration. The staff will have to consider which powers and duties should be subject to this remedy.

The Commission decided not to relocate Section 9611 at the end of the estate management provisions. Section 9611 should be kept with the general provisions at the beginning of the statute where it is presently located.

§ 9612. Effect of court authorization or approval

Once again, the Commission considered whether subdivision (b) (no liability where order based on misrepresentation, including omission of material fact) should be deleted. The Commission reaffirmed its

previous decision to keep subdivision (b). The Comment should refer to two recent cases (advance sheets, volume 18, of July 3, 1986) which strengthened the finality concept and limited the meaning of "omission of a material fact": the Lazzaroni case (181 Cal. App.3d 581) and Bank of America v. Superior Court (181 Cal. App.3d 705).

In response to the staff note following Section 9612, the Commission agreed with Study Team 1 that there is no inconsistency in referring to an interim account as a "final" order for the purpose of Section 9612. The Commission approved the concept, previously adopted in guardianship-conservatorship law (see Comment to Prob. Code § 2103), that the rule of finality applies to an order settling an interim account. The Commission approved Section 9612 as drafted.

§ 9620. Submission of dispute to temporary judge

The Commission revised the introductory clause of Section 9620 as follows:

9620. If there is a dispute relating to the estate between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may do either of the following:

In the second line of subdivision (a), the word "to" should be inserted after "dispute."

§ 9621. Submission of dispute to arbitration

The first sentence of Section 9621 was revised as follows:

9621. If there is a dispute relating to the estate between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may enter into an agreement

The court should have authority to approve an arbitration agreement ex parte (without notice and hearing) upon a finding that, for good cause, notice and hearing should be dispensed with.

The Comment to Section 9621 should say that an arbitration award pursuant to the section is "ordinarily" binding, citing Code of Civil Procedure Sections 1285-1288.8, and 6 B. Witkin, California Procedure Proceedings Without Trial § 320, at 612 (3d ed. 1985).

There is no right to jury trial when a private arbitration award as contemplated by Section 9621 is confirmed (see *Madden v. Kaiser Foundation Hospitals*, 17 Cal.3d 699, 714, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976)), but there is a right to trial de novo "by court or jury" under judicial arbitration (Code Civ. Proc. § 1141.20(b)). The Commission wanted it to be clear that there is no right to jury trial when an arbitration award made under Section 9621 is confirmed, either by inserting the word "binding" preceding the word "arbitration" in the first sentence of Section 9621, or by a statement in the Comment that there is no right to jury trial.

§ 9630. Authority of joint personal representative to act

Subdivision (c) of Section 9630 permits the court to authorize the remaining joint personal representatives to act when one or more are absent from the state. This should be revised to require not only that a personal representative be absent from the state, but also that the absent personal representative be "unable to act," since absence alone does not deprive the personal representative of the power to participate in joint decision-making concerning the estate. See the Comment to Section 9630. The subdivision should either apply where the personal representative is "absent from the state and unable to act," or where he or she is "unable to act," without regard to whether he or she is absent from California.

§ 9631. Liability of joint personal representative for breach of duty by another personal representative

The Commission decided to include the transitional provision set out in the staff note to Section 9631 (drawn from Section 16402 in the trust recommendation) to apply the section prospectively only.

The staff should review for accuracy the statement in the Comment that Section 9631 is "consistent with case law," citing *In re Estate of Osborn*, 87 Cal. 1, 25 P. 157 (1890).

§ 9650. Possession and management of decedent's estate

Subdivision (a) of Section 9650 refers to the personal representative taking property "into possession," while subdivision (b) refers to property "under his or her control." The staff should try to make these two phrases consistent with each other.

In response to the staff note following Section 9650, the Commission asked the staff to try to develop language to accommodate the situation where some of the decedent's property passes outside probate -- for example, to a surviving spouse. As now drawn, Section 9650 requires the personal representative to take into possession "all" the estate. This could be revised to require the personal representative to take into possession all the estate of the decedent except any portion not subject to administration (cf. provisions re inventory and appraisal).

The question was raised whether taking possession always refers to physical possession, or whether it may refer to constructive possession. The trust bill deals with this problem by requiring the trustee "to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." Section 16006. The Commission thought that similar language would be useful in the context of decedents' estates.

§ 9656. Abandonment of valueless tangible personal property

The Commission asked the staff to make the procedure under Section 9656 for notice of proposed disposition or abandonment more nearly the same as the procedure for advice of proposed action under the Commission's Tentative Recommendation relating to Independent Administration of Estates Act (March 1986). Some of the differences are as follows:

(1) Under the Independent Administration of Estates Act, notice is given to the State of California if any portion of the estate is to escheat to it. Proposed Section 10552(e). No comparable notice is provided in Section 9656.

(2) The Independent Administration of Estates Act provides for a restraining order against the personal representative (proposed Section 10558), while Section 9656 does not.

(3) Under the Independent Administration of Estates Act, a person who consents in writing to the proposed action need not be given advice of proposed action. Proposed Section 10553. Also, a person may waive advice of proposed action. Proposed Section 10554. There are no similar provisions in Section 9656.

(4) Under the Independent Administration of Estates Act, failure to object waives later court review. Proposed Section 10560(b). There is no comparable provision in Section 9656.

(5) Under the Independent Administration of Estates Act, one who objects is entitled to notice of the court hearing. Proposed Section 10559(c). There is no comparable provision in Section 9656.

The Commission approved two differences between Section 9656 and the Independent Administration of Estates Act:

(1) The Commission approved the period of notice under Section 9656, which is shorter than the period of notice under proposed Section 10556 (Independent Administration of Estates Act).

(2) The Commission approved the provision in Section 9656 (not in the Independent Administration of Estates Act) for the personal representative to request an objecting party to take possession of property in lieu of its disposition or abandonment.

In response to the staff note following Section 9656, the Commission decided that the comparable provision of guardianship-conservatorship law (Prob. Code § 2465) should be conformed to Section 9656.

§ 9700. Savings accounts

The Comment to Section 9700 should note that "trust company" is a defined term (see Section 83), and means one authorized to do business in this state. Since the authority in Section 9700 for deposit of estate funds in a bank or trust company is limited to such institutions in this state, a similar restriction should be applied to savings and loan associations and credit unions.

§ 9701. Deposit of personal property with trust company

§ 9702. Deposit of securities in securities depository

The Comment to Sections 9701 and 9702 should refer to the definition of "trust company" (see Section 83; Fin. Code § 107) which includes a bank authorized to do a trust business.

§ 9703. Accounts and deposits withdrawable only upon court order

The second word in subdivision (b) of Section 9703 should read "or" rather than "of". The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

§ 9705. Interest on deposits by trust company

The Commission approved Section 9705 as drafted.

§ 9730. Investments permitted without court authorization

In response to the staff note following Section 9730, the Commission decided to substitute the following for the draft language of subdivision (b):

(b) An interest in a money market mutual fund registered under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) or an investment vehicle authorized for the collective investment of trust funds pursuant to Section 9.18 of Part 9 of Title 12 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations.

§ 9735. Purchase of securities or commodities sold short

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

§ 9760. Operation of decedent's business other than partnership

In response to the staff note following Section 9670, the Commission decided that the language "unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death" should go in subdivision (a) of Section 9670 in place of "a business that was operated by the decedent".

§ 9761. Settlement of affairs of partnership in which decedent was a general partner

In response to the staff note following Section 9761, the Commission agreed that the staff should draft a general provision concerning enforcement of orders against third persons, such as partners or others who have property of the decedent.

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

§ 9762. Personal representative continuing as partner in decedent's partnership

The Commission asked the staff to give further thought to the suggestion to delete subdivision (d) from Section 9762. If subdivision (d) is deleted, what will the rule be when the decedent was a limited partner?

The staff should make clearer the interrelation of Section 9762 (court may authorize personal representative to continue as general partner if not inconsistent with partnership agreement) and Corporations Code Section 15031 (death of general partner dissolves partnership unless otherwise provided by agreement). If the matter is not covered by agreement, Corporations Code Section 15031 appears to dissolve the partnership, while Section 9762 contemplates continuation of the partnership.

The interrelation of Section 9762 and Corporations Code Section 15675 (exercise of rights by personal representative on death of limited partner) should also be made clear.

§ 9830. Authority to compromise claims and actions and to extend, renew, or modify obligations

Subdivision (b) (court authorization not required unless required elsewhere) should be made subdivision (a), and subdivision (a) (what personal representative may do) should be made subdivision (b).

The Comment to Section 9830 notes that when the personal representative acts without court authorization, the action taken may be later reviewed by the court. The Commission thought that rule should be codified, either in Section 9830 or in a general provision.

The Comment to Section 9830 should refer to other statutes that may apply to a compromise or settlement. See, e.g., Code Civ. Proc. § 372 (compromise of pending action or proceeding); Lab. Code § 5001 (compromise of worker's compensation proceeding).

With these changes, the Commission approved Section 9830.

§ 9831. Compromise before time for filing creditor's claims has expired

The Commission approved Section 9831 as drafted.

§ 9832. Matters relating to real property

The Commission approved Section 9832 as drafted.

§ 9833. Compromise in excess of specified amount

The Commission approved Section 9833 as drafted.

§ 9834. Claim of estate against personal representative; debt of personal representative to estate

The staff should consider whether Section 9834 should be expanded to require court authorization when a spouse or relative of the personal representative is involved in the compromise, extension, etc.

Cf. Section 9880 (personal representative may not purchase estate property "directly or indirectly"). Subject to resolution of this question, the Commission approved Section 9834.

§ 9835. Wrongful death and personal injury claims

The Commission approved Section 9833 as drafted.

§ 9836. Court having authority to give authorization

Under Section 9836 (drawn from Section 2505--guardianship-conservatorship law), court authorization for a compromise by the personal representative where no action is pending is in the probate court. If an action is pending, court authorization may be either in the probate court or in the court where the action is pending.

The Commission thought the probate court should always be involved, whether or not an action is pending, because only the probate court is fully acquainted with the condition of the estate. According to Commissioner Stodden, when the personal representative settles a pending action, the court in which the action is pending often accepts the settlement subject to approval by the probate court. The Commission thought this was the best procedure, and that Section 9836 should be revised accordingly. Guardianship-conservatorship law (Section 2505) should be conformed.

§ 9837. Petition for court authorization; notice

Some doubt was expressed about the usefulness of paragraph (2) of subdivision (a) which permits an interested person to petition, but only "with the approval of the personal representative." The Commission thought the provision might permit the personal representative to avoid the expense of petitioning. On balance, the Commission decided to keep the provision.

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted, and possibly also the penultimate sentence. With that change, the Commission approved Section 9837 as drafted.

The Commission approved the staff recommendation not to include the provision concerning the application of other statutes (formerly proposed Section 9838) as set out in the note following Section 9837. However, the Comment to Section 9830 should refer to other statutes that may apply to a compromise or settlement. See, e.g., Code Civ. Proc. § 372 (compromise of pending action or proceeding); Lab. Code § 5001 (compromise of worker's compensation proceeding).

§ 9880. Prohibition against purchase of estate property or claim
against estate

A question was raised whether the prohibition in Section 9880 against purchase of estate property by the personal representative "directly or indirectly" applies to purchase by relatives of the personal representative. The cases suggest that it does not apply to relatives. See, *e.g.*, Estate of Denlinger, 98 Cal. App.2d 130, 219 P.2d 495 (1950) (son-in-law and daughter of personal representative); Estate of Ettlenger, 87 Cal. App.2d 494, 197 P.2d 163 (1948) (mother and aunt of personal representative). There was some sentiment that relatives of the personal representative should be prohibited from purchasing estate property without court authorization. The staff should report further. .

The Commission thought the cross-reference to "credit in accounts only for amount actually paid on claim" was more confusing than helpful. It should either be rephrased or deleted.

§ 9883. Petition for order under Section 9881 or 9882

The Commission revised the last sentence of subdivision (c) of Section 9883 as follows: "Unless otherwise provided in the will or in the consents referred to in Section 9881 , or in the order of the court , shall provide that the sale of the property shall be made in the same manner as other estate property of the same nature."

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

Under the Independent Administration of Estates Act, the personal representative may act without court approval except where court approval is required by the Act. See proposed Sections 10500-10511 (continuing Prob. Code § 591.2(a)). There is no requirement in the Act that the personal representative obtain court authorization to purchase estate property. The Act should be revised to require court authorization in such a case.

§ 9944. Notice of hearing

The Commission reaffirmed its approval of the longer period of notice (20 days) where a proposed lease is to be for a term longer than 10 years.

§ 9948. Effectiveness of lease

In response to the note following Section 9948, the Commission approved omission of the requirement that the order authorizing the lease be recorded and that the lease set forth that it is made by authority of the order, giving the date of the order. The Commission approved Section 9948 as drafted.

The Commission liked the permissive provision suggested by State Bar study team 3: "Any probate order affecting title to real property may be recorded in the county in which the real property is located." This should go with other general provisions.

§ 9961. Petition

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

§ 10002. Directions in will as to mode of selling or property to be sold

The Commission approved subdivision (b) of Section 10002.

§§ 10150-10166. Brokers' commissions

The Commission did not consider Sections 10150-10166, since these sections were considered at the June meeting.

§ 10200. Sale or surrender for redemption or conversion of securities

Paragraph (4) of subdivision (e) of Section 10200 permits securities to be surrendered for redemption or conversion without notice of sale. Study team 3 was concerned about the application of this paragraph to closely held corporations. The Commission decided to adopt the revision suggested by team 3, to read substantially as follows:

(4) The securities are to be surrendered for redemption or conversion are listed on an established stock or bond exchange or are designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., and the redemption or conversion is at a price or value not less than the market price on the date of the redemption or conversion.

The staff should consider whether the language of paragraphs (3) and (4) should be made more similar to each other.

§ 10250. Notice of sale

The Commission did not accept the more limited notice provision suggested by study team 3. The Commission approved Section 10250 as drafted.

§ 10258. Court order relaxing requirements for credit sale

The last sentence of the Comment (removal of personal representative who unreasonably refuses to petition) should be deleted.

§ 10351. Order vacating sale and confirming sale to new high bidder

A note following Section 10551 asks what the meaning is of the phrase "and in the manner prescribed in the original notice of sale" in paragraph (1) of subdivision (a). It was agreed that it refers to whether the sale is to be a private sale or a sale at public auction as specified in the notice of sale. See Sections 10253 (personal property), 10304 (real property). The Commission's only concern was with the word "original," since the relevant notice of sale may not be the first such notice. The Commission concluded that the term would be read to mean the original notice as to that sale. The Commission decided to keep the quoted phrase.

§ 10382. Limitation of actions for recovery of property

The Commission approved subdivision (b) (no tolling for any reason) as drafted.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

COMMERCIAL LEASING STUDY
Cockran
7/15/86

SUPPLEMENT #1; TOPIC SUGGESTIONS RECEIVED

The following additional topic suggestions have been received.
This supplements the list of 6/15/86/.

FITNESS.

Is a waiver of C.C. 1941 & 1942 effective in a commercial lease?

(It seems the answer is yes per existing statute. C.C. 1942.1 provides that a waiver is void if made by "a lessee of a dwelling." Since residential is expressly included and commercial is not mentioned, it would seem that commercial is excluded from the waiver prohibition.)

STRICT TORT LIABILITY FOR INJURIES.

Does the strict liability of lessor for injuries applied in residential tenancies (Becker v. IRM) extend to commercial tenancies?

USE; COMPULSORY OPERATION CLAUSE.

Is a clause in a shopping center lease which compels the tenant to continue operating a business specifically enforceable? If not, is a penalty of twice the monthly rent (customarily found in most standard form shopping center leases) enforceable without strict compliance with the liquidated damage law?

FITNESS.

Is there a time limit on how long the lessor can wait, either by intention or neglect, before billing a tenant for its pro rata share of common area charges and other expense reimbursements? Can a lessor bill the tenant one, two or three years after the costs have been incurred?

SECURITY DEPOSITS.

Whose property is a security deposit upon tenant's bankruptcy? Do state and federal law conflict and if so isn't the supremacy of federal law controlling?

(note: C.C.1950.7(c) provides in part: "The claim of a tenant to the payment or deposit shall be prior to the claim of any creditor of the landlord, except a trustee in bankruptcy.")

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MAX FELIX
1922-1954
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H. NEAL WELLS III
PARTNER

July 16, 1986

Irwin Goldring, Esq.
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Re: LRC Memorandum 86-69

Dear Irv:

Team 3 received this memorandum only last Saturday. Accordingly, we have not as yet had an opportunity to study it in depth from a technical standpoint. However, we do offer the following comments for the Commission's consideration:

1. The overall drafting approach utilized by the staff is sound. The organization and structure of this portion of the code presents a new body of law in a straightforward manner without complications, a difficult task well done.

2. Team 3 would still prefer to have creditor's claims filed with either the personal representative or with the court, not both (Section 9150). The easiest and most effective way for a creditor to submit a claim is to send it to the personal representative (or attorney for the personal representative) together with a cover letter upon which the recipient acknowledges receipt of the claim. Most creditors are not familiar with the procedures for filing documents with a court or preparing proofs of service. The dual filing system will be difficult for them and it is likely that partial compliance will be the rule rather than the exception thereby causing delays while probate notes are cleared upon petitions for distribution. In practice, it is usually only attorneys or funeral homes who avail themselves of the court filing procedure. Everyone else sends the claims directly to the personal representative at the address specified in the notice of death. One objective of the Commission is to make the processing of claims easier e.g. Section 9300

Irwin Goldring, Esq.
July 16, 1986
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permits a personal representative to pay a bill by accepting it as a claim without formal requirements or the filing of a copy of the bill with the court. It does not appear in keeping with this objective to institute new burdensome formal creditor's claims requirements which will initially cause caos among uninformed creditors throught out the state.

Moreover, in the future, Superior Courts which currently have a probate policy of the ultimate filing of all creditor's claims with the court may dispense with this requirement thereby saving the cost of this burdensome paperwork at the county clerk's office.

3. The second sentence of Section 9050(a) does not state upon whom the creditor has made a demand for payment. This may require technical clarification.

4. The form of notice specified in Section 9052 is brief and should be kept that way. However, a layperson creditor will not understand the legal significance of "date of service". Also, the notice does not alert the creditor that, if he has submitted a 90 day unpaid bill, the 30 day grace period set forth in the notice may be inapplicable (see Section 9100(2)).

5. The comments to § 9200 and § 9201 restate existing law as to the 1 year filing period for claims pursuant to these sections. However, § 9100 does not retain the sentence in this regard from existing § 704.2 and § 704.4. Was this intended by staff?

6. Is the inventory and appraisement required by § 9201 etc. to be by a probate referee similar to the inventory and appraisal required of the decedents' assets?

There are undoubtedly other technical revisions which should be considered. Team 3 will be studying the memorandum further and providing additional technical comments to either the Commission or the staff.

Respectfully submitted,

H. Neal Wells III

H. Neal Wells III