

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

jd10  
07/06/87

<u>Time</u>	<u>Place</u>
July 23 (Thursday) 10:00 a.m. - 6:00 p.m.	Airporter Inn Hotel
July 24 (Friday) 9:00 a.m. - 3:00 p.m.	18700 MacArthur Blvd. Irvine (800) 432-7018

**FINAL AGENDA**

for meeting of

**CALIFORNIA LAW REVISION COMMISSION**

Irvine

July 23-24, 1987

**1. Minutes of June 25-26, 1987, Meeting (sent 7/10/87)**

**2. Administrative Matters**

**1987 Legislative Program**

Oral Report at meeting

**Election of Chairperson and Vice Chairperson**

Memorandum 87-48 (sent 7/6/87)

**Schedule for Work on New Probate Code**

Memorandum 87-56 (sent 7/6/87)

**Budget for 1988-89**

Memorandum 87-65 (enclosed)  
Draft of Budget (attached to Memorandum)

**Letter from California Judges Association**

Memorandum 87-64 (sent 7/6/87)

**3. Study L-655 - Inventory and Appraisal (Approval for Printing)**

Memorandum 87-57 (sent 7/9/87)  
Draft of Recommendation (attached to Memorandum)

4. Study L-1040 - Public Guardian and Public Administrator (Approval for Printing)

Memorandum 87-58 (sent 7/9/87)  
Draft of Recommendation (attached to Memorandum)

5. Study L-1038 - Abatement; Interest and Income Accruing During Administration (Approval of Tentative Recommendation for Distribution for Comment)

Memorandum 87-61 (sent 7/10/87)  
Revised Recommendation (attached to Memorandum)

6. Study L-3010 - Change in Corporate Trustees (Review of Suggestions of California Bankers Association and State and Local Bars)

Memorandum 87-54 (to be sent)

7. Study L-1027 - Accounts (Approval of Tentative Recommendation for Distribution for Comment)

Memorandum 87-59 (sent 7/9/87)  
Draft of Recommendation (attached to Memorandum)

8. Study L-1048 - Rules of Procedure (Approval of Tentative Recommendation for Distribution for Comment)

Memorandum 87-53 (enclosed)  
Draft of Tentative Recommendation (attached to Memorandum)

9. Study L-1025 - Litigation Involving Decedent (Review of Staff Draft of Tentative Recommendation)

Memorandum 87-43 (sent 6/15/87)  
Draft of Tentative Recommendation (attached to Memorandum)

10. Study H-408 - Uniform Dormant Mineral Interests Act (Review of Staff Draft of Tentative Recommendation)

Memorandum 87-45 (sent 6/09/87)  
Draft of Tentative Recommendation (attached to Memorandum)

11. Study L-1011 - Opening Estate Administration (Review of Comments on Tentative Recommendation)

Memorandum 86-201 (sent 1/21/87)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 86-201 (sent 3/3/87)  
Second Supplement to Memorandum 86-201 (sent 3/28/87)  
Third Supplement to Memorandum 86-201 (sent 3/31/87)  
Fourth Supplement to Memorandum 86-201 (sent 4/30/87)

12. Study L-1029 - Distribution and Discharge (Review of Comments on Tentative Recommendation)

Memorandum 86-203 (sent 6/2/87)  
Draft of Tentative Recommendation (attached to Memorandum)

13. Study L-1046 - Nonresident Decedent (Review of Comments on Tentative Recommendation)

Memorandum 86-204 (sent 6/2/87)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 86-204 (sent 7/9/87)

14. Study L-1033 - Determining Class Membership (Review of Comments on Tentative Recommendation)

Memorandum 86-205 (sent 5/20/87)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 86-205 (enclosed)

15. Study L-2006 - Miscellaneous Provisions of Division 3

Memorandum 87-63 (sent 7/9/87)  
Draft Statute (attached to Memorandum)

16. Handbook of Practices and Procedures

Memorandum 87-21 (sent 3/20/87)  
Draft of Handbook (attached to Memorandum)

Note. We will start at page 7 (Chapter Three - Relationship With Legislature)

MEETING SCHEDULE

JULY 1987

23 (Thursday)	10:00 a.m. - 6:00 p.m.	Irvine
24 (Friday)	9:00 a.m. - 3:00 p.m.	Airporter Inn Hotel 18700 MacArthur Blvd. (800) 432-7018

SEPTEMBER 1987

17 (Thursday)	10:00 a.m. - 6:00 p.m.	Los Angeles
18 (Friday)	9:00 a.m. - 3:00 p.m.	State Bar Building 818 West 7th (213) 689-6200

OCTOBER 1987

15 (Thursday)	10:00 a.m. - 6:00 p.m.	Sacramento
16 (Friday)	9:00 a.m. - 2:00 p.m.	

NOVEMBER 1987

19 (Thursday)	10:00 a.m. - 6:00 p.m.	San Francisco
20 (Friday)	9:00 a.m. - 3:00 p.m.	

DECEMBER 1987

10 (Thursday)	3:00 p.m. - 7:00 p.m.	Monterey
11 (Friday)	9:00 a.m. - 3:00 p.m.	

The July meeting has been scheduled for the Airporter Inn Hotel in Irvine which is across from the Orange County Airport. We were unable to find an affordable meeting place in Newport Beach. The room rate at the Airporter is \$70. The telephone number is (800) 432-7018 or (714) 833-2770.

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
JULY 23-24, 1987  
IRVINE

A meeting of the California Law Revision Commission was held in Irvine on July 23-24, 1987.

Law Revision Commission

Present: Arthur K. Marshall, Chairperson                      Tim Paone  
Ann E. Stodden, Vice Chairperson                      Forrest A. Plant  
Roger Arnebergh

Absent: Elihu M. Harris, Member of Assembly                      Edwin K. Marzec  
Bill Lockyer, Member of Senate                      Vaughn R. Walker  
Bion M. Gregory

Staff Members

Present: John H. DeMouilly    Stan G. Ulrich  
Nathaniel Sterling

Absent: Robert J. Murphy III

Consultants Present

None

Other Persons Present

Edward V. Brennan, California Probate Referees' Association,  
San Diego (July 23)  
Phyllis Cardoza, Beverly Hills Bar Association, Probate,  
Trust and Estate Planning Section, Los Angeles  
Nicholas S. Chrisos, Orange County Counsel, Santa Ana  
(July 23)  
Nancy E. Ferguson, California Probate Referees' Association,  
Sacramento (July 23)  
Irwin D. Goldring, Executive Committee, State Bar Estate  
Planning, Trust and Probate Law Section, Los Angeles  
Michael Harrington, California Bankers Association,  
San Francisco  
Susan T. House, Executive Committee, Los Angeles County Bar  
Association, Probate and Trust Law Section, Los Angeles  
Linda C. Martinez, Orange County Public Administrator/Public  
Guardian, Santa Ana (July 23)  
L. Bruce Norman, California Bankers Association, Los Angeles  
(July 23)  
James C. Opel, Executive Committee, State Bar Estate  
Planning, Trust and Probate Law Section, Pasadena  
Howard Serbin, Orange County Counsel, Santa Ana (July 23)

ADMINISTRATIVE MATTERS

MINUTES OF JUNE 25-26, 1987, MEETING

The Minutes of the June 25-26, 1987, Meeting were approved as submitted by the staff.

ELECTION OF OFFICERS

The Commission elected a new Chairperson and a new Vice Chairperson. Ann E. Stodden was unanimously elected as Chairperson, and Forrest A. Plant was unanimously elected as Vice Chairperson. They will hold office for a one year term, commencing on September 1, 1987.

The Commission expressed its appreciation to Commissioner Marshall for his outstanding service as Chairperson of the Commission during the past year.

SCHEDULE FOR FUTURE MEETINGS

Future meetings are scheduled as set out below. On the Friday meetings, the Commission will meet until 2:00 p.m. without taking a break for lunch.

SEPTEMBER 1987

17 (Thursday)	10:00 a.m. - 6:00 p.m.	Los Angeles
18 (Friday)	9:00 a.m. - 2:00 p.m.	State Bar Building 818 West 7th (213) 689-6200

OCTOBER 1987

15 (Thursday)	10:00 a.m. - 6:00 p.m.	Sacramento
16 (Friday)	9:00 a.m. - 2:00 p.m.	

NOVEMBER 1987

19 (Thursday)	10:00 a.m. - 6:00 p.m.	San Francisco
20 (Friday)	9:00 a.m. - 2:00 p.m.	

DECEMBER 1987

10 (Thursday)	3:00 p.m. - 7:00 p.m.	Monterey
11 (Friday)	9:00 a.m. - 2:00 p.m.	

LEGISLATIVE PROGRAM

The staff made the following report on the 1987 legislative program.

**Passed Legislature**

**Chapter 128, Statutes of 1987 (Assembly Bill 362) (Urgency Trust Bill)**  
(Harris)

**Senate Concurrent Resolution 12 (Continues Authority to Study**  
Previously Authorized Topics; Senator Lockyer amended this  
concurrent resolution to include authorization to study  
administrative law) (This measure does not require approval by  
Governor) (Lockyer)

**Passed First House**

**Assembly Bill 708 (Comprehensive Probate Bill) (Harris) (Bill amended**  
on July 13. Bill set for hearing by Senate Judiciary Committee on  
August 18. Technical amendments will be made at the hearing.)

**Dead**

**Assembly Concurrent Resolution 42 (Authorizes Study of Administrative**  
Law) (This measure no longer necessary since authority to study  
administrative law is included in Senate Concurrent Resolution 12  
which has been adopted by Legislature) (Harris)

**Revised Comments to AB 708**

The Revised Comments to AB 708, which had been distributed to the members of the Commission and persons attending the meeting prior to the meeting, were approved. The staff indicated that there are a number of typographical errors in the Revised Comments that will be corrected before the Revised Comments are submitted to the Senate Judiciary Committee members.

**SCHEDULE FOR WORK ON NEW PROBATE CODE**

The Commission considered Memorandum 87-56.

The Commission decided not to increase the number of meeting hours at meetings at this time. It was noted that the Commission recently changed the time the meeting starts on Thursday from 3:00 p.m. to 10:00 a.m. If necessary, the Commission will consider whether to increase the number of meeting hours after the next two meetings have been held.

The Commission authorized the legal staff to carry over into 1988 any excess hours of vacation that cannot be taken during 1987 without seriously jeopardizing the Commission's goal to recommend in 1988 provisions to replace existing Division 3 of the Probate Code. The Executive Secretary should make a serious effort to reduce the excess hours of vacation that will need to be carried over into 1988.

#### BUDGET FOR 1988-89

The Commission considered Memorandum 87-65 which presented a staff recommended revised budget for the 1987-88 fiscal year and a staff recommended proposed budget for the 1988-89 fiscal year.

The Commission approved the substance of the revised budget for the 1987-88 fiscal year and the proposed budget for 1988-89 fiscal year. The staff was authorized to make minor technical revisions in the budget, including revisions to reflect actual expenditures during 1986-87 and to reflect the actual amount authorized by the Department of Finance for expenditure in 1988-89 fiscal year.

The Commission directed that a budget change proposal be submitted to the Department of Finance to request additional money (approximately \$26,500) to permit the purchase of a new copying machine.

#### NEW TOPIC - PAYMENT OF ATTORNEY FEES AND SHIFTING OF FEES BETWEEN LITIGANTS

The Commission considered Memorandum 87-64. The Commission determined that it will request authority at the 1988 legislative session to study the following topic:

Whether the law relating to the payment of attorney fees and the shifting of attorney fees between litigants should be revised.

The request to study this new topic should be included in the draft of the next Annual Report.

#### RESPONDING TO PERSONS WHO SUBMIT COMMENTS ON TENTATIVE RECOMMENDATIONS

The staff should develop a form letter thanking persons who send comments and indicating that the comments will be considered by the Commission.

#### STUDY H-408 -- UNIFORM DORMANT MINERAL INTERESTS ACT

The Commission considered Memorandum 87-45, relating to the Uniform Dormant Mineral Interests Act. The Commission, after repunctuating Section 883.020(b) as follows, decided to circulate for comment the tentative recommendation proposing adoption of the Uniform Act:

(b) "Minerals" includes gas, oil, coal, other gaseous, liquid, and solid hydrocarbons; oil shale; cement material, sand and gravel, road material, building stone; chemical substance; gemstone; metallic, fissionable, and nonfissionable ores; colloidal and other clay; steam and other geothermal resource; and any other substance defined as a mineral by the law of this State.

#### STUDY L-655 — INVENTORY AND APPRAISAL

The Commission considered Memorandum 87-57 and the attached draft of the recommendation relating to inventory and appraisal. The Commission approved the recommendation for printing and submission to the Legislature, subject to the following revisions.

##### § 8800. Inventory and appraisal required

The appraisal (as opposed to the inventory) should be filed within six months after first issuance of letters to a general personal representative "or within such further time as is reasonable under the circumstances of the particular case." The Comment would note that a longer period than six months might be reasonable where there are federal estate tax considerations. Section 8804 (failure to timely file inventory and appraisal) should be adjusted accordingly. The staff should prepare a redraft of this section for Commission review, along with redrafted sections in which conforming changes are needed.

##### § 8801. Supplemental inventory and appraisal

The first sentence should make reference to a supplemental inventory and appraisal in the manner prescribed for an original inventory and "original" appraisal. The second sentence should be conformed to Section 8800.

##### § 8803. Notice of filing of inventory and appraisal

This section should require notice of filing each inventory, each supplemental inventory, each appraisal, and each supplemental appraisal.

##### § 8804. Failure to timely file inventory and appraisal

This section should be conformed to Section 8800. The reference in the Comment to shorter periods should be eliminated.

§ 8903. Waiver of appraisal by probate referee

The statute requiring reappraisal of property for a sale made more than one year after the original appraisal should be revised to provide that a probate referee is appointed for reappraisal if a probate referee did the original appraisal. This clarification should be added to Section 10309(c) in AB 708.

§ 8920. Designation by court

The first sentence of this section was revised to read, "The probate referee, when designated by the court, shall be among the persons appointed by the State Controller to act as a probate referee for the county."

§ 8963. Maximum and minimum commissions

Notice under this section should be given to known heirs and devisees whose interest would be affected by the increase in fees.

**STUDY L-1010 — OPENING ESTATE ADMINISTRATION**

The Commission considered Memorandum 86-201 and the First through Fourth Supplements thereto, reviewing comments on the tentative recommendation relating to opening estate administration. The Commission completed consideration of Sections 8000 to 8404 of the tentative recommendation, making the following decisions concerning these sections.

§ 8002. Contents of petition

In subdivision (a), the persons required to sign and verify the petition should be governed by the general provisions relating to persons who may sign and verify probate papers generally. Subdivision (b)(2) should be revised to require street number "or other address". Subdivision (c) should require a typed copy of a holographic will to accompany the photographic copy. The staff should make sure that translation of foreign language wills is adequately dealt with in the statute. The Comment will be adjusted to reflect the revised content of the section.

§ 8004. Opposition

The first paragraph should be governed by general rules relating to a continuance for the purposes of filing written objections. The staff should revise the general rules to allow a continuance to file "or to consider filing" objections.

§ 8005. Hearing

Subdivision (a), relating to court determination of objections, should be deleted in reliance on general procedural provisions. The reference to jurisdictional facts in subdivision (c)(1) should include publication of notice and whether the decedent left property in this state; the reference to notice in subdivision (c)(3) should be to notice other than publication. The Comment might indicate that for jurisdiction the decedent must either have been domiciled or left property in this state.

§ 8006. Court order

Instead of referring to "jurisdictional facts", the section should refer to the matters in Section 8005(c)(1). The last sentence of this section should refer to "an order resulting from" any subsequent proceeding.

§ 8007. Determination of jurisdiction conclusive

Subdivision (b) should refer to "either" rather than "any" of the following cases.

§ 8100. Form of notice

This section, particularly the provisions relating to independent administration, should be conformed to AB 708. The reference to persons interested in the will "and/or" the estate should be changed to "the will or estate or both." The estate number should go in the caption rather than the text of the notice. The references to Estate and Trust Code should be changed to Probate Code.

§ 8110. Persons on whom notice served

The 10 day notice provision should be changed to 15 days.

§ 8112. Notice to Director of Health Services and other state agencies

This section should refer to other provisions requiring notice.

§ 8113. Notice involving foreign citizen

This section should be adopted, with "county" changed to "country". The Comment should note that the State Department can be called for a current list of foreign countries having consul representation. The staff should check to make sure this actually works.

§ 8121. Publication of notice

The reference to the "community" in which the decedent resided should be replaced by a reference to the "area of the county" in which the decedent resided. The Comment should note that there may be rural areas of the county that are not communities. The legislation enacted in 1986 providing for publication in the newspaper published nearest to the county seat should be added to the statute.

§ 8123. Posting of notice

This section was deleted. The 1986 legislation providing for publication in the newspaper published nearest the county seat makes posting unnecessary. References in the statute to posting should be eliminated.

§ 8124. Type size

This section was revised to eliminate the readability requirement and to require the same type sizes as existing law.

§ 8200. Delivery or filing of will by custodian

The custodian of a will should file the will with the clerk and mail a copy to the executor, if the executor's whereabouts are known, and if not, to a beneficiary, if the beneficiary's whereabouts are known. The executor must petition within 15 days after delivery of the will. Upon payment of the required fee, the clerk must release a copy of the will to the executor or a beneficiary under the will.

§ 8202. Will detained outside jurisdiction

This section should provide for admission to probate of a "certified photographic copy" of the will. The Comment should note that the word "residence" is changed to "domicile" for clarification. The headline should refer to a will detained outside California.

§ 8224. Perpetuation of testimony

This section should be limited to testimony taken at a proceeding for probate of a will. The Comment might compare this to the self-proving will where there is no testimony of a witness. The headline should be revised for clarity, such as "Admission of testimony of unavailable witness."

§ 8225. Admission of will to probate

Subdivision (b) should be relocated to Section 8002 (contents of petition).

§ 8226. Effect of admission of will to probate

Subdivision (a) should be subject to Section 8007(b), which creates a fraud exception to the conclusive effect of admission of a will to probate.

Subdivision (b) should enable the court to determine how prior distributions are affected by subsequent probate of a will. See subdivision (c).

Subdivision (c) should be revised to provide that a will may not be admitted to probate to the extent it affects property previously distributed. The court should be able to order adjustments of gifts in light of a will later admitted to probate, but should not be able to rescind a distribution once made. An omnibus clause in an order of distribution for after-discovered property would be superseded by later admission of a will.

§ 8250. Summons

A provision should be added that failure to respond to the summons precludes the defaulting parties from further participation in proceedings relating to the will contest. The staff should further investigate the differentiation between a citation, summons, and notice of hearing, and the differentiation between a hearing and a trial.

The section should include the recently-enacted provision that a person named executor in the will is not under a duty to defend a will contest until appointment.

§ 8251. Responsive pleading

The pleading times in this section should be 15 rather than 10 days.

§ 8252. Trial

The provision eliminating jury trial was retained. However, if it appears the provision will jeopardize enactment of the probate bill, the provision should be deleted and jury trial reinstated.

§ 8254. Judgment

The judgment under this section should include appointment of a personal representative.

§ 8270. Petition for revocation

The phrase "close of administration" should be replaced by "entry of order for final distribution". The Comment should note the change this makes in existing law, as well as in the preliminary part.

§ 8271. Summons

Revision of this section is subject to further staff research on citation, summons, and notice of hearing. See discussion of Section 8250, above.

§ 8273. Costs and attorney's fees

This section was deleted in reliance on the general costs section.

§ 8401. Deposit in controlled account

The listing of accounts in subdivision (a) should be replaced by a reference to "an insured account in a financial institution".

§ 8403. Oath

This section should authorize an oath at the time the petition is signed; the Comment should refer to case law to the same effect.

§ 8404. Statement of duties and liabilities

The staff should revise the contents of the form to conform to the latest draft of the Probate Code revision.

Instead of the clerk delivering a copy of the statement to the personal representative, the personal representative should file a signed copy with the clerk at the time of filing the oath acknowledging receipt of the statement. The court should be authorized to adopt local rules to require driver's license and social security number, provided their confidentiality can be assured.

The statute should note that the form includes an incomplete statement of the law and that the summary of statutes in the form does not override the statutes themselves. If there is a Judicial Council form for this, it should be used.

#### STUDY L-1025 — LITIGATION INVOLVING DECEDENT

The Commission considered Memorandum 87-43, relating to the staff draft of the tentative recommendation relating to litigation involving a decedent. The Commission approved the tentative recommendation to distribute for comment, subject to the following changes.

##### Probate Code § 9103 [AB 708] (amended). Late claims

Paragraphs (1) and (2) of subdivision (a) were revised to read:

(1) Neither the creditor nor the creditor's attorney had actual knowledge of the administration of the estate within ~~four months after the date letters were first issued to a general personal representative and the petition was filed within a reasonable time~~ 15 days before expiration of the time provided in Section 9100 and the petition was filed within 30 days after the creditor or the creditor's attorney had actual knowledge of the administration.

(2) The claim is for an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, for a cause of action that does not arise out of the creditor's conduct ~~by the creditor~~ of a trade, business, or profession in the state.

If the phrase "general personal representative" is still used in the statute, the Comment should cross-refer to its definition. The same should be done for Section 9100, which appears in AB 708.

#### STUDY L-1027 — ACCOUNTS

The Commission considered Memorandum 87-59, relating to the staff draft of the accounts tentative recommendation. The Commission approved the tentative recommendation to distribute for comment, subject to the following changes.

##### § 10900. Duty to account

The report of administration in subdivision (b) should require a statement that actual notice to creditors was given as provided by statute.

##### § 10954. Waiver of account

This section should be revised so that waiver is not required of a creditor who has been or will be paid in full or a beneficiary (other than a residuary devisee) whose interest has been or will be satisfied in full under the petition (and who is not entitled to interest or income on the interest). The acknowledgment that adequate provision

has been made may be eliminated. The draft of these changes should be flagged for Commission review at the time comments on the tentative recommendation are reviewed.

**STUDY L-1038 — ABATEMENT; INTEREST AND INCOME ACCRUING  
DURING ADMINISTRATION**

The Commission considered Memorandum 87-61, together with a letter from Richard S. Kinyon distributed at the meeting (Exhibit 1 to these Minutes), relating to interest and income accruing during administration and abatement. The Commission decided to split the two subjects into separate independent studies. The Commission made the following decisions concerning the two studies.

**INTEREST AND INCOME ACCRUING DURING ADMINISTRATION**

§ 12000. Definitions. The definitions should be relocated to the general provisions relating to wills. They should be refined where necessary, but should not be definitions that govern the construction of the remainder of the code.

§ 12001. Testator's intention controls. The staff should revise the headline of this section to more accurately reflect the section.

§ 12002. Rate of interest. The applicable rate of interest should be that in effect on the date interest accrues. The Comment should note that once interest is fixed, it remains at that amount and is not changed as the Series EE savings bond rate changes. The statute should include a fall-back rate in the event the Series EE savings bond rate is discontinued; the fall-back rate should be 3 percentage points less than the legal rate on judgments.

§ 12003. Earnings on and expenses of specific devises. A provision should be added to allow the personal representative to charge expenses allocable to the distributee under this section against the share of the distributee or to impose and enforce a lien on the property.

§ 12004. Interest on general pecuniary devise. The general provisions describing types of devises should include "general pecuniary devise", which is a general devise of money. An exception should be made to this section for a marital deduction gift that is made outright as well as to a marital deduction gift in trust. Jim Opel will also provide the staff with draft language on the matter of interest payable on a marital deduction gift between the date of death and the date of distribution in trust or otherwise.

§ 12006. Remaining income to residuary or intestate distributees. This section should refer to all distributees "who received either" residuary or intestate property. The Comment should note that this would include persons who receive both types of property.

§ 12008. Application of chapter to trusts, deeds, and other instruments. The Commission rejected the concept in the Memorandum of applying the estate administration income and interest rules to trusts. The Commission approved the concept of drafting express rules for trusts to supplement the Revised Uniform Principal and Interest Act, along the lines suggested in Mr. Kinyon's letter. The Commission questioned the need for a one-year delay before interest commences to accrue, and requested further research from the staff concerning the tax and other considerations that affect this matter. The staff should also consider whether the rules should be the same for trusts as for wills, as suggested by the State Bar, particularly in the area of marital deduction gifts. See discussion of Section 12004, above.

#### ABATEMENT

§ 21100. Definitions. This section was deleted. The abatement provisions should speak in general terms such as "gifts" rather than "devises".

§ 21102. Transferor's intention controls. This section was deleted.

§ 21402. Abatement to carry out transferor's intent. The words "express or implied" should be deleted from this section, and the reference to "intention" should be replaced by "plan". This provision and the other abatement provisions should be phrased in general gift terms rather than testamentary gift terms.

#### STUDY L-1040 — PUBLIC GUARDIAN AND PUBLIC ADMINISTRATOR

The Commission considered Memorandum 87-58 and the First Supplement thereto, together with the attached draft recommendation relating to the public guardian and public administrator. The Commission approved the recommendation for printing and submission to the Legislature, subject to the following revision.

##### § 2920. Application for appointment

The staff should prepare a revision to subdivision (b), which requires the public guardian to accept appointment on court order, that would limit the court order to cases where all other alternatives have been considered. A Comment should be prepared to give illustrative cases where other alternatives may be available instead of appointment of the public guardian. The Commission will review this alternative approach before acting on this provision for inclusion in the final recommendation.

#### STUDY L-1048 - RULES OF PROCEDURE

The Commission considered Memorandum 87-53 and the draft *Tentative Recommendation Relating to Probate Law and Procedure*. (The draft attached to Memorandum 87-53 supersedes the draft attached to Memorandum 87-42, considered at the June meeting.) The Commission approved the recommendation to be distributed for comment, subject to the following revisions:

##### § 1003. Appointment of guardian ad litem

In connection with this section, the Commission considered a letter from Mr. Jack E. Cooper relating to appointment of guardians ad litem which was distributed at the meeting. (See Exhibit 2, attached hereto.) Mr. Cooper approves of the draft section which would govern the appointment of guardians ad litem under the Probate Code and, to this extent, would supplant the procedure of Code of Civil Procedure Sections 372-373.5.

§ 1020. Petitions, reports, accounts

This section should be revised as follows:

1020. A petition, report, or account shall be in writing, signed by all of the persons filing the petition, petitioners or by all of the persons making the report, or account, and filed with the court clerk.

§ 1021. Verification required

This section should be revised as follows:

1021. (a) All of the following shall be verified:

(1) A petition, report, or account filed pursuant to this code.

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

(b) Except as provided in subdivision (c), the verification shall be made as follows:

(1) A petition shall be verified by the petitioner or, if there are two or more parties joining in the petition, by any of them.

(2) A report or account shall be verified by the person who has the duty to make the report or account or, if there are two or more persons having a duty to make the report or account, by any of them.

(3) An objection or response shall be verified by the objector or respondent or, if there are two or more parties joining in the objection or response, by any of them.

(c) If ~~a~~-~~petitioner~~, an objector, or respondent is absent from the county or for some other cause is unable to make a verification, the ~~petition~~, objection, or response may be verified by the attorney for the ~~petitioner~~, objector, or respondent.

§ 1043. Response or objection

This section should be revised as follows:

1043. (a) An interested person may make a response or objection in writing at or before the hearing.

(b) An interested person may appear and make a response or objection orally at the hearing. The court in its discretion may hear and determine the response or objection at the hearing or may grant a continuance for the purpose of making the response or objection in writing.

§ 7050. Exclusive jurisdiction

§ 7060. Authority of court or judge

Section 7050 should be revised as set out in subdivision (a) and combined with draft Section 7060 as set out in subdivision (b):

7050. (a) ~~The superior court having jurisdiction over a decedent's estate pursuant to this division~~ has exclusive jurisdiction of proceedings under this code concerning the administration of the decedent's estate.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

§ 7051. Venue in case of domiciliary

This section should be revised as follows for consistency with Section 7050:

7051. If the decedent was domiciled in this state at the time of death, the proper county for proceedings under this division concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died.

§ 7052. Venue in case of nondomiciliary

This section governing venue in cases where the decedent is a nondomiciliary should be revised to restate existing law, rather than make a distinction between counties where real property is located and those in which personal property is located.

§ 7240. Appealable orders and refusals to make orders

Part of the comment to this section should be revised as follows:

~~(3) The part of subdivision (m) of former Section 1297~~  
The right to appeal from an order relating to determination of heirship provided in subdivision (m) of former Section 1297 is ~~replaced by~~ restated in Section 325 (appeal of order determining membership in a class).

§ 7242. Protection of person dealing with personal representative whose appointment is reversed

This section should be relocated with the provisions concerning appointment and removal of personal representatives. (See draft Section 8400 *et seq.* in Memorandum 86-201.)

Code of Civil Procedure § 166 (amended). Matters in chambers

The staff needs to search Division 3 of the Probate Code for references to "court or judge" so that Code of Civil Procedure Section 166 can be amended to include any needed chambers authority.

**STUDY L-3010 - REPLACEMENT OF CORPORATE TRUSTEE**

The Commission discussed the question of appropriate mechanisms to control excessive fees alleged to be charged by some trust companies. (The Commission did not consider the draft recommendation attached to Memorandum 87-54.) The Commission decided that a questionnaire should be developed and distributed to attorneys on the Commission's probate mailing list in order to determine whether there is a problem concerning fees of corporate trustees and, if so, what should be done about it. The staff should also contact a number of corporate trustees to find out what their fees were in 1982 before the law was amended to require removal of trusts from court supervision and what their fees are now. Representatives of the California Bankers Association reported that the banks had been considering various proposals but had not been able to settle on a procedure nor had their members agreed that a problem exists.

The staff will attempt to obtain the requested data from attorneys and trust companies in time to present it at the September meeting. The staff will also analyze the various approaches that have been suggested so that progress can be made on developing any desired legislation for the 1988 session.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

LAW OFFICES OF

## MORRISON &amp; FOERSTER

LOS ANGELES  
WOODLAND HILLS  
WALNUT CREEK  
PALO ALTOCALIFORNIA CENTER  
845 CALIFORNIA STREET  
SAN FRANCISCO, CALIFORNIA 94104-2105  
TELEPHONE (415) 434-7000  
TELEX 34-0154WASHINGTON, D. C.  
DENVER  
LONDON  
HONG KONG

WRITER'S DIRECT DIAL NUMBER

July 20, 1987

(415) 434-7035

VIA FEDERAL EXPRESSRobert J. Murphy, III  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739Re: Memorandum 87-61 (Study L-1038)  
dated 7/9/87

Dear Bob:

Thank you for your letter of July 13 sending me a copy of the above-referenced memorandum.

With regard to the application of interest and income provisions to trusts and other cases outside the context of estate administration, please refer to my letter to you of June 10, 1987 (a copy of which is enclosed herewith) in which I suggested adding a new provision under Sections 15000 et. seq. under the Probate Code requiring a trustee to make mandatory pecuniary distributions (similar to general devises under a will) within a reasonable time after they become payable, and if any portion of such amount, including one in further trust, is not made within one year after it becomes distributable, the undistributed portion would bear interest thereafter.

I also mentioned that it would be desirable to require a trustee to distribute income that is required to be paid currently, at least as often as annually, in order to avoid the tax problem referred to in my June 10 letter, although such a requirement is probably part of the California common law of trusts.

With regard to Chapter 8 (commencing with Section 12000) of Part 10 of Division 7 of the Probate Code, I have the following suggestions:

MORRISON & FOERSTER

Robert J. Murphy, III  
July 20, 1987  
Page Two

- (1) I suggest that the phrase "commencing at the testator's death" be added to the end of Subdivision (a) of Section 12000.
- (2) I suggest that the term "compounded annually" be added to the end of Section 12002.
- (3) I suggest that the word "pecuniary" be deleted from the caption and the body of Section 12004. The term "general pecuniary devise" is not defined in the Code, and would seem to be synonymous with the term "general devise," which is defined in Subdivision (c) of Section 12000.
- (4) I suggest that Section 12005 be amended to read as follows:

§12005. Interest on Annuity

If an annuity is not paid at the end of the annual, monthly, or other specified period, it bears interest thereafter. However, no interest accrues during the first year after the testator's death.

Proposed Section 12005 as it appears in Memorandum 87-61, seems inappropriate with respect to its application to a beneficiary of a trust. Rights of trust beneficiaries should be in Division 9, not Division 7. Also, the requirement that the income beneficiary of a trust be paid interest on amounts of accumulated income seems inappropriate in that any such interest would presumably be charged against the beneficiary's future income, which would make it ineffective. I think a better way to provide for trust beneficiaries would be as suggested in my letter to you of June 10, 1987.

Best regards.

Sincerely yours,



Richard S. Kinyon

RSK:pmd

A58925[RSK1]  
9198(3)(1)(c)

LAW OFFICES OF

MORRISON & FOERSTER

LOS ANGELES  
WOODLAND HILLS  
WALNUT CREEK  
PALO ALTO

CALIFORNIA CENTER  
848 CALIFORNIA STREET  
SAN FRANCISCO, CALIFORNIA 94104-2105  
TELEPHONE (415) 434-7000  
TELEX 94-0164

WASHINGTON, D C  
DENVER  
LONDON  
HONG KONG

WRITERS DIRECT DIAL NUMBER

June 10, 1987

(415) 434-7035

Robert J. Murphy III  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Study L-1038 -- Abatement; Interest  
and Income Accruing During  
Administration

Dear Bob:

Thank you for your letter of June 3 responding to my letter of May 21. I am returning to you herewith a copy of your draft of a Third Supplement to Memorandum 87-37, showing my suggested changes in it that will better reflect my proposal. Please call if you have any further questions.

With regard to the similar provision relating to mandatory general pecuniary distributions from trusts, rather than the approach suggested in your letter to me of June 4, an additional duty of a trustee might be included under Sections 15000 *et seq* of the probate code requiring the trustee to make mandatory general pecuniary distributions within a reasonable time after they become payable; and if any portion of a mandatory general pecuniary distribution, including a mandatory general pecuniary distribution in trust, is not made within [one year] after it becomes distributable, the undistributed portion would bear interest at the rate applicable to judgments thereafter.

A related provision that might be included in the code is the duty of a trustee to distribute income that is required to be paid currently at least as often as annually. Enclosed are copies of two recent private letter rulings illustrating the need for such a provision in the context of a trust that the parties are intending to qualify for the marital deduction under an out of date instrument. I think it would be desirable to have a provision in the new trust

MORRISON & FOERSTER

Robert J. Murphy III  
June 10, 1987  
Page Two

law that specifically requires currently distributable income to be paid at least as often as annually rather than having to rely on the common law for that requirement.

Sincerely yours,



Richard S. Kinyon

RSK:pmd  
Enclosures

cc: Edward C. Halbach, Jr.

EXHIBIT 2

Minutes  
July 23-24, 1987

JACK E. COOPER  
ATTORNEY AT LAW  
530 B STREET, SUITE 910  
SAN DIEGO, CALIFORNIA 92101  
(619) 232-4525

July 14, 1987

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendation relating to Probate  
Law And Procedure - Rules Of Procedure

Gentlemen:

I have read and considered your tentative recommendations concerning Rules Of Procedure and particularly that portion dealing with Guardians ad Litem. While I appreciate the fact that it is impossible to cover all circumstances that might be envisioned, at least one attorney has taken advantage of what I see as a major fault in the rules governing Guardians ad Litem.

I am the attorney for a conservator whose duties have been terminated by the death of the conservatee although litigation is still pending in the Court of Appeal. While the conservatee was alive the conservator of the person was given exclusive authority to give consent for medical treatment of the conservatee under Probate Code, section 2355. The conservator after consultation with the conservatee's physician agreed to a course of treatment. The daughter of the conservatee did not agree to the course of treatment, she wanted to "pull the plug" and let the conservatee die. The daughter's attorney filed a civil action for injunctive relief to compel cessation of the treatment being given. With the filing of the complaint he petitioned for appointment of the plaintiff daughter as Guardian ad Litem for the conservatee. The result was a civil trial with the Guardian ad Litem espousing cessation of medical treatment and the conservator who had been given exclusive authority to make medical decisions opposing cessation of medical treatment. Obviously both asserted their right to make decisions.

I respectfully submit that Code of Civil Procedure does not consider the possibility that a Guardian ad Litem might be appointed to represent the personal rights of a minor or incompetent person. C.C.P. §372 does state that when such a person is a party to an action they shall appear either by guardian or conservator of the estate, or Guardian ad Litem, and does make several references to conservator of the estate. The section does not cover the situation

JACK E. COOPER  
ATTORNEY AT LAW

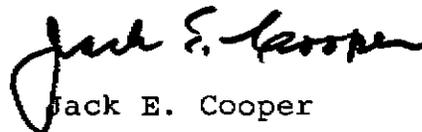
described above.

Your tentative recommendation for §1004. Appointment of guardian ad litem, I find to be very desirable, particularly with regard to the provision " . . . , if the court determines that representation of the interest otherwise would be inadequate." I do recommend that C.C.P. 372 be amended to include such a provision or, in the alternative, that when there is a conservator of the person and/or estate the petition for appointment of a Guardian ad Litem be made after notice to the conservator or, that the petition for appointment be made in the probate proceedings.

Without some sort of provision for appointment of Guardian ad Litem when there is a conservator of the person all of the safeguards provided by statutes for appointment of a conservator can be circumvented.

For your information; despite a motion for judgment on the pleadings based upon various Probate Code sections, and C.C.P. §372, and a trial brief presenting the Attorney General's Opinion 81-508, the Court suspended the powers of the conservator and the plaintiff was appointed as temporary special conservator with the power to direct medical care. She removed the conservatee from the hospital and nine days later the conservatee was dead.

Very truly yours,

  
Jack E. Cooper