

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

adl
07/06/88

Time

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

Place

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

Mtg Rm: Circle Drive 2

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

July 14-15, 1988

THURSDAY, JULY 14

1. Minutes of May 5-6, 1988, Commission Meeting (sent 5/23/88)

2. Minutes of May 20, 1988, Commission Meeting (sent 5/23/88)

3. Administrative Matters

Election of Officers

Memorandum 88-53 (sent 6/27/88)

Public Relations

Memorandum 88-56 (sent 7/5/88)

Communications from Interested Persons

4. Recommended 1988 Legislation

Status of 1988 Commission Bills

Handout at Meeting

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

Memorandum 88-54 (sent 7/1/88)

AB 2841 (as amended 6/20/88) (sent 6/24/88)

5. Study L-1036/1055 - Personal Representative and Attorney Fees in Probate

General Approach

Memorandum 88-48 (sent 5/23/88)

Tentative Recommendation

Memorandum 88-43 (sent 5/23/88)
Staff Draft of Statute (attached to Memorandum)
First Supplement to Memorandum 88-43 (sent 6/1/88)
Staff Draft of Preliminary Part of Tentative Recommendation
(attached to Supplement)
Second Supplement to Memorandum 88-43 (sent 6/1/88)
Third Supplement to Memorandum 88-43 (sent 7/5/88)
Fourth Supplement to Memorandum 88-43 (sent 7/5/88)

6. Study L-1025 - Probate Code (Notice to Creditors)

Memorandum 88-49 (sent 6/24/88)
First Supplement to Memorandum 88-49 (enclosed)

7. Study L-3010 - Fees of Corporate Trustees

Memorandum 88-45 (sent 6/6/88)
First Supplement to Memorandum 88-45 (sent 7/1/88)
Second Supplement to Memorandum 88-45 (enclosed)

8. Study L-3017 - Petition for Removal of Trustee by Settlor

Memorandum 88-51 (sent 6/1/88)

9. Study L-636 - No Contest Clause

Memorandum 88-11 (sent 2/5/88; another copy sent 5/23/88)
Draft of Tentative Recommendation (attached to Memorandum)

10. Study L-621 - Confidential Relationship in Will Contests

Memorandum 88-22 (sent 5/23/88)

11. Study L-3016 - Effect of Homicide

Memorandum 88-23 (sent 5/23/88)
First Supplement to Memorandum 88-23 (sent 6/1/88)

12. Study L-1026 - Probate Code (Payment of Debts)

Memorandum 88-50 (sent 6/22/88)

FRIDAY, JULY 15

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

Memorandum 88-44 (sent 6/1/88)

First Supplement to Memorandum 88-44 (sent 6/27/88)

14. Study F-641 - Limitations on Disposition of Community Property

Memorandum 88-47 (sent 6/6/88)

Draft of Tentative Recommendation (attached to Memorandum)

15. Study D-1000 - Creditors' Remedies—Miscellaneous Matters

Memorandum 88-46 (sent 5/23/88)

First Supplement to Memorandum 88-46 (sent 6/6/88)

16. Continuation of Matters Not Completed Thursday, July 14

MEETING SCHEDULE

July 1988

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	Hyatt at LAX 6225 W. Century Blvd. Rm: Circle Drive 2

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 1988 COMMISSION BILLS

(as of June 22, 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

BILL STATUS		AB 2779	AB 2841	ACR 42	SCR 62	
Introduced		Jan 13	Jan 26	Jan 20 [‡]	Jan 14	
First House	Policy Committee	Mar 2	Mar 2	4/9/87	Mar 7	
	Fiscal Committee	****	Mar 23	5/7/87	Mar 16	
	Passed House	Mar 10	Apr 4	5/14/87	Mar 24	
Second House	Policy Committee	Apr 19	June 21	Mar 7	May 18	
	Fiscal Committee	****		Mar 16	June 22	
	Passed House	May 2		Mar 24		
Concurrence		May 12		Apr 4		
Governor	Received	May 16		****		
	Approved	May 24		****		
Chaptered by Secretary of State	Date	May 25		Apr 6		
	Ch. #	113		Res 20		

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

****: not applicable

[]: date scheduled

STATUS OF COMMISSION STUDIES

(as of May 23, 1988)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
D-1000	Creditors' Remedies -- Miscellaneous Matters	2/88	[7/88]			
F-641	Limit Dispos Commun Prop	4/88	[7/88]			
H-111	Commercial Leases -- Assignment & Sublease	2/88	3/88			
L-1	New Probate Code	2/88				
L-612	Simultaneous Death	2/88				
L-636	No Contest Clause	1987	1/88	[7/88]		
L-1036/ 1055	Personal Rep & Atty Fees in Probate	8/87	1/88	[7/88]		
L-3005	Anti-Lapse & Other Rules	1/88	5/88			
L-3007	Ancestral Property Doctrine	2/88				
L-3010	Fees of Corporate Trustees	3/88	5/88			
L-3012	Unif Manage Instit Funds					
	1988 Annual Report					

[date] = scheduled

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JULY 14-15, 1988
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on July 14-15, 1988.

Commission:

Present:	Ann E. Stodden Chairperson Roger Arnebergh Arthur K. Marshall	Edwin K. Marzec Forrest A. Plant Vice Chairperson
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Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel Tim Paone Vaughn R. Walker
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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 (July 15)

Other Persons:

Edward V. Brennan, California Probate Referees' Association, San Diego, (July 15)

Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles

Ronald P. Denitz, Tishman West Management Corporation, Los Angeles, (July 15)

Irwin D. Goldring, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles, (July 15)

Michael Harrington, California Bankers Association, San Francisco

Susan T. House, Executive Committee, Los Angeles County Bar Association, Probate and Trust Law Section

Mark Kellman, State Bar Industrial and Development, Southern California, Los Angeles, (July 15)

David Lauer, California Bankers Association, San Francisco, (July 14)

Howard Lind, State Bar Commercial and Industrial Development, Northern California, Oakland (July 15)

Valerie J. Merritt, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles, (July 14)

Kenneth Petrusis, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Beverly Hills
G. Sinclair Price, California First Bank, San Diego, (July 14)
M. J. Pritchett, Orrick, Herrington & Sutcliffe, San Francisco (July 15)
Kay Trout, California Probate Referees' Association, Los Angeles, (July 14)
Neal Wells, State Bar Estate Planning, Trust and Probate Law Section, Irvine
Michael Whalen, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles, (July 15)

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF MAY 5-6, 1988, COMMISSION MEETING

The Commission approved the Minutes of the May 5-6, 1988, meeting, with the following changes:

At the bottom of page 4 and the top of page 5, "principal" should be changed to "principle".

APPROVAL OF MINUTES OF MAY 20, 1988, COMMISSION MEETING

The Commission approved the Minutes of the May 20, 1988, meeting, without change.

ELECTION OF OFFICERS

The Commission elected a new Chairperson and a new Vice Chairperson. Forrest A. Plant was unanimously elected as Chairperson, and Edwin K. Marzec was unanimously elected as Vice Chairperson. They will hold office for a one year term, commencing on September 1, 1988.

PUBLIC RELATIONS

The Commission considered Memorandum 88-56 relating to the request of a Sacramento radio station for cooperation in production of a public service message concerning the work of the Commission. The Commission directed the Executive Secretary to work with the station, if it will not consume an undue amount of staff time and if the Commission will have some control of the content of the message.

TRAVEL EXPENSES

The Commission considered Memorandum 88-57, relating to changes in reimbursement for travel expenses on Commission business. The Commission authorized and directed the Chairperson, the Executive Secretary, and the Assistant Executive Secretary to prepare and approve requests for lodging expenses in excess of the \$75 plus tax standard rate when the lodging expense for the place where a Commission meeting will be held will exceed the \$75 rate, and also to prepare and approve in advance other requests where justified. This decision is subject to clarification with the Department of Personnel Administration that this is an acceptable method for executing the necessary prior approval.

1988 LEGISLATIVE PROGRAM

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

- 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

BILL STATUS		AB 2779	AB 2841	ACR 42	SCR 62	
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	Approved	May 24		****		
Chaptered by Secretary of State	Date	May 25		Apr 6		
	Ch. #	113		Res 20		

STUDY D-1000 - CREDITORS' REMEDIES

The Commission considered Memorandum 88-46 and the First Supplement thereto relating to miscellaneous creditors' remedies matters. The Commission also considered a letter from Ronald H. Sargis, on behalf of the California Association of Collectors, which was distributed at the meeting. (Copy attached to these Minutes as Exhibit 1.) The Commission approved preparation and distribution of a tentative recommendation on creditors' remedies containing the revisions discussed in the memorandum and supplement. In addition, the tentative recommendation would also amend Code of Civil Procedure Section 701.680 to reduce the time for bringing an action to set aside an execution sale from six months to 60 days. The tentative recommendation should be sent to both the creditors' remedies and probate mailing lists since it deals with both areas of the law.

STUDY F-641 - LIMITATIONS ON DISPOSITION OF COMMUNITY PROPERTY

The Commission commenced, but did not complete, consideration of Memorandum 88-47 and the attached draft tentative recommendation relating to limitations on disposition of community property. The Commission made the following decisions on the matters reviewed.

Civil Code § 5110. Community property

The provision of Section 5110 imposing a one-year statute of limitations on an action by the successors of the husband of a married woman who acquired real property before May 19, 1889, and conveyed it

thereafter, should be repealed unless there is objection to deleting it. The staff should solicit the input of title companies on this matter.

Civil Code § 5125.150. Agency

This section was revised to provide that a spouse may "authorize", rather than "appoint", the other spouse to act as agent.

Civil Code § 5125.220. Person in whose name title stands must join

Subdivision (b), permitting either spouse to make a disposition of property without joinder of the other if title lists the names of the spouses in the alternative, should be limited to community personal property.

A provision might also be added to deal with the recent case of Estate of Propst, 88 Daily Journal DAR 6505 (May 20, 1988), which held that a married person may not unilaterally sever a joint tenancy bank account.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

The Commission considered Memorandum 88-44 and the First and Second Supplements thereto, relating to assignment and sublease. The Commission reviewed the staff draft attached to the memorandum as Exhibit 1, and made the following decisions:

Civil Code § 1995.020. Definitions

The definition of "lease" in subdivision (b) should be revised to provide that a lease includes a sublease "or other agreement affecting a lease." The Comment under subdivision (c) relating to a restriction outside a "lease" should be revised and relocated under subdivision (b).

The definition of "restriction on transfer" in subdivision (c) may be inadequate when dealing with transfer provisions such as advance notice and the like that are not actually "restrictions". Howard Lind agreed to provide the Commission further advice concerning this matter.

A note should be added to the statute that its application to ground leases will be reviewed upon completion of the draft.

Civil Code § 1995.030. Right to transfer absent a restriction

A note should be added to the statute that whether the statute "completely supersedes" the law governing unreasonable restraints on alienation and good faith and fair dealing will be reviewed upon completion of the draft.

Civil Code § 1995.050. Transfer restriction requiring landlord's consent

The last sentence of subdivision (a) was revised to read in substance, "The tenant may satisfy the burden of proof by showing that the landlord has not acted in a reasonable manner in stating a reasonable objection to the transfer in response to a request for consent." The paragraph in the Comment discussing commercial reasonableness was deleted.

Subdivision (b)(1) was revised to refer to freedom of contract "by" rather than "between" the parties.

Subdivision (b)(5)(A) was deleted, with the result that the new statute will apply only to leases executed after the date of the Kendall case, whether or not property subject to a lease executed before that date is transferred after that date.

The Commission also reviewed the remainder of the policy issues raised by the consultant in Exhibit 2 to Memorandum 88-44 concerning limitations on the right to assign or sublet. The Commission made the following decisions on these issues.

Express reasonableness standard. The draft should validate a lease clause that requires the landlord's consent and imposes a standard of reasonableness on the landlord.

Express sole discretion consent standard. The draft should validate a lease clause that requires the landlord's consent and expressly gives the landlord sole discretion to refuse consent. The Comment should note that other general rules governing the validity of contracts, including the adhesion contract doctrine, would apply to such a lease clause.

Absolute prohibition. The draft should validate a lease clause that absolutely prohibits leasehold transfers by the tenant. The Comment should note that other general rules governing the validity of contracts, including the adhesion contract doctrine, would apply to such a lease clause.

Increased rent clause. The Commission rejected the proposal that the landlord should be precluded from sharing in any bonus value of the lease unless an express lease clause authorizes it.

Specific standards. Specific standards or conditions for transfer included in the lease should be free from attack as unreasonable, except in connection with the lock-in remedy under Civil Code Section 1951.4. This matter is subject to further review on policy grounds.

Right to recover possession of property. The draft should validate a clause authorizing the landlord to recover possession on transfer or in lieu of transfer by the tenant.

Right to recover profit. The draft should validate a profit recovery or sharing clause for the landlord on transfer by the tenant.

The policy issues raised by the consultant in Exhibit 2 to Memorandum 88-44 concerning the lock-in remedy of Civil Code Section 1951.4, the Commission resolved as follows.

Where lease is silent on right to assign or sublet. The draft should revise Civil Code Section 1951.4 to provide that the statute may be applicable if the lease does not prohibit, rather than "if the lease permits", assignment or sublease.

Silent consent standard. The requirement that the right to assign or sublet may only be subject to reasonable limitations should be satisfied if the lease includes a silent consent standard, for which reasonableness is presumed. This provision should be drafted in such a way that its application to existing leases is coordinated with the operative date of the Kendall statute.

Specific standards for transfer. Any lease standards for transfer are presumed reasonable; the tenant has the burden of proving that a particular standard or condition is unreasonable at the time and the manner it is applied.

Changed circumstances. If a condition on transfer has become unreasonable due to a change in circumstances, the landlord may waive the condition and still take advantage of the Section 1951.4 remedy.

Landlord's option to be reasonable or unreasonable. The draft should validate a lease clause that allows the landlord to be unreasonable in withholding consent, but that requires reasonableness if the landlord elects to use the lock-in remedy. The draft should not validate a lease clause that provides the landlord the lock-in remedy but unreasonably restricts the tenant's right to assign or sublet (such a clause could be based on the ability of the landlord to waive the unreasonable restriction); the tenant's right to assign or sublet should be stated in the lease. The staff needs to review the effect of this on existing leases; this may already be covered by the statute as drafted.

Election to recover premises. The Section 1951.4 remedy should not be denied to a landlord because of the presence in a lease of a provision giving the landlord the right to recover the premises in case of a transfer. Exercise of such an election, however, would terminate the lease and preclude the landlord's use of the lock-in remedy.

Profit recapture. The Section 1951.4 remedy should not be denied to a landlord because of the presence in a lease of a provision giving the landlord the right to recapture profits in case of a transfer.

STUDY L-621 - CONFIDENTIAL RELATIONSHIP IN WILL CONTESTS

The Commission considered Memorandum 88-22 concerning confidential relationship in will contests. As recommended by staff, the Commission decided not to try to codify the confidential relationship doctrine. The Commission thought case law is satisfactory and there is no need to codify the doctrine.

STUDY L-636 - NO CONTEST CLAUSE

The Commission considered Memorandum 88-11 and the attached draft of a tentative recommendation relating to no contest clauses, together with a letter from the legislative committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (attached to these Minutes as Exhibit 2). The Commission approved the tentative recommendation to distribute for comment, subject to the following changes:

Prob. Code § 21300. Definitions

The definition of "contest" was revised to read, "'Contest' means an attack on an instrument or on a provision of an instrument."

Prob. Code § 21304. Construction of no contest clause

This section was revised to read, "In determining the intent of the transferor, a no contest clause shall be strictly construed."

Prob. Code § 21305. Declaratory relief

This section should be expanded to apply to a petition for instructions or to construe the will, in addition to a civil action for declaratory relief. If the existing law governing such petitions appears inadequate, such petitions should be expressly authorized, either in this section or elsewhere, as appears appropriate. The Comment should make clear that this section covers only a determination whether a particular action or proceeding would be an "attack" within the meaning of the particular no contest clause, and does not cover a determination on the probable merits of such an attack.

Prob. Code § 21306. Forgery or revocation

"Revocation", rather than "revocation by a subsequent instrument", should be used in subdivision (b). Language should be added to the section to make clear that notwithstanding the inclusion of forgery or revocation as grounds for a contest, a no contest clause may still apply if other grounds are also alleged.

Prob. Code § 21307. Interested preparer or witness

This section was revised to read:

A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

- (1) A person who drafted or transcribed the instrument.
- (2) A person who gave instructions concerning the contents of the instrument.
- (3) A person who acted as a witness to the instrument.

The Comment should note that giving instructions concerning the contents of an instrument does not include providing information such as birthdates, the spelling of names, and the like.

STUDY L-950 - EFFECT OF HOMICIDE

The Commission considered Memorandum 88-23 concerning effect of homicide. The Commission thought the words "felonious and intentional" in Probate Code Sections 250-257, taken from Section 2-803 of the Uniform Probate Code, should be revised to correspond more nearly to case law under the UPC. The Commission thought the words "an intentional killing without legal excuse or justification" is better language because it more nearly conforms to case law.

For example, a juvenile killer may not inherit from the victim, even though a killing by a juvenile is not "felonious." *In re Estates of Josephsons*, 297 N.W.2d 444, 448 (N.D. 1980); *Fellows, The Slayer Rule: Not Solely a Matter of Equity*, 71 Iowa L. Rev. 489, 496 n.26 (1986).

On the other hand, insanity is a legal excuse, and therefore under the proposed new language, if the killer is insane at the time of the killing, the killer is not barred from taking. *In re Estate of Brumage*, 460 So.2d 989 (Fla. App. 1984); 1 Uniform Probate Code Practice Manual, at 76 (2d ed. 1977).

Also accidental manslaughter is not intentional. Therefore the proposed new language would not change existing law that accidental manslaughter does not bar the killer from taking. 1 Uniform Probate Code Practice Manual, at 76 (2d ed. 1977). The Commission wanted to know the boundaries of this doctrine -- does intentional manslaughter bar the killer? What is the effect of a killing caused by gross negligence, or willful and wanton negligence?

Intention is not imputed under the felony murder rule to a participant in a felony if the participant was not the killer. Comment to Probate Code Section 250.

The Commission approved the staff recommendation to revise subdivision (b) of Probate Code Section 254 to refer to "a final judgment of conviction."

The Commission asked the staff to prepare a draft of the revised sections with Comments for Commission review.

STUDY L-1025 - PROBATE CODE (NOTICE TO CREDITORS)

The Commission considered Memorandum 88-49 and the First Supplement thereto, together with letters from the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association and the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (attached to these Minutes as Exhibits 3 and 4), relating to the notice of probate given to creditors.

After discussion of the various approaches to the due process problem involved, the Commission decided to draft a statute with the following features:

(1) The statute should require notice to known creditors, but should not impose a search requirement for unknown but reasonably ascertainable creditors.

(2) The statute should include a special one-year statute of limitations that runs from the date of the decedent's death, and as to

existing claims, runs from the date of enactment of the statute. The staff should research whether the statute can or should be extended to one year after the opening of probate.

(3) If the regular statute of limitations on the cause of action runs before the special statute of limitations, the regular statute controls.

(4) The late claim procedure should be adapted to accommodate an unnotified creditor, but not a creditor who has actual knowledge, whether or not notified.

(5) The personal representative should be immunized from liability to reasonably ascertainable but unnotified creditors. Liability should be on distributees of the property.

STUDY L-1026 - PROBATE CODE (PAYMENT OF DEBTS)

The Commission considered Memorandum 88-50, together with a letter from the State Bar Special Creditors' Claim Team (see Exhibit 5 to these Minutes), relating to problems concerning payment of informal claims in administration. The Commission requested the views of the Los Angeles County Bar Association and Beverly Hills Bar Association on these matters, and deferred decision until the September meeting.

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

The Commission reviewed Memorandum 88-54, reporting the current status of AB 2841. The Commission took no action on this matter.

STUDY L-3010 - FEES OF CORPORATE TRUSTEES

The Commission considered Memorandum 88-45 and the First, Second, and Third Supplements thereto, relating to fees of corporate trustees. The Commission reviewed the various statutory schemes that have been put forth over the last year and a half, and directed the staff to develop a draft statute including the following elements:

(1) Permit transfer to another corporate trustee with court approval where it is shown to be to the advantage of the trust in light of the fees charged by the existing corporate trustee. (This was designated as procedure "a" in Memorandum 88-45.)

(2) Permit transfer to another corporate trustee if the corporate trustee to be replaced and all trust beneficiaries agree. (Procedure "b" in Memorandum 88-45.) If the trust designates the successor trustee, the parties would be bound by the trust unless court approval is sought.

(3) Permit the trustee to increase fees if no objection is received after giving notice to all trust beneficiaries. (Procedure "f" in Memorandum 88-45.) This proposal might be developed along the lines of the revised draft prepared by the California Bankers Association that was attached to the First Supplement to Memorandum 88-45, with modifications as discussed below.

(4) Provide specifically by statute for court review of the reasonableness of a trustee's fees on petition by any interested person. (Procedure "g" in Memorandum 88-45.)

The Commission rejected the following approaches, at least for the time being:

(1) Permit transfer without court approval to another corporate trustee if all trust beneficiaries agree on the transfer (consent of existing corporate trustee not required). (Procedure "c" in Memorandum 88-45.)

(2) Permit transfer to another corporate trustee upon the direction of all cotrustees other than the one to be replaced (consent of beneficiaries not required). (Procedure "d" in Memorandum 88-45.)

(3) Require prior court approval of any increase in the fees charged by a trustee. (Procedure "e" in Memorandum 88-45.)

(4) Establish a statutory fee schedule for trustees based on the value of the trust estate and permit charging additional fees for extraordinary services only with court approval. (Procedure "h" in Memorandum 88-45.)

"All beneficiaries" should mean all adult beneficiaries who are receiving or are entitled to receive income under the trust or who would be entitled to receive a distribution of principal if the trust were terminated at the time consent is sought, as in the case of modification or termination of a trust.

The draft submitted by the California Bankers Association would require the trustee to give notice to beneficiaries 60 days before increasing its percentage, base, or minimum compensation. If all beneficiaries object in writing, the trustee must seek a compromise, postpone the increase so that a petition can be filed by a beneficiary to review the fee, or resign as trustee. The Commission rejected the requirement that all beneficiaries would have to object to forestall the increase and decided that the draft statute should provide that one objection is sufficient.

Where the trustee and the beneficiaries are unable to agree, the CBA draft provides a formal procedure permitting all beneficiaries to select a replacement trustee within 60 days following the stated effective date of the proposed fee increase. Selection of the successor trustee may be accomplished without court approval by a method provided in the trust or otherwise by agreement of all beneficiaries (as defined). Selection of a successor may also be accomplished by all beneficiaries with court confirmation or on petition of an interested person, where all beneficiaries cannot agree. Under the CBA draft, if a beneficiary files a petition before the stated effective date of the proposed fee increase, the increase may not be implemented until confirmed by the court. Petitions for review of the fee after its effective date would relate only to prospective fees.

The court should have discretion to assess attorney's fees, costs, and expenses of proceedings under Section 17200 against the trustee, the trust, or the objecting beneficiary.

The Commission did not consider the proposal in the revised CBA draft to limit the liability for exemplary damages to three times the amount of compensatory damages.

STUDY L-3017 - PETITION FOR REMOVAL OF TRUSTEE BY SETTLOR

The Commission considered Memorandum 88-51 relating to whether the settlor should be permitted to petition for removal of the trustee of an irrevocable trust. The Commission postponed a decision on this matter so that the bar associations and other interested persons would have more time to analyze it and consider the tax issues.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

**HEFNER
STARK &
MAROIS**
Law Offices

2710 Gateway Oaks Drive
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(916) 925-6620
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(415) 837-2131

July 8, 1988

Mr. Stan Ulrich
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

CA LAW REV. COMM'N

JUL 12 1988

RECEIVED

RE: Memorandum 88-46
Miscellaneous Creditors Remedies

Dear Mr. Ulrich:

Our office is general counsel for the California Association of Collectors and I have been requested to contact you regarding Memorandum 88-46 concerning execution sales. The suggested amendment to C.C.P. §701.680(c)(1) would specifically provide for the re-attaching of any liens against the property that were extinguished by the judgment sale in the event that the sale set aside. The proposed amendment is not objectionable, however, we believe that an additional correction to this section is necessary.

Hugh B. Bradford
(1876-1955)

S. W. Cross
(1881-1956)

Archie Hefner, Inc.*
Theodore M. Marois, Jr.
James M. Woodside
John D. Bessey
Kenneth R. Stone
Timothy D. Taron
Judy Campos McKeegan
William M. Gallagher
Robert S. Willett
Todd A. Murray
Timothy M. Cronan
Joel S. Levy
Christina J. Savage
Dennis L. Viglione
Robert P. Biegler
Peggy C. Turner
Ronald H. Sargis
Martin B. Steiner
Lisa A. Wible Wright
Jeffrey H. Graybill
Howard S. Nevins
Kevin F. Schoneman
Janice L. Thurston
Joseph E. Hustein
Michael J. Cook
Edward E. Jaszewski
Judy J. Borchers
Marla J. Winterberger
Steven R. Crooks
Daniel W. Smith
Lucy W. Burns

Of Counsel
Robert N. Stark
Robert W. Bell

*A Professional Corporation

Section 701.680 provides that a judgment debtor may commence an action within six months after the date of the execution sale to set aside such a sale if the purchaser at the sale was the judgment creditor and the sale was improper because of irregularities in the proceeding. In attempting to balance the competing interests of the creditor and debtor, it strikes the Association as being inequitable that such a long period exists to cloud the title of property obtained by the judgment creditor.

It must be remembered that an execution sale cannot occur until after a final judgment has been obtained by the creditor, a notice of levy has been served, the debtor has an opportunity to contest the levy and claim an exemption, 120 days pass from the date of notice of levy (C.C.P. §701.545), notices of the sale are posted and mailed and all other requirements for the sale of property are met. Additionally, the ultimate sale of the debtor's property, from notice through sale, is handled by the sheriff or marshal and not the creditor. This provides additional protections for a judgment debtor as well as insulates a judgment creditor who is attempting to execute upon the debtor's real property

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July 8, 1988
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property.

The concern expressed by the Association under existing law is that the six month period could allow debtors and debtors' counsel, in attempting to delay the inevitable loss of property and maximize bargaining leverage against a judgment creditor, to cloud a judgment creditor's title for the six month period during which an action could be filed to set aside the sale as well as the months or years necessary to fully litigate the issues raised in such an action.

The innocent judgment creditor who purchased the property at sale in an effort to satisfy the judgment, thereby relieving the debtor of a financial obligation, could be put in a precarious position. Because of the execution sale, the judgment creditor may be precluded from further attempts at enforcing the judgment during the many months that it would take to resolve the debtor's allegations. The judgment creditor would be unable to resell the property because of the cloud on title and his judgment would effectively not be satisfied. If it is ultimately determined that the sheriff's or marshal's office made a procedural error in conducting the sale, the judgment creditor may have lost months and years in actually enforcing a judgment against the debtor.

As part of the proposed amendments to C.C.P. §701.680, the Association proposes that the six month period for raising objections to the execution sale because of irregularities in the proceedings be decreased from the existing six month period to a period of three weeks. If a judgment debtor has a bonafide belief in the irregularity of the proceedings then that should be brought out in a timely manner during the proceedings. A judgment debtor should not be allowed to wait for six months to attack an innocent judgment creditor who believes that the judgment has been satisfied. A three week period, especially in light of the long notice period required for an execution sale, provides an adequate time in which for a debtor to review, evaluate and object to any of the execution proceedings.

An analogy between objecting to the execution proceedings can be drawn with a judgment debtor appealing (objecting) to the judgment itself. A notice of appeal must be filed by the debtor within 60 days of the notice of entry

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of judgment in Superior Court (Rule 2, California Rules of Court), within 30 days after the notice of entry of judgment in Municipal Court (Rule 122, California Rules of Court), within 30 days after the entry of judgment in the United States District Court (Rule 4(a)(1) Federal Rules of Appellate Procedure) and within 10 days after the entry of a judgment or order in the United States Bankruptcy Court (Rule 8002, Rules of Bankruptcy Procedure). The short 10 day appeal period for orders in the Bankruptcy Court also applies to any appeal that a debtor may want to take from an order approving the sale of property by the Trustee in the bankruptcy case. The holder of any lien against the property being sold in the bankruptcy case may purchase the property and credit bid the amount of such a lien against the purchase price. Even though the Bankruptcy Code is strongly oriented in favor of debtors, there is the recognition that the sale of property by the Trustee for satisfaction of creditors must achieve finality within a relatively reasonable period of time.

As set forth above, the California Association of Collectors requests that the proposed amendments to C.C.P. §701.680 be further amended to reduce the time in which a judgment debtor may commence an action to set aside an execution sale to three weeks. Such an amendment would balance the many protections and notices afforded the judgment debtor during the long period before which an execution sale may be conducted by the sheriff and the interest of a judgment creditor in having that judgment satisfied once the sale has been completed. Representatives of the California Association of Collectors, including Larry Cassidy, the chairman of our legislative counsel, will attend the July 15, 1988 hearing in Los Angeles, California.

Very truly yours,

HEFNER, STARK & MAROIS

BY


RONALD H. SARGIS

RHS/skr

cc: Mr. Robert Morris
Mr. Larry Cassidy

Minutes
July 14-15, 1988

EXHIBIT 2

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OUR FILE NO. _____

July 11, 1988

CA LAW REV. COMM'N

JUL 13 1988

RECEIVED

Nathan Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Memorandum 88-11
Study L-636
No Contest Clause

Dear Mr. Sterling:

The Legislative committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (the "Committee") has reviewed the above-referenced Memorandum and Draft of Tentative Recommendation. I have been requested to comment, on behalf of the Committee, on the provisions of proposed Sections 21305, which authorizes a prior proceeding under Section 1060 of the Code of Civil Procedure for a declaration whether a particular act by a beneficiary would be a contest within the terms of a no contest clause.

The Committee is concerned about whether the "probable cause" requirement contained in Sections 23106 and 23107 would be determined in a prior 1060 proceeding. This would apparently give a beneficiary two chances at being excluded from enforcement of the no contest clause.

The Committee recommends that Section 21307 be further expanded to include a person who was otherwise instrumental in procuring the instrument, and such a provision could be inserted in paragraph (b):

(b) As used in this section, a person who prepared or assisted in the preparation or execution of an instrument includes but is not limited to an

Nathan Sterling
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Page Two

attorney, estate planner, or other person who drafted or transcribed the instrument, a person who gave instructions concerning the contents of the instrument, a person who was otherwise instrumental in procuring the instrument, and a person who acted as a witness to the instrument.

Thank you for your consideration of these matters.

Respectfully submitted,



JAMES J. STEWART,
Member of Legislative Committee
Probate, Trust and Estate Planning
Section, Beverly Hills Bar
Association

JJS:sr

cc: Kenneth Petrulis, Chairman
Phyllis Cardoza, Executive Vice-Chair

memo

Minutes

July 14-15, 1988

EXHIBIT 3

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CA LAW REV. COMM'N

JUL 15 1988

RECEIVED

July 12, 1988

Nat Sterling
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Memorandum 88-49
Study L-1025 - Probate Code
(Notice to Creditors - Constitutional Requirements)

Dear Mr. Sterling:

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association ("the Committee") has reviewed the above referenced Memorandum and submits the following comments regarding the constitutionality of the Creditors Claim Statute raised by the case of Tulsa Professional Collection Services v. Cope, (No. 88-1961, April 19, 1988) (the "Tulsa case").

Prior to Tulsa, Creditors Claims Statutes provided a means to handle claims and determine them with some certainty, in order to promote the efficient administration of decedents' estates. Our Committee feels that these goals are still attainable within the context of the Tulsa case, which requires that reasonably ascertainable creditors be given actual notice in order to gain the benefit of the Creditors Claim Statutes.

Our Committee, therefore, favors the hybrid solution described in Memorandum 88-49, for the following reasons:

1. Concepts of fairness suggest that a search should be made for reasonably ascertainable creditors. This procedure is thus more likely to meet due process requirements.
2. The facts of the search can serve as the basis for a finding by the Court that all reasonably ascertainable creditors had been found. Based upon that finding, the Court could order the personal representative released from personal liability.

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defending the suit, and subject the representative to a 20/20 hindsight guess as to whether the creditor was reasonably ascertainable? It is the personal representative who needs protection against the slovenly creditor, not visa versa.

The foregoing is not meant to imply that a prudent personal representative will not look for creditors. To the contrary, a prudent personal representative will both look for creditors and be liberal in the giving of notice so as to avoid entangling the Decedent's estate in due process challenges.

The issue here is not the desirability of the search and the giving of notice. Rather, the issue is whether to impose upon the representative the personal expense of defending a suit against a creditor who was asleep at the switch and the possibility of having to pay the creditor out of the representative's own pocket rather than having the creditor paid from the assets on hand or distributed from the estate. Faced with this kind of an exposure, would members of the Commission volunteer to act as the personal representative of an estate for a relative or friend?

Since my July 1st letter to you, I learned that the State Bar of Ohio is currently considering a legislative response to Tulsa v. Pope similar to that proposed by the California Special Creditor's Claim Team. The differences between the Ohio proposal and the California proposal are as follows:

1. A three month creditor's claim period as opposed to California's four month;
2. A nine month statute of limitations rather than the one year statute suggested for California; and
3. A requirement that notice be given to both known and reasonably ascertainable creditors but with an absolute rather than a "good faith" exculpation from liability to any person for the failure to give notice to either known or reasonably ascertainable creditors.

The Executive Committee has not yet had an opportunity to address the acceptability of item 3 of the Ohio proposal. However, based upon the tenor of the discussion at last Saturday's meeting, it appears that the unfair imposition of possible liability upon the personal representative and the attorney is of greater concern to the Committee than the work entailed in the search for creditors or the exposure of estates to suits by creditors for breach of a duty to give notice.

A similar scheme, for example, makes probate proceedings binding on unlocated heirs-at-law. Unlocated heirs-at-law need not be given actual notice. Pursuant to PC Section 1220, notice is mailed care of the county clerk.

Under CCP Section 473, a non-noticed creditor could still move to set aside the order upon a showing of excusable neglect, mistake or fraud.

3. As set forth in the Tulsa case, the statute should state that notice need not be given, "to those with mere 'conjectural' claims."

Finally, we support the recommendation for a Statute of Limitations requiring the filing of any action based upon a claim against the decedent within one year following the date of death.

Thank you for your consideration of these matters.

Respectfully submitted,

KENNETH G. PETRULIS
Chairman, Legislative Committee
Probate, Trust and Estate Planning Section
Beverly Hills Bar Association

KGP/ar

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July 13, 1988

Mr. Nathaniel Sterling
Assistant Executive Secretary
Law Revision Commission
4000 Middlefield Road; Suite D-2
Palo Alto, CA 94303

Re: Memorandum 88-49 (as supplemented)

Dear Nat:

The Executive Committee reviewed Memorandum 88-49 and the supplement thereto. It was in general agreement with its Special Creditor's Claim Team and in particular made two unanimous recommendations:

1. Do not require either a personal representative or an attorney for a personal representative to search for and send notice to creditors who are not known; and
2. Enact a one year statute of limitations as to claims against personal representatives and distributees of a Decedent's estate.

It should be noted that most business creditors send bills monthly. Thus, a personal representative will receive at least four statements from most creditors during the creditor's claim period, actually know of the creditors, and give the creditors notice pursuant to Probate Code §9050. It is only creditors who send nothing to the Decedent for five or six months from date of death that might not be known. Even those creditors would have a full one year (the new statute of limitations) to take action with respect to their claims if they were reasonably ascertainable.

Why should a creditor who has been asleep for more than a year be permitted to sue a personal representative, cause the representative to incur the attorneys fees and other costs of

Mr. Nathaniel Sterling
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Page Three

Since my July 1st letter, I also became aware of the holding of the Ohio State Supreme Court in Palazzi v. Estate of Gardner (1987) 32 Ohio St. 3d 169, 174, 512 N.E.2d 971, 976. In Palazzi, an heir of the Decedent who had actual knowledge of his death was precluded from challenging the notice provisions relative to a Will contest on the basis that "[A] constitutional challenge to notice provisions of a state statute cannot be sustained where the party claiming a denial of procedural due process possessed actual knowledge of the facts which form the basis of the notice." While there is still concern that simple knowledge of the existence of a probate proceeding may not satisfy the constitutional requirements of Tulsa v. Pope, Palazzi v. Estate of Gardner may lend support to the viability of the Staff's opinion that creditors' having actual knowledge of an estate administration within the four month creditor claim period may be barred as effectively as a creditor which is given actual notice. Accordingly, the Staff may wish to review Palazzi and the cases cited therein.

Best regards.

Sincerely yours,

H. Neal Wells

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July 11, 1988

LA-LAW REV. COMM'N

JUL 18 1988

RECEIVED

Mr. Nathaniel Sterling
Assistant Executive Secretary
Law Revision Commission
4000 Middlefield Road; Suite D-02
Palo Alto, California 94303

Re: Clarification of the Impact of Estate of
Sturm on Sections 929 and 9154

Dear Nat:

The following is the recommendation of the Special Creditors's Claim Team appointed by the Executive Committee regarding the impact of the Sturm holding on Sections 929 and 9154:

In Estate of Sturm, the Second Appellate District of the California Court of Appeals held that the partial payment of a debt within the time limits of Section 707 verifies the existence and knowledge of the debt and justifies payment of its balance after the expiration of the fourth-month claims period. The question has arisen as to whether the holding in Sturm, or the policy considerations supporting that holding, should be codified in Sections 9154 and 929 (the substance of which will be in proposed substitute Section 11005).

1. Section 9154 allows the personal representative to elect to pay debts of the decedent without the submission of a formal claim if the following conditions are satisfied:

- (a) The creditor submits a written demand within the claim period;
- (b) The payment is made within thirty (30) days of the close of the claims period;
- (c) The debt was justly due;

- (d) The debt was paid in good faith;
- (e) The amount paid was accurate; and
- (f) The estate is solvent.

The Sturm holding raises the question as to whether a partial payment prior to the expiration of the 30 day period would be sufficient validation of the entire amount due. The team concluded that the impact of the Sturm holding on the requirements of Section 9154 is unclear and that clarification within the statutory provisions is desirable for the efficient administration of estates, including the determination of the validity of the payment of debts and the deductibility of debts for federal estate tax purposes. The Team further concluded that a primary purpose of the creditor's filing requirements is to assure that the personal representative has knowledge of the existence of the debt. Consequently, the requirement that a written demand be received by the personal representative within the four-month claims period was sufficient to satisfy this purpose, and the further requirement that the claim be paid within a specified time was unwarranted in light of the consequences to the estate and the confusion which could result in judicial responses to situations such as partial payment, installment payments, and similar circumstances.

Based on the above, the Team recommends the following amendments to Section 9154:

Notwithstanding any other provision of this part, if a creditor makes a written demand for payment within four (4) months after the date letters are first issued to a general personal representative, the personal representative may waive formal defects and elect to treat the demand as a claim that is filed and established under this part by paying the amount demanded either before or after the expiration of ~~thirty-(30)-days-after~~ the four-month period if all of the following conditions are satisfied:

(a) The debt was justly due at the date of death or as either a last illness or funeral expense of the decedent;

(b) The debt was paid in good faith;

Mr. Nathaniel Sterling
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(c) The amount paid was the true amount of the indebtedness over and above all payments and offsets;

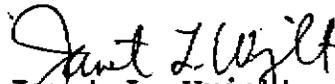
(d) The estate is solvent.

2. Section 929 provides for the allowance of certain debts in settling an account even though formal claims were not filed or approved. It is the Team's opinion that the debts subject to allowance under this section should include all debts which can be validly paid under Section 9154. The Team recommends that Section 929 (as well as proposed substitute Section 11055) be amended as follows:

If it appears that debts of the decedent have been paid without verified claims having been filed or presented and allowed and approved, and it shall be proven that such debts were validly paid pursuant to Section 9154, justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, the court in settling the account, shall allow the sums so paid.

The Team is aware of the position taken by the Executive Committee regarding Section 11005 as outlined in the letter to you from Kathryn A. Ballsun dated May 3, 1988. As is noted in the letter, the Executive Committee voted 13 to 10 for the proposition that "for payment of an informal claim to be considered justly due, the payment must be made within the creditor's claim period." It was the Team's opinion that the consideration raised by the holding in Sturm justified a reconsideration of the issue by the full Executive Committee. This occurred on July 9, 1988, at which time the Executive Committee adopted the view herein expressed.

Very truly yours,


Janet L. Wright

cc: D. Keith Bilter
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