

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

adl  
03/04/88

Time

March 10 (Thursday) 1:30 p.m. - 6:00 p.m.  
March 11 (Friday) 9:00 a.m. - 2:00 p.m.

Place

Hyatt at LAX  
6225 West Century Blvd.  
Los Angeles  
(213) 670-9000

REVISED FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

March 10-11, 1988

1. Minutes of January 14-15, 1988, Commission Meeting (sent 2/10/88)

Ms. Barbano (representative of AARP) has called our attention to the following error in portion of the Minutes which reports her testimony, and she requests that the error be corrected: On page 51, line 4, substitute "\$7,150" for "\$2,000."

2. Recommended 1988 Legislation

Status of 1988 Commission Bills

Oral Report at Meeting

Study L-2008 - AB 2779 (Urgency Bill)

Memorandum 88-7 (sent 2/18/88)  
First Supplement to Memorandum 88-7 (sent 3/3/88)  
Bill as Introduced (sent 1/19/88)  
Amended Bill (sent 2/24/88)

Study L-2009 - AB 2841 (1988 Probate Legislation)

Memorandum 88-8 (sent 2/22/88)  
First Supplement to Memorandum 88-8 (sent 2/26/88)  
Second Supplement to Memorandum 88-8 (sent 3/1/88)  
Third Supplement to Memorandum 88-8 (sent 3/2/88)  
Fourth Supplement to Memorandum 88-8 (sent 3/3/88)  
Fifth Supplement to Memorandum 88-8 (enclosed)  
Bill as Introduced (sent 2/1/88)

Study L-2009 - Transitional Provisions for AB 2841

Memorandum 88-9 (sent 2/3/88)  
First Supplement to Memorandum 88-9 (sent 3/1/88)

ACR 42 (Attorneys' Fees Study Authorization)

Memorandum 88-24 (sent 2/22/88)

3. Study L-831 - Recording of Personal Property Affidavit in Office of Recorder

Memorandum 88-10 (sent 1/26/88)  
First Supplement to Memorandum 88-10 (sent 2/18/88)  
Second Supplement to Memorandum 88-10 (sent 2/18/88)

4. Study L-3010 - Fees of Corporate Trustees

Memorandum 88-19 (sent 2/1/88)  
First Supplement to Memorandum 88-19 (sent 2/11/88)  
Second Supplement to Memorandum 88-19 (enclosed)

5. Study L-707- Misuse of Conservatorship Funds

Memorandum 88-5 (sent 1/26/88)  
First Supplement to Memorandum 88-5 (sent 2/18/88)  
Second Supplement to Memorandum 88-5 (sent 3/1/88)

6. Study L-1030 - Notice to Decedent's Guardian or Conservator in Summary Proceedings for Small Estate

Memorandum 88-18 (sent 2/1/88)

7. Study L-1036 - Attorney Fees in Probate

Memorandum 88-12 (sent 2/1/88)  
Memorandum 87-100 (sent 12/15/87;  
another copy sent 2/18/88)  
First Supplement to Memorandum 88-12  
(sent 2/25/88)

ITEMS 7 AND 8:  
SPECIAL ORDER OF BUSINESS  
AT 4:00 P.M. ON  
THURSDAY, MARCH 10, OR  
IMMEDIATELY FOLLOWING  
AGENDA ITEM 6, WHICHEVER  
IS EARLIER

8. Study L-1055 - Fees of Personal Representative

Memorandum 88-13 (sent 2/1/88)  
Memorandum 87-107 (sent 12/15/87)

9. Study H-111 - Commercial Lease Law  
(Assignment and Sublease)

SPECIAL ORDER OF BUSINESS  
AT 9:00 A.M. ON  
FRIDAY, MARCH 11

Memorandum 88-14 (sent 2/22/88)  
Background Study (attached to Memorandum)

10. Administrative Matters

Extend Scheduled Meeting Hours If Necessary

Consultant to Study Administrative Law

Memorandum 88-15 (sent 2/18/88)

Consultant to Study Uniform Rule Against Perpetuities Act

Memorandum 88-17 (sent 1/26/88)

Suggestion for Priority for Study from Assembly Member Sher

Memorandum 88-26 (sent 3/1/88)

Study of Issues Involved in Nonprobate Transfers

Memorandum 88-25 (sent 2/26/88)

Communications from Interested Persons

11. Study L-1060 - Multiple-Party Accounts

Memorandum 88-6 (sent 1/26/88)  
Draft of Tentative Recommendation (attached to Memorandum)

**REVISED**  
**MEETING SCHEDULE**

**NOTE.** This schedule provides basically for a Commission meeting every other month during the first half of 1988, reflecting the fact that substantial staff time will be consumed in working on the 1988 legislative program and in preparing the final version of the new Probate Code for enactment in 1989.

**March 1988**

10 (Thursday)	1:30 p.m. - 6:00 p.m.	Hyatt at LAX
11 (Friday)	9:00 a.m. - 2:00 p.m.	6255 West Century Blvd. Los Angeles (213) 670-9000

**May 1988**

5 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
6 (Friday)	9:00 a.m. - 2:00 p.m.	

**July 1988**

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	

**September 1988**

8 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
9 (Friday)	9:00 a.m. - 2:00 p.m.	

**October 1988**

27 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
28 (Friday)	9:00 a.m. - 2:00 p.m.	

**December 1988**

1 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
2 (Friday)	9:00 a.m. - 2:00 p.m.	

**STATUS OF COMMISSION STUDIES**

(as of February 18, 1988)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
D-1000	Creditors' Remedies -- Miscellaneous Matters	2/88				
F-641	Limit Dispos Commun Prop					
H-111	Commercial Leases -- Assignment & Sublease	2/88	[3/88]			
L-1	New Probate Code	2/88				
L-612	Simultaneous Death					
L-636	No Contest Clause	1987	1/88			
L-707	Misuse of Conservatorship Funds	11/87	1/88	[3/88]		
L-831	Recording Personal Property Affidavit	12/87	1/88	[3/88]		
L-1036	Probate Attorneys' Fees	8/87	1/88			
L-1055	Personal Rep's Fees	10/87	[3/88]			
L-1060	Multiple Party Accounts	1987	[3/88]			
L-3005	Anti-Lapse & Other Rules	1/88	[3/88]			
L-3007	Ancestral Property Doctrine					
L-3012	Unif Manage Instit Funds					
	1988 Annual Report					

[date] = scheduled

**STATUS OF 1988 COMMISSION BILLS**

(as of March 3, 1988)

**Legislative Program:**

AB 2779 (Harris): Urgency probate bill  
 AB 2841 (Harris): Major probate bill  
 ACR 42 (Harris): Attorney's fees study authorization  
 SCR 62 (Lockyer): Continuing authority to study topics  
 Spot bills (AB 3895 and AB 3896)

BILL STATUS	AB 2779	AB 2841	ACR 42	SCR 62	
Introduced	Jan 13	Jan 26	Jan 20 <sup>‡</sup>	Jan 14	
Assembly Judiciary Committee	Mar 2	Mar 2	4/7/87		
Assembly Ways & Means Comm		****	****		
Passed Assembly			4/14/87		
Senate Judiciary Committee			Mar 1	Mar 1	
Senate Finance Committee			****	****	
Passed Senate					
Concurrence					
To Governor					
Signed by Governor					
Chaptered by Secretary of State	Date				
	Ch. #				

‡: ACR 42 introduced in 1987 and amended January 20, 1988,  
 as attorney's fee study authorization

\*\*\*\*: not applicable  
 [ ]: date scheduled

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
MARCH 10-11, 1988  
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on March 10-11, 1988.

Commission:

Present:	Ann E. Stodden Chairperson Forrest A. Plant Vice Chairperson Roger Arnebergh	Bion M. Gregory Arthur K. Marshall Vaughn R. Walker Tim Paone (Mar. 11)
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Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Edwin K. Marzec
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Staff:

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

William G. Coskran, Landlord and Tenant Law (Mar. 11)

Other Persons:

Phyllis Cardoza, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Los Angeles  
Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Mar. 10)  
Ronald P. Denitz, Tishman West Management Corp., Los Angeles (Mar. 11)  
Kenneth A. Feinfield, Executive Committee, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles (Mar. 10)  
Nancy E. Ferguson, California Probate Referees' Association, Sacramento  
Irwin D. Goldring, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Mar. 11)  
Michael Harrington, California Bankers Association, San Francisco  
Howard W. Lind, State Bar Real Property Section and Subsection on Commercial and Industrial Real Estate, Oakland (Mar. 11)  
Valerie J. Merritt, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Mar. 11)  
Charles Mosse, HALT of San Diego, Del Mar (Mar. 10)  
L. Bruce Norman, California Bankers Association, Los Angeles

Jim Opel, State Bar Estate Planning, Trust and Probate Law Section,  
Los Angeles (Mar. 10)  
Gloria S. Pitzer, Los Angeles County Bar Association, Probate and  
Trust Law Section, Los Angeles (Mar. 11)  
Irv Reifman, California Probate Referees' Association, Los Angeles  
(Mar. 10)  
Glenn Sonnenberg, State Bar Real Property Section and Subsection on  
Commercial and Industrial Real Estate (Mar. 11)  
Kay Trout, California Probate Referees' Association, Los Angeles  
(Mar. 10)  
Shirley Yawitz, California Probate Referees' Association, San  
Francisco

#### ADMINISTRATIVE MATTERS

##### MINUTES OF January 14-15, 1988, MEETING

The Commission approved the Minutes of the January 14-15, 1988,  
Commission meeting with the following correction:

On page 51, line 4, substitute "\$7,150" for "\$2,000."

##### EXTENSION OF SCHEDULED MEETING TIME

The time scheduled for the Commission meeting on May 5-6 in  
Sacramento was extended on Friday, May 6, to 4:00 p.m. The Commission  
will arrange to have lunch brought in and will work through lunch on  
Friday if necessary to complete consideration of matters on the agenda  
for that meeting.

##### RECORDING OF COMMISSION MEETINGS

The Commission adopted a policy that mechanical recording of  
Commission meetings by persons other than the staff should be  
prohibited. The reason for the prohibition is that recording might  
hinder full and frank debate and impair the open-minded and flexible  
attitude that must be brought to the type of work the Commission is  
involved in. Recording of meetings by the staff is used only for the  
purpose of preparing Minutes and redrafting statutes, and the tapes are  
subsequently erased.

APPROVAL OF CONSULTANT CONTRACT

The Commission considered Memorandum 88-15, relating to the Commission's study of administrative law and procedure. The Commission unanimously adopted a motion directing the Executive Secretary to execute on behalf of the Commission a contract with Professor Michael Asimow to prepare an analysis of the possible scope of a background study on administrative law and procedure. The analysis would give the Commission an overview of the field and the general problem areas that exist, drawn from the cases and the literature and from persons interested in the study. The analysis would be designed to help the Commission decide what aspects of administrative law and procedure could profitably be studied, and what sorts of priorities would be involved. The staff will work out the details of the analysis with Professor Asimow. The compensation for the analysis is to be \$1250, plus travel expenses not exceeding \$250 in attending Commission meetings. The analysis would be due July 31, 1988. The contract should conform to the standard form of contract used by the Law Revision Commission for expert consultants.

RECOMMENDED 1988 LEGISLATION

The Executive Secretary made the following report on the status of the 1988 Commission bills.

Legislative Program:

AB 2779 (Harris): Urgency probate bill  
AB 2841 (Harris): Major probate bill  
ACR 42 (Harris): Attorney's fees study authorization  
SCR 62 (Lockyer): Continuing authority to study topics  
Spot bills (AB 3895 and AB 3896)

Minutes  
March 10-11, 1988

BILL STATUS		AB 2779	AB 2841	AGR 42	SCR 62	
Introduced		Jan 13	Jan 26	Jan 20	Jan 14	
Assembly Judiciary Committee		Mar 2	Mar 2	4/9/87		
Assembly Ways & Means Comm		****		5/7/87		
Passed Assembly				5/14/87		
Senate Judiciary Committee				Mar 1	Mar 1	
Senate Finance Committee						
Passed Senate						
Concurrence						
To Governor						
Signed by Governor						
Chaptered by Secretary of State	Date					
	Ch. #					

AB 2779 was passed out of the Assembly Judiciary Committee on the consent calendar. AB 2841 was passed out of the Assembly Judiciary Committee after amendments were made to delete the \$250 cap on probate referee commissions for appraising publicly traded stock, to require appointment of a probate referee to receive notice of a waiver petition, and to consolidate the inventory and appraisal in a single document filed within four months after opening administration.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

The Commission considered Memorandum 88-14, relating to assignment and sublease issues in the commercial lease law study. The Commission's consultant, Professor William G. Coskran, presented his background study on this matter. His conclusions are summarized at pages 90-97 of the study attached to Memorandum 88-14.

Professor Coskran supplemented the conclusions with a discussion of California's adhesion contract doctrine and its potential use in determining the validity of a landlord's "express sole discretion standard" or an "absolute prohibition" clause relating to assignment or sublease. Special considerations might apply to a long term ground lease.

Howard W. Lind of Oakland, attending the meeting on behalf of the Commercial and Industrial Subsection (North) of the California State Bar Real Property Law Section, commented to the effect that the law in this area is not clear and should be clarified by legislation. He felt it is particularly important to make clear the extent to which lease provisions affecting change in use are governed by the reasonableness requirement of the Kendall case.

Ronald P. Denitz of Tishman West Management Corporation agreed that there are real problems in practice in this area that need to be clarified by statute.

Glenn A. Sonnenberg of Los Angeles, attending the meeting on behalf of the Commercial and Industrial Subsection (South) of the California State Bar Real Property Law Section, stated that practitioners have concerns about Kendall, particularly its retroactivity and whether it will be extended beyond "silent consent" lease clauses. He noted that many lease clauses, including clauses in ground leases, are heavily negotiated and should be upheld. Legislation needs to be enacted that will ensure the parties of certainty.

The Commission requested the staff to seek to obtain the involvement in this study of persons representing tenants' interests. Perhaps the State Bar's Housing/Residential subcommittee would be

interested, or the California Association of Realtors, or other more specialized commercial brokers' associations. The State may also have some tenant expertise, for example in the Department of General Services.

Although the Commission made no decisions on the scope of this project, several Commissioners expressed views about what should be covered. These matters include, (1) residential as well as commercial leases, and (2) consent provisions in leases concerning matters other than assignment and sublease, including change of use.

The Commission decided to attempt to draft a recommendation in this area for the 1989 legislative session, and requested the staff to schedule the matter for policy decisions at the May 1988 meeting. The Commission expressed its appreciation to persons attending the meeting and commenting on the study, and invited them to return for the May meeting.

STUDY L-707 — MISUSE OF CONSERVATORSHIP FUNDS

The Commission considered Memorandum 88-5 and the First and Second Supplements concerning misuse of conservatorship funds. Since several bills on the subject have been introduced (SB 1957, SB 2351, SB 2352), the Commission decided not to take any action now. Senate Bill 1957 (Rogers) would require the Judicial Council to develop an information pamphlet for guardians. If this bill is enacted, the staff should consider whether the Commission should recommend that the Judicial Council be required to prepare a pamphlet explaining the duties of other fiduciaries, such as conservators, personal representatives, and trustees.

STUDY L-831 - RECORDING OF PERSONAL PROPERTY AFFIDAVIT  
IN OFFICE OF RECORDER

The Commission considered Memorandum 88-10 and the First and Second Supplements to Memorandum 88-10, together with a report from William V. Schmidt on behalf of State Bar Study Team 1 (Exhibit 1 attached to these Minutes).

The Commission approved the following amendment to Section 13101 of the Probate Code:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
- (5) "The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.
- (7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.
- (8) Either of the following, as appropriate:
  - (A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."
  - (B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."
- (9) "No other person has a right to the interest of the decedent in the described property."
- (10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

~~(e)~~ (d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

The staff has prepared a Comment to amended Section 13101 that will read:

**Comment.** Subdivision (c) is added to Section 13101 to alert the person preparing or using the affidavit or declaration to the additional requirements of Section 13106.5. Where the item of property transferred is an obligation secured by a lien on real property, Section 13106.5 requires that, in addition to the requirements of Section 13101, the affidavit or declaration include the recording reference to the instrument creating the lien and a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration.

Where the particular item of property transferred under this chapter is an obligation secured by a lien on real property, Section 13106.5 requires that the affidavit or declaration be recorded in the office of the county recorder of the county where the real property is located. Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with satisfactory evidence that the affidavit or declaration has been recorded and satisfies the requirements of Section 13101 and subdivision (a) of Section 13106.5. Such evidence might be, for example, a certified copy of the recorded affidavit or declaration, but any other satisfactory evidence of the recorded affidavit or declaration would be sufficient. The reference to Civil Code Section 2935 in subdivision (b) of Section 13106.5 makes clear that the recording of the affidavit or declaration is not itself notice to the obligor so as to invalidate a payment made to the holder of the note secured by the lien on the real property.

New Section 13106.5 of the Probate Code (as proposed by Assembly Bill 1779) was revised to read:

13106.5. (a) If the particular item of property transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall be recorded in the office of the county recorder of that county and, in addition to the contents required by Section 13101, shall include both of the following:

(1) The recording reference of the instrument creating the lien.

(2) A notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration.

~~(b) Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with a certified copy of the affidavit or declaration recorded under subdivision (a).~~

~~(e) (b) The transfer under this chapter of the debt or obligation secured by a lien on real property has the same effect as would be given to an assignment of the right to collect the debt or enforce the obligation. The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Section 1934 Sections 1934 and 1935 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.~~

(c) If a deed of trust upon the real property was given to secure the debt and the requirements of subdivision (a) and of Sections 13100 to 13103, inclusive, are satisfied;

(1) The trustee under the deed of trust may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(2) A good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely upon a recorded reconveyance of the trustee under the deed of trust.

(d) If a mortgage upon the real property was given to secure the debt and the requirements of subdivision (a) and of Sections 13100 to 13103, inclusive, are satisfied, a good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent or by their successors in interest.

The Comment to Section 13106.5 was approved to read substantially as follows:

**Comment.** Section 13106.5 is a new provision that covers the situation where the particular item of property transferred under this chapter is a debt (including a promissory note) secured by a lien on real property.

Where the instrument (including a mortgage or deed of trust) creating the lien has been recorded, subdivision (a) requires that the affidavit or declaration be recorded in the office of the county recorder of the county where the real property is located instead of being furnished to the holder of the property as required by the introductory clause of subdivision (a) of Section 13101. Recording of the affidavit or declaration in the real property records is mandatory so that the title records will reflect the transfer of the debt and security interest under this chapter to the person or persons executing the affidavit or declaration as successor of the decedent and to establish of record their authority to execute a satisfaction or release of the mortgage where the debt is secured by a mortgage.

The affidavit or declaration must be in the form prescribed by Section 13101 and must also satisfy the requirements of paragraphs (1) and (2) of subdivision (a) of Section 13106.5. The affidavit or declaration must be executed under penalty of perjury under the laws of the State of California. See Section 13101(a)(11). A certified copy of the decedent's death certificate must be attached to the affidavit or declaration. Section 13101(d).

Subdivision (a)(1) requires that the recording reference of the instrument creating the lien be included in the affidavit or declaration. This information will make it easier to locate the recorded lien instrument. Additionally, the recording reference will insure that the affidavit or declaration relates to an obligation secured by a lien on real property.

Subdivision (a)(2) requires that the affidavit or declaration include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration. This is required because the affidavit or declaration is to be recorded in the real property records. The requirement also avoids the need to furnish the obligor on the debt with additional proof of the identity of each person executing the affidavit or declaration. See Section 13104(e).

Under subdivision (b), the transfer of the debt under this chapter is given the same effect as the assignment of the debt. It is a well established principle of law that the assignment of a debt carries with it the security for the payment of the debt. Thus, the assignment of a debt secured by a mortgage carries the mortgage with it (Civil Code § 2936); and, when a power to sell is given to a mortgagee or

other encumbrancer in an instrument intended to secure the payment of money, the power is deemed a part of the security and vests in the person who by assignment becomes entitled to the money, and the power of sale may be executed by that person if the assignment is acknowledged and recorded (Civil Code § 2932.5).

The person or persons executing the affidavit or declaration as successor of the decedent have the same rights and duties they would have if they were an assignee of the mortgage or an assignee of the beneficial interest under the deed of trust. See Civil Code § 2941. Giving these persons these rights would, for example, permit a title insurer to rely upon the affidavit or declaration in case of the recording of a notice of default in a non-judicial foreclosure of the deed of trust or the mortgage (with a power of sale). The duties include, for example, the duty to execute a certificate of discharge of the mortgage if the lien is secured by a mortgage.

Under subdivision (b), the recording of the affidavit or declaration operates as constructive notice of its contents to all persons. See Civil Code § 2934. Any duty of the obligor under Section 13105 to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with satisfactory evidence that the affidavit or declaration has been recorded and satisfies the requirements of subdivision (a). Such evidence might be, for example, a certified copy of the recorded affidavit or declaration, but any other satisfactory evidence of the recorded affidavit or declaration would be sufficient. The reference to Civil Code Section 2935 in subdivision (b) makes clear that the recording of the affidavit or declaration is not itself notice to the obligor so as to invalidate a payment made to the holder of the note secured by the lien on the real property.

Subdivision (c) makes clear that the trustee under the deed of trust can execute a reconveyance in reliance upon the statements made in the affidavit or declaration and protects a good faith purchaser, lessee, or lender who relies upon the recorded reconveyance. Subdivision (d) makes clear that a good faith purchaser, lessee, or lender may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent (or by the successor in interest of such a person). These protections are consistent with the protection given the holder of the decedent's property under Section 13106. They are necessary to protect the obligor on the debt who has paid the debt to the person or persons executing the affidavit or declaration and needs to have the property title records reflect the fact that the debt has been paid and the security released.

Except as specifically provided in Section 13106.5, the provisions of this chapter--including but not limited to Sections 13109-13113 (liability of persons to whom payment, delivery, or transfer of property is made under this chapter)--apply to money collected pursuant to Section 13106.5.

Section 13106.5 covers not only the right to payment of a debt secured by a lien on real property, but also the right to enforce an obligation the performance of which is secured by a lien on real property.

Assembly Bill 2779 is to be amended to effectuate the decisions of the Commission concerning Probate Code Sections 13101 and 13106.5.

#### STUDY L-1036 - ATTORNEY FEES IN PROBATE PROCEEDING

The Commission considered Memorandum 87-100, Memorandum 88-12, and the First Supplement to Memorandum 88-12, concerning attorney fees in probate. The Commission accepted a written statement from Charles Mosse on behalf of the San Diego chapter of HALT. A copy of Mr. Mosse's statement is attached to these Minutes as Exhibit 2. The Commission made the decisions described below.

#### STATUTORY FEE SCHEDULE

The Commission unanimously decided to retain the statutory fee concept and rejected the reasonable fee standard of the Uniform Probate Code.

The Commission unanimously decided to reduce the four percent rate on the first \$15,000 of estate value (Prob. Code § 901) to three percent. Thus, the fee would be three percent on the first \$100,000 of estate value.

The Commission decided that the statute should not provide a fixed dollar amount as a minimum fee.

The Commission decided not to give the court authority to reduce the statutory fee where it is shown that the statutory fee is clearly excessive or unconscionable under the circumstances of the particular case. Commissioner Walker requested that he be recorded as voting in favor of giving the court this authority.

#### EXTRAORDINARY SERVICES

The Commission asked the staff to draft a statement of standards or factors to be considered by the court in fixing fees for extraordinary services. The statement of standards or factors should take into account that the attorney may have performed extraordinary services pursuant to court order. Complexity and results obtained should be significant factors. Time spent by the attorney should not be the primary consideration in fixing the attorney fee for extraordinary services.

The Commission decided not to add a provision to the statute to limit the fees for extraordinary services to cases where the court determines that the statutory fee is inadequate under the circumstances of the particular case. Attorneys and courts are familiar with the rule in *Estate of Walker*, 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832 (1963), that in deciding whether to award fees for extraordinary services the court may consider whether the statutory fee for ordinary services is adequate compensation for both ordinary and extraordinary services.

The Commission decided not to continue in the statute the partial list of extraordinary services now found in Probate Code Section 902. Instead, the Comment should include a more comprehensive list of what constitutes extraordinary services. A useful list may be found in the Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum in California Local Probate Rules* (9th ed. Cal. Cont. Ed. Bar 1988).

#### WRITTEN CONTRACT REQUIREMENT

The Commission decided it should be made clear that Business and Professions Code Section 6148(a) applies in a case where the attorney fee is set by statute or court rule. This will make clear that written contracts are required for attorney fees in all types of cases where there is no specific exception in Section 6148. (Section 6148 does not apply to contingent fee contracts, or to cases where it is reasonably foreseeable that the total expense to a client (including attorney fees) will not exceed \$1,000, where the services are rendered in an

emergency or where a writing is otherwise impractical, where the fee is implied by prior relationship, where there is a written waiver, or where the client is a corporation.)

#### DISCLOSURE THAT STATUTORY FEE IS SUBJECT TO NEGOTIATION

The Commission decided by a four to three vote to require that the estate attorney disclose to the personal representative that, notwithstanding the statutory fee schedule, the attorney and personal representative may negotiate and agree to a lower fee. Commissioners Stodden, Marshall, Paone, and Walker voted in favor. Commissioners Arnebergh, Gregory, and Plant voted against. The disclosure provision should go with provisions requiring written contracts for attorney fees. Bus. & Prof. Code §§ 6147-6148.

#### MISCELLANEOUS

The Commission decided to keep existing law that gross value of estate property is used to fix the fee (Prob. Code § 901), and rejected net value used by some states.

The Commission decided not to require by statute that attorney fees for services in connection with nonprobate property be reasonable.

The Commission decided to keep existing law that the decedent's will may provide for the attorney's fee, and that the fee provided by will is full compensation for the attorney's services unless the attorney renounces it. See Prob. Code §§ 900, 910.

The Commission decided to keep existing law that, unless dual compensation is expressly authorized in the decedent's will, an attorney who serves as personal representative is entitled to compensation as personal representative but not for services as estate attorney.

The Commission asked the staff to write a memorandum on the practice of the personal representative hiring the estate attorney to perform some duties of the personal representative and paying the attorney out of his or her own funds, not funds of the estate. The staff study attached to Memorandum 87-100 (page 93) refers to but does not cite local court rules that require such an agreement to be

disclosed to and approved by the court. The staff recommended a statute providing that court approval is not necessary. The Commission asked the staff to cite the local court rules that would be invalidated by such a statute.

The Commission did not discuss the staff recommendation to lower the estate size defining the highest bracket (reasonable fee) from \$25 million to \$10 million.

**STUDY L-1055 - FEES OF PERSONAL REPRESENTATIVE**

The Commission considered Memorandum 87-107 and Memorandum 88-13, concerning fees of personal representatives. The staff should draft a statute for Commission consideration that is consistent with the decisions made concerning attorney fees in probate. The lowest percentage rate should be reduced from four (Prob. Code § 901) to three percent, the same as the attorney fee. The draft which the staff will prepare of a statement of standards or factors to be considered by the court in fixing fees for extraordinary services should apply to the personal representative as well as to the estate attorney. The requirement that the attorney disclose to the client that the attorney fee is negotiable should not apply to the compensation of the personal representative.

**STUDY L-2008 - AB 2779 (URGENCY BILL)**

The Commission considered Memorandum 88-7, the First Supplement to Memorandum 88-7, and two reports from State Bar Study Team 1 (Exhibits 3 and 4, attached to these Minutes), relating to AB 2779 (1988 urgency bill). The Commission approved the following amendments to the bill.

**AMENDMENT 1**

On page 19, between lines 3 and 4, insert:

SEC. 13.3. Section 1211 is added to the Probate Code,  
to read:

1211. If a notice is required by this code and no other type of notice is prescribed by law, by the Judicial Council, or by the court or judge, the notice shall be in substantially the following form:

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE (CITY AND) COUNTY OF \_\_\_\_\_

Estate of \_\_\_\_\_  
No. \_\_\_\_\_

NOTICE OF HEARING

(If to be published, describe purport or character of the notice to be given.)

Notice is hereby given that (name of petitioner and representative capacity, if any) has filed herein a (nature of petition, application, report, or account), reference to which is made for further particulars, and that the time and place of hearing the same has been set for (date) \_\_\_\_\_, at \_\_\_\_m., in the courtroom (of Department No. \_\_\_\_\_, if any) of said court, at (the courthouse, or state other location of the court), in the City of \_\_\_\_\_, California.  
Dated \_\_\_\_\_

\_\_\_\_\_, Clerk

By \_\_\_\_\_, Deputy Clerk

AMENDMENT 2

On page 20, line 32, strike out "acknowledgement" and insert:  
acknowledgment

AMENDMENT 3

On page 22, following line 40, insert:  
SEC. 19.5. Section 17101 of the Probate Code is amended to read:  
17101. If notice of the time and place of a hearing is required to be given, the notice shall be in the form prescribed by the Judicial Council or, if the Judicial Council has not prescribed an applicable form, in compliance with Section ~~1200~~ 1211.

AMENDMENT 4

On page 23, between lines 17 and 18, insert:  
SEC. 21.5. Section 21525 of the Probate Code is amended to read:  
21525. (a) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive the transferor by a period that exceeds or may

exceed six months, other than a condition described in subdivision (b), the condition shall be limited to six months as applied to the marital deduction gift.

(b) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive a common disaster that results in the death of the transferor, the condition shall be limited to the time of the final audit of the federal estate tax return for the transferor's estate, if any, as applied to the marital deduction gift.

(c) The amendment of subdivision (a) made by the act that enacted this subdivision is declaratory of, and not a change in, either existing law or former Section 1036.

The Comment that accompanies the amendment to Section 21525 states:

Comment. Subdivision (a) of Section 21525 is amended to make clear that a survival requirement that is not fixed in duration is limited to six months for a marital deduction gift, just as is a survival requirement of fixed duration that exceeds six months. For example, if an instrument that makes a marital deduction gift requires that the spouse survive the decedent until the date of distribution, subdivision (a) would impose a six month limitation on the requirement.

This clarification is a specific application of the general intent of this chapter that a transferor's intent to make a marital deduction gift overrides any conflicting intent expressed by language in the instrument that may disqualify the gift from the federal estate tax marital deduction. Therefore, language in an instrument that would disqualify a gift from the marital deduction should be disregarded or interpreted in light of the overriding intent to obtain the marital deduction.

The amendment of subdivision (a) is declaratory of, and not a change in, existing law. Subdivision (c) emphasizes the fact that the amendment merely clarifies the Legislature's intent in originally enacting former Section 1036 (Cal. Stats. 1982, ch. 41, § 3) as well as in restating former Section 1036 without substantive change in subdivision (a) of Section 21525 (Cal. Stats. 1987, ch. 923, § 101). See also Section 21501 (application of part) and former Section 1031 (application of former article).

**STUDY L-2009 - AB 2841 (1988 PROBATE LEGISLATION)**

The Commission considered Memorandum 88-8, the First through Sixth Supplements to Memorandum 88-8, and letters (copies attached to these Minutes) from State Bar Study Team 1 (Exhibit 5), State Bar Study Team

2 (Exhibit 6), Charles A. Collier, Jr. (Exhibit 7), and the Beverly Hills Bar Association (Exhibit 8), relating to AB 2841 (1988 probate legislation). The Commission authorized the staff to make such technical revisions in the bill as appear proper in light of the comments submitted to the Commission.

The Commission discussed at length the amendments made in the Assembly Judiciary Committee relating to inventory and appraisal and probate referees. The Commission decided to request Assemblyman Harris to remove from the bill the provisions relating to inventory and appraisal and probate referees. He should be made aware that the Commission no longer recommends these provisions of the bill, if they are left in the bill. The Senate should also be made aware of the Commission's position if the provisions are left in the bill. However, the Commission continues to recommend the remainder of the bill.

The Commission also made the following decisions concerning the bill.

§ 1003. Appointment of guardian ad litem. Subdivision (c) was revised to provide for expenses to be paid out of the property of the estate involved or by the petitioner "or from such other source as the court orders." The staff should review for consistency other provisions where similar language is used, and should make sure that references to expenses, compensation, and fees, are used consistently in the Probate Code.

§ 2631. Death of ward or conservatee. The reference to "charges" should be deleted from this section, unless the staff is able to find a derivation for the term that indicates its intended scope.

§ 8113. Notice involving foreign citizen. The staff should check with the U.S. Department of State to see whether the reference to "treaty rights" in subdivision (b) uses proper terminology.

§ 8121. Publication of notice. The staff should check with the newspaper publishers to see whether the phrase "published for at least 10 [or 15, as the bill is being amended] days" can be clarified.

§ 8125. Contents of subsequent published notice. This section should apply only to any subsequent publication of the notice "ordered by the court."

§ 8441. Priority for appointment as administrator with the will annexed. Subdivision (b) of this section was revised to read:

(b) A person who takes under the will has priority over a person who does not, but the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the nominee of several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will.

The Comment should make clear that this provision is intended to apply to a person who takes by intestate succession or as an omitted heir.

§ 8547. Fees and commissions. This section should be revised to allow the special administrator to be awarded extraordinary fees without waiting until the close of administration.

§ 9103. Late claims. The "clear and convincing evidence" standard should be replaced by a simple requirement that the claimant establish the circumstances that qualify the claimant for a late claim. This change should be made in AB 1779 (urgency bill) as well as in AB 2841.

The requirement in subdivision (a)(1) that the petition be filed within 30 days after the creditor or the creditor's attorney had actual knowledge of administration should be revised to make clear that the 30 days commences to run on the first to occur of these events.

§ 9353. Bar of rejected claims. This section should be revised to provide that in the case of a pending action against the decedent, if the claim is rejected the claimant must act to substitute the personal representative as a party within three months after rejection.

§ 10954. When an account is not required. In subdivision (b), the phrase "by the following persons" should be replaced by the phrase "as follows". Subdivision (b)(4) should be revised to make clear that the court's approval is not necessary in the case of a supervised trust and subdivision (b)(5) should be revised to make clear that the court's approval is not necessary in the case of a probate estate.

§ 11004. Settlement of claim not paid in full. This section was deleted from the bill.

§ 12002. Income and expenses of specific devise. The staff should revise subdivision (b) and the Comment to make clear that the taxes and expenses referred to are those that relate specifically to the property, including income tax attributable to income generated by the property that goes to the specific devisee.

A provision should be added that interest on sale proceeds of specifically devised property is allocated to the specific devisee.

§ 12005. Interest on devise for maintenance. The Comment to this section should make clear that a devise for maintenance includes a devise for support.

§ 12006. Remaining income to residuary or intestate distributees. Subdivision (b) of this section was deleted.

§ 16314. Interest on trust distributions. This section was replaced by the substance of following provision:

A specific gift, a general pecuniary gift, an annuity, and a gift for maintenance distributable under a trust carries with it income or bears interest from the date of the settlor's death or such other event as the distributee's right to receive it occurs, in the same manner as a specific devise, a general pecuniary devise, an annuity, and a devise for maintenance under a will set forth in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7.

**STUDY L-2009 - TRANSITIONAL PROVISIONS FOR AB 2841**

The Commission considered Memorandum 88-9 and the First Supplement thereto, relating to transitional provisions for AB 2841. The Commission approved the transitional provisions set out in the memorandum for inclusion in the bill, with the following changes.

§ 3. General transitional provision. The statute should refer to "the" new law rather than "a" new law throughout. The Comment should note that the transitional provision governs all changes in the law, including reenactments and recodifications. Subdivision (d) was revised to provide, in substance:

(d) If a petition, account, report, inventory, appraisal, or other document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law, but any subsequent proceedings taken after the operative date concerning the petition, account, report, inventory, appraisal, or other document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law.

Inventory and appraisal. These transitional provisions should be omitted from the bill on the assumption that the basic inventory and appraisal and probate referee provisions will be deleted from the bill. The Commission will review these provisions in connection with its further study of the basic substantive issues.

§ 10955. Accounts. This section should be omitted from the bill.

§ 16315. Interest and income accruing during trust administration. This provision should refer to the specific sections in the trust law in which changes are made. The Comment should refer to provisions that allow the instrument to specify rules for allocation of interest and income.

§ 9357. Litigation involving decedents. The date of commencement of an action, rather than the date of death, should be the critical time in determining whether new law or old law applies to the action.

§ 2903. Public guardians. The phrase "notwithstanding its repeal by the act that enacted this chapter" should be added at the end of this provision.

§ 12574. Nondomiciliary decedents. The extra "the" should be deleted from the second line of the section. A sentence should be added that nothing in the section limits the right to use the new affidavit procedure. The Comment should elaborate this concept.

#### STUDY L-3010 - FEES OF CORPORATE TRUSTEES

The Commission considered Memorandum 88-19 forwarding the request from Assembly Member Harris to reopen the study of corporate trustees' fees. The Commission also considered the First and Second Supplements

Minutes  
March 10-11, 1988

to the memorandum and the oral and written remarks of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section and the California Bankers Association. (See Exhibit 9, attached to these Minutes, stating the position of the Trust State Governmental Affairs Committee of the California Bankers Association.) The Commission decided to reopen this study with a view toward considering various suggested statutory approaches. The staff was also directed to seek additional opinions from probate judges and from groups in a position to assess the views of trust "consumers," such as the American Association of Retired Persons.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

R E P O R T

**TO:** VALERIE J. MERRITT  
D. KEITH BILTER  
IRWIN D. GOLDRING  
CHARLES A. COLLIER, JR.  
JAMES D. DEVINE  
JAMES C. OPEL  
THEODORE J. CRANSTON  
JAMES V. QUILLINAN  
THE EXECUTIVE COMMITTEE IN GENERAL

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

**DATE:** MARCH 7, 1988

**SUBJECT:** FIRST AND SECOND SUPPLEMENT TO LRC MEMORANDUM 88-10

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This report is prepared on behalf of Study Team No. 1 solely by William V. Schmidt in view of shortness of time. Since the next Law Revision Commission meeting is set for March 10 and 11, 1988, I did not feel that we had sufficient time to arrange a conference call to receive the input of the entire study team.

The First Supplement is in response to a letter received from John C. Hoag, Vice President Senior Associate Title Counsel of Ticor Title Insurance Company in Los Angeles. As a result of Mr. Hoag's letter new subsections (d) and (e) of Section 13106.5 are proposed by the staff together with appropriate changes in the Comment.

I feel that the general concept is good and I see no technical problems with the proposed new subsections.

However, this is not an area of law with which I am intimately familiar. Certainly the proposed changes should be reviewed by Mr. Hoag and possibly other Title Company attorneys.

In regard to the Second Supplement to Memorandum 88-10, I approve of the new proposed subsection (c) to Section 13101 in accordance with the suggestion of Charles Collier.

The deletion by the staff of subdivision (b) of Section 13106.5 and the revision of the second section of subdivision (c) together with the proposed revision to the Comment seem to me to be satisfactory. Again, I am uncomfortable in trying to judge these proposed sections by myself in an area with which I am not intimately familiar. Civil Code Sections 2934 and 2935 are not ones that I deal with on a regular or frequent basis.

In regard to whether or not the recording of the affidavit or declaration should be mandatory or permissive, I tend to agree with the staff and feel that the requirement that the recording be mandatory will serve the public interest in the majority of the cases. Even if the recording was not mandatory it seems to me that the parties involved would want to record the affidavit or declaration in the majority of the cases. I would point out, however, that the suggestion that the recording be permissive arose at the February meeting of the Executive Committee and met with no

real opposition. Although we did not spend a great deal of time on it, it seemed to represent the view of the majority of the members of the Executive Committee at the time it was discussed. I did not get the feeling, however, that the Executive Committee would seriously object to a mandatory requirement particularly if such a requirement was supported by the Title Insurance Companies.

Respectfully submitted.



William V. Schmidt

## Testimony of

Charles Mosse  
Representative, HALT — San Diego

## Regarding

Probate Reform Proposals Contained in Memorandum 88-12

Presented to the  
California Law Revision Commission  
Los Angeles, California

March 10, 1988

I am Charles Mosse, a representative of HALT — San Diego. HALT — San Diego is a chapter of HALT — An Organization of Americans for Legal Reform, the only national public interest organization working to make the legal system more simple, affordable, and equitable for legal consumers. As I noted in my January statement, HALT has more than 28,000 members in the state of California and more than 2,700 members in the San Diego area.

At your January meeting, you asked for public comment about two issues: whether the statutory percentage fee system should be retained, and whether the new law requiring written attorney-client contracts applied to probate lawyers. We realize that you weren't anticipating further public comment but, in light of the Commission staff's recent recommendations (contained in Memorandum 88-12), we thought it important for consumers to be heard once again. Thank you for affording us this opportunity.

**The Basic Issue: Statutory Percentage Fees**

HALT—San Diego is puzzled and disturbed that the Commission appears inclined to retain the statutory percentage fee system. We are puzzled because none of the staff's documents offer any explanation or justification for such a decision. We are disturbed because, from consumers' point-of-view, there is no adequate justification to retain an unfair and arbitrary system.

In scouring Memorandum 87-100, the staff's voluminous study, we are struck by the weakness, paternalism, and self-interest of the probate bar's arguments in favor of percentage fees:

I'm getting old -- I resent change -- I think the old system works well.

Statutory fee avoids fee shopping.

The current percentage method is easy for the client to understand.

Few clients have any understanding of an "appropriate" fee.

System minimizes fee disputes.

[Under reasonable fee system] [lots more time would go into recording time & litigating fees.

Judges have no idea of how expensive it is to practice.

I would not be able to meet my overhead if the clients could dictate the amount of the fees. I would probably go out of business.

Although many of the attorneys surveyed were honest enough to admit that clients could handle fee negotiations (if this weren't true, why is there so much concern about comparison shopping?) and that percentage fees are often excessive (if this weren't true, why all the talk about the expense of practicing and going out of business?), the comments of many others reveal a pervasive anti-consumer bias.

On what is the Commission basing its inclination to keep percentage fees? There is no need to repeat our criticisms of the percentage fee system outlined in our January testimony. Instead, we urge you to pay attention to the comments of legal-services consumers and those in the probate bar who were honest enough to admit the system's flaws. The Commission would do a great disservice to the public to recommend keeping the percentage fee system on the basis of the anti-consumer pleas of some probate lawyers.

### **Court Authority to Reduce Excessive Probate Fees**

Further, HALT—San Diego emphatically disagrees with the staff's conclusion that authorizing the court to lower fees somehow justifies keeping the statutory percentage fee system. At best, this reform just makes an unfair system a little less unfair. It does not make it fair. Because the system is based on a faulty premise (i.e., that the value of the estate is a fair and reasonable basis for setting fees), it produces unfair results (i.e., unreasonable fees).

But, if you do decide to recommend keeping percentage fees, it is absolutely vital that you also recommend giving courts the power to lower fees found to be excessive. As it currently stands, attorneys are guaranteed and routinely collect the statutory percentage, with the option of getting more for "extraordinary" services. Although the statute says these percentages are maximums, in reality, they are often the minimums. Filing compensation petitions with the court is almost meaningless, from consumers' perspective, if the court's only role is to rubber-stamp them or rule on requests for even more money.

Judicial review should always be available upon the filing of an objection, whether that objection is to the will, the performance of the personal representative, or the attorney's fee. The entire rationale for requiring decedents' estates to go through probate at all is to protect the decedent's interests by preserving the estate. In reality, the court's role

is minimal. But, just as in other areas of law where transfer of property is involved, the court's only legitimate role in the context of probate is to resolve any disputes that may arise. We see no good reason to exempt disputes about attorney fees, and what can go up should be able to come down.

Moreover, simply authorizing the court to lower fees, and doing nothing more, is insufficient. Inherent in the statutory fee system is a presumption that the statutory percentage is reasonable. Allowing consumers to petition to lower the fee merely allows consumers to rebut this presumption. Without additional reforms, it places on consumers the burden of fighting, but with no ammunition, thereby rendering the "right" empty.

To understand this, one only need consider under what circumstances a consumer might have a good case that a fee was excessive. The most obvious case would be one where, because of pre-death planning or the liquidity of the assets, the work was minimal, yet, because of the estate's size, the statutory percentage yields a very high fee. As a practical matter, how does the consumer prove the work was minimal? For that matter, how does the attorney prove the fee is reasonable? The attorney isn't required to keep time or other work records, and what evidence of minimal work there may be is in the attorney's control.

The bar is right -- to permit courts to reduce excessive fees would both "destroy the concept of statutory fees as a [sic] simple reasonable compensation" and "result in the ... fee in every estate, or at least in every larger estate, having to be justified on an hourly or other basis in great detail."<sup>1</sup> This is because allowing courts to lower fees changes the presumption in favor of statutory percentages from being irrebuttable to being rebuttable. They also recognize they would have to begin keeping time and work records (just like they do for nonprobate clients) because without them, there is no right to challenge or ability to defend a fee.

As noted earlier, HALT strongly opposes percentage fees having any statutory presumption of reasonableness in the first place. If you keep them, however, as a matter of simple fairness you must permit courts to reduce them.<sup>2</sup> And to make the reduction right meaningful, you must give consumers the tools they need to have a chance of winning. This means requiring attorneys to: 1) keep detailed records of time spent and work performed and 2) execute written contracts containing a prominent notice of the statutory schedule and the client's right to bargain. Further, before the court rules on the attorney's fee, all interested persons should receive ample notice of: the basis for the request, their

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<sup>1</sup> Comments of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California, First Supplement to Memorandum 88-12, at 2-3 (Feb. 24, 1988) [hereafter referred to as "Bar Comments."].

<sup>2</sup> In recommending judicial authority to reduce fees, the staff advances "strict" standards the court could use to determine excessiveness, such as "clearly excessive...." Memorandum 88-12 at 8. This "standard" gives the court absolutely no guidance. HALT—San Diego suggests something a bit more objectively ascertainable, such as "exceeds the attorney's hourly rate of compensation for comparable legal work by more than 10%." This means that a fee of more than \$5,000 for an attorney who would normally get \$4500 for 30 hours of similar (e.g., bankruptcy) work at \$150/hour would be excessive.

right to object, and the procedure for doing so. Finally, once an objection is filed, the burden of persuasion should shift to the attorney to prove that the fee is not unreasonable.

### **Require Written Contracts for Probate Work and Add Special Provisions for Disclosure**

HALT wholeheartedly supports the staff's recommendations to clarify the applicability of the new contract law to probate and require contracts to contain additional disclosures. The bar still offers no reasoned basis for its plea for exemption and its comments demonstrate that it still misunderstands or chooses to ignore the clear intent of the new law. HALT was actively involved in the debate over attorney discipline at the time SB 1569 was considered and HALT was present at Sen. Presley's press conference to announce the Governor had signed it into law. We won't repeat our previous testimony on this point. Suffice it to say that it was intended to address much more than just disclosing and memorializing the amount of the fee.

### **Delineation of What Constitutes "Ordinary" and "Extraordinary" Services; Allowance of Additional Compensation for Extraordinary Services Only to the Extent Statutory Fee Doesn't Provide Reasonable Compensation**

In its comments, the Probate Section opposes "any effort to delineate what is ordinary and what is extraordinary on a statutory basis in great detail" because it would likely result in "unfairness."<sup>3</sup> Unfairness to whom they don't say, but one must presume the unfairness would be to attorneys from not getting paid for performing a service not on the list. The bar also opposes the staff's suggestion of devising flat fees for certain services because the complexity of estates (and thus amount of work required) can vary greatly from estate to estate. Finally, the bar vehemently opposes the recommendation that extra fees be allowed only if the statutory fee for ordinary services doesn't yield reasonable compensation. The reason? Again, "such an approach would substantially undermine the concept of statutory compensation for statutory services" and "involve a justification of the statutory fee in every estate where extraordinary fees were sought, including ... complex[ity]..., hours spent and other ... factors."<sup>4</sup>

No comments of the bar on the staff recommendations so reveal the bar's disingenuousness and the bankruptcy of the statutory percentage fee system as its comments on these two recommendations. The bar argues both sides of the coin when it suits their purposes. Variance from estate to estate in the complexity, amount of time spent or work required, risk for the attorney, and so on is of no concern to them when they argue in favor of percentage fees "for statutory services" and their inherent reasonableness.

Yet, when it comes to recommendations like spelling out what constitutes a "statutory service" vs. an "extraordinary service" or setting flat fees for certain services, all of a sudden the varying complexities, risks, and time required to do the work take on

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<sup>3</sup> Bar comments at 4-5.

<sup>4</sup> Bar comments at 5-6.

tremendous importance. All of a sudden, the particulars of each individual case must be looked at in determining fees. Are you going to let the bar have it both ways — ignoring the time and work required when they want their percentage fees but taking into consideration the time and work required when they want more for "extraordinary" services?

And what happened to the bar's "simplicity of computation" and "easy for clients to understand" arguments? Wouldn't flat fees be easy to compute and understand? Don't misunderstand. We aren't saying that flat fees should be imposed for any or all services. But doesn't all this sound just the teeniest bit inconsistent to you? The result of these inconsistencies is that attorneys get assured minimum fees plus extra for "extraordinary" services, and the consumer gets ripped off.

In arguing here that differences from estate to estate should be taken into account, at least the bar agrees with what we've been saying all along: consumers should be charged on the basis of the time spent and work performed. By basing fees on estate values with no regard for individual circumstances, consumers are already paying flat fees.

If the percentage fee system persists, HALT definitely supports the staff's recommendation that extra fees be permitted **only** to the extent that the fee allowed for ordinary services isn't "reasonable." But why go through all the gymnastics of ordinary vs. extraordinary services, probate work vs. nonprobate work, deciding when to look at compensation already provided for ordinary services, and other meaningless distinctions? If you just got rid of the statutory fee system and the arbitrary distinction between probate and nonprobate work, you would simplify the law, open up the system to price competition, lower legal costs for the surviving relatives, and permit those who are paying the bill to decide whether they wanted to pay percentage fees, hourly fees, flat fees, or some combination of the three.

### **Other Staff Recommendations**

#### **Add Statutory Statement of Factors Used To Determine Reasonableness of Fees**

As noted in our January statement, the law should specify that attorneys are entitled to collect a reasonable fee and precisely define objective factors to be taken into account in determining reasonableness. In HALT's view, the fairest and most objective basis for determining fees is time actually spent and work actually performed. These factors already encompass all of the legitimate factors on the ABA's list but are more easily ascertained.<sup>5</sup>

#### **Add a Minimum Fee for Small Estates or Allow Contracts for Fees Higher Than Statutory Percentage**

HALT opposes statutory fees, and especially statutory minimum fees. If attorneys want to set a minimum fee for handling small estates, that's their business. As the California legislature has recognized, small estates shouldn't be subject to probate or

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<sup>5</sup> See HALT's prior testimony in the Commission's Minutes at 16 (Jan. 14-15, 1988).

require legal assistance to administer. But as long as some do, attorney-client contracts should be required and the parties should be free to bargain over price.

#### Lower Percentage from 4% to 3% on First \$15,000

HALT supports the reduction, but we are not satisfied with such cosmetic changes merely so "it can be said that the maximum percentage rate ... has been reduced from four percent to three percent."<sup>6</sup> As the staff and bar note, the 4% figure is applicable only to the first \$15,000 and estates of this size rarely go through probate anyway.

#### Require Court To Determine Reasonable Fee for Estates Worth over \$10,000,000

HALT supports any reduction in the applicability of unexamined, unjustified, statutory, percentage fees. Although we are more concerned about low- and middle-income consumers who simply can't afford unnecessary siphoning of their inheritances off to professional fees, it's the largest estates, for a variety of reasons, that are most likely to result in the biggest windfalls.

#### Recommendations Concerning Attorney Who Serves as Personal Representative or Performs Some Duties of Personal Representative

In HALT's view, the Presley contract law already requires attorneys to execute written contracts with clients when the fee is expected to exceed \$1,000. Moreover, according to the law, such contracts are already required to delineate who will perform which tasks, among other terms. Thus, we agree with the bar that no statutory change is necessary in this regard. But we agree with the staff that these (and other) contracts should not require automatic approval or review by the court unless an interested person petitions for such review. Finally, the consumer should be billed at the rate charged by the person who actually did the work.

Although our reasons are different, HALT also agrees with bar in opposing the staff's recommendation to permit attorneys in dual roles to collect dual fees. In other states where this arrangement is permitted, it has led to increased potential for double-dipping and other fee abuses. To have any chance of working, attorneys must be required to keep detailed time and work records delineating legal from nonlegal work, a largely meaningless distinction in the probate context anyway. As long as the present system is retained -- windfall percentage fees, no requirement to keep detailed records or justify fees, and large-scale rebellion against a new law requiring contracts -- HALT sees no justification for compounding lawyers' gold mines and consumers' woes.

#### Permit Compensation for Services Rendered by Paralegals at a Reasonable Paralegal Rate

Whenever a paralegal does the work, whether on ordinary or extraordinary tasks or on probate or nonprobate property, the client should be billed at the paralegal's rate. As we noted in our January statement, because probate is so routine, the vast majority of

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<sup>6</sup> Memorandum 88-12 at 5.

California attorneys already delegate probate work to paralegals. When this happens, the savings should be passed on to consumers.

In fact, we have an even better suggestion. We urge the Commission to recommend to the Legislature that the law be amended expressly to authorize nonlawyers to provide assistance and perform routine legal tasks associated with probate without the supervision of attorneys. Paralegals across the state are already doing this work, largely unsupervised, anyway.

The bar already has a monopoly over the provision of legal services; why allow it also to maintain this unnecessary "tying arrangement" whereby consumers are forced to pay lawyers' fees to get the services of paralegals? Opening up probate to independent paralegals would probably do more to lower legal fees than any other reform.

In conclusion, HALT — San Diego implores you to take advantage of this opportunity to make legal services more affordable and accessible. Abolish the statutory percentage fee system and replace it with a requirement that fees be reasonable and based on documented time spent and work performed. If, for some reason, you decide to recommend keeping it, however, we ask that you explain your decision and in addition, recommend the reforms we've urged above.

Thank you for your attention. I'd be happy to answer any questions you may have.

Respectfully Submitted by:

Charles Mosse  
HALT — San Diego  
13708 Nogales Dr.  
Del Mar, CA 92014  
(619) 755-7915

R E P O R T

TO: VALERIE J. MERRITT  
D. KEITH BILTER  
IRWIN D. GOLDRING  
CHARLES A. COLLIER, JR.  
JAMES D. DEVINE  
JAMES C. OPEL  
THEODORE J. CRANSTON  
JAMES V. QUILLINAN  
THE EXECUTIVE COMMITTEE IN GENERAL

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

DATE: MARCH 7, 1988

SUBJECT: LRC MEMORANDUM 88-7

---

This report is prepared on behalf of Study Team No. 1 solely by William V. Schmidt in view of shortness of time. Since the next Law Revision Commission meeting is set for March 10 and 11, 1988, I did not feel that we had sufficient time to arrange a conference call to receive the input of the entire study team.

This memo concerns the Marital Deduction Gift Statute Sections 21500-21541. To my knowledge this is not an area on which Study Team No. 1 has been previously requested to comment. The proposed amendment to Section 21525(a) seems worthwhile to me as an amendment which is consistent with the general legislative intent and an amendment which would be helpful to those administering marital deduction gifts.

Respectfully submitted,

  
William V. Schmidt

R E P O R T

**TO: VALERIE J. MERRITT  
D. KEITH BILTER  
IRWIN D. GOLDRING  
CHARLES A. COLLIER, JR.  
JAMES D. DEVINE  
JAMES C. OPEL  
THEODORE J. CRANSTON  
JAMES V. QUILLINAN  
THE EXECUTIVE COMMITTEE IN GENERAL**

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

**DATE: MARCH 7, 1988**

**SUBJECT: ASSEMBLY BILL 2779 AS AMENDED FEBRUARY 22, 1988**

---

This report is prepared on behalf of Study Team No. 1 solely by William V. Schmidt in view of shortness of time. Since the next Law Revision Commission meeting is set for March 10 and 11, 1988, I did not feel that we had sufficient time to arrange a conference call to receive the input of the entire study team.

I understand that this bill was referred to Study Team No. 1 because some of the matters contained therein have previously been studied by our Study Team. However, other matters in the bill have not previously been reviewed by our Study Team. I am uncomfortable in reporting on the latter, particularly without the benefit of other members of our Study Team, but do so for whatever help this report may provide.

Section 1 -- Civil Code Section 63. It would have been helpful if the bill had indicated one way or another the proposed change to be made in the section. Assuming that subdivision (13) was the only area of change, the change from Section 649.1 to Sections 13502 and 13503 of the Probate Code is correct.

Section 2 -- Civil Code Section 990. The only change that I could find here was in subdivision (4) of subdivision (d). The change is satisfactory.

Section 3 -- Civil Code Section 1086. Subdivision (4) of subdivision (e) has been deleted. This deletes the reference to old Probate Code Section 670 which has been repealed.

Section 4 -- Civil Code Section 1089.5. This is a new section and it seems to be satisfactory.

Section 5 -- Civil Code Section 2322. Satisfactory.

Section 6 -- Civil Code Section 2467. It is not clear to me where the proposed new section changes the existing section. The proposed change is not highlighted or in any way indicated on the face of the bill.

Section 6.5 -- Civil Code Section 2502. The change is highlighted and correct.

Section 7 -- Food and Agricultural Code Section 62708.5.  
It is not clear to me how this section amends existing law.  
I only see that the words "as defined in the Probate Code"  
have been removed from subdivision (b).

Sections 8, 9 and 10 -- Government Code Sections 26827,  
26827.4 and 26827.5. These provisions are satisfactory for  
the time being. I would like to alert the Commission and the  
staff that the Probate Administration Committee of the State  
Bar Executive Committee is currently in the process of having  
a report done by one of its subcommittees. Serving on this  
subcommittee are representatives from the Office of the  
County Clerk of Los Angeles, Orange County and Alameda  
counties. The study will encompass these sections as well as  
the general topic of filing fees in probate matters. We  
assume that the Commission and staff will be receptive to the  
results of such a study which we hope will be completed in  
the next few months.

Section 11 -- Health & Safety Code Section 7902.  
Satisfactory.

Section 12 -- Insurance Code Section 11580.3.  
Satisfactory.

Section 13 -- Probate Code Section 1143. The change in  
the reference from Probate Code Section 950 to Probate Code  
Section 11420 seems correct.

Probate Code Section 3002. The change is correct.

Section 15 -- Probate Code Section 9052. Satisfactory.

Section 15.3 -- Probate Code Section 11421.  
Satisfactory.

Section 15.7 -- Probate Code Section 13106.5. This is the subject of Memorandum 88-10 which has been expanded by a First and Second Supplement. The First and Second Supplements are being reported on concurrently with this report. The staff has proposed changes to this new section and we expect that the Commission may very well adopt some of those changes. Hopefully, those changes will be in time to be included in this bill.

Sections 16, 17 and 18 all expand certain sections of Part 1, Division 8 pertaining to the collection or transfer of small estates without administration by adding to those sections that they do not permit the enforcement of a claim that is barred under Part 4 (commencing with Section 9000 of Division 7). These proposed changes are satisfactory.

Section 19 -- Probate Code Section 15401. It is not clear to me where this proposed new section amends or modifies the existing section.

Section 20 -- Probate Code Section 21520. The only change that I see is the inclusion of the word "tax" after the words "federal gift" in subdivision (a). This change is satisfactory.

Section 21 -- Probate Code Section 21521. Satisfactory.

Section 22 -- Welfare and Institution Code Section 6254. Satisfactory.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wm V Schmidt".

William V. Schmidt

R E P O R T

**TO:** VALERIE J. MERRITT  
D. KEITH BILTER  
IRWIN D. GOLDRING  
CHARLES A. COLLIER, JR.  
JAMES D. DEVINE  
JAMES C. OPEL  
THEODORE J. CRANSTON  
JAMES V. QUILLINAN  
THE EXECUTIVE COMMITTEE IN GENERAL

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

**DATE:** MARCH 7, 1988

**SUBJECT:** FIRST SUPPLEMENT TO LRC MEMORANDUM 88-8

---

This report is prepared on behalf of Study Team No. 1 solely by William V. Schmidt in view of shortness of time. Since the next Law Revision Commission meeting is set for March 10 and 11, 1988, I did not feel that we had sufficient time to arrange a conference call to receive the input of the entire study team.

The matter of priority for appointment as administrator CTA first came to our attention in the First Supplement to Memorandum 88-2. The proposed revision there would strike out the concept that a person who takes under the will has priority over one who does not and seemed to introduce the concept that persons taking the greatest share have the highest priority. In our report dated January 8, 1988, our team expressed great concern over this proposed revision.

Later, in Memorandum 88-8, the staff changed the language to Section 8441 to a concept which is satisfactory to our team. The concept of a person who takes under a will having priority of one who does not has still been retained but the new section would allow the court in its discretion to give priority to a person who does not take under the will if that person will take a substantial portion of the estate and the priority appears otherwise appropriate under the circumstances.

Turning our attention then to the First Supplement to Memorandum 88-8, we believe that the letter of Larry R. Cox of Bakersfield tends to support the Commission's current approach which we support.

A good portion of the remainder of the First Supplement to 88-8 involves litigation involving a decedent. This is not a matter which, to my knowledge, has previously been reviewed by Study Team No. 1 and our team does not have sufficient time to collectively review it. I prefer not to comment on it by myself as it is not a matter with which I am familiar.

Respectfully submitted,



William V. Schmidt

WVS/ds

Minutes  
March 10-11, 1988

EXHIBIT 6  
ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA

RECEIVED

MAR 8 - 1988

VALERIE J. MERRITT

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(415) 561-8200

March 7, 1988

FEDERAL EXPRESS

Valerie J. Merritt, Esq.  
KINDEL & ANDERSON  
555 South Flower Street  
Los Angeles, CA 90071

Re: Assembly Bill 2841 (Study Team No. 2)

Dear Valerie:

Team No. 2 is responsible for a review of pages 157 through 180 of A.B. 2841. Our comments are as follows:

1. Page 166, line 15: There is a "\$" in the line that should be omitted.

2. Page 166, Line 28: The word "that" should be deleted and the comma which precedes section 7604 should be moved to follow the section number so that the line reads as follows:

"to the dollar limitation specified  
in section 7604, has."

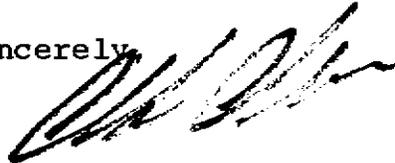
3. Page 176, Line 11: The fifth word in that line should read: "set". There is an obvious typographical error in the Bill.

4. Page 179, Line 33: It is proposed that section 17208 of the Probate Code be repealed. New Section 1003 (page 36 of the Bill) re-enacts the provision, making it applicable to proceedings beyond trust proceedings. In old Section 17208, Sections 372-373.5 of the Code of Civil Procedure are negated; this is not in new Section 1003 and the Bill does not appear to repeal Sections 372-373.5. Is this an oversight?

Mr. John H. DeMouilly  
March 10, 1988  
Page Two

5. Page 29, line 8: The word "guardian" is misspelled.
6. Page 29, line 39: The word "administered" is misspelled.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: D. Keith Bilter, Esq.  
James Quillinan, Esq..  
James Devine, Esq.  
Valerie Merritt, Esq.  
James Opel, Esq.  
Irwin Goldring, Esq.

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**



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March 10, 1988

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DIANE C. YU, *Oakland*

Mr. John H. DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94303-4739

Re: AB 2841

Dear John:

Members of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, are submitting individual comments of a technical nature on various portions of AB 2841. A number of these have already been received and are included in supplements to Memo 88-8.

The following are my technical comments on pages 1 through 15 and 24 through 33 of the Bill. These comments are personal to me and have not been reviewed by the Executive Committee.

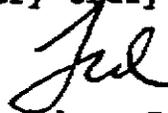
They are as follows:

1. Page 6, lines 14-15: I do not understand the reason for the reference to "order notice of settlement of supplementary accounts," since I believe the court has power in a number of situations to order shortened or additional notice of any number of different types of petitions, accounts, etc.
2. Page 6, line 16: The letter "s" should be added to the word "representative."
3. Page 11, line 8: There is a punctuation error following the word "personally."
4. Page 13, line 2: The phrase "of an executor or administrator" for consistency should be replaced with the term "personal representative" which is defined in Section 58(a) to include persons who perform a like function in other jurisdictions.

Ms. Valerie J. Merritt, Esq.  
March 7, 1988  
Page 2

If you have any questions concerning the suggestions above,  
please call.

Very truly yours,



Theodore J. Cranston  
for  
GRAY, CARY, AMES & FRYE

TJC:gm

cc: Charles A. Collier, Jr., Esq.  
James D. Devine, Esq.  
James C. Opel, Esq.  
James Quillinan, Esq.  
Irwin D. Goldring, Esq.  
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March 10, 1988

BEVERLY HILLS BAR ASSOCIATION  
PROBATE, TRUST, & ESTATE PLANNING SECTION  
SUGGESTED AMENDMENTS TO AB 2841

(References are to bill as introduced January 16, 1988)

§ 8121. Publication of Notice (Page 83, lines 19-23)

(a) ~~Notice shall be published for at least 10 days.~~ Publication of the notice shall begin at least 15 days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.

BHBA Comment.

i. It has always been unclear what is meant by:

"Notice shall be published for at least 10 days."

when contrasted with the sentence that follows, allowing only five days to intervene between first and last publication. The legal newspapers in Los Angeles have determined that it means publication should begin 10 [or 15] days before the hearing date. Thus, we suggest the underlined language.

ii. In addition, we note that in §8110, notice is to be mailed 15 days before the hearing, your 1-20-87 original draft of this section calls for publication for 15 days, and the present §333 effective 7-1-88 calls for 15 days. Therefore, we assume it was an oversight to revert to 10 days in AB 2841 as introduced.

BEVERLY HILLS BAR ASSOCIATION  
PROBATE, TRUST, & ESTATE PLANNING SECTION  
SUGGESTED AMENDMENTS TO AB 2841

(References are to bill as introduced January 16, 1988)

Notice of Death: No Republication For Reissued Letters

~~8125.--Contents-of-subsequent-published-or-posted-notice.--(Page 84, lines 35-38)~~

~~Notwithstanding Section 8100, after the notice of hearing is published and an affidavit filed, any subsequent publication of the notice may omit the information for creditors and contingent creditors.~~

BHBA Comment.

When the already-appointed personal representative of an estate dies, resigns, or is removed, and another person petitions to be successor representative, or when someone petitions for admission of another will or codicil after letters have already been issued to a personal representative, present law requires republication of the notice of death and administration of the estate, leaving out the notice to creditors. However, persons interested in the estate have either already received mailed notice of the proceedings, or have filed a request for special notice in the proceedings.

If anyone is seeking to admit another testamentary document or to change the personal representative, notice of the new petition will be mailed directly to the parties affected by that new petition. Section 8522(b) of AB 2841 calls for only "service of notice on interested parties", which would seem to remove the necessity of republication. In any event, even without the notice to creditors, republication is redundant and is an unnecessary expense to the estate.

Typographical errors

§8004 (Page 79, line 21)

(a) If appointment of the personal ~~representataive~~ representative is contested, the ~~seunds~~ grounds of opposition may include . . . .

Study L-3010



California Bankers Association  
Established 1891

March 7, 1988

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Suite D-2  
4000 Middlefield Road  
Palo Alto, California 94303-4739

**Re: Trustee Fees**

Dear Mr. DeMouilly:

The Trust State Governmental Affairs Committee of the California Bankers Association has received a copy of a letter from Assemblyman Elihu Harris to the Commission transmitting concerns that the Assemblyman apparently still has regarding trust industry practices.

We disagree with the factual premises of several of the assertions made by Mr. Harris. The following is a roughly sequential response to certain of the statements in Mr. Harris' letter.

1. The subject matter of the San Diego Union article (which we note is at this point over a year old), attached to Mr. Harris' letter does not illustrate any problem reasonably related to the reason behind the 1982 legislation (AB 3612) referenced in the first paragraph of his letter. Mrs. Hinman resolved her fee dispute with her then current trustee by asking that trustee to resign in favor of another corporate trustee, which in fact occurred. The solution to Mrs. Hinman's concern illustrates the method by which beneficiary disputes are frequently handled by corporate trustees: Voluntary agreement.
2. If a request is to be made to the California Law Revision Commission to explore the relationships between trustees and beneficiaries, then it is appropriate to have the scope of the inquiry reach all trustees and not merely "bank trustee departments". It strikes us as inherently unfair that corporate trustees be discriminated against by being the target of a vague and unstructured investigation. For instance, while the terms "consumer" may have some meaning when used in connection with the individual initially establishing the trust relationship, under the California

Mr. John DeMouly  
March 4, 1988  
Page 2

Trust Law, the term "beneficiary" is clearly defined in Probate Code Section 24, and nowhere is the term "consumer" used. What class of individuals is intended to be included by use of the term consumer? We also question the significance of the comment that some beneficiaries have chosen not to be represented by legal counsel. Such beneficiaries are neither compelled to retain counsel nor are they prohibited from retaining counsel. In addition, the Bankers are gravely concerned about the characterization of trust estates of under \$1,000,000 as being "small". The experience of the California Bankers Association with its member trust banks is that there is no consensus of what constitutes "small" trust estates. Indeed, at least one major corporate trustee markets trust services for accounts of \$50,000 in size. We also question use of the term "disproportionate" with respect to fees, regardless of the size of a trust estate. An appropriate fee for any trust is of necessity a function of the trustee's responsibilities and risks incurred under the governing agreement, the nature and complexities of the trust assets, and the needs of the beneficiaries.

3. We would like to respond to what amounts to an accusation that corporate trustees refuse to act as trustees of smaller trust estates. In examining what trust business should be accepted, corporate trustees should not accept accounts believed at the outset to be unprofitable. To do otherwise is to violate the trust and confidence imposed on the management of trust institutions by their boards of directors, and ultimately, their shareholders. Moreover, because it is widely known that the profitability of corporate trustees has been marginal at best, operating any unprofitable business (whether the account is, relatively speaking, small or large), is simply irresponsible.

4. Most trusts provide a mechanism for the removal of a trustee and the appointment of a successor, which may or may not call for court intervention. In the absence of such mandatory guidance, the trustee is frequently compelled to seek court assistance as a part of the process of having an account transferred from one trustee to another. To illustrate the point we offer the following hypothetical fact situation. An individual creates a trust and does not provide for the qualifications or identity of a successor trustee. Beneficiary/spouse of a subsequent marriage wants "X" to serve. Beneficiary/children of a prior marriage want "Y" to serve. The trustee is obligated under Probate Code

Section 16003 to deal impartially with the beneficiaries. Consequently, what choice other than seeking court intervention would satisfy that duty? Indeed, in general the intervention of the court has long been intended to provide continuity and order to the administration of trusts for the purpose of protecting the interests of all trust beneficiaries.

5. We take exception the statement that "a substantial number of trust beneficiaries" are "unaware of fee increases which would give them cause to complain". Most, if not all, corporate trustees provide prior written notice of fee increases. In addition, trust beneficiaries receive regular statements which disclose fees charged. Concerning Mr. Harris' comments as to the reasons for which a beneficiary does not seek the advice of an attorney, we do not feel it is appropriate for the California Bankers Association to address the issues of the costs of legal services or the factor of the intimidation of beneficiaries by attorneys. It is said that banks have made fee increases which they represented to the Legislature would not be made. While it is true that fee increases may have been initiated in response to inflation and increased operating costs, the competitive pressures of the marketplace have kept these increases to reasonable levels and there has been no immediate explosion in fees as charged by the opponents of AB 3612. This fact is the essence of what was represented to the Legislature and the California Bankers Association has remained true to its word.

6. We do not understand why Mr. Harris has chosen to raise the issue of executor and administrator fees in the context of the discussion of trustee fees. For an objective analysis of the issues, we refer to the Law Revision Commission Staff memoranda considering the subject. Memorandum 88-12 dated 1/22/88 (Attorney fees in Probate), and Memorandum 88-13, dated 2/1/88 (Fees of Personal Representatives).

7. The "problem" referenced in the second full paragraph of the second page of Mr. Harris' letter focuses on the refusal of corporate trustees to accept appointment as executor or administrator unless an estate is a "sizable one". We are unclear as to the intended meaning of this statement. Corporate trustees evaluate each estate on its own merits in terms of size, complexity, and risk. Take a hypothetical example: A corporate fiduciary is nominated in a will to serve as an executor. While the estimated fair market value of the estate, which consists primarily of real estate, is

\$8,000,000, the institution might decline to act upon being advised that one of the properties of the estate was an abandoned dump site selected by the Environmental Protection Agency for hazardous waste clean up. The risks and complexities of administering this type of asset could well outweigh any fee considerations based on the size of the estate, and would bear careful analysis as a condition precedent to accepting the business or turning it down.

8. The California Bankers Association has been advised by Wells Fargo Bank that the example used in Mr. Harris' letter regarding Wells' probate practices is not accurate. The CBA is further advised that Wells Fargo Bank has addressed this subject in a separate letter to Mr. Harris.

9. The characterization of corporate fiduciaries' policies of determining what estates they can act in profitably as "skimming the cream" is highly inflammatory and unjustified. No negative connotation should be attached to the business decision to accept estates which are considered to be profitable and for which no unreasonable risks of liability are likely to be assumed. We do not understand the reference to the so called "Robin Hood theory". Whatever is intended by the reference to the "Robin Hood theory", we cannot accept a "compensation scheme" that adopts as its philosophical foundation the inequitable charging of larger probate estates to offset the uncompensated or undercompensated costs of administering smaller estates. Every probate estate must stand on its own and adequately compensate the personal representative for the services being performed.

10. Beneficiaries are not unprotected and have recourse to the courts on trust fees. If by "automatic protection" it is meant that statutory trustee fees would be appropriate, the California Bankers Association would oppose vigorously any such proposal.

11. With respect to the request that questionnaires be sent to bar associations for the ostensible purpose of surveying the "appropriate consumer population," it would appear that such an inquiry is unfocused and unnecessary in view of both the previous questionnaire directed to those attorneys most directly involved in, and most familiar with, the issues of trustee services and fees, as well as the questionnaire directed to corporate fiduciaries who voluntarily completed and submitted responses in good faith to the Law Revision Commission. We question the public benefit of additional

Mr. John DeMouilly  
March 4, 1988  
Page 5

surveys of a broad population which, more than likely, has little interest or familiarity with the issues.

We have formally advised Assemblyman Harris that the California Bankers Association believes that there is no problem regarding trust administration issues which require a legislative solution. The CBA has not changed its very strong belief in this regard. Nevertheless, we recognize that there is a perception that such a problem exists, as evidenced by Mr. Harris' subject January 26, 1988 letter. Accordingly, in the spirit of further promoting the interests of trust beneficiaries, the CBA has drafted a legislative proposal, a copy of which is enclosed.

Thank you for your consideration of our views on this most important area of the law. If we can supply additional information, we welcome the opportunity to meet with you.

David W. Lauer  
L. Bruce Norman  
Co-chairmen, Trust State  
Governmental Affairs Committee

David W. Lauer

cc: The Honorable Elihu Harris  
Stan Wieg

March 7, 1988

Existing: Increase in Compensation

15681 (a) existing

15681 (b) The trustee may increase its rate of percentage compensation or its stated minimum fee (hereinafter "compensation") only after compliance with the requirements of this Section.

(1) The trustee shall provide notice in the form specified in this Section in writing at least sixty days prior to the stated effective date of the increase to all beneficiaries, as defined in Section 15681(b)(4), of trusts affected by the increase.

(2) The notice shall contain the following information:

(a) The effective date of the increase.

(b) The current and the proposed compensation.

(c) The name, address and telephone number of the person or persons representing the trustee to whom questions may be addressed.

(d) A statement that if all of the beneficiaries as defined in Section 15681(b)(4) advise the trustee in writing prior to the effective date of the increase specified in the notice of their objection to the increase, no increase will be implemented until the trustee complies with Section 15681(b)(3).

(e) A statement that any beneficiary may petition the court pursuant to Section 17200 to review the increase to the trustee's compensation, and that if the petition is filed and notice is given to the trustee prior to the effective date of the increase, such increase shall not be implemented until confirmed by order of the court.

(3) If all of the beneficiaries as defined in Section 15681(b)(4) object to the proposed increase, and advise the trustee in writing prior to the effective date of the increase, the trustee shall do one of the following:

(a) Withdraw or compromise the proposed increase to compensation; or

(b) Postpone the proposed increase for a period not to exceed 30 days subsequent to the effective date of the increase to enable the beneficiaries to file a petition under Section 17200 to review the proposed increase and to serve notice on the trustee; or

(c) Resign as trustee pursuant to Section 15640. The trustee shall incur no liability to the beneficiaries by reason of the exercise of this power to resign.

(4) For purposes of this Section, the term beneficiary shall include those beneficiaries specified in Section 16062(a), subject to the limitations in Section 15800. If such beneficiary is a ward or conservatee, the notice required by Section 15681(b)(1) shall be sent to the guardian or conservator, as the case may be, of such beneficiary. If such beneficiary is a minor for whom no guardian has been appointed, notice shall be sent to the parent having legal custody of the minor. The guardian, conservator or parent of such a beneficiary shall represent the interests of the beneficiary for all purposes under this Section.

(5) If any beneficiary petitions the court under Section 17200 to review the increase prior to the effective date of the increase, such increase shall not be implemented until confirmed by order of the court.

(6) If any beneficiary petitions the court under Section 17200 subsequent to the effective date of the increase to review the increase, any determination of the court shall relate only to the prospective application of the increase to compensation.

(7) The court, in its discretion, may charge fees, costs and expenses of a proceeding under Section 17200 to review the increase in the trustee's compensation against the trust estate.

(8) This Section shall be applicable only to those trusts as defined in Section 82(a).