

<p>DATE & TIME:</p> <ul style="list-style-type: none"> •November 30 (Thursday) 10:00 am - 6:00 pm •December 1 (Friday) 9:00 am - 5:00 pm 	<p>PLACE:</p> <ul style="list-style-type: none"> • San Francisco Airport Grosvenor Airport Inn 380 S. Airport Blvd. South San Francisco (415) 873-3200
<p>NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p>	

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

THURSDAY, NOVEMBER 30, 1989

[Any matters scheduled for Thursday that are not completed on Thursday will be rescheduled for the Commission's January meeting.]

1. MINUTES OF AUGUST 31-SEPTEMBER 1, 1989, COMMISSION MEETING (sent 9/21/89)

2. ADMINISTRATIVE MATTERS

Annual Report for 1989

Memorandum 89-76 (JHD) (sent 11/07/89)

Fiscal Matters

Memorandum 89-109 (JHD) (enclosed)

Communications from Interested Persons

3. STUDY L-1036/1055 - COMPENSATION OF ATTORNEY AND PERSONAL REPRESENTATIVE

Comments of HALT

Memorandum 89-83 (JHD) (sent 10/23/89)

4. STUDY L - NEW PROBATE CODE

AB 759 (Friedman) (as amended May 30, 1989) (sent 10/31/89)

Recommendation Proposing New Probate Code

Memorandum 89-100 (JHD) (sent 11/07/89)

Proposed Amendments to Bill

Memorandum 89-101 (JHD) (sent 10/31/89)
First Supplement to Memorandum 89-101 (enclosed)

Revised Comments

Memorandum 89-102 (JHD) (to be sent)

5. 1990 URGENCY PROBATE REVISIONS

Study L-1060 - Multiple-Party Accounts (cleanup for SB 985)
Memorandum 89-84 (SGU) (sent 9/21/89)

Study L-1029 - Qualified Domestic Trusts (approve to print)
Memorandum 89-99 (NS) (sent 11/14/89)

Study L-1025 - Notice to Creditors in Estate Administration
(approve to print)
Memorandum 89-93 (NS) (sent 11/14/89)

Study L-1040 - Disposition of Small Estate by Public Administrator
(approve to print)
Memorandum 89-98 (NS) (sent 11/14/89)

6. STUDY L-3024 - SPRINGING POWERS OF ATTORNEY

Approve to Print
Memorandum 89-87 (SGU) (sent 9/26/89)

7. STUDY L-3019 - UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

Approve to Print
Memorandum 89-103 (JHD) (sent 10/27/89)
First Supplement to Memorandum 89-103 (sent 10/27/89)
Second Supplement to Memorandum 89-103 (sent 11/09/89)
Memorandum 89-91 (sent 9/21/89)
First Supplement to Memorandum 89-91 (sent 9/28/89)
Second Supplement to Memorandum 89-91 (sent 10/02/89)
Third Supplement to Memorandum 89-91 (sent 10/03/89)

8. REVISIONS OF NEW PROBATE CODE (Separate Bill or Bills)

Study L-3029 - Court-Authorized Medical Treatment (approve to print)
Memorandum 89-97 (SU) (enclosed)

Study L-619 - Survival Requirement for Beneficiary of Statutory
Will (approve to print)
Memorandum 89-94 (JHD) (sent 11/14/89)

Study L-3027 - Execution or Modification of Lease Without Court
Order (approve to print)

Memorandum 89-95 (JHD) (sent 11/14/89)

Study L-3028 - Limitation Period for Action Against Surety in
Guardianship or Conservatorship Proceeding (approve to print)

Memorandum 89-96 (JHD) (sent 11/14/89)

Study L-3030 - Duration of Custodianship under Uniform Transfers to
Minors Act (approval to print)

Memorandum 89-108 (JHD) (sent 11/14/89)

Study L-3007 - In-Law Inheritance (approve to print)

Memorandum 89-89 (RJM) (sent 9/26/89)

First Supplement to Memorandum 89-89 (sent 10/3/89)

Second Supplement to Memorandum 89-89 (sent 11/14/89)

Study L-3022 - Access to Decedent's Safe Deposit Box (approve to
print)

Memorandum 89-105 (RJM) (sent 11/14/89)

Study L-1062 - Priority for Appointment as Administrator (draft of
tentative recommendation)

Memorandum 89-77 (RJM) (sent 9/8/89)

9. STUDY L-3012 - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Deferral of Recommendation

Memorandum 89-104 (SGU) (sent 11/07/89)

10. STUDY L-3023 - UNIFORM TOD SECURITY REGISTRATION ACT

Approval of Tentative Recommendation to Send Out For Comment

Memorandum 89-107 (JHD) (sent 10/30/89)

11. STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Memorandum 89-88 (RJM) (sent 9/12/89)

Draft of Tentative Recommendation (attached to memorandum)

First Supplement to Memorandum 89-88 (sent 10/4/89)

12. STUDY L-3015 - DISTRIBUTION OF PROPERTY IN ESTATE

Debts that are Contingent, Disputed, or Not Due

Memorandum 89-78 (NS) (sent 9/25/89)

Draft of Tentative Recommendation (attached to memorandum)

13. STUDY L-1030 - AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER OF
PERSONAL PROPERTY

Study L-1030 - Collection by Affidavit Despite Probate
Memorandum 89-79 (RJM) (sent 9/14/89)
First Supplement to Memorandum 89-79 (sent 9/26/89)

Study L-1030 - Summary Collection in Small Estates (Cameron letter)
Memorandum 89-33 (RJM) (sent 7/19/89; another copy sent 9/6/89)
First Supplement to Memorandum 89-33 (sent 9/8/89)

Study L-3026 - Affidavit Procedure for Substitution of Parties
Memorandum 89-86 (SGU) (sent 9/26/89)
Draft of Tentative Recommendation (attached to memorandum)

FRIDAY, DECEMBER 1, 1989

14. STUDY H-111 - ASSIGNMENT AND SUBLEASE

Residential Tenancies
Memorandum 89-80 (NS) (sent 9/26/89)
Draft of Tentative Recommendation (attached to memorandum)

Remedies of Parties
Memorandum 89-81 (NS) (sent 9/26/89)
Draft of Tentative Recommendation (attached to memorandum)

Use Restrictions
Memorandum 89-11 (NS) (sent 12/14/88; another copy sent 9/6/89)
Background Study (attached to memorandum)

15. STUDY F-1000 - FAMILY RELATIONS LAW

Scope of Study
Memorandum 89-65 (SGU) (sent 9/28/89)

16. STUDY F-641 - DISPOSITION OF COMMUNITY PROPERTY

Donative Transfers and Revocation of Consent
Memorandum 89-106 (NS) (sent 11/07/89)

Draft of Revised Tentative Recommendation
Memorandum 89-55 (NS) (sent 10/27/89)

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STATUS OF COMMISSION STUDIES

(as of November 15, 1989)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
F-641 /L-3020	Limitations on Disposition of Community Property	4/88	9/88	[12/89]		
F-1000	Family Relations Law --scope of study	10/89	[12/89]			
H-111	Assignment & Sublease --related issues	12/88	9/89	[12/89]		
L-608	Deposit of Estate Planning Documents with Attorney	6/89	7/89	[11/89]		
L-3007	In-Law Inheritance	2/88	12/88	7/89	[11/89]	
L-3009	TOD Designation in Real Property Deeds	10/89	[01/90]			
L-3012	Uniform Management of Institutional Funds Act	8/88	12/88	2/89	7/89	7/89
L-3013	Uniform Statutory Rule Against Perpetuities	5/89	[03/90]			
L-3015	Debts that are Contingent, Disputed, or Not Due	8/89	9/89	[11/89]		
L-3019	Uniform Statutory Form Power of Attorney	5/89	7/89	7/89	[11/89]	
L-3022	Access to Safe Deposit Box	6/89	7/89	9/89	[11/89]	
L-3023	Uniform TOD Security Registration Act	8/89	[11/89]			
L-3024	Springing Powers of Attorney	9/89	---	---	---	[11/89]
L-3025	Motor Vehicle and Vessel TOD	8/89	[01/90]			
L-3026	Affidavit Procedure for Substitution of Parties	9/89	[11/89]			
N-101	Admin. Adjudication --structural issues	[12/89]	[01/90]			

[date] = scheduled

MEETING SCHEDULE

November-December 1989

Nov. 30 (Thurs.) 10:00 p.m. - 6:00 p.m. San Francisco
Dec. 1 (Fri.) 9:00 a.m. - 5:00 p.m.

January 1990

Jan. 11 (Thurs.) 1:30 p.m. - 6:00 p.m. San Jose
Jan. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

February 1990

Feb. 15 (Thurs.) 1:30 p.m. - 6:00 p.m. Sacramento
Feb. 16 (Fri.) 9:00 a.m. - 2:00 p.m.

March 1990

Mar. 8 (Thurs.) 1:30 p.m. - 6:00 p.m. Santa Barbara
Mar. 9 (Fri.) 9:00 a.m. - 2:00 p.m.

April 1990

Apr. 26 (Thurs.) 1:30 p.m. - 6:00 p.m. Sacramento
Apr. 27 (Fri.) 9:00 a.m. - 2:00 p.m.

May-June 1990

May 31 (Thurs.) 1:30 p.m. - 6:00 p.m. San Francisco
June 1 (Fri.) 9:00 a.m. - 2:00 p.m.

July 1990

July 26 (Thurs.) 1:30 p.m. - 6:00 p.m. San Diego
July 27 (Fri.) 9:00 a.m. - 2:00 p.m.

August 1990 No Meeting

September 1990

Sep. 13 (Thurs.) 1:30 p.m. - 6:00 p.m. Monterey
Sep. 14 (Fri.) 9:00 a.m. - 2:00 p.m.

October 1990

Oct. 11 (Thurs.) 1:30 p.m. - 6:00 p.m. Los Angeles
Oct. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1990

Nov. 29 (Thurs.) 1:30 p.m. - 6:00 p.m. Palm Springs
Nov. 30 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1990 No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 30-DECEMBER 1, 1989
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on November 30 and December 1, 1989.

Commission:

Present:	Edwin K. Marzec Chairperson Roger Arnebergh Vice Chairperson Bion M. Gregory (Nov.30) Legislative Counsel	Arthur K. Marshall Forrest A. Plant Ann E. Stodden Vaughn R. Walker
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Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Tim Paone
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Staff:

Present:	John H. DeMouilly (Nov. 30) Nathaniel Sterling	Stan G. Ulrich
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Absent:	Robert J. Murphy III
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Consultants:

William G. Coskran, Landlord and Tenant Law (Dec. 1)

Other Persons:

Kenneth A. Feinfield, Los Angeles County Bar Association, Probate and Trust Law Section Executive Committee, Los Angeles (Nov. 30)
Jonathan Ferdon, San Francisco Public Administrator/Public Guardian, San Francisco (Nov. 30)
David E. Lich, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Legislative Committee, Beverly Hills (Nov. 30)
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View
Barry Russ, State Bar Family Law Section Executive Committee, Sherman Oaks (Dec. 1)
Harley Spitler, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Nov. 30)
Michael Whalen, Los Angeles County Bar Association, Probate and Trust Law Section Executive Committee, Los Angeles (Nov. 30)

Susan A. Wilkinson, Assembly Member Jackie Speier's Office,
Sacramento (Dec. 1)
Shirley Yawitz, California Probate Referees Association, San
Francisco

ADMINISTRATIVE MATTERS

MINUTES OF AUGUST 31-SEPTEMBER 1, 1989, MEETING

The Minutes as submitted by the staff were approved after the word "No" was inserted after the strike out type at the beginning of subdivision (b) of Section 2333 at the bottom of page 10 of the Minutes.

FISCAL MATTERS

The Commission considered Memorandum 89-109 reporting on various matters relating to the moneys available to the Commission for the current fiscal year (1989-90) and for the next fiscal year (1990-91).

One of the matters reported was that the Department of Finance has disapproved any increase in the Commission's budget for the next fiscal year (1990-91) to reflect the addition of the new topic--family relations law. The Legislature directed that this study be given the same priority as the administrative law study. The Commission has considered the resources that would be required to comply with this legislative directive and believes that it can comply only if additional funds are made available to the Commission to fund an additional staff position and to cover some additional operating expenses. With the present level of the staff, the Commission cannot move forward with two major projects on a schedule that will permit completion of the projects within a reasonable time.

Commission directed that the Chairperson send a letter to the Director of the Department of Finance indicating the Commission's disappointment with the Department of Finance decision denying the requested moneys (\$65,000) and requesting that the decision be reviewed and reversed and that the requested moneys be included in the Governor's budget. A copy of the letter to the Director of the Department of Finance should be sent to the legislative members of the Law Revision Commission and also to Assembly Member Speier. If the

moneys are not included in the Governor's budget, the staff was directed to approach the legislative members of the Law Revision Commission to have them during the legislative budget process include the \$65,000 requested for the family relations law study as a part of the Assembly and Senate additions to the budget. It was believed that Assembly Member Speier would be supportive of this addition.

It was suggested that the Chairperson might call the Director of Finance to orally support the request.

ANNUAL REPORT

The Commission considered Memorandum 89-76 and the attached draft of the Annual Report for 1989. The draft was approved for printing after it has been revised to reflect the decisions made at the meeting.

SCHEDULE FOR FUTURE MEETINGS

The Commission revised the schedule for future meetings as follows. The Commission understands there is a quorum problem for the February meeting, and requested the staff to poll the Commissioners concerning a possible change of the February meeting date to February 8 and 9.

January 1990

Jan. 11 (Thurs.) 1:30 p.m. - 6:00 p.m. Los Angeles
Jan. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

February 1990

Feb. 15 (Thurs.) 1:30 p.m. - 6:00 p.m. Sacramento
Feb. 16 (Fri.) 9:00 a.m. - 2:00 p.m.

March 1990

Mar. 8 (Thurs.) 1:30 p.m. - 6:00 p.m. Santa Barbara
Mar. 9 (Fri.) 9:00 a.m. - 2:00 p.m.

April 1990

Apr. 26 (Thurs.) 1:30 p.m. - 6:00 p.m. Sacramento
Apr. 27 (Fri.) 9:00 a.m. - 2:00 p.m.

May-June 1990

May 31 (Thurs.) 1:30 p.m. - 6:00 p.m. San Francisco
June 1 (Fri.) 9:00 a.m. - 2:00 p.m.

July 1990

July 26 (Thurs.) 1:30 p.m. - 6:00 p.m. San Diego
July 27 (Fri.) 9:00 a.m. - 2:00 p.m.

August 1990

No Meeting

September 1990

Sep. 13 (Thurs.) 1:30 p.m. - 6:00 p.m. San Jose
Sep. 14 (Fri.) 9:00 a.m. - 2:00 p.m.

October 1990

Oct. 11 (Thurs.) 1:30 p.m. - 6:00 p.m. Los Angeles
Oct. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1990

Nov. 29 (Thurs.) 1:30 p.m. - 6:00 p.m. Orange County
Nov. 30 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1990

No Meeting

STUDY F-641 - DISPOSITION OF COMMUNITY PROPERTY

The Commission considered Memorandum 89-55 and the attached draft of a revised tentative recommendation, together with letters distributed at the meeting and attached as Exhibits 1 and 2, relating to disposition of community property. Susan Wilkinson, of Assembly Member Jackie Speier's office, reported that Assembly Member Speier will be reintroducing legislation concerning some of the same matters that would be affected by the tentative recommendation. The Commission decided not to pursue this matter for the time being.

The Commission also briefly considered Memorandum 89-106, relating to donative transfers and revocation of consent. The Commission decided to defer this matter to the January meeting in order to get input from the State Bar Probate Section.

STUDY F-1000 - FAMILY RELATIONS LAW

The Commission considered Memorandum 89-65 concerning the scope of the family relations law study and heard the views of interested persons. (Due to a clerical error, two memorandums were numbered as 89-65; the memorandum considered at this meeting is dated 9/26/89.) Susan Wilkinson, of Assembly Member Jackie Speier's office, gave the

views of the proponents of Assembly Concurrent Resolution 30, which directed the Commission to study this topic. Barry Russ, liaison with the State Bar Family Law Section, expressed the Section's opposition to creation of a new family relations court. The staff reported on discussions by telephone with a number of persons involved with the Child Victim Witness Judicial Advisory Committee and ACR 30. These persons expressed the view that the Commission's role should be to deal with procedural issues, resolve inconsistencies, and reorganize the relevant statutes, not revise the substantive law on family relations.

The staff was directed to prepare a draft of a questionnaire designed to assess the views of experts and interested persons in this field for consideration at the next meeting.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

RESIDENTIAL TENANCIES

The Commission considered Memorandum 89-80, relating to possible extension of the assignment and sublease legislation to residential tenancies. The Commission decided not to recommend such an extension. In this connection, if the occasion arises to amend Civil Code Section 1995.270 (declaration of legislative policy), the reference in subdivision (a)(1) to "commercial real property leases" should be revised to refer to leases "for other than residential purposes".

REMEDIES OF PARTIES

The Commission considered Memorandum 89-81, relating to remedies of the parties for breach of an assignment or sublease clause. Commissioner Walker abstained from the Commission's decisions on this matter.

The Commission approved the draft of the tentative recommendation attached to the memorandum to distribute for comment, with the following changes. Copies of the tentative recommendation should be sent to the Commissioners at the time it is distributed for comment.

§ 1995.310. Tenant's remedies for landlord's breach. The last line of the Comment should be revised to avoid the implication that tort recovery is a remedy for breach rather than for wrongful conduct.

§ 1995.330. Application of remedies to assignee or subtenant.
The reference to a subtenant should be deleted from subdivision (a), so that its application is limited to an assignee, since there is no privity of contract between a landlord and subtenant. The Comment should be adjusted accordingly.

Subdivision (b) was revised to read, "An assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant's interest in a lease is jointly and severally liable with the tenant for contract damages under Section 1995.320. For this purpose the provisions of Section 1951.2 applicable to a lessee apply as-well also to an assignee."

§ 1995.340. Rule in Dumpor's case abolished. Subdivision (a) should be revised to refer to a subsequent transfer by the tenant as well as by an assignee or subtenant. Subdivision (b) should require that the landlord's consent or waiver be in writing.

USE RESTRICTIONS

The Commission considered Memorandum 89-11, relating to use restrictions in commercial real property tenancies. Commissioner Walker abstained from the Commission's decisions on this matter.

The Commission decided to prepare a recommendation governing use restrictions. Among the reasons expressed by Commissioners for dealing with use restrictions were that a use restriction may be used to evade limitations on assignment and sublease, and that the use restriction is the next most common type of lease provision (after transfer restrictions) that may involve a consent requirement. The draft of the recommendation should have the following features.

(1) The contractual obligation of good faith and fair dealing that applies between parties to a lease should not prevent clearly expressed restrictions on use of the premises.

(2) An absolute restriction on use that is not subject to the landlord's consent should not be subject to a requirement of commercial reasonableness by the landlord.

(3) A restriction on use that is subject to the landlord's sole and absolute discretion should not be subject to a requirement of commercial reasonableness by the landlord. Among the reasons expressed

by Commissioners for this provision were that a sole and absolute discretion clause does not raise in a tenant's mind an implication that the landlord will act reasonably, and that a landlord needs to be able to negotiate a provision that will allow the landlord to exercise the landlord's best business judgment without being subject to lawsuit and second guessing by a court on the basis that the landlord's business judgment is not "commercially reasonable".

(4) A restriction on use that is subject to the landlord's consent but that includes no express standard for giving or withholding consent should be subject to a requirement of commercial reasonableness.

(5) If the landlord terminates the lease due to the tenant's breach, and there is no restriction on use or a restriction on use that is subject to reasonableness, the tenant is entitled to have a possible reasonable change in use considered as one of the factors in determining the reasonably avoidable rental loss.

(6) If the landlord terminates the lease due to the tenant's breach, and there is an absolute restriction on use or a restriction on use that is subject to the landlord's sole and absolute discretion, the tenant is not entitled to have a possible reasonable change in use considered as one of the factors in determining the reasonably avoidable rental loss.

(7) In order for the landlord to keep the lease in effect under Civil Code Section 1951.4 after the tenant's breach and abandonment, the leasehold should be subject to a reasonable change in use unless the lease includes an absolute restriction against a change in use or is subject to the landlord's consent in the landlord's sole and absolute discretion.

STUDY L - RECOMMENDATION PROPOSING NEW PROBATE CODE

The Commission considered Memorandum 89-100 and the attached preliminary portion of the Recommendation Proposing New Probate Code.

The Recommendation will consist of the following:

Letter of Transmittal (attached to Memorandum 89-100)

Acknowledgments (being prepared by staff)

Preliminary Portion of Recommendation (attached to Memorandum 89-100)

Comments (attached to Memorandum 89-102)

Comments to Sections of Existing Probate Code Not Continued
in the New Probate Code

The letter of transmittal and preliminary portion of the recommendation were approved to print but before printing they are to be revised to reflect actions taken at the meeting.

The Commission considered Memorandum 89-101 and the First, Second, and Third Supplements thereto, relating to proposed amendments to AB 759. The Commission approved the amendments as set out in the memorandum and supplements, which also should be included in the recommendation proposing the new Probate Code. The comment to proposed Section 21321 (jurisdiction to determine whether act is within terms of no contest clause) should note that in the case of a trust, the proper court is the court that has jurisdiction over the trust.

The Commission considered Memorandum 89-102 and the attached Comments to the new Probate Code. The Comments were approved for printing as a part of the Recommendation Proposing New Probate Code. Suggestions from interested persons concerning revisions of the Comments will be considered when the printed Recommendation is available and the Commission can then consider what revisions, if any, should be made in the Comments. The revisions would be made by a report to the Legislature.

The Commission approved the printing of the Recommendation and submission of the Recommendation to the Legislature.

The staff reported that the Recommendation will be sold, rather than given away free. However, persons who assisted the Commission in preparing the new Probate Code will receive free copies.

STUDY L-619 - SURVIVAL REQUIREMENT FOR BENEFICIARY OF STATUTORY WILL

The Commission considered Memorandum 89-94 and the attached Recommendation and the First Supplement to Memorandum 89-94. The Commission approved the Recommendation for printing and submission to

the 1990 Legislature after the following paragraph was added to footnote 2 of the Recommendation:

The Commission does not recommend that the 120-hour limitation be made applicable to all written wills. When a will is drafted for a testator, the person drafting the will can include or omit a survival requirement for beneficiaries of the will, according to the direction of the testator. A 120-hour survival requirement is recommended for a statutory will because the substance of that will is fixed by statute.

The State Bar representative suggested that a definition of "survive" might be included on the face of the statutory will, but this suggestion was not adopted by the Commission. The suggestion can be taken into account when the State Bar revises the statutory will form.

STUDY L-1025 - NOTICE TO CREDITORS

The Commission considered Memorandum 89-93 relating to notice to creditors in estate administration, together with a copy of the Commission's tentative recommendation on this matter. After considerable discussion of various alternatives and the problems with each, the Commission decided to submit the recommendation to the 1990 legislative session without change. The representative of the Executive Committee of the State Bar Probate Section agreed to help find an author for the legislation and to contribute vigorous support for it.

STUDY L-1029 - QUALIFIED DOMESTIC TRUSTS

The Commission considered Memorandum 89-99, together with a letter from the State Bar (attached to these Minutes as Exhibit 3), relating to qualified domestic trusts. The Commission approved for printing and submission to the Legislature the draft curative legislation attached to the memorandum. If Congress enacts legislation that affects qualified domestic trusts, the Commission will revisit this matter.

STUDY L-1036/1055 - COMPENSATION OF ATTORNEY
AND PERSONAL REPRESENTATIVE

The Commission considered the following materials:

- (1) Memorandum 89-83.
- (2) First Supplement to Memorandum 89-83.
- (3) A letter handed out at the meeting from HALT (dated November 27, 1989) (attached to these Minutes as Exhibit 4).

(2) A letter handed out at the meeting from the Executive Committee of the Estate Planning, Trust and Probate Law Section (dated November 27, 1989) (attached to these Minutes as Exhibit 5).

The Commission made the following decisions.

Section 9864. Court review of employment and compensation

HALT expressed concern that there was no standard for court review of the attorney fee (such as a standard that the reasonableness of the fee is to be determined in light of the legal work actually performed for the estate). HALT was also concerned that it be made clear that the court could order the attorney to make a refund of excess compensation as a part of the same proceeding in which the compensation is determined to be unreasonable. To deal with these concerns and to clarify the interrelationship of the relevant provisions, Section 9864 was revised to read:

9684. (a) On Subject to Section 10590 and to subdivision (f) of this section, on petition of the personal representative or an interested person, the court may shall review the following as requested in the petition:

(1) The propriety of employment by the personal representative of any person under Section 9680 who has been or is to be paid out of funds of the estate.

(2) The reasonableness of the agreed compensation under subdivision (a) of Section 9681 of any person who has been or is to be paid out of funds of the estate.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) The person whose employment or compensation is in question.

(2) Each person listed in Section 1220.

(3) Each known heir whose interest in the estate is affected by the petition.

(4) Each known devisee whose interest in the estate is affected by the petition.

(5) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(c) On hearing the petition, the court shall approve the agreed compensation unless the court determines that the agreed compensation is unreasonable in light of the work to be performed for the estate. If the work has already been performed and the court has not previously reviewed the agreed compensation, the court shall determine whether the agreed compensation is unreasonable in light of the work actually performed for the estate. In making the determination as to the reasonableness of the compensation in the case of the attorney for the personal representative, the court shall be guided by Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation and may order the person who has received excessive compensation to make an appropriate refund.

(d) If the court determines that the attorney for the personal representative has received excessive compensation, the court shall order the attorney to make an appropriate refund. Unless the person ordered to make the refund is If the court determines that a person other than the attorney for the personal representative has received excessive compensation, the an order for the refund of the excessive compensation may be obtained only in a proceeding under Section 9684.5.

~~(d)~~ (e) Except as provided in subdivision ~~(e)~~ (f), nothing in this section limits the right to contest the account of the personal representative under Chapter 3 (commencing with Section 11000) of Part 8.

~~(e)~~ (f) The petitioner and all persons to whom notice of the hearing on the petition was given pursuant to subdivision (b) are bound by the determination of the court under this section.

The Comment to Section 9684 was revised as follows:

Comment. Section 9684 continues Section 9684 of the repealed Probate Code without change. The section is drawn in part from Section 3-721 of the Uniform Probate Code (1987).

Section 9684 permits the personal representative and the person who will provide the services to the estate (such as an attorney) to make a fee arrangement and then to obtain approval of the fee agreement prior to the performance of services. If the fee agreement is approved by the court or by the beneficiaries (either expressly or under the independent administration procedure), the agreement itself sets the rules for determining the compensation to be paid.

Section 9684 also permits an interested person to obtain review of the reasonableness of the compensation paid or to be paid to a person who has been or is to be paid out of funds of the estate. However, this review may not be obtained if the court previously has either approved the fee agreement or fixed the reasonable compensation for the services provided or to be provided. The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person also may be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, 10580(b) (notice of proposed action permitted but not required); Sections 10585.5, 10590 (effect of giving notice of proposed action).

In determining whether the compensation for the estate attorney is reasonable, the court may consider any relevant factors, including but not limited to those set out in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). See subdivision (c).

Subdivision (e) (d) avoids the need for a separate action or proceeding to recover an excess payment of compensation, thus providing a quick and efficient remedy. Where the person ordered to make the refund is the attorney for the personal representative, the court can order the refund at the same time it determines the agreed compensation is unreasonable. In other cases, the procedure in Section 9684.5 (reimbursement of excessive compensation) must be used but the hearing under Section 9684.5 can be combined with the hearing under Section 9684.

~~The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person also may be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, 10580(b) (notice of proposed action permitted but not required); Sections 10585.5, 10590 (effect of giving notice of proposed action).~~

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders), 1200-1230 (notice of hearing), 1250-1252 (request for special notice), 1260-1265 (proof of giving of notice).

Section 11001 provides an alternative procedure to the procedure provided in Section 9684. Under Section 11001, the court may review, in a contest on settlement of the final account, the propriety of employment and reasonableness of compensation of any person employed under Section 9680, including the estate attorney. But see subdivision (e) (f) of Section 9684 (binding effect of determination under Section 9684) and Sections 10585.5, 10590 (effect of giving notice of proposed action). See also Section 10900 (report of administration to show hiring and payment of persons hired under Section 9680).

If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

As to the law applicable to a proceeding commenced before January 1, 1990 1991, see Section 9686. As to the application of any amendments made after that date, see Section 3.

Background on Section 9684 of Repealed Code

Section 9684 was added by 1990 Cal. Stat. ch. AB831. For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

Section 10801. Additional compensation for extraordinary services of personal representative

The Commission considered a concern of HALT that the court might avoid the prohibition of the personal representative receiving compensation for legal services as estate attorney by awarding the compensation as "extraordinary services." In light of the HALT concern, the last paragraph of the Comment Section 10801 was revised to read:

Under the introductory clause of Section 10801, the section is subject to the provisions of this part. Thus, for example, Section 10801 is subject to Section 10802. Section 10802 provides that, if the decedent's will makes provision for the compensation of the personal representative and the court does not relieve the personal representative from those provisions, the compensation provided by the will shall be the full and only compensation for the services of the personal representative. See also the discussion in the Comment to Section 10802. Likewise, Section 10801 is subject to Section 10804. Section 10804 provides that, unless expressly authorized by the decedent's will, a personal representative who is an attorney may not receive compensation for services as estate attorney.

Section 10804. Attorney serving as personal representative

Existing law provides that an attorney who serves as personal representative and as estate attorney may not receive any compensation as estate attorney unless authorized by the will. The Commission's recommendation proposed to expand the existing rule by permitting the personal representative to receive compensation as estate attorney if authorized by court order. HALT objected to this expansion which

permitted dual compensation if authorized by a court order. After considerable discussion, the Commission decided to adopt the suggestion of HALT and not to permit compensation for dual service unless specifically authorized in the will. Accordingly, Section 10804 was revised to read:

10804. Unless expressly authorized by the decedent's will ~~or by court order~~, a personal representative who is an attorney may receive the personal representative's compensation but not compensation for services as the estate attorney.

HALT was also concerned that the personal representative might share in fees paid to the law firm with which the personal representative is associated as an attorney. However, existing California case law, which is not affected by the recommended legislation, precludes this. It was noted that the Comment to Section 10804 makes clear that existing case law on this matter is continued by the recommended legislation. The relevant portion of the Comment to Section 10804 was reviewed and approved as set out below:

The term "estate attorney" is to be given a broad meaning for the purposes of this section and includes the associates, partners, and attorneys of counsel with the law firm of the attorney retained by the personal representative as estate attorney, and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney retained by the personal representative as estate attorney, if the personal representative will share in the compensation that would be paid to the law firm. See also *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926).

Section 12205. Sanctions for delay

HALT urged retention of the existing sanction against the estate attorney where there is a delay in the administration of the estate beyond the time required by statute or court. The State Bar urged the Commission not to change its recommendation which would have eliminated this sanction.

In response to the HALT suggestion, the Commission decided to restore the sanction against the estate attorney and only to make technical conforming revisions in Section 12205 which deals with this matter. Accordingly, Section 12205 was revised to read:

12205. (a) The court may reduce the compensation of the personal representative or the attorney for the personal representative by an amount the court determines to be appropriate if the court makes all of the following determinations:

(1) If ~~the~~ The time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court, ~~the court may, on the hearing for final distribution or for an allowance on the commissions of the personal representative or on the fees of the attorney, reduce the commissions or fees by an amount the court deems appropriate, regardless of whether the commissions or fees otherwise allowable under the provisions of Sections 901 and 910 would be reasonable compensation for the services rendered, if the court determines that the~~

(2) The time taken was within the control of the personal representative or attorney whose ~~commissions or fees~~ are compensation is being reduced, and

(3) The delay was not in the best interest of the estate or interested persons.

(b) An order under this section reducing compensation may be made regardless of whether:

(1) The compensation otherwise allowable under Part 7 (commencing with Section 10800) would be reasonable compensation for the services rendered by the personal representative.

(2) The compensation otherwise paid or to be paid to the attorney for the personal representative would be considered reasonable compensation for the services rendered by the attorney.

(c) An order under this section may be made on any of the following hearings:

(1) The hearing for final distribution.

(2) The hearing for an allowance on the compensation of the personal representative.

(3) The hearing under Section 9684 to review the compensation of the attorney for the personal representative.

(d) In making a determination under this section, the court shall take into account any action taken under Section 12202 as a result of a previous delay.

(e) If the court determines that the attorney for the personal representative has received compensation in excess of the reduced amount allowed under this section, the court shall order the attorney to make an appropriate refund.

The Comment to Section 12205, revised to conform to this revision of the text of the statute, reads:

Comment. Section 12205 continues Section 12205 of the repealed Probate Code without change. This section does not apply in any proceeding commenced before January 1, 1991. See Section 900. As to the law applicable in a proceeding

commenced before January 1, 1991, see Section 900. As to the application of any amendments made after that date, see Section 3.

Background on Section 12205 of Repealed Code

Section 12205 was added by 1988 Cal. Stat. ch. 1199 § 93. The section restated the fourth paragraph of former Probate Code Section 1025.5 (repealed by 1988 Cal. Stat. ch. 1199 § 55.5), with the addition of a direction to the court to consider prior delays in setting sanctions.

Section 12205 was amended by 1990 Cal. Stat. [AB 831] ~~which made revisions in the section (1) to delete the reference to compensation of the attorney for the personal representative (this matter being covered by Section 9681), to change "commissions" to "compensation", consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative), (2) to substitute a reference to Part 7 which superseded former Section 901, and to add the clarifying words "that the delay," (3) to permit the order authorized by section 12205 to be made at a hearing under Section 9684 to review the compensation of the attorney for the personal representative, (4) to add subdivision (e), and (5) to make other nonsubstantive revisions. See also Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative, 20 Cal. L. Revision Comm'n Reports 31 (1990) and Communication from the California Law Revision Commission Concerning Assembly Bill 831, 20 Cal. L. Revision Comm'n Reports XXX (1990). For background on the provisions of this part, see the Comment to this part under the part heading.~~

Section 8404

Section 8404 is to be amended in AB 831 to read:

8404. (a) Before letters are issued, the personal representative, ~~(other than a trust company or a public administrator),~~ shall file an acknowledgment of receipt of a statement of duties and liabilities of the office of personal representative. The statement shall be in the form provided ~~in subdivision (e) or, if the Judicial Council prescribes the form of the statement, in the form~~ prescribed by the Judicial Council.

(b) The court may by local rule require the acknowledgment of receipt to include the personal representative's social security number and driver's license number, if any, provided that the court ensures their confidentiality.

~~(b) (c) The statement of duties and liabilities, whether in the form provided in subdivision (e) or prescribed by the Judicial Council, does not supersede the law on which the statement is based.~~

~~(e) The form for the statement of duties and liabilities of a personal representative is as follows:~~

~~DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE~~

~~When you have been appointed as personal representative of an estate by the court, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters. You should clearly understand the following:~~

~~1. You must manage the estate assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments. You may deposit estate funds in insured accounts in financial institutions, but you should consult with an attorney before making other investments.~~

~~2. You must keep the money and property in this estate separate from anyone else's, including your own. When you open a bank account for the estate, the account name must indicate that it is an estate account and not your personal account. Estate accounts, other than checking accounts intended for ordinary administration expenses, must earn interest. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. Securities in the estate must also be held in a name that shows they are estate property and not your personal property.~~

~~3. There are many restrictions on your authority to deal with estate property. You should not spend any of the estate's money until you have received permission from the court or if so advised by an attorney. You may reimburse yourself for official court costs paid by you to the county clerk and for the premium on your bond. You may not pay fees to your attorney, if any, or to yourself without prior order of the court. If you do not obtain the court's permission when it is required, you may be removed as personal representative, or you may have to reimburse the estate from your own personal funds, or both. You should consult with an attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.~~

~~4. You must attempt to locate and take possession of all the decedent's property to be administered in the estate. You must arrange to have a court appointed referee determine the value of the property unless this is waived by the court. (You, rather than the referee, must determine the value of certain "cash items"; an attorney can advise you as to this procedure.) Within four months after your appointment as personal representative you must file with the court an inventory and appraisal of all the assets in the estate. At the time you file the inventory and appraisal you must also file a change of ownership statement with the county recorder or assessor in each county where the decedent owned real property at the time of death, as provided in Section 480 of the California Revenue and Taxation Code.~~

~~5. You must mail notice of administration to each known creditor of the decedent within four months after your appointment as personal representative. If the decedent~~

~~received Medi-Cal assistance you must notify the State Director of Health Services within 90 days after appointment.~~

~~6. You should determine that there is appropriate and adequate insurance covering the assets and risks of the estate. Maintain the insurance in force during the entire period of the administration.~~

~~7. You must keep complete and accurate records of each financial transaction affecting the estate. You will have to prepare an account of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses. Your account will be reviewed by the court. Save your receipts because the court may ask to review them. If you do not file your accounts as required, the court will order you to do so. You may be removed as personal representative if you fail to comply.~~

~~This statement of duties and liabilities is a summary and is not a complete statement of the law. Your conduct as a personal representative is governed by the law itself and not by this summary.~~

~~If you have an attorney, you should cooperate with the attorney at all times. You and your attorney are responsible for completing the estate administration as promptly as possible. When in doubt, contact your attorney.~~

Operative Date Provisions

The amendments to AB 831 (attached as Exhibit 2 to Memorandum 89-83) were drafted on the assumption that the bill would be enacted in 1989 and become operative on January 1, 1990. This did not happen, and the bill, if enacted in the amended form, will become operative on January 1, 1991. Accordingly, in the draft of the amendments attached, "January 1, 1991" was substituted for "January 1, 1990" in the following:

- (1) Section 9686 (two places) (page 10 of Exhibit 2).
- (2) Section 10406(d) (two places) (top of page 12 of Exhibit 2).
- (3) Section 10850 (three places) (pages 17 and 18 of Exhibit 2).
- (4) Section 27 (three places) (pages 22 and 23 of Exhibit 2).

Approval for Submission to Legislature

The Commission determined that its recommendation relating to compensation of the estate attorney and personal representative (as revised above) should be submitted in amendments to Assembly Bill 831 or if that is not practical as a separate bill introduced at the 1990 legislative session.

Request to Judicial Council to Prepare New Form

The Commission decided not to recommend any change in the existing statutory forms. The staff suggested that the Judicial Council be requested to consider adopting a new form for waiver of an account, with an appropriate statement on the form of the consequences of waiving the account.

The staff was requested to look into the situation with respect to the publication of a pamphlet containing a statement of duties of a guardian or conservator.

STUDY L-1040 - PUBLIC ADMINISTRATORS

The Commission considered Memorandum 89-98 and the attached draft of the recommendation relating to disposition of small estates by the public administrator. The Commission approved the recommendation for printing and submission to the Legislature, with the addition of the Comment set out in the memorandum noting when claims are made to the county treasurer and when to the court.

STUDY L-1060 - MULTIPLE-PARTY ACCOUNTS

The Commission considered Memorandum 89-84, relating to a technical corrective change in the operative date of legislation governing multiple-party accounts. The Commission approved the revision for submission to the Legislature.

STUDY L-1062 - PRIORITY FOR APPOINTMENT AS ADMINISTRATOR

The Commission considered Memorandum 89-77 and the attached *Tentative Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator*. The Commission decided to revise proposed Section 8469 substantially as follows:

Probate Code § 8469 (added). Conservator or guardian who
does not meet requirements of Section 8461

8469. (a) For good cause, the court may allow a conservator or guardian of the estate of the decedent serving in that capacity at the time of death the priority given by Section 8461, notwithstanding that the guardian or conservator has not filed a first account, is acting as guardian or conservator for another person, or both.

(b) If the petition for administration requests the priority permitted by subdivision (a), the petitioner shall, in addition to the notice otherwise required, serve notice of the hearing by mail or personal delivery on the public administrator.

Comment. Section 8469 is new, and permits the court to allow the priority given by Section 8461 to a guardian or conservator of the estate of the decedent serving in that capacity at the time of death, notwithstanding that the guardian or conservator fails to satisfy the other requirements of Section 8461.

The Commission approved the Tentative Recommendation for printing and submission to the Legislature with the foregoing revision.

STUDY L-3007 - IN-LAW INHERITANCE

The Commission considered Memorandum 89-89, the attached *Tentative Recommendation Relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance")*, and the First and Second Supplements to Memorandum 89-89. The Commission approved the Recommendation for printing and submission to the Legislature.

STUDY L-3012 - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The Commission considered Memorandum 89-104 concerning the Uniform Management of Institutional Funds Act and approved the staff's proposal to defer introducing a bill to implement the Commission's recommendation on this subject to permit the Commission to consider policy issues raised by representatives of Stanford University and The Common Fund. Chairperson Marzec did not participate in the consideration of this matter.

STUDY L-3019 - UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

The Commission considered Memorandum 89-103, the First and Second Supplements to Memorandum 89-103, Memorandum 89-91, the First, Second, and Third Supplements to Memorandum 89-91, and a letter (attached to these Minutes as Exhibit 6), dated November 27, 1989, from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.

The Tentative Recommendation (attached to Memorandum 89-91) was approved for printing and submission to the Legislature after the following revisions were made:

Preliminary Portion of Recommendation

On page 8, line 4, of the Tentative Recommendation, the word "agent" was substituted for "principal".

§ 2475. Statutory form

The third paragraph (in CAPITAL LETTERS) in the form on page 15 of the Tentative Recommendation was replaced by the following:

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

§ 2476. Requirements for statutory form power of attorney

The reference in the third line of the Comment to subdivision (b) should be changed to refer to subdivision (a).

§ 2479. Power of attorney that becomes effective upon occurrence of specified event or contingency

A new section was added to the recommended legislation, to read:

2479. (a) A power of attorney under this chapter that limits the power to take effect upon the occurrence of a specified event or contingency, including but not limited to the incapacity of the principal, may contain a provision designating one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred.

(b) A power of attorney that contains the provision described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless whether the specified event or contingency has actually occurred.

(c) The provision described in subdivision (a) may be included in the "Special Instructions" portion of the form set out in Section 2475.

(d) Subdivisions (a) and (b) do not provide the exclusive method by which a power of attorney under this chapter may be limited to take effect upon the occurrence of a specified event or contingency.

Comment. Section 2479 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). The section is drawn from Section 5-1602 of the New York General Obligations Law. A provision described in subdivision (a) protects a third person who relies on the declaration under penalty of perjury of the person or persons named in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person, or several persons, to make this declaration.

Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for creating a "springing power" (a power of attorney that goes into effect upon the occurrence of a specified event or contingency). The principal is free to set forth in a power of attorney under this chapter any provision the principal desires to provide for the method of determining whether the specified event or contingency has occurred. For example, the principal may provide that his or her "incapacity" be determined by a court under Sections 2410-2423. See Section 2412(a). If the power of attorney provides only that it shall become effective "upon the incapacity of the principal," the determination whether the power of attorney is in effect also may be made under Sections 2410-2423.

§ 2480. Compelling third person to honor power of attorney

A new section was added to the recommended legislation, to read:

2480. If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor it within a reasonable time, the attorney in fact may compel the person to honor the power of attorney in an action for that purpose brought against the person. If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds that the person acted unreasonably in refusing to honor the power of attorney.

Comment. Section 2480 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). The section is drawn Probate Code Section 13105 (affidavit procedure for collection or transfer of personal property of small estate). The person to whom the power of attorney is presented may, for example, act reasonably in refusing to honor it where it is not absolutely clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, for example, the person may reasonably refuse to honor the power of attorney if the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney.

§ 2481. General provisions applicable to power under this chapter

A new section was added to the recommended legislation, to read:

2481. The following provisions apply to a statutory form power of attorney under this chapter:

- (a) Article 3 (commencing with Section 2400) of Chapter 2.
- (b) Article 4 (commencing with Section 2410) of Chapter 2.
- (c) Sections 2512 and 2513.

Comment. Section 2481 makes clear that the general provisions that apply to a power of attorney apply to a statutory form power of attorney under this chapter. Accordingly, the following provision apply to a power of attorney under this chapter:

Section 2400 (requirements to create durable power of attorney). The statutory form set out in Section 2475 satisfies the requirements to create a durable power of attorney unless the provision making the power of attorney durable is struck out on the form.

Section 2400.5 (proxies given by attorney in fact to exercise voting rights).

Section 2401 (effect of acts by attorney in fact during incapacity of principal).

Section 2402 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal's property).

Section 2403 (good faith reliance upon power of attorney after death or incapacity of principal).

Section 2404 (good faith reliance upon affidavit of attorney in fact as conclusive proof of the nonrevocation or nontermination of the power).

Sections 2410-2423 (court enforcement of duties of attorney in fact).

Section 2512 (protection against liability of person acting in good faith reliance upon power of attorney).

Section 2513 (application of power of attorney to all or portion of property of principal; unnecessary to describe items or parcels of property).

Renumbering of sections

Sections 2479, 2480, and 2481, of the tentative recommendation were renumbered as Sections 2482, 2483, and 2484, respectively.

Article 2. Construction of Powers

The following paragraph was added to the Comment to Article 2 (Construction of Powers) on pages 21 and 22 of the Tentative Recommendation:

Provisions of this article grant the agent authority to enforce rights of the principal "by litigation or otherwise" or to initiate litigation or to bring an action. These grants of authority do not affect the Code of Civil Procedure Section 367 requirement that an action be prosecuted in the name of the real party in interest.

§ 2490. Banking and other financial institution transactions

Subdivision (c) of Section 2490 was revised to read:

(c) Hire or close a safe deposit box or space in a vault.

This revision was considered to be a clarifying, nonsubstantive revision.

§ 2499.5. Power to modify or revoke trust

A new section was added to the recommended legislation, to read:

2499.5. A statutory form power of attorney under this chapter does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this chapter empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.

Comment. Section 2499.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 2499.5 makes clear that the agent has no power to modify or revoke a trust unless a specific provision is added to the statutory form giving the agent that power. The "Special Instructions" portion of the statutory form provides space for such a provision. The first sentence is a clarification that is consistent with the uniform act powers. See Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), which does not give the agent the power to modify or revoke a trust created by the principal.

The second sentence of Section 2499.5 recognizes the requirement of Probate Code Section 15401(b) which precludes modification or revocation of a trust by an attorney in fact unless the trust instrument expressly so permits.

STUDY L-3022 - ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

The Commission considered Memorandum 89-105 concerning access to decedent's safe deposit box. The Commission decided to revise proposed Section 331 as follows:

Prob. Code § 331 (added). Access to decedent's safe deposit box

331. ~~(a) If a decedent has a safe deposit box in a financial institution, a~~ This section applies only to a safe deposit box in a financial institution rented by the decedent in the decedent's sole name, or rented by the decedent and others where all are deceased.

(b) A person who has a key to the safe deposit box may, before letters have been issued ~~and without the need to wait 40 days after death,~~ obtain access to the safe deposit box ~~solely~~ only for the purposes specified in this section by providing the financial institution with both of the following:

(1) Proof of the decedent's death. Proof may be provided by a certified copy of the decedent's death certificate or by a written statement of death from the coroner, treating physician, or hospital or institution where decedent died.

(2) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this paragraph if the requirements of Section 13104 are satisfied.

~~(b)~~ (c) When the person seeking access has satisfied the requirements of subdivision ~~(a)~~ (b), the financial institution shall do all of the following:

(1) Keep a record of the identity of the person.

(2) Permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution, and to make an inventory of its contents.

(3) Take custody of ~~any original will~~ all wills of the decedent found in the safe deposit box.

(4) Deliver the ~~will~~ wills to the clerk of the superior court and mail or deliver a copy ~~of the will~~ to the person named in the will as executor or beneficiary as provided in Section 8200.

(5) On If the person given access is not entitled to a copy under paragraph (4), on payment of a reasonable fee by the person given access, provide the person with a photocopy of any will of the decedent found in the safe deposit box.

(6) Permit the person given access to remove any instructions for disposition of the decedent's remains if the instructions are not an integral part of the decedent's will.

~~(e)~~ ~~(d)~~ Except as provided in subdivision ~~(b)~~ ~~(c)~~, the person given access shall not remove any of the contents of the decedent's safe deposit box.

~~(d)~~ ~~(e)~~ Nothing in this section prevents collection of a decedent's property pursuant to Division 8 (commencing with Section 13000).

Comment. Section 331 is new, and permits a person who has a key to a decedent's safe deposit box to gain immediate access in order to obtain a copy of the decedent's wills, remove instructions for disposition of the decedent's remains, and inventory the contents of the box. If no other directions have been given by the decedent, the right to control the disposition of the decedent's remains devolves, in order, on the surviving spouse, children, parents, other kindred, and the public administrator. Health & Safety Code § 7100.

If the person seeking access does not have a key to the safe deposit box and is not the public administrator, the person must obtain letters from the court to gain access to the box. Concerning the authority of the public administrator, see Section 7603.

Paragraph (4) of subdivision (b) requires the financial institution to deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary "as provided in Section 8200." Section 8200 requires the custodian to deliver the will to the clerk of the superior court in the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the custodian. Although both Section 8200 and paragraph (4) of subdivision (b) require that the copy be mailed to the person named as executor, personal delivery is equivalent to mailing. Section 1215. For the county in which the estate of the decedent may be administered, see Sections 7051 (for California domiciliary, county of domicile), 7052 (nondomiciliary). See also Sections 40 ("financial institution" defined), 52 ("letters" defined), 88 ("will" includes a codicil).

The Commission approved the recommendation for printing and submission to the Legislature with the foregoing revisions.

STUDY L-3023 - UNIFORM TOD SECURITY REGISTRATION ACT

The Commission considered Memorandum 89-107 and the attached draft of a Tentative Recommendation Relating to Uniform TOD Security Registration Act. The Commission approved the Tentative Recommendation for distribution to interested persons and organizations for review and comment.

It was noted that the TOD registration permits designation of a TOD beneficiary and avoids the need to create a joint tenancy which involves the transfer of a present interest in the stock. Creating a joint tenancy hampers estate planning, whereas a TOD beneficiary can easily be changed as a part of an estate plan. The problem is that a joint tenancy is difficult to change as a part of an estate plan.

STUDY L-3024 - SPRINGING POWERS OF ATTORNEY

The Commission considered Memorandum 89-87 relating to springing powers of attorney and the attached draft of a Tentative Recommendation. The Tentative Recommendation was approved for printing and submission to the Legislature.

STUDY L-3027 - EXECUTION OF MODIFICATION OF LEASE WITHOUT COURT ORDER

The Commission considered Memorandum 89-95 and the attached Recommendation. The representative of the State Bar reported that the Executive Committee of the Estate Planning, Trust and Probate Law Section supported the concept of the Recommendation but recommended that the maximum amount be increased to \$5,000.

The Commission approved the Recommendation for printing and submission to the Legislature after increasing the maximum amount to \$5,000. This would remove everything but large commercial leases from the court order requirement.

STUDY L-3028 - LIMITATION PERIOD FOR ACTION AGAINST SURETY IN
GUARDIANSHIP OR CONSERVATORSHIP PROCEEDING

The Commission considered Memorandum 89-96 and the attached Recommendation. The Recommendation was approved for printing and submission to the Legislature.

STUDY L-3029 - COURT AUTHORIZED MEDICAL TREATMENT

The Commission considered Memorandum 89-97 and the attached draft of a Recommendation. The Recommendation was approved for printing and submission to the Legislature in the form in which it was attached to Memorandum 89-97.

STUDY L-3030 - DURATION OF CUSTODIANSHIP
UNDER UNIFORM TRANSFERS TO MINORS ACT

Action on recommendation. The Commission considered Memorandum 89-108 and the attached Recommendation and the First Supplement to Memorandum 89-108. The Executive Committee of the State Bar Section opposed the Recommendation because the Executive Committee feared that increasing the age to 25 for an irrevocable gift (as the Recommendation proposes) would be a tax trap. The Recommendation was tabled.

Additional research. The Commission asked the staff to prepare a tentative recommendation to permit property to be transferred to a person over age 21 to be retained in the custodianship until age 25 if that is the desire of the transferor for other than an irrevocable gift. See the Muhs comment in Memorandum 89-108.

The State Bar representative indicated that he would be sending a letter concerning a problem under the uniform act in relation to the duty to support the beneficiary of the custodianship. The staff will consider that letter when it makes the study on possible revisions in the California version of the uniform act.

STUDY L-3031 - ACCEPTANCE BY AGENT
OF RESPONSIBILITIES UNDER POWER OF ATTORNEY

The staff was requested to research what action by the agent will constitute an acceptance of the fiduciary responsibility under the power of attorney. The trust law should be examined in connection with this research.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary



NOV 28 1989

RECEIVED

Minutes,
November 30-December 1, 1989

Los Angeles
Women's Leadership Network

2447 Century Hill
Los Angeles, CA 90067
(213) 557-9000 Ext. 460

November 20, 1989

TO: Assemblywoman Jackie Speier and Susan Wilkinson

FROM: Dorothy Jonas

SUBJECT: Tentative Proposal by Mr. Nat Sterling and the Staff of the Law
Revision Commission Relative to Statutes on Disposition of
Community Property

Dear Jackie and Susan:

I appreciate your asking for my comments on the proposal Mr. Sterling plans to submit to the Law Revision Commission.

While I'm dismayed, after six years, to have to respond to these same recommendations once again, I do so now in the hope of saving time and energy later on. Defeating this proposal in bill form might require a lengthy campaign, and I would much prefer to use our time working on constructive solutions to real problems.

If, however, the plan *is* presented -- it will be defeated again.

This document is a rehash of a plan proposed in 1983 by the Law Revision Commission. That plan, carried in bill form as SB 1392, died in the State Senate after protests by women's organizations.

Contrary to the claim of Mr. Sterling's latest document, the California Commission on the Status of Women (I was Chair of the Commission at the time) did *not* oppose SB 1392 because we believed it did not go far enough. We objected to the bill because it was going in the *wrong* direction -- backwards.

Briefly, the Law Revision Commission's 1983 plan would have undermined the equal partnership marriage by removing major legal protections over the property rights of one spouse. Six years later, with no significant changes, the same proposal is being submitted again.

This proposal is unacceptable because it recommends granting one spouse legal carte blanche to give away or sell the other spouse's jointly-owned property without that spouse's consent, an act guaranteed to plunge marriages into a state of anarchy wherein -- to use William Reppy's prophetic words -- a "race to seize assets" becomes the norm prescribed by law.

Discussions of Christmas gifts and garage sales cannot conceal the enormity of these proposed changes. They are a revolutionary departure from currently accepted standards, and a wholesale dismissal of time-tested guidelines for conduct in marriage.

First, it's necessary to identify and appreciate the safeguards which protect all married persons under our current law.

Unless the written consent of the other spouse has first been obtained, --

1. No spouse may make a gift of community personal property (community personal property includes stocks, bonds, assets, bank accounts, credit union accounts, business partnerships, family businesses -- all of a family's assets which are not real estate);

2. No spouse may dispose of (transfer, sell) community personal property for less than valuable consideration;

3. No spouse may sell the furniture or household furnishings;

4. No spouse may sell the wearing apparel of the other spouse or the minor children.

These are not protections written for marriages in the abstract. They are down-to-earth, specific standards, put into law decades ago to *correct and prevent spousal mismanagement of community property*. Over the years, these standards have reinforced the concept of the equal partnership marriage in two ways:

1. They have protected the rights of each marital partner equally by refusing to favor the spouse who may be more active in the business world, and by encouraging *shared*, rather than *unilateral*, management of community property;

2. They have provided a necessary stability through years of changing traditions and shifting expectations for marriage and the roles of the marital partners. This has been particularly important in a society where married women's rights have *never* enjoyed a solid base of support in the law. (In years past, those rights were non-existent; at present, they are tentative and incomplete.)

By removing the unconditional requirement of CONSENT IN WRITING in each of the four transactions listed above, The Law Revision Commission proposal would destroy these standards. Specifically, Article 2, Section 5125.240 of this document decrees:

A spouse may make a gift of community personal property, or make a disposition of community personal property without a valuable consideration, WITHOUT THE WRITTEN CONSENT OF THE OTHER SPOUSE, if the gift or disposition is usual or moderate, taking into account the circumstances of the marriage. (emphasis added)

COMMENT: Possibly the words "usual or moderate" were inserted intentionally, in order to draw attention away from the serious effects of this section. People can argue forever over what is a "usual" or "moderate" gift, and if this proposal were adopted, they most certainly would.

But that's not the point.

Whether something is "usual" or "moderate" has nothing to do with what is being proposed here: a totally altered view of ownership rights in marriage. This section gives one person legal permission to give away another person's property without that person's consent.

Another change guaranteed to promote activities which are both antisocial and anti-marriage is revealed within the Comment section following the proposed new rule for the sale of household furniture: "Written consent is no longer required for a sale of community property household furnishings and clothing." (Section 5125.260)

COMMENT: In other words, the person who is enjoying a new freedom to dispose of someone else's property can make a little profit on the side. Even the family television set and a person's own clothing are no longer safe!

Finally, in a section appropriately entitled "Power of Disposition Absolute," the Law Revision Commission neatly ties together its package of opportunities for spousal mismanagement:

... each spouse has absolute power of disposition, other than testamentary, of community property of which that spouse has management and control, and may make a disposition of the property without the joinder or consent of the other spouse. (Section 5125.210)

COMMENT: Although at first glance this is simply a rewording of current law (Civil Code 5125a), certain portions of 5125a have been omitted in this version -- and what the Commission chose to omit is quite revealing. *Every one of the significant restrictions on spouses who would abuse their management and control powers has been eliminated.* The spouse who wins the "race to seize assets" will have a brand-new unilateral control over the couple's property -- and an unprecedented power to determine the couple's economic future.

The Law Revision Commission proposes wiping out those safeguards which over the years have been the surest protection (often, the *only* protection) for women and children: the unequivocal requirements for joint consent for gifts, sale and transfer of community personal property.

Then, with those legal safeguards no longer in place, the Commission provides the manager-spouse with virtually unlimited powers to sell, transfer, or give away financial assets and other personal property of the family's business.

The Law Revision Commission's proposal is a blueprint for abuse of power.

It is necessary to point out that the Law Revision Commission staff authored this document with full knowledge that women's organizations have been unable to enact into law a clearly defined Fiduciary Duty between spouses.

Their proposals are based on the continuing assumption that the legal protections women have are no longer needed -- that both spouses now have the means to protect their own interests -- that a blessed state of equitable marital finances has descended onto modern marriages.

Where has the Law Revision Commission been for the past six years?

In 1983: Women's organizations communicated with the Law Revision Commission for the express purpose of documenting the problems existing in management and control of marital property, and the need for extending the law's full protection over the property rights of each spouse equally.

In 1984: The Commission's staff was present when the same organizations testified concerning the same problems before a Senate Interim Committee:

In 1986: The same problems were thoroughly aired again, in testimony supporting Senator Lockyer's SB 1071, before the Assembly and Senate Judiciary Committees.

In 1987: The Senate Task Force on Family Equity held public hearings and issued a written exposition of California's discriminatory divorce laws, identifying the role played by those laws in the impoverishment of women and their dependent children.

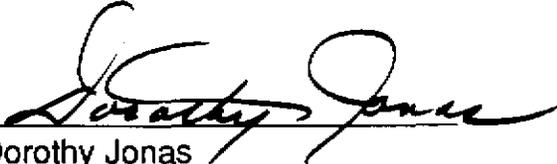
In 1989: The overwhelming need to clarify a Fiduciary Duty between spouses in marriage and throughout the dissolution process was thoroughly expounded in both the Senate and Assembly Judiciary Committees. With strong bipartisan support, both the Senate and Assembly approved legislation designed to achieve this goal.

The Law Revision Commission has repeatedly chosen to ignore the efforts of respected groups who have worked to bring equity and justice to marriage.

Their own work product summarily withdraws legal protections from an entire class of citizens, as if this were an act of the most minimal nature.

If the Law Revision Commission's scheme is successful, marriage will assume a new and bizarre status within the law. I can think of no other legal partnership where partners are asked to *forego the law's protection and waive their status of equal partner* as a price for joining the partnership!

I totally reject their 1989 proposal.


Dorothy Jonas

cc: Law Revision Commission ✓

***Dorothy Jonas
2447 Century Hill
Los Angeles, CA 90067***

DOROTHY JONAS: Resume

Founder/Coordinator, Los Angeles Women's Leadership Network*

***(a network of activist organizations who monitor and lobby on state and local legislation affecting women, comprised of American Association of University Women; Asian-Pacific Women's Network; Black Women Lawyers of L.A.; Business and Professional Women; Comision Feminil de Los Angeles; Fund for the Feminist Majority; League of Women Voters; National Council of Jewish Women; National Women's Political Caucus; National Organization for Women; Older Women's League; Women For;; Women Lawyers of L.A.; Women of Color, Inc., and YWCA - Los Angeles)**

Legislative Representative, Coalition for Family Equity, Los Angeles
(comprised of 28 statewide organizations representing over 95,000 women)

Chair, NOW National Task Force on the Rights of Women in Marriage

Chair, California Commission on the Status of Women (1984-85)

CA LAW REV. COMM'n
NOV 27 1989
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LAW OFFICES OF
McCALLUM & McCALLUM
201 H STREET, SUITE 310
SACRAMENTO, CALIFORNIA 95814-1808
TELEPHONE (916) 444-7486
IN REPLY REFER TO

November 21, 1989

Susan Wilkinson
ASSEMBLYWOMAN JACKIE SPEIR'S OFFICE
Room 4140, State Capitol
Sacramento, CA 95814

re: Law Revision Commission Tentative Proposal
F-641 - Disposition of Community Property

Dear Susan:

I have reviewed the "Revised" Tentative Recommendation of the staff of the Law Revision Commission, and was disappointed to determine that the revision was only putting into the draft the language which was enacted in SB-1071 in 1986. Otherwise, it is just a complete re-hash of the proposal submitted in 1983, and which was later submitted in bill form by Senator Lockyer until he found that all the major women's organizations were adamantly opposed.

What seriously disturbs me is that obviously no new thinking has been done on the subject, and nothing has been taken into account in this draft of the opposition letters and testimony during the interim hearings. Further Professor Carol Bruch is being quoted by Staff, notwithstanding the fact that she repudiated the 1983 draft, testified with the opposition in the interim hearings, and worked with us on SB-1071. As you know SB-1071 had the fiduciary language in it that we put in AB-2194 until the Assembly Judiciary Committee mangled the language on the last day to pass a bill out of committee.

Since the 1983 and now the "Revised" draft is based upon an invalid premise, i.e. that spouses have equal management and control, Staff have by their suggested changes taken a bad situation and made it worse! In truth and fact in most marriages there is one dominant spouse who manages and controls almost everything. The purpose for our AB-2194 legislation was to clarify what we believe is still good case law, (which I see plead in cases all the time) and

that is any spouse handling the community property of both spouses has a fiduciary duty to the non-managing spouse.

In one move, the Law Revision proposal negates the efforts of Women's organizations over the past almost 20 years to try and get an equal marital **PARTNERSHIP**. I believe that we made the clearest statement we could of that in the intent language of SB-1071, which while continued in the Revised Draft, obviously ignores its meaning:

"It is the intent of the Legislature in enacting this act to clarify and **enhance** the duties owed by one spouse to another in managing community property. . . ." (emphasis mine)

"It is the intent of this legislation to set a standard with regard to the financial and property rights of the marriage which would promote an **equal marital partnership** protecting the rights and establishing the responsibilities of both parties equally." (emphasis mine)

The proposed draft, which all the women's organizations thought was defeated once and for all in 1984, would virtually take us back to unilateral control by one spouse, and then add insult to injury, by adding the ability to "give away" community property without any consideration of the other party's wishes whatsoever!

Here we have Ivory Tower professionals writing legislation which in an ideal world might be all right. But, we do not live in that ideal world. To those of us in the trenches, we know it is just a blueprint for more control by one spouse, and in the majority of the cases that spouse will be the male spouse.

Reality is that under this proposal the dominant spouse is given unilateral control. "He" can do almost anything he pleases without any **real** control over his actions.

The statement that "both spouses own the community property in equal shares and each may protect the property from dissipation by the other" is laughable. If neither spouse has any duty to get consent from the other, each may give away community property without the other knowing about it. Months could go by without the spouse even knowing that certain items of property s/he thought was in the garage had been given away. In fact, it is possible that both parties could orally give the same item away to two different

TO: Susan Wilkinson

-3-

November 21, 1989

people. If two people own a piece of property, then both parties should make the decision whether to give it away.

The fact which the Law Revision Commission seems to completely ignore is that both parties OWN these things, but both parties do not necessarily have the management and control of them. Accordingly, the parties DO NOT HAVE EQUAL MANAGEMENT AND CONTROL!

If the Staff of the Law Revision Commission had listened to the debates on the floors of both the Assembly and the Senate on AB-2194, they would know that the major plea was for higher standards and more protections, and interestingly enough, the most dramatic arguments on its behalf were made by both male and female members of the Republican party. This overwhelming bi-partisan support in the Legislature shows the need is there.

If this draft proposal is submitted to the Legislature AGAIN, I can guarantee you that the Commission on the Status of Women, and all of the major women's organizations, including the Women, Family and Work Coalition which I represent containing over 350,000 members will oppose it strenuously!

Women want to be consulted about the management and control of their property. They want to have a voice in community decision making. They want to be an active member in the marital partnership. And, in situations where one spouse is allowed sole management by the other spouse, the managing spouse should be held to a high fiduciary duty to the non-managing spouse. This is not a hardship. It is very easy. If you don't want to worry about the possibility of breaching the fiduciary duty, you get your spouse's consent!

Very truly yours,

BARBARA EILAND MCCALLUM

BEM:s

cc: California Law Revision Commission
Attn: Nathaniel Sterling

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

NOV 28 1989

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Vice-Chair
BRUCE S. ROSS, Los Angeles

Executive Committee
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CLARK R. BYAM, Pasadena
MICHAEL G. DESMARAIS, San Jose
ROBERT J. DURHAM, JR., La Jolla
MELITTA FLECK, La Jolla
ANDREW S. GARB, Los Angeles
JOHN T. HARRIS, Gridley
LYNN P. HART, San Francisco
BEATRICE LAIDLAY-LAWSON, Los Angeles
VALERIE J. MERRITT, Los Angeles
BARBARA J. MILLER, Oakland
JAMES V. QUILLINAN, Mountain View
BRUCE S. ROSS, Los Angeles
ROBERT L. SULLIVAN, JR., Fresno
MICHAEL V. VOLLMER, Irvine



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November 27, 1989

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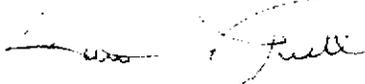
John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: TR re Misc. Revisions

Dear John:

I have enclosed a copy of Bill Schmidt's report on the TR Relating to Misc. Probate Code Revisions. The report has been reviewed by the Executive Committee and represents the position of the Section. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/h1
Encls.
cc: Valerie Merritt
Terry Ross

Irv Goldring

REPORT

TO: JAMES V. QUILLINAN
IRWIN D. GOLDRING
VALERIE J. MERRITT
STERLING L. ROSS, JR.
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT

DATE: November 15, 1989

RE: LRC MEMORANDUM -- (Tentative Recommendation
Relating to Miscellaneous Probate Code Revisions)

Study Team #1 held a conference call on September 27, 1989. Its report dated September 27, 1989 was reviewed and discussed at the Executive Committee meeting on October 6, 1989. This report therefore reflects the opinion primarily of the Executive Committee.

CONTINUATION OF EXISTING LAW Satisfactory.
(Probate Code Sec. 2)

REFERENCE TO STATUTE INCLUDES Satisfactory.
AMENDMENTS AND ADDITIONS
(Probate Code Sec. 7)

120-HOUR SURVIVAL REQUIREMENT
(Probate Code Sections 221,230,6211)

Study Team #1 expressed its concern that this would be one step in expanding the "survive by 120 hours" concept from

intestacy to testacy. The Executive Committee as a whole opposes the 120 hour limitation for all written wills.

ACCEPTANCE BY DISTRIBUTE Satisfactory
(Probate Code Sections 1206,11850)

TRANSITIONAL PROVISIONS FOR
GUARDIANSHIP-CONSERVATORSHIP LAW OF 1981
(Probate Code Sections 1480-1491)

Terry Ross of Study Team #1 states that the deletion of Probate Code Sections 1485(a) and (b) is inappropriate. This proposed deletion appears at the bottom of page 22 of the tentative recommendation. Terry states that there are still cases which were originally created under the old law of a guardianship for an incompetent that still exist today. Therefore, these provisions are still worthwhile and of assistance to the court and the fiduciary. Study Team #1 agrees with Terry and recommends that these sections not be deleted.

THIRD PERSONS ACTING IN GOOD FAITH Satisfactory.
(Probate Code Sections 1875,3074,
11750,13106.5,13203,18103,18104)

LIABILITY OF FIDUCIARY WHO SIGNS INSTRUMENT Satisfactory.
(Probate Code Sections 2110,2551,9606,9805)

LIMITATION PERIOD FOR ACTION AGAINST SURETY
IN GUARDIANSHIP OR CONSERVATORSHIP PROCEEDING Satisfactory.
(Probate Code Sec. 2333)

COURT-AUTHORIZED MEDICAL TREATMENT
FOR MINOR OR INCOMPETENT Satisfactory.
(Probate Code Sections 2357,3208)

EXECUTION, EXTENSION, RENEWAL OR MODIFICATION
OF LEASE Satisfactory.
(Probate Code Sections 2501,2555,9832,9941)

<u>EXAMINATION OF WRONGDOER</u> (Probate Code Sections 2616-2619.5)	Satisfactory.
<u>DISPOSITION OF ASSETS ON DEATH OF WARD OR CONSERVATEE</u> (Probate Code Sec. 2631)	Satisfactory.
<u>IMMUNITY OF COUNTY RECORDER</u> (Probate Code Sections 2901, 7603)	Satisfactory.
<u>NOTICE IN COMMUNITY PROPERTY PROCEEDING</u> (Probate Code Sec. 3131)	Satisfactory.
<u>DURATION OF CUSTODIANSHIP UNDER UNIFORM TRANSFERS TO MINORS ACT</u> (Probate Code Sec. 3920.5)	
<p>The Executive Committee in general opposes this proposed change because of likely adverse tax consequences.</p>	
<u>PARENT-CHILD RELATIONSHIP IN INTESTATE SUCCESSION</u> (Probate Code Sections 6408, 6408.5)	Satisfactory.
<u>PROPERTY DEPOSITED WITH COUNTY TREASURER</u> (Probate Code Sec. 7663)	Satisfactory.
<u>FRAUD IN PROCURING ORDER ADMITTING WILL TO PROBATE OR APPOINTING PERSONAL REPRESENTATIVE</u> (Probate Code Sec. 8007)	Satisfactory.
<u>STATEMENT OF DUTIES OF PERSONAL REPRESENTATIVE</u> (Probate Code Sec. 8404)	Satisfactory.
<u>LIABILITY OF PERSONAL REPRESENTATIVE FOR CLAIMS AGAINST DECEDENT</u> (Probate Code Sec. 8544)	Satisfactory.
<u>APPRAISAL OF PROPERTY SUBJECT TO OPTION</u> (Probate Code Sec. 9962)	Satisfactory.
<u>SALE OF DECEDENT'S INTEREST IN COTENANCY</u> (Probate Code Sec. 10006)	

The Executive Committee discussed this matter at its August meeting in San Francisco and voted to oppose the proposed new

Probate Code Section 10006. We continue to believe that this law is not really needed as a practical matter and could cause undesirable and unexpected problems. Some of our members seriously question whether the court would have jurisdiction to do these acts even if such written consent of the cotenant was filed.

Other members of the section did not feel that the problem expressed in Mr. Blanchard's letter was a real problem as a practical matter. Many members of the section, including Commission Barbara Miller, have had experience with sales of a fractional interest. In such situations, the judge may well inquire whether the remaining fractional interest is also available for sale on the same terms and conditions.

The potential buyer certainly has notice that only a fractional interest is being sold in the probate proceeding and most generally is in contact with the other cotenant. The potential buyer can then proceed or not proceed with the sale if he or she is satisfied that they will be able to buy the entire interest.

For these reasons, we continue to oppose this proposed change.

The Executive Committee as a whole at its October 6th meeting agreed with Study Team #1. The problem is not a

practical problem. It can already be done by existing procedures.

BROKERS' COMMISSIONS Satisfactory.
(Probate Code Sec. 10162.6)

INFORMAL DISTRIBUTION Satisfactory.
(Probate Code Sec. 12250)

QUALIFIED DOMESTIC TRUSTS
(Probate Code Sections 21524, 21526)

The Executive Committee felt that the State of California should do nothing until they know what the U.S. Congress is going to do in this regard. As of the time of its last meeting on November 11, 1989, the members of the Executive Committee were still unaware of any definite U.S. legislation. The Committee, however, is well aware that both the House and the Senate versions contain proposed changes in this area. We would like to see what happens to these proposed changes in the present U.S. legislative session before any action is taken in California.

Respectfully submitted,

STUDY TEAM #1


William V. Schmidt
Captain

AMERICANS FOR LEGAL REFORM

November 27, 1989

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

Dear Commissioners:

HALT has reviewed the staff's response to our recommendations for amendments to the Commission's probate fee reform proposal. Although we disagree with some of the staff's conclusions, we are largely pleased with the staff's responsiveness to our concerns and suggestions for refinements.

I have enclosed a recent article from *Newsday* that reports on the double-dipping problem in New York. As you can see, one suggested method for minimizing the potential for double-dipping is to require lawyer-personal representatives to keep a detailed account of their time and legal work so that interested persons can meaningfully object to excessive fee requests. In light of the staff's rejection of most of our suggestions concerning lawyer-PR's, we urge you to consider adopting a similar logging requirement.

Although no HALT representative will be able to attend your upcoming meeting, we will continue to monitor the Commission's progress and will continue to work with Assemblyman Harris on AB 831. Thank you for your consideration of our views.

Sincerely,



Deborah Chalfie
Legislative Director

LAWYERS

Dual Estate Fees Under Fire in NY

By Timothy R. Dougherty

WHILE A SPECIAL panel of the American Bar Association studies the reasons for lawyers' poor public image, lawyers in New York continue to operate under rules that invite overcharging of dead people and their heirs.

The practice is called double dipping. Lawyers who are paid a percentage of the value of an estate to act as its executor hire themselves to handle legal questions, and then charge another percentage-based fee.

Executor functions and legal functions are distinct and merit separate fees, legal experts say. But problems arise when judges allow a lawyer to perform both functions, and charge percentage-based fees without accounting for the legal work they have done.

Without vigilance, the fees can be excessive and can deplete an estate, critics of the practice say.

But things are changing. Some judges are getting tougher about double dipping and some lawyers are declining the dual job. Further, the Internal Revenue Service is challenging the deductibility of some estate-related legal fees on federal tax returns.

"It's a subject of concern" for members of the Suffolk County Bar Association Surrogate Court's Committee, said Thomas R. Hirschmann, a Huntington lawyer who is committee chairman.

For a long time, lawyers were reluctant to put a stop to double dipping because it was a way to add to their income with little work. "Let's not mince words," Hirschmann said. "For years and years, you went to pasture with this."

Although many lawyers oppose the practice as improper, double dipping still occurs because judges who can stop it haven't given it enough attention and the state Legislature, which can outlaw it, has done little more than talk about studying it.

An executor, according to state law, pays an estate's bills, files its tax returns, sells its assets and distributes the proceeds to the estate's beneficiaries. The Legislature 50 years ago laid out the formula to pay executors based on

For their part, estate lawyers handle legal work in settling wills in Surrogate Court. While some estates involve complicated legal questions that justify high fees, more typically the legal work is largely clerical.

Bar associations and judges have urged the public to learn how wills and estates are settled in Surrogate courts, but beneficiaries are often stumped by the system's arcane functions.

As a result, many beneficiaries don't object to legal fees, and, without complaints, many Surrogate Court judges don't demand detailed accountings from lawyers.

But some judges are cracking down. In Suffolk County, Surrogate Judge Ernest Signorelli last year lopped off \$7,900 from a \$15,900 fee lawyers charged a \$239,000 estate.

—Continued on Page 15



'It's not my role to enrich lawyers.'

— Suffolk County Surrogate Judge Ernest Signorelli

Lawyers' Dual Fees Questioned

—Continued from Page 5

The lawyers wanted a fee of 6.7 percent of the estate and challenged Signorelli's ruling. But when they presented documents to the judge stating that "we would guess that the amount of time expended on this estate would be 160.35 hours," Signorelli refused to change his ruling because the lawyers did not show what they did during those hours.

Signorelli's action is uncommon, say legal scholars and court watchdogs. Signorelli and Queens County's Judge Louis Laurino are among the few surrogate court judges in the state who require lawyers acting as both an estate's attorney and executor to file detailed reports about how they were hired for both jobs and how they computed fees.

But now the federal government has added focus to the problem.

In a case before the U.S. Tax Court in Washington, D.C., the Internal Revenue Service sharply reduced a deduction for legal fees on a federal tax return for an estate in Brooklyn.

The estate's attorney, Charles Bianco, had drawn the will of Joseph V. Calgano. Bianco also was executor. Calgano's estate was valued at \$460,000, and, as executor, Bianco's commission was \$17,000. He then charged the estate an additional \$28,000 to serve as its lawyer.

IRS lawyers balked. "After examining the simplicity of the estate involved," they said, "it becomes clear that the attorney could not have expended 205 hours performing purely legal duties. We see the great extent to which Bianco's duties as attorney and executor overlap." It said only \$9,200 of the \$28,000 in legal fees could be deducted.

Donald Fraser, a Brooklyn lawyer representing Bianco's interest in the tax court case, could not be reached for comment.

The IRS ruled that the \$28,000 fee was "based upon a straight percentage of the value of the gross estate and bears no relationship to the difficulty or amount of work" performed.

Hirschmann, the Huntington lawyer, said percentage-fee billing when a lawyer acts both as executor and attorney "probably is improper" because "probably you can't justify the fees."

Washington-based Americans for Legal Reform has long campaigned to outlaw double dipping and percentage-based fees.

"In effect, it is a retirement fund for lawyers," said Deborah M. Chalfie, the organization's legislative director. "Our view is that probate fees are just too darn high in light of the minimal amount of work that is involved. There needs to be wholesale revision."

Aside from that, Hirschmann said, "the sole savior here is going to be public education."

Signorelli agrees that beneficiaries need to be aware of the double-dipping issue so they can challenge it if they wish.

In 1988, Signorelli began requiring lawyers acting in both capacities to go on record that they informed clients that two fees would be charged to the estate.

Signorelli made the rules because, he said, "I quite frankly became alarmed at the frequency of attorneys wearing both hats. It's not my role to enrich lawyers." And since the rules were put in place, "Something refreshing is happening. Lawyers are waiving their [legal] fees" when they are the estate's executor and its attorney.

Kenneth Joyce, a law professor at the State University of New York at Buffalo who is director of the New York State Law Revision Commission, has urged the Legislature to bar lawyers from the dual roles, as many other states have done.

Joyce said the proposal has stalled because "it isn't seen as a big policy question." Of the 61 state senators, 34 are lawyers, and 36 of the 150-member Assembly are lawyers.

U.S. District Judge Michael A. Telesca in Rochester called the practice "an intolerable conflict of interest."

A Rochester lawyer is involved in a case before the U.S. Supreme Court in which the IRS refused to allow a deduction on an estate tax return because the lawyer would not produce time sheets accounting for his fees. The lawyer, James M. White, charged an estate \$16,530 in legal fees and an additional \$17,548 in commission as its executor.

The Monroe County Surrogate Court and a U.S. District Court allowed both fees, but when the IRS took the case to an appeals court, it ruled White must turn over the record. White has refused and has appealed to the Supreme Court, which is expected to rule soon. ■

**ESTATE PLANNING, TRUST AND
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THE STATE BAR OF CALIFORNIA**

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November 27, 1989

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REPLY TO:

444 Castro St., #900
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(415) 969-4000

John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Memo 89-83 and First Supplement, Compensation of Attorney,
etc.

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar has reviewed LRC Memo 89-83 and its First Supplement. These are our comments for the Commission's consideration.

1. LA County Proposal re Revision of Section 9864 (c).

The proposal is accepted and appears to solve a problem with the interface between the IAEA and the Compensation provisions.

2. HALT Proposals Opposed by Staff.

Many of the HALT proposals are opposed by Staff. We concur with Staff on all such positions.

3. Dual Compensation of Attorney as Personal Representative.

HALT completely misses the point. The roles of personal representative (PR) and attorney for the PR are completely different. The PR is the person in the trenches who has to collect the assets and deal with the world regarding the estate. The PR has to collect the assets, manage the assets and undertake the proper distribution of the estate. The attorney is to provide counsel and to prepare necessary court papers and to see that the proper legal steps are taken by the PR. The liabilities for the two jobs are different. To suggest that just because a lawyer is the PR, he or she is presumed not entitled to compensation is insulting.

Anyone who has acted as a PR will tell you that it is thankless, time consuming and worrisome job. To somehow jump to the conclusion that an attorney is not entitled to compensation for taking on this job, that is really unrelated to lawyering altogether, is presumptuous.

As pointed out in the LRC's study and the Stein study, this whole issue is really a non-problem. Very few attorneys take on the job anyway.

The law as it is currently proposed answers the problems and should not be amended as suggested by HALT. HALT's amendments would only create a burden for the court and treat lawyers as a distinct class.

4. LA County Proposal re Revision of Section 10804.

The Executive Committee has not reviewed this proposal. It is as Staff points out controversial. My personal thoughts are to support it, but it may threaten the whole package of amendments. The Section has supported the current version of 10804 and will stand on that decision subject to further review.

5. Sanction for Delay.

HALT and the Staff proposes to amend Section 12205 to penalize the attorney for delay in estate proceedings. This proposal changes the long standing rule of privity that the "estate" and the estate beneficiaries have no direct cause of action against the attorney for malpractice or otherwise. This amendment not changes that rule but

Mr. John H. De Mouilly
November 27, 1989
Page 3

opens up the attorney for direct liability to the estate. This is ill founded. The PR is the attorney's client and if there is a problem in the representation of the PR the PR should be responsible for seeking recourse, not the beneficiaries nor the court. The Section opposes the concept as is currently in the law. Given the fact that it is the law and we have already last the battle, the Section also opposes the changes as unnecessary. Even though we don't like the current law, the law as it exists works and should not be changed.

Thank you for your attention to this matter. If you have any questions, please feel free to call.

Very truly yours,



James V. Quillinan
Chair

Enclosure
JVQ/bf

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REPLY TO:

November 27, 1989

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

Re: Statutory Form Power of Attorney: CLRC Memo 89-103
Springing Power of Attorney: CLRC Memo 89-91

Dear John:

The following actions were unanimously taken and approved by the Executive Committee at its November 11, 1989 meeting in Los Angeles:

A. Regarding CLRC Memorandum 89-103 Dated October 23, 1989

1. Conditionally Approved the addition of a Civil Code Section reading as follows:

§ 247?. Power of attorney that becomes effective upon occurrence of specified event or contingency

274?. (a) A power of attorney under this chapter may limit the power to take effect upon the occurrence of a specified event or contingency, including but not limited to the incapacity of the principal, if the power of attorney contains language that requires that a person or persons named in the instrument declare, in writing, that the event or contingency has occurred.

(b) A power of attorney under this chapter limited as provided in subdivision (a) takes effect upon the written declaration of the person or persons named in the power of attorney that the specified event or contingency has occurred, regardless whether the specified event or contingency has actually occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person.

(c) The provision described in subdivision (a) may be included in the "Special Instructions" portion of the form set out in Section 2475.

(d) Nothing in this section limits the provisions that may be included in the "Special Instructions" portion of the form set out in Section 2475.

The Executive Committee approved that section on the condition that the certificate procedure set forth in the new proposed section not be the exclusive method, in California, of creating a springing power. Restated, the Executive Committee wants the principal to be totally free

to set forth in his/her durable power any procedure he/she desires to determine the fact of "incapacity."

Ex: A principal may desire that his/her "incapacity" be determined by a final decree or judgment of a court, e.g., a decree appointing a conservator for the conservatee on the ground of the principal's "incapacity."

That is not now expressly provided for in the new proposed Civil Code Section 247?.

2. Approved the following proposed Civil Code Section 247? as set forth on page 8 of CLRC memorandum 89-103:

§ 247?. Compelling third person to honor power of attorney

247?. If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor it within a reasonable time, the attorney in fact may compel the person to honor the power of attorney in an action for that purpose brought against the person. If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds that the person acted unreasonably in refusing to honor the power of attorney.

3. Approved the following proposed Civil Code Section 247? as set forth on page 9 of CLRC memorandum 89-103:

§ 247?. General provisions applicable to power
under this chapter

247?. The following provisions apply to a
statutory form power of attorney under this
chapter:

(a) Article 3 (commencing with Section 2400) of
Chapter 2.

(b) Article 4 (commencing with Section 2410) of
Chapter 2.

(c) Sections 2512 and 2513.

We are, however, still studying this proposed new
section to determine whether or not all of the provisions
mentioned should apply to a statutory form power of
attorney.

4. Approved the following proposed Civil Code Section
2499.5 as set forth on page 11 of CLRC memorandum 89-103:

§ 2499.5. Power to modify or revoke trust

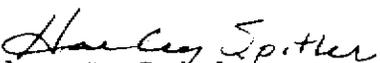
2499.5. A statutory form power of attorney
under this chapter does not empower the agent to
modify or revoke a trust created by the principal
unless that power is expressly granted by the
power of attorney. If a statutory form power of
attorney under this chapter empowers the agent to
modify or revoke a trust created by the principal,
the trust may only be modified or revoked by the
agent as provided in the trust instrument.

John DeMouilly
Page 5

B. Regarding CLRC memorandum 89-91 as supplemented:

1. Approved recommendations "(1)" and "(2)" as set forth on page 2 of CLRC memorandum 89-91, dated September 20, 1989.

Sincerely,


Harley J. Spittler

cc: James V. Quillinan
Irwin D. Goldring
Sterling L. Ross, Jr.
Matthew S. Rae, Jr.

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