

CALIFORNIA LAW REVISION COMMISSION

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10/11/91

<p>DATE: • October 31 - November 1</p> <hr/> <p>• Oct. 31 (Thursday) 10:00 am - 5:00 pm • Nov. 1 (Friday) 9:00 am - 4:00 pm</p>	<p>PLACE:</p> <p>• Sacramento State Capitol Room 447</p>
<p>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> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the proper amount made out to the "California Law Revision Commission".</p>	

FINAL AGENDA*for meeting of***CALIFORNIA LAW REVISION COMMISSION****Thursday, October 31, 1991**

1. MINUTES OF SEPTEMBER 12-13, 1991, COMMISSION MEETING (sent 9/23/91) (\$8.50)

2. ADMINISTRATIVE MATTERS
 - Governor's Budget for 1992/93
Memorandum 91-72 (NS) (enclosed) (\$5.50)

 - Conflict of Interest Code
Memorandum 91-71 (SU) (sent 9/27/91) (\$5.50)

 - Communications from Interested Persons

3. 1991 LEGISLATIVE PROGRAM
 - Final Report
Memorandum 91-58 (NS) (to be sent)

4. 1992 LEGISLATIVE PROGRAM

Memorandum 91-70 (NS) (to be sent)

5. STUDY F-1000 - FAMILY CODE

Comments on Staff Draft
Memorandum 91-59 (JHD) (to be sent)

6. STUDY N-100 - ADMINISTRATIVE ADJUDICATION

SPECIAL ORDER N-103.01 - VOLUNTARY TEMPORARY ASSIGNMENT OF HEARING
OF BUSINESS: PERSONNEL

2:00 PM Draft of Recommendation
Memorandum 91-75 (NS) (sent 10/10/91) (\$5.50)

N-105 - EFFECT OF ALJ DECISION
Revised Draft
Memorandum 91-69 (NS) (sent 10/10/91) (\$8.50)

N-106 - IMPARTIALITY OF DECISION MAKER
Staff Draft
Memorandum 91-74 (NS) (sent 10/10/91) (\$8.50)

Friday, November 1, 1991

7. STUDY D-1001 - 1991-92 CREDITORS' REMEDIES MATTERS

Comments on Tentative Recommendation
Memorandum 91-61 (SU) (to be sent)

8. STUDY F-3050/L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

Comments on Tentative Recommendation
Memorandum 91-62 (NS) (to be sent)

9. STUDY L-3010 - NOTICE OF TRUSTEES' FEES

Comments on Tentative Recommendation
Memorandum 91-63 (SU) (to be sent)

10. STUDY L-708 - SPECIAL NEEDS TRUST FOR DISABLED MINOR OR INCOMPETENT
PERSON

Comments on Tentative Recommendation
Memorandum 91-64 (RJM) (to be sent)

11. STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT (PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION)

Comments on Tentative Recommendation
Memorandum 91-65 (RJM) (to be sent)

12. STUDY L-3051 - TRANSFER OF OMITTED PROPERTY TO TRUST BY CONSERVATOR

Comments on Tentative Recommendation
Memorandum 91-66 (RJM) (to be sent)

13. STUDY L-3052 - NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

Comments on Tentative Recommendation
Memorandum 91-67 (RJM) (to be sent)

14. STUDY L-1039.01 - DISTRIBUTION OF INCOME

Problems with Interest and Income Statute
Memorandum 91-73 (SU) (sent 10/10/91) (\$5.50)

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

Memorandum 91-68 (RJM) (sent 10/3/91) (\$8.50)

16. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Draft of Tentative Recommendation
Memorandum 91-40 (SU) (sent 5/30/91 for June meeting) (\$25.00)
First Supplement to Memorandum 91-40 (sent 7/16/91 for July meeting) (\$5.50)
Second Supplement to Memorandum 91-40 (to be sent)

NOTE. We will continue consideration of this matter commencing at Section 2515.080 on page 27.

17. STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

Policy Issues
Memorandum 91-10 (NS) (sent 12/18/90; another copy sent 4/16/91 for June meeting) (\$8.50)
First Supplement to Memorandum 91-10 (sent 5/13/91 for June meeting) (\$5.50)
Second Supplement to Memorandum 91-10 (sent 5/30/91 for June meeting) (\$5.50)
Third Supplement to Memorandum 91-10 (sent 6/7/91 for June meeting) (\$5.50)

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MEETING SCHEDULE

October/November 1991

Oct. 31 (Thur.) 10:00 a.m. - 5:00 p.m.
Nov. 1 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

December 1992

No Meeting

January 1992

Jan. 23 (Thur.) 10:00 a.m. - 6:00 p.m.
Jan. 24 (Fri.) 9:00 a.m. - 4:00 p.m.

Los Angeles

February 1992

No Meeting

March 1992

Mar. 12 (Thur.) 10:00 a.m. - 5:00 p.m.
Mar. 13 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

April/May 1992

April 30 (Thur.) 10:00 a.m. - 6:00 p.m.
May 1 (Fri.) 9:00 a.m. - 4:00 p.m.

San Francisco

June 1992

No Meeting

July 1992

July 9 (Thur.) 10:00 a.m. - 6:00 p.m.
July 10 (Fri.) 9:00 a.m. - 4:00 p.m.

San Diego

August 1992

No Meeting

September 1992

Sep. 10 (Thur.) 10:00 a.m. - 5:00 p.m.
Sep. 11 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

October 1992

No Meeting

November 1992

Nov. 12 (Thur.) 10:00 a.m. - 6:00 p.m.
Nov. 13 (Fri.) 9:00 a.m. - 4:00 p.m.

Los Angeles

December 1992

No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 31-NOVEMBER 1, 1991
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on October 31 and November 1, 1991.

Commission:

Present:	Edwin K. Marzec Chairperson Arthur K. Marshall Vice Chairperson	Forrest A. Plant Sanford Skaggs Ann E. Stodden
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Roger Arnebergh Bion M. Gregory Legislative Counsel

Staff:

Present:	Nathaniel Sterling Stan Ulrich	Robert J. Murphy III Pamela K. Mishey
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Consultants:

Michael Asimow, Administrative Law (Oct. 31)
John H. DeMouilly, Family Code (Oct. 31)
Jerry Kasner, Community Property (Nov. 1)
Robert J. Sullivan, Administrative Law (Oct. 31)

Other Persons:

Seymour R. Appleby, California Probate Referees Association, Hayward
Pamela Babich, Caltrans, Sacramento (Oct. 31)
Sam Buckles, Department of Developmental Services, Sacramento
(Nov. 1)
Candice Christensen, California Unemployment Insurance Appeals
Board, Sacramento (Oct. 31)
Frieda Gordon Daugherty, Chair, Family Law Section, Women Lawyers'
Association of Los Angeles, and Legislative Committee, Beverly
Hills Bar Association, Beverly Hills
Edmond R. Davis, Attorney, Los Angeles (Nov. 1)
Monica Dell'Osso, Executive Committee, State Bar Estate Planning,
Trust and Probate Law Section, Oakland (Nov. 1)
Fred H. Delmer, Attorney, Placerville (Oct. 31)
Joe Egan, Department of Developmental Services, Sacramento (Nov. 1)
Karl Engeman, Office of Administrative Hearings, Sacramento (Oct. 31)
Lawrence M. Gassner, State Bar Family Law Section, Ontario (Oct. 31)
Don E. Green, Executive Committee, State Bar Estate Planning, Trust
and Probate Law Section, Sacramento (Nov. 1)

Bill Heath, California School Employees Association, San Jose (Oct. 31)
Judith Imel, Department of Health Services, Sacramento (Nov. 1)
Melanie McClure, State Teachers' Retirement System, Sacramento (Oct. 31)
Joel T. Perlstein, Public Utilities Commission, San Francisco (Oct. 31)
Harriet Prensky, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Mill Valley (Nov. 1)
Carol Reichstetter, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles (Nov. 1)
Elise S. Rose, State Personnel Board, Sacramento (Oct. 31)
Virginia Rose, Department of Developmental Services, Sacramento (Nov. 1)
Marilyn Schaff, Department of Motor Vehicles, Sacramento (Oct. 31)
John Sikora, Association of California State Attorneys and Administrative Law Judges, Sacramento (Oct. 31)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Nov. 1)
Stuart Wein, Occupational Safety and Health Appeals Board, Sacramento (Oct. 31)

MINUTES OF SEPTEMBER 12-13, 1991, COMMISSION MEETING

The Commission approved the Minutes of the September 12-13, 1991, Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

MEETING SCHEDULE

The Commission changed the location of the January 23-24, 1992, meeting from Los Angeles to Sacramento to facilitate consideration of administrative law matters.

GOVERNOR'S BUDGET FOR 1992/93

The Commission considered Memorandum 91-72, a staff report on the Governor's budget for 1992/93 that is currently being prepared. The staff reported that the lease amount for the Commission's offices is being increased, and the staff is investigating the availability of other space nearby. The staff also reported that the Commission's Wang word processing system is antiquated and starting to develop problems. Commissioner Skaggs noted that his office is planning to phase out some

of its Wang equipment next year, and some of that might be made available to the Commission. With respect to the shortage of funds in the proposed budget for research consultants, the Commission raised the possibility that if new topics are assigned by the Legislature, they might be accompanied by funds to retain a consultant.

CONFLICT OF INTEREST CODE

The Commission considered Memorandum 91-71 concerning revision of the disclosure categories in the Commission's Conflict of Interest Code. The Commission approved the staff proposal (1) to add heir tracers and appraisers to the list of disclosable sources of income and (2) to work out a new procedure with the Fair Political Practices Commission for selecting the specific sources of income that are disclosable for a given reporting period, based on active topics on the Commission's agenda.

GUBERNATORIAL APPOINTMENTS TO THE COMMISSION

The Chairperson reported that conversations he has had with the Governor's Office indicate that the delay in making appointments and reappointments to the Commission is a result of vacations and turnover in that office, but that they are working on the matter and action should be forthcoming.

VACATION CARRYOVER

The Commission authorized the Executive Secretary and legal staff to carry over excess vacation time into 1992 to the extent necessary to enable completion of the Family Code draft for the Commission's January meeting. The Chairperson and Executive Secretary were authorized to execute any necessary documents for this purpose.

COMMUNICATIONS FROM INTERESTED PERSONS

The Chairperson reported that Kathy Ballsun of the State Bar's Living Trust "Truth Squad" had been attempting to reach him. The Commission delegated the Vice Chairperson to contact Ms. Ballsun to

indicate that the Commission is willing to hear her presentation but that the Commission may not be in a position to take any action on this matter.

1991 LEGISLATIVE PROGRAM

The Commission reviewed Memorandum 91-58, presenting the final report on the 1991 legislative program. The staff noted that despite the Commission's success this legislative session, there were a number of last year's recommendations that did not make it into bill form. The staff is hopeful that they can be incorporated in 1992 legislation.

1992 LEGISLATIVE PROGRAM

The Commission reviewed Memorandum 91-70, presenting the prospective 1992 legislative program. The Commission noted that several of the proposals mentioned in the memorandum for 1992 will not be presented to the Legislature as a result of Commission decisions at this meeting, notably voluntary temporary assignment of hearing personnel, and possibly special needs trusts.

STUDY D-1001 - CREDITORS' REMEDIES MATTERS

The Commission considered Memorandum 91-61, the *Tentative Recommendation Relating to Miscellaneous Creditors' Remedies Matters [September 1991]*, and the First Supplement. The Commission approved the recommendation to print and for submission to the 1992 legislative session. The Commission approved the suggestion of the California State Sheriffs Association to make the bill an urgency measure.

STUDY F-1000 - FAMILY CODE

The Commission considered Memorandum 91-59 and the attached Revised Staff Working Draft (August 1991) of the Family Code (which included the Family Code division relating to minors). Mr. DeMouly, the Commission's Special Consultant on the Family Code, presented the memorandum to the Commission on behalf of the Commission's staff.

Observers present at the meeting when this subject was discussed included:

Lawrence M. Gassner, law firm of Gassner & Gassner, 337 N. Vineyard Avenue, 2nd Floor, Suite 205, Ontario, CA 91764 (714) 983-1352 (representing the State Bar Family Law Section) (hereinafter referred to as the "State Bar Section")

Frieda G. Daugherty, attorney at law, 433 North Camden Drive, Suite 111, Beverly Hills, CA 90210 (213) 275-1554 (Chair, Family Law Section, Women Lawyers' Association of Los Angeles, and Legislative Committee, Beverly Hills Bar Association, Beverly Hills)

The Executive Committee of the State Bar Section submitted fairly detailed comments on some portions of the staff draft of the Family Code, but the representative of the Section present at the meeting reported that a delay of approximately one month in the Section's review of the revised staff draft was caused because the draft was sold rather than sent to the Section by the Commission for review and comment. The one-month delay was caused because of the mechanics of the purchase by the Section of copies of the revised draft. The Commission directed the staff to provide the Section and representatives of a few other groups with sufficient free copies of revised drafts in the future so that the Section can expeditiously review the drafts and provide its comments and suggestions for Commission consideration without delay.

Detailed comments were not received from any other sources although some comments from other sources suggested areas of family law in need of study.

SCHEDULE ON FAMILY CODE PROJECT

Bill Proposing Family Code. The Commission decided that it will request Assembly Member Jackie Speier to introduce a Commission recommended bill at the 1992 legislative session proposing a new Family Code. The bill will be introduced early in the session and amended before enactment to make any needed revisions. (The Commission recognized that it may not be possible to make all needed revisions in time to permit enactment of the bill in 1992, in which case it will be necessary to recommend a revised bill for enactment in 1993.)

The bill will have a one-year delayed operative date (until January 1, 1994), to permit any necessary revisions in the new code to be made at the 1993 legislative session and to allow time for the law publishers to revise family law publications and time for the Judicial Council to revise rules and forms.

State Bar Section Comments and Suggestions. The representative of the State Bar Section stated that the Section could review the entire revised staff draft (which is already prepared and copies are in the hands of the Section) and provide comments and suggestions for Commission consideration within 60 days.

Staff to Meet with State Bar Section Representatives and Representatives of Other Interested Groups to Deal with Technical Problems in Staff Draft of New Code; Review of Important Issues and Approval by Commission of Bill For Introduction at Commission's January 1992 Meeting. The Commission will review the State Bar Section comments and suggestions and the comments and suggestions of other interested persons at its January 23 meeting which will be held in Sacramento.

In order to permit the Commission to consider fully the important matters raised by the State Bar Section and others, the Commission suggested that the staff meet with representatives of the Section with the view to developing a solution to technical problems in the draft so that the Commission will not need to devote its time to considering these technical problems but will have adequate time at the meeting to consider all matters of importance. One or more representatives of the support division of the office of the district attorney in one or more

major counties might be invited to the work session of the Section and the Commission's staff when the support provisions are considered. Likewise, knowledgeable persons in the adoption field might be invited to the work session when the Section and the staff consider the adoption provisions of the Family Code.

After reviewing the comments and suggestions at its January 1992 meeting, the Commission will approve for introduction a bill proposing the Family Code.

Preparation of Draft of Family Code Bill for Introduction. In December 1991, the staff should send a draft of the Family Code to the Legislative Counsel for preparation for introduction. The draft received from the Legislative Counsel should be revised to reflect the technical changes jointly developed by the State Bar Section and the staff to deal with technical problems. After the January meeting of the Commission, the revisions determined to be made by the Commission should be incorporated in the Legislative Counsel's draft and the bill then introduced.

Separate Bill Proposing Conforming Revisions in Other Codes. The Commission will also request Assembly Member Speier to introduce a separate bill (probably a "spot" bill) to make necessary conforming revisions in other codes. The bill will be amended before it passes the Legislature so that it makes all conforming revisions in other codes that are known to be necessary. Any necessary conforming revisions that are overlooked can be made in 1993 before the Family Code becomes operative on January 1, 1994.

Report Containing Commission Recommendation. The Commission decided not to publish a report containing its tentative recommendation proposing enactment of the Family Code and the Comments to the sections of the recommended Family Code.

REVIEW OF COMMENTS RECEIVED ON STAFF DRAFT

Generally

The Commission discussed the extent to which existing provisions should be "clarified" in the Family Code. A clarification of existing language would be allowed if everyone agrees what the substantive law

is and that the clarification would not be a substantive change. However, where there is a disagreement as to what the substantive law is, then the existing language should be retained. At the same time, obsolete provisions may be deleted and the conflict between existing provisions resolved. Procedures may be streamlined and made consistent.

The Commission did not review all of the comments outlined in Memorandum 91-59. Suggestions from the State Bar Section for technical changes were not reviewed in cases where the staff agreed that the suggested technical change should be made. These suggested changes will be incorporated in the next revised staff draft.

The State Bar Section did not comment with respect to many of the notes contained in the staff draft. In these cases, the staff reported that it plans to review the notes and make the changes it considers appropriate in the next staff draft. The State Bar Section can then review the changes made by the staff to deal with the technical problems identified in these notes, and the Commission can review any areas where the technical changes in existing law were made that cause concern to the State Bar Section. For example, the existing Family Law Act, which is contained in a "part" of the existing Civil Code contains many references to "this part." An appropriate substitution will need to be made for each reference in existing law to "this part." In the next staff draft, the staff plans to make the appropriate substitutions for "this part," and these substitutions will be reviewed by the State Bar Section and any substitutions that cause concern to the State Bar Section will be brought to the attention of the Commission for review and decision.

The staff will revise the existing staff draft to incorporate any changes or additions or deletions made by 1991 enactments.

The staff will check the existing staff draft to determine whether it makes any unintended substantive changes in existing law and to assure that all technical substantive changes in existing law are noted in the Comments to the relevant Family Code sections.

General Comment on Staff Draft -- Do We Want a New Family Code?

The Commission considered the Comment from Matthew Bender which noted the cost implications of enacting a new Family Code and also considered the staff discussion of this question in the memorandum. The Commission reaffirmed its previous decision to recommend a new Family Code for enactment.

Review of Comments Concerning Provisions of Staff Draft

The Commission decided to consider the comments from the State Bar Section and others that presented policy issues for decision by the Commission. Where the State Bar Section made a suggestion that a technical revision be made in the staff draft and the Commission's staff agrees with the suggestion, the staff was authorized to make the substance of the change. Where the State Bar Section raised a technical problem in connection with a particular provision, the staff should seek to make an appropriate revision that deals with the concern of the Section. In preparing a revised draft for the January meeting, the staff should make an effort to resolve the problems identified in the "Notes" that follow the Comments to the sections. Also, as indicated above, the staff should work with the State Bar Section to resolve any other technical matters that are identified by the State Bar Section or the staff.

§ 4. Construction of amendments, additions, and repeals (pages 45-46). The Commission approved this section which was approved by the State Bar Section.

§ 50. Application of definitions (page 49, Note). Existing statutes and the staff draft use the terms "judgment," "order," and "decree" without any apparent reason why one or more of the terms are used in a particular section. The staff indicated that "judgment" will be used in place of "decree," following the pattern of the new Probate Code which no longer uses the word "decree." The staff was directed to send to the State Bar Section and the California Land Title Association Forms and Practices Committee (hereinafter referred to as "CLTA") a copy of the bill as introduced with the terms "judgment" or "order" highlighted so the Commission can obtain the views of the State Bar Section and CLTA on whether definitions of these terms are needed and

which term (or both) should be used in place of each highlighted term. Thereafter, the staff and the State Bar Section and CLTA should attempt jointly to determine which term (or both) should be used in each provision of the bill.

§ 85 "Family Law Act" (page 52). Part 5 (commencing with Section 4000) of Division 4 of the Civil Code is the existing Family Law Act. The existing Family Law Act contains many references to "this part," meaning the existing Family Law Act. The question is: What should be substituted for these references to "this part"?

The staff will study these provisions and, working with the State Bar Section, will seek to make appropriate substitutions for "this part." If there are any problems that cannot be resolved, the matter can be brought to the Commission for consideration at the January 1992 meeting.

§ 90. "Family or household member" (pages 52-53). The Commission tentatively determined to substitute the following for this section of the staff working draft:

90. When used with reference to a domestic violence prevention order, "Family or household member" means a spouse, former spouse, cohabitant, former cohabitant, parent, child, or any other person related by consanguinity or affinity within the second degree, or any person who regularly resides in the household, or who, within the previously six months, regularly resided in the household.

The staff should search the entire draft to determine each place the term "family or household member" is used. If the term is used in a particular provision not in connection with a domestic violence prevention order, consideration should be given to whether the term "family or household member" used in that provision should be defined as in Section 90 set out above or should have a different definition.

§ 145. "State" (page 55). The Commission considered the comment of the California Land Title Association Forms and Practices Committee (CLTA): "The Commonwealth of Northern Marianas would not seem to fit into the categories mentioned." The Commission decided not to change the definition provided by Section 145. The definition in Section 145 is the same in substance as the definition of "state" used in Uniform Acts, and none of the existing California definitions of "state" in other codes refer to the Commonwealth of Northern Marianas.

§ 210. Rules of practice and procedure (pages 58-59). The Commission considered a comment from Matthew Bender suggesting that it be made clear whether the general civil procedure rules (in the Code of Civil Procedure) apply in instances in which neither the Family Law Act nor the California Rules of Court address a particular issue. The Commission concluded that this was a good suggestion and determined to make the matter clear by adding a provision to the staff draft to make clear that the general procedural rules apply except where the general procedural rule conflicts with a provision of the Family Code or a court rule. This provision would be consistent with the Family Law Rules adopted by the Judicial Council (Rules 1206 and 1207).

§ 221. Transfer of proceeding (new provision to be added). The Commission determined that Code of Civil Procedure Section 397.5 should be compiled in the Family Code. The staff should give consideration to whether the provision should be limited in application to marriage dissolution and legal separation provisions or should have broader application.

§ 230. Temporary restraining order in summons in dissolution or nullity proceeding (pages 62). CLTA strongly supported the addition of the language contained in the staff Note to Section 230: "Nothing in this paragraph shall adversely affect the rights, title, and interest of a purchaser for value, encumbrancer for value, or lessee for value, who is without actual knowledge of the restraining order." This language was proposed to be added by Assembly Bill 426 of the 1991 legislative session, but that bill was not enacted in 1991. After considerable discussion, the Commission agreed that the provision stated existing law and should be included in the draft, with the understanding that it would be removed if any objections were made to the provision.

§ 241. Granting temporary order without notice (pages 65-66). The Commission considered the staff Note to this section. This section needs to be considered in connection with Sections 230 and 242. Uniform times should be provided in Section 242. The staff should work with the State Bar Section to develop uniform and clear rules concerning these provisions and present the solution to the Commission at its January 1992 meeting.

§ 242. Order to show cause (pages 66-67). See discussion under Section 241 above.

§ 362. Denial of license (Note on page 80). This section was revised to read:

362. No marriage license shall be granted when either of the parties who are applying for the license ~~is--an imbecile, is--insane,~~ lacks the capacity to enter into a valid marriage or is, at the time of making the application for the license, under the influence of an intoxicating liquor or narcotic drug.

This revision is consistent with Probate Code Section 1901.

§ 721. Contracts with each other and third parties (pages 97-98). This and other sections deal with the question, What are the standards that apply in determining what is required to have a valid marital agreement during marriage? Although development of a statute governing marital agreements during marriage is beyond the scope of the Family Code project, this matter is one that perhaps should be given some priority on the Commission's agenda.

§ 754. Limitation on disposition of separate property residence if notice of pendency of proceeding recorded (pages 100-101). The Commission considered a suggestion of CLTA that the scope of the existing provision be narrowed or the section be eliminated entirely. The State Bar Section would add a provision to declare the prohibited transfer void. In view of the lack of agreement concerning the provision, the Commission determined that existing language should be retained without change.

Part 2 (commencing with Section 760). Characterization of Marital Property (beginning on page 102). The staff urged that the Commission undertake as a priority project the definition of "community property." A problem identified by the State Bar Section is the nature of property that was acquired by married persons while domiciled in another state where the property was community property under the law of that state at the time it was acquired. Under existing law, after the spouses move to California, such property appears to be quasi-community property, which is considered separate property for purposes of management and control. Also unclear is the nature of real property acquired with community property funds by married persons while domiciled in California. Real property in another state is not

within the existing definition of "community property." The Commission did not take any action on this suggestion. Instead, the Commission requested the staff to prepare a memorandum for a future meeting identifying various matters in the family law field that might be the subject to separate studies and suggesting the priority to be given the matters so identified.

§§ 770 & 771. Separate property (page 104). Consideration should be given by the staff to combining Sections 770 and 771 of the staff draft.

§ 774. Recording inventory of separate personal property (page 105). The Commission determined not to continue this section in the Family Code because the section is obsolete and superseded by later enacted legislation. The omission of this provision should be noted in the preliminary portion of the Commission's recommendation.

§ 800. Effect of presumptions (page 107). The Commission approved the inclusion of subdivision (a) but subdivision (b) should be omitted.

§ 801. Community property presumption (page 107-108). The substance of this section was approved by the Commission.

§ 1612. Subject matter of premarital agreement (page 130). The State Bar Section suggested "a resolution of the question of spousal support limitation, and consideration of the attorneys fee issue." The State Bar representative said that a recent case holds that contracts to eliminate attorney's fees in later litigation between the spouses are invalid contracts. The Commission concluded that these matters should not be dealt with in connection with the Family Code although they might be considered in a separate study of agreements between spouses if the Commission decides to undertake such a study.

§§ 1760-1770. Termination of Parental Rights in Adoption Proceeding (pages 143-148). In response to a suggestion from Matthew Bender, the Commission decided that Sections 1760-1770 should be relocated in Division 16 (adoption).

§ 2313. Duty of support not affected by dissolution on grounds of insanity (page 174). The staff recommended that this section be omitted as unnecessary. The staff's position is that a support order granted in a dissolution proceeding grounded on incurable insanity

should be enforceable in the same manner as a support order granted in a dissolution proceeding grounded on any other ground. The section is unnecessary in view of Sections 3600-3604 (spousal support during pendency of proceeding), 4330-4339 (spousal support upon dissolution or legal separation). See also Sections 4339 (security for payment of spousal support). The staff noted that the concern expressed by the State Bar Section (that bond provisions be applicable) is satisfied by the general provision permitting security for payment of spousal support (Section 4339). The Commission requested that the staff further discuss with the State Bar Section whether this section should be retained in the Family Code.

§ 2335. Evidence of specific acts of misconduct (page 178). In response to a suggestion from the State Bar Section, Section 2335 was revised to read in substance as follows:

2335. In a pleading or proceeding for dissolution of marriage or legal separation, including depositions and discovery proceedings, evidence of specific misconduct is improper and inadmissible, except where in any of the following cases:

(a) Where child custody is in issue and the evidence is relevant to that issue.

(b) Where a domestic violence prevention order is sought or has been obtained and the evidence is relevant in connection with the order.

(c) Where an order for the temporary exclusion of either party from the family dwelling or from the dwelling of the other party is sought or has been obtained pursuant to subdivision (b) of Section 753 or subdivision (c) of Section 1900 or Section 1910 and the evidence is relevant in connection with the order.

The additional language recognizes other sections which provide an exception to the rule stated in Section 2335. When the staff meets with the representatives of the State Bar Section, the State Bar representatives should be asked whether there are any other exceptions to the rule stated in Section 2335.

§§ 2338 et seq. Judgments (pages 180 et seq.). Under former law, an "interlocutory judgment" was obtained and later a "final judgment" was entered. This concept was eliminated so that now, subject to certain exceptions, a judgment is entered that automatically becomes final insofar as it severs the marriage relationship six months after the date of service of a copy of summons and petition or the date of

appearance by the respondent, whichever occurs first. There no longer is an "interlocutory judgment." The problem is that not all of the statutory provisions were conformed to the new scheme. The staff will work with the State Bar Section to conform existing provisions to the new concept, using language that is not confusing.

§ 2610. Division of retirement plan benefits (page 196). The staff noted that the office of the City Attorney of Los Angeles reports that existing Section 4800.8 (now Family Code Section 2160) has "engendered tremendous confusion among trial courts and family law practitioners with respect to the division of community interests and retirement benefits." The staff will note this as one of the matters that might be given separate study in the memorandum to be prepared for a future meeting identifying matters that might be given separate study.

§ 3008. Remedy for abuse of parental authority (page 207). The staff recommends that this section be deleted as superseded by the dependent children provisions of the Juvenile Court Law. Concern was expressed that this section may be of some use. The Commission would want to be sure that no one is relying on this section to protect abused children. The Commission deferred taking any action on this section until the State Bar Section has had an opportunity to review the need for the section. The staff should also check with the county counsel of Los Angeles, San Francisco, and Sacramento to determine that those counties do not use or rely on Section 3008. In other words, we want to be sure that we are not disrupting a system based on the authority granted by Section 3008.

§§ 3200-3295. Freedom From Parental Custody and Control (pages 233-250). In response to a suggestion from Matthew Bender, the Commission determined that Sections 3200-3295 should be relocated in Division 16 (adoption). The State Bar representative commented that the only use of these provisions is in adoption proceedings.

The Commission considered the suggestion of Matthew Bender that a finding of adoptability should be made a condition precedent to the termination of parental rights in all cases. The courts of appeal have been divided in this question. The Commission declined to make this

part of the Family Code, and the staff is to include this suggestion in the memorandum identifying matters that might be given future study in the family law field.

Enforcement of Support Provisions Found in Welfare and Institutions Code. The Commission considered the suggestion of Josanna Berkow, office of the Attorney General, that the enforcement of support provisions found in the Welfare and Institutions Code should be a part of the Family Code. The Commission determined that this suggestion should be given further consideration when the memorandum identifying matters that might be special projects is considered. However, the Commission decided that at this time it would not delay the introduction of the bill proposing the Family Code in the 1992 Legislature in order that the Welfare and Institutions Code provisions could be included in the bill. The staff stated that it would be a substantial undertaking to move the Welfare and Institutions Code provisions into the Family Code and to make the necessary adjustments in the remaining provisions in the Welfare and Institutions Code. It was suggested that the Chief Deputy District Attorney Child Enforcement Officer in San Francisco (member of the State Bar Section Executive Committee) should be consulted concerning this issue.

Delayed Operative Date. In response to a suggestion from Matthew Bender, the Commission determined that the bill introduced in 1992 to enact the Family Code should have a delayed operative date -- the operative date should be delayed one year until January 1, 1994.

Provisions of Juvenile Court Law relating to dependent children. This is a matter to be considered in connection with the memorandum discussing separate projects. If the Commission ultimately decides to include these provisions in the Family Code, they could be added to the Family Code at a later time. In evaluating this matter in preparing the memorandum for the future meeting, the staff should obtain the views of the State Bar Section concerned with this area of the law (Juvenile Justice Section).

STUDY F-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 91-62 and the First Supplement to Memorandum 91-62, reviewing comments received on the tentative recommendation on nonprobate transfers of community property. The Commission approved the recommendation for printing and submission to the Legislature after making the following changes:

§ 5003. Protection of holder of property

The Commission added to the Comment the following sentence: "For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3."

§ 5010. "Written consent" defined

The Commission expanded the Comment to this section with the following language: "A written consent, to be effective, need not satisfy the statutory requirements for a transmutation. See Section 5022 (written consent not a transmutation). A written consent becomes irrevocable on death of either spouse. Section 5030 (revocability of written consent)."

§ 5011. Governing provision of instrument, law, or consent

The introductory clause of this section was revised to read:

Notwithstanding any other provision of this chapter, part, the rights of the parties in a nonprobate transfer of community property on death is-governed-by are subject to all of the following:

§ 5013. Waiver of rights in community property

This section and its comment were revised to read:

5013. Nothing in this chapter limits the effect of a surviving spouse's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2 or other instrument or agreement that affects a married person's interest in community property .

Comment. Section 5013 recognizes ~~an-alternate-procedure~~ alternate procedures for releasing rights of a surviving spouse in community property.

Waiver of a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation. Civil Code § 5110.740 (estate planning instruments).

§ 5021. Transfer without written consent

The Commission was concerned about the grammar of the clause in subdivision (a) reading, "subject to the terms and conditions or other remedy that appears equitable under the circumstances of the case". The Commission directed the staff to fine tune the language, possible by deleting the first "the" and making "appears" agree with a plural subject.

Subdivision (b) was revised to read, "Nothing in ~~this-section~~ subdivision (a) affects any additional remedy ..." The last sentence of the Comment should note that it may be proper to allow the surviving spouse, "instead of or in addition to proceeding against the beneficiary of the nonprobate asset, to proceed against the decedent's estate" for an offset.

§ 5022. Written consent not a transmutation

Language was added to the Comment to make clear that property subject to a nonprobate transfer is part of the community estate for purposes of division at dissolution, and otherwise remains community property "until the consent becomes irrevocable by the death of either spouse".

§ 5023. Effect of modification

The Comment to subdivision (a), defining "modification" to include election of a different benefit or payment option, should note that the choice of benefit or payment options can substantially affect the rights of the parties, for example by selecting a life expectancy or term certain payout on a pension plan or by selecting a cash payout, annuity, or reinvestment option in an insurance policy.

§ 5030. Revocability of written consent

The following paragraph should be added to the Comment:

The surviving spouse may modify a provision for a nonprobate transfer of community property previously consented to by the deceased spouse to the extent provided in Section 5023.

§ 5031. Form and delivery of revocation

Subdivision (a) should require that a revocation of consent by "served on", rather than "delivered to" the other spouse. The Comment should note, "For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3."

A paragraph should be added to the Comment that:

It should be noted that a consent is irrevocable, regardless of the observance of the formalities of this section, on the death of either spouse. See Section 5030 & Comment (revocability of written consent).

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

The Commission considered Memorandum 91-68 and the attached staff draft of a *Revised Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney*. The Commission asked the staff to add a provision specifying a fee for the superior court clerk for each search for a deposited document. With this addition, the Commission approved sending out the *Revised Tentative Recommendation* for comment. Commissioner Stodden dissented from this action.

The staff should get the views of the county clerks and of the State Bar central staff. Under Probate Code Section 8200, there is no fee when a will is delivered to the clerk on death of the testator, so the proposed fee on delivery of an estate planning document under the *Revised Tentative Recommendation* would be a significant benefit to the clerks.

STUDY L-708 - SPECIAL NEEDS TRUST FOR
DISABLED MINOR OR INCOMPETENT PERSON

The Commission considered Memorandum 91-64, the attached *Tentative Recommendation Relating to Special Needs Trust for Disabled Minor or Incompetent Person*, and the First and Second Supplements. The Commission decided that a trust created under Section 3602 or 3611 should have the following limitations:

(1) It should only be for a minor or incompetent person "who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial handicap." This standard is drawn from Probate Code Section 15306(b).

(2) It should be shown to the satisfaction of the court that the proposed beneficiary would likely have special needs beyond what government programs may furnish that could be furnished by the trust. For example, if the beneficiary is in a state hospital in a persistent vegetative state, a special needs trust would appear not to be useful.

(3) The trust should be subject to continuing court supervision. There should be provision for an affected state agency to petition the court to terminate the trust on a showing that the trust is no longer necessary to fulfill special needs of the beneficiary.

The staff should work with the Department of Developmental Services, the Department of Health Services, and other interested persons to develop appropriate language.

The Commission revised proposed Section 3604(b) in the First Supplement as follows:

(b) Notwithstanding any provision in the trust instrument, on the death of a minor or incompetent person who is the beneficiary of the trust, trust property is subject to claims of public entities for reimbursement to the extent authorized ~~under the Welfare and Institutions Code~~ by law.

The Comment to Section 3604 should say that reimbursement is permitted by the Welfare and Institutions Code and by federal law, with appropriate citations.

The Commission asked the staff to bring back a revised draft for Commission consideration at the next meeting.

STUDY L-812 - PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION

The Commission considered Memorandum 91-65 and the attached *Recommendation Relating to Preliminary Distribution Without Court Supervision*. The Commission revised proposed Probate Code Section 10520 as follows:

Prob. Code § 10520 (added). Preliminary distribution of specified personal property

10520. If the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person, the personal representative has the power to make preliminary distributions of the following:

(a) Income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10.

(b) Household furniture and furnishings, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature to the persons entitled to the property under the decedent's will ~~or under the laws of intestate succession~~, not to exceed an aggregate fair market value to all persons of fifty thousand dollars (\$50,000) computed cumulatively through the date of distribution. Fair market value shall be determined on the basis of the inventory and appraisal.

(c) Cash to general pecuniary devisees entitled to it under the decedent's will ~~or to the persons entitled to it under the laws of intestate succession~~, not to exceed ten thousand dollars (\$10,000) to any one person.

Corresponding revisions should be made to the narrative portion of the *Recommendation*. With these revisions, the Commission approved the *Recommendation* for printing and submission to the Legislature.

STUDY L-1039.01 - INTEREST AND INCOME ON TRUST DISTRIBUTIONS

The Commission considered Memorandum 91-73 concerning a technical clarification of the statutes governing application of interest and income rules to trust distributions pursuant to Probate Code Section 16314. The Commission approved the proposed amendment of Section 16314 to be included in the 1992 general probate bill.

STUDY L-3010 - NOTICE OF TRUSTEES' FEES

The Commission considered Memorandum 91-63, the *Tentative Recommendation Relating to Notice of Trustees' Fees [July 1991]*, and the First Supplement. The Commission approved the recommendation for printing and submission to the 1992 legislative session.

STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Don Green of Team 4 of the State Bar Probate Section Executive Committee reported to the Commission that the team is actively reviewing material produced by the staff on the comprehensive powers of attorney statute. The team believes this is a difficult and important project, and the State Bar is quite involved and concerned with it. Mr. Green noted that the absence of a Team 4 representative at the last Commission meeting does not reflect of lack of interest, but merely that the team was unaware that this item would be taken up at that time.

STUDY L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

See discussion in these Minutes under STUDY F-3050.

STUDY L-3051 - TRANSFER OF CONSERVATORSHIP PROPERTY TO TRUST

The Commission considered Memorandum 91-66, the attached *Recommendation Relating to Transfer of Conservatorship Property to Trust*, and the First Supplement. The Commission approved the *Recommendation* for printing and submission to the Legislature.

STUDY L-3052 - NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

The Commission considered Memorandum 91-67 and the attached *Recommendation Relating to Nonprobate Transfer to Trustee Named in Will*. The Commission approved the *Recommendation* for printing and submission to the Legislature.

STUDY N-103.01 - VOLUNTARY TEMPORARY ASSIGNMENT OF HEARING PERSONNEL

The Commission considered Memorandum 91-75, along with a letter from John E. Sikora of the Association of California State Attorneys and Administrative Law Judges distributed at the meeting and attached to these Minutes as Exhibit 1, relating to voluntary temporary assignment of hearing personnel. The Commission also received oral comments on this matter from Mr. Sikora and from Karl Engeman, director of the Office of Administrative Hearings.

The consensus of expert advice on this matter was that a voluntary transfer of exchange program could be implemented administratively, without the need for legislative authorization, and that an administratively operated pilot project could provide useful information on the feasibility of such a transfer or exchange program.

In light of the consensus of affected parties on this issue, the Commission decided not to sponsor legislation on it for 1992. Instead, the Commission will encourage the interested parties to engage in a voluntary pilot program, and request feedback on the success of any program undertaken.

STUDY N-105 - EFFECT OF ALJ DECISION

The Commission considered Memorandum 91-69, relating to the effect of the hearing officer's decision (appeals within the agency). The Commission approved the draft statutory language for inclusion in the administrative adjudication statute that is being assembled, with the following changes.

§ 642.010. Applicable hearing procedure

The Commission's consultant, Professor Asimow, suggested that in light of the Commission's decision to cover in the administrative procedure act only hearings required by constitution or statute, the summary adjudicative proceeding would not be appropriate for inclusion in the draft. If the Commission follows this recommendation, the reference in subdivision (b)(1) to the summary proceeding would be deleted.

In this connection, the draft of the scope of the statute should make clear that for decisions not covered by the administrative procedure act, the agencies may apply any appropriate procedure.

§ 642.230. Voluntary temporary assignment of hearing personnel

This section should be deleted. Instead, the Commission will encourage a pilot program developed administratively for the same purpose. See discussion in these Minutes under STUDY N-103.01 - VOLUNTARY TEMPORARY ASSIGNMENT OF HEARING PERSONNEL. Conforming changes should be made in other sections, including restoration of the authority of the director of the Office of Administrative Hearings to appoint pro tem hearing personnel.

§ 642.710. Proposed and final decisions

The last sentence of subdivision (b) was revised to refer to "any rights", rather than "the rights" of the agency in the case.

The Comment should make clear that an agency may use its own internal procedures, including internal review processes, in the development of a proposed decision.

§ 642.720. Form and contents of decision

The Comment should be expanded to note that the "manner" of a witness includes actions of the witness.

§ 642.740. Filing of proposed decision

The concept of "filing" should be deleted from the statute, replaced perhaps by "issuance", "signing", or other appropriate language.

Service on parties and their attorneys in subdivision (a) should be replaced by service on the parties or their attorneys. This provision might be generalized.

The first sentence of the Comment should be corrected by making reference to hearings "not required to be conducted".

§ 642.770. Service of final decision on parties

The concept of "filing" should be deleted and other appropriate language substituted.

§ 642.780. Correction of mistakes and clerical errors in decision

This section should be limited to a final decision. Other sections that apply to both proposed and final decisions should repeat those words, and not just refer to a "decision".

The statute should allow an agency by regulation to provide a longer period than 15 days for correction of mistakes, except that correction should not be allowed after filing of a petition for review.

In connection with the time limits in this section, the statute should replicate a provision like Code of Civil Procedure Section 1013, which provides longer times when a notice is sent by mail.

§ 642.810. Availability and scope of review

This and other sections should be reviewed and possibly redrafted to avoid the implication that a party has no right to review unless authorized by the agency. The basic rule should be that there is a right to review unless limited by the agency.

The review provisions should be drawn in such a way that the agency may reject a proposed decision, but the agency must act to decide the case within a reasonable time.

§ 642.820. Initiation of review

The last sentence of subdivision (a), should be revised to read, "The petition shall state ~~its~~-basis the basis for review ."

§ 642.830. Review procedure

Subdivision (b) should be clarified by providing that a party shall have an opportunity to present either a written brief or an oral argument, as determined by the agency.

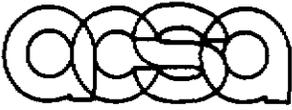
APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary



ASSOCIATION OF CALIFORNIA STATE ATTORNEYS
AND ADMINISTRATIVE LAW JUDGES

Law Revision Commission
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File: N-103.01

Key: _____

October 31, 1991

Roger Arnebergh, Esq.
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Voluntary Temporary Assignment of Hearing Personnel

Dear Mr. Arnebergh:

The Association of California State Attorneys and Administrative Law Judges (ACSA) is responding to the California Law Revision Commission (CLRC) memorandum #91-75 and the proposed legislation revising Government Code Section 11370.3.

On behalf of the administrative law judges (ALJs) represented by ACSA, we wholeheartedly support the concept of developing a voluntary system for temporary re-assignment of ALJs to help combat ALJ burnout. As you know, we have expressed our concern that this is a major factor in ALJ turnover. ALJs reach a high level of competence after a certain period of time on the bench hearing matters directly related to their departmental interest. This expertise can be expanded and the burnout factor can be avoided by allowing ALJs and hearing officers to volunteer to participate in a pool to conduct hearings in Departments other than their own.

The proposed legislation noticed in Memorandum #91-75, dated October 10, 1991, appears to be somewhat stringent and may be unworkable in its present format. The elimination of the language to allow the Director of the Office of Administrative Hearings (OAH) to appoint pro tempore part-time ALJs would appear to be inconsistent with the intent of this program. If OAH is allowed to develop a pilot project and invite all volunteers from any ALJ or hearing officer position in state service, the Director of OAH could appoint pro tempore part-time ALJs consistent with the current legislation 11370.3(a) G.C. The pool of volunteer judges could be developed as a task force or ad hoc committee. The pool could be composed of an incumbent from each Department in which ALJs or hearing officers work, an ACSA representative and a representative from OAH. ACSA would be willing to coordinate such an effort on behalf of the ALJs/HOs to

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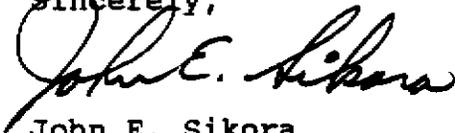
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Roger Arnebergh
October 31, 1991
Page 2

work with their departmental administrators to coordinate the needs of the individual departments. ACSA does not have recommended language for legislation to allow this to occur. However, ACSA is also of the opinion that no legislation is needed to allow this occur. If the CLRC were to either direct or request OAH Director Karl Engeman to conduct a year long pilot project commencing on or about July 1, 1992 and report back to CLRC its findings on the feasibility of such a project, this may provide the basis for developing legislation to address this issue. In the meantime, ACSA would be most anxious to solicit its membership for volunteers and to coordinate their responses and coordinate the efforts with Director Engeman.

In summary, we request the CLRC not approve the recommended legislation as proposed by staff to address the burnout factor. We feel the pooling concept should be addressed in the interest of deterring burnout and not in the interest of fiscal management. We feel it is possible to combine the two with emphasis on avoidance of burnout and not on fiscal management as is proposed in the staff draft. ACSA will be at the CLRC meeting on October 31, 1991 and will be more than anxious to respond to inquiries from Commission members.

Sincerely,



John E. Sikora
Labor Relations Consultant