

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
 PALO ALTO, CA 94303-4739
 (415) 494-1335



10/16/92

<p>DATE: • October 29 & 30</p> <p>• October 29 (Thursday) 10:00 am - 5:00 pm</p> <p>• October 30 (Friday) 9:00 am - 4:00 pm</p>	<p>PLACE: • Sacramento</p> <p>State Capitol Room 3191</p>
<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> <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 29, 1992**

1. MINUTES OF SEPTEMBER 10-11, 1992, COMMISSION MEETING (sent 10/13/92)
2. ADMINISTRATIVE MATTERS

Budget Matters

Memorandum 92-48 (NS) (enclosed) (\$5.50)

New Topics

Memorandum 92-64 (NS) (sent 9/25/92) (\$5.50)

Annual Report for 1992

Memorandum 92-72 (Staff) (sent 9/25/92) (\$35.00)

Conflict of Interest Code

Memorandum 92-76 (SU) (to be sent)

Communications from Interested Persons

3. STUDY J-02.01/D-02.01 - CONFLICTS OF JURISDICTION MODEL ACT

Staff Draft

Memorandum 92-65 (RJM) (sent 9/30/92) (\$8.50)

4. STUDY F-1000 - FAMILY CODE

STUDY F-1001 - FAMILY CODE GENERALLY

"The List"

Memorandum 92-58 (SU) (sent 10/13/92) (\$8.50)

STUDY F-1010 - PRELIMINARY PROVISIONS AND DEFINITIONS

Definition of "Community Estate"

Memorandum 92-77 (SU) (enclosed) (\$5.50)

STUDY F-1090 - CUSTODY OF CHILDREN

Draft of Tentative Recommendation

Memorandum 92-60 (PKM) (to be sent)

STUDY F-1120 - PREVENTION OF DOMESTIC VIOLENCE

Comments on Tentative Recommendation

Memorandum 92-67 (PKM) (to be sent)

STUDY F-1130 - JUVENILE COURT LAW

Relocation of Juvenile Dependency Statute

Memorandum 92-55 (NS) (to be sent)

STUDY F-1170 - IMPLEMENTATION OF 1992 FAMILY LAW LEGISLATION

Memorandum 92-66 (SU et al.) (to be sent)

STUDY F-1180 - MINOR SUBSTANTIVE AND TECHNICAL REVISIONS

Memorandum 92-74 (SU) (to be sent)

5. STUDY F-521.1/L-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

Revised Draft of Tentative Recommendation

Memorandum 92-68 (NS) (sent 10/15/92) (\$8.50)

6. STUDY L-659.01 - INHERITANCE INVOLVING ADOPTED CHILD (PROBATE CODE § 6408)

Draft of Recommendation

Memorandum 92-69 (RJM) (sent 9/22/92) (\$5.50)

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

Results of State Bar Negotiations

Memorandum 92-39 (RJM) (sent 7/22/92) (\$8.50)

First Supplement to Memorandum 92-39 (enclosed) (\$5.50)

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

Revised Draft

Memorandum 92-50 (SU) (sent 9/3/92) (\$35.00)

First Supplement to Memorandum 92-50 (to be sent)

Friday, October 30, 1992

9. STUDY N-201 - JUDICIAL REVIEW OF ADMINISTRATIVE DECISION

Preliminary Issues--Consultant's Background Study

Memorandum 92-71 (NS) (sent 9/30/92) (\$25.00)

10. STUDY N-100 - ADMINISTRATIVE ADJUDICATION

Revised Draft of Statute

Memorandum 92-70 (NS) (sent 10/13/92) (\$25.00)

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MEETING SCHEDULE

<u>October 1992</u>		<u>Sacramento</u>
Oct. 29 (Thur.)	10:00 a.m. - 5:00 p.m.	
Oct. 30 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>November 1992</u>	No Meeting	
<u>December 1992</u>		<u>Sacramento</u>
Dec. 10 (Thur.)	10:00 a.m. - 5:00 p.m.	
Dec. 11 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>January 1993</u>		<u>Los Angeles</u>
Jan. 28 (Thur.)	10:00 a.m. - 6:00 p.m.	
Jan. 29 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>February 1993</u>	No Meeting	
<u>March 1993</u>		<u>Sacramento</u>
Mar. 25 (Thur.)	10:00 a.m. - 5:00 p.m.	
Mar. 26 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>April 1993</u>	No Meeting	
<u>May 1993</u>		<u>Sacramento</u>
May 13 (Thur.)	10:00 a.m. - 5:00 p.m.	
May 14 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>June 1993</u>	No Meeting	
<u>July 1993</u>		<u>Sacramento</u>
July 22 (Thur.)	10:00 a.m. - 5:00 p.m.	
July 23 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>August 1993</u>	No Meeting	
<u>September 1993</u>		<u>Sacramento</u>
Sep. 23 (Thur.)	10:00 a.m. - 5:00 p.m.	
Sep. 24 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>October 1993</u>	No Meeting	
<u>November 1993</u>		<u>Los Angeles</u>
Nov. 18 (Thur.)	10:00 a.m. - 6:00 p.m.	
Nov. 19 (Fri.)	9:00 a.m. - 4:00 p.m.	
<u>December 1993</u>	No Meeting	

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MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 29-30, 1992
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on October 29-30, 1992.

Commission:

Present:	Arthur K. Marshall Chairperson	Christine Byrd Daniel M. Kolkey Edwin K. Marzec Forrest A. Plant Colin Wied
	Sanford Skaggs Vice Chairperson	
Absent:	Bill Lockyer Senate Member Terry B. Friedman Assembly Member	Bion M. Gregory Legislative Counsel

Staff:

Present:	Nathaniel Sterling Pamela K. Mishey (Oct. 29)	Stan Ulrich Robert J. Murphy (Oct. 29)
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Consultants:

Michael Asimow, Administrative Law (Oct. 30)
Edward G. Halbach, Jr., Probate Law (Oct. 29)
Robert J. Sullivan, Administrative Law (Oct. 30)

Other Persons:

Larry Alamao, California Department of Real Estate, Sacramento (Oct. 30)
Herb Bolz, Office of Administrative Law, Sacramento (Oct. 30)
William M. Chamberlain, California Energy Commission, Sacramento (Oct. 30)
Frieda Gordon Daugherty, Executive Committee, Family Law Section, Los Angeles County Bar Association, Women Lawyers' Association of Los Angeles Family Law Section, Association of Certified Family Law Specialists, Beverly Hills (Oct. 29)
Karl Engeman, Office of Administrative Hearings, Sacramento (Oct. 30)
Margaret Fanon, Office of Administrative Hearings, Sacramento (Oct. 30)
M. Jeffrey Fine, California Unemployment Insurance Appeals Board, Sacramento (Oct. 30)

William N. Foley, California Public Utilities Commission, San Francisco (Oct. 30)
Don Green, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Oct. 29)
Robert Hargrove, Department of Motor Vehicles, Sacramento (Oct. 30)
Bill Heath, California School Employees Association, San Jose (Oct. 30)
Steve Kahn, Office of Attorney General, Department of Justice, Sacramento (Oct. 30)
Melanie McClure, State Teachers' Retirement System, Sacramento (Oct. 30)
Iris Mitgang, Legislative Chair, Association of Certified Family Law Specialists, Walnut Creek (Oct. 29)
Dick Ratliff, California Energy Commission, Sacramento (Oct. 30)
Miles J. Rubin, Executive Committee, Family Law Section, Los Angeles County Bar Association, Los Angeles (Oct. 29)
Anita Scuri, Department of Consumer Affairs, Sacramento (Oct. 30)
Bill Shank, California Public Employment Appeals Board, Sacramento (Oct. 30)
James Simon, Department of Social Services, Sacramento (Oct. 30)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Oct. 29)
Stuart A. Wein, California Occupational Safety and Health Appeals Board, Sacramento (Oct. 30)

MINUTES OF SEPTEMBER 10-11, 1992, COMMISSION MEETING

The Minutes of the September 10-11, 1992, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The December 1992 meeting of the Commission was cancelled. See discussion under "Budget Matters", below. The next meeting is scheduled for January 28-29, 1993, in Los Angeles.

Budget Matters

The Executive Secretary reviewed Memorandum 92-48 with the Commission, relating to budget matters. The Executive Secretary noted that the Commission's Administrative Assistant, Steve Zimmerman, has been laid off and has found a position in the Department of Finance in Sacramento. He will remain on the Commission's payroll until October 31, rather than November 30 as stated in the memorandum.

The Executive Secretary reported that of the five specific suggestions made to the Department of Finance for helping the Commission cope with its 15% budget reduction, four had been rejected. The fifth was made in a separate letter, to which the Department has not yet responded.

The Commission accepted the staff recommendation to cancel the December 1992 meeting in order to save money and give the staff time to adjust to the loss of the Administrative Assistant.

New Topics

The Commission considered Memorandum 92-64, relating to new topics for Commission study. The Commission approved the staff suggestion that authority be requested to study the Uniform Unincorporated Nonprofit Association Act. The work would be done on a low priority basis, as time and resources permit.

The description of the topic of "Shareholder Rights and Corporate Director Responsibilities" in Exhibit 1 of the memorandum was revised to read:

Shareholder Rights and Corporate Director Responsibilities

The California law governing shareholder derivative actions requires the shareholder to allege with particularity the efforts made to secure the board action the shareholder desires or the reasons for not making the effort before proceeding with an action in the corporation's name. Corp.

Code § 800(b)(2). Notwithstanding the statute, the demand requirement is excused routinely. See, e.g., 2 Marsh's California Corporation Law § 15.29 (3d ed, 1992 supp.). The law should be reviewed with the view toward clarification and codification of standards for excuse under the statute.

A principal defense of a director in a shareholder derivative action and in other litigation is the business judgment rule, a common law principle now codified in Corporations Code Section 309. The codification ~~limits~~ delineates the protection given for a good faith business decision. ~~The protection is not available if the decision is not made with the care of an ordinarily prudent person, including reasonable inquiry. Section 309(a); Gaillard v. Natomas Co., 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702 (1989).~~ The importation of ordinary negligence principles into the business judgment rule has confused the law in this area and been a factor in the decision of a number of California corporations to reincorporate in Delaware. Section 309(a); Gaillard v. Natomas Co., 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702 (1989). Delaware has a clear and well-defined body of law governing the business judgment rule, including a gross negligence limitation with respect to inquiry. See, e.g., 2 Marsh's California Corporation Law § 11.3 at 788-9 (3d ed, 1992 supp.). The business judgment rule of Delaware and other jurisdictions should be examined to determine whether they may offer useful guidance for codification and clarification of the law in California.

These changes should be incorporated in the draft of the Annual Report for 1992.

Annual Report for 1992

The Commission considered Memorandum 92-72 and the attached draft of the Annual Report for 1992. The Commission approved the Annual Report for printing, subject to any necessary editorial corrections.

Conflict of Interest Code

The Commission considered Memorandum 92-76 concerning revisions of the Commission's Conflict of Interest Code. The Commission approved the suggested approach of working out a technical revision of the Code to adopt a more flexible procedure for adjusting the list of disclosure categories in light of the subject matter under active Commission consideration.

D-02.01 - CONFLICTS OF JURISDICTION
AND ENFORCEMENT OF FOREIGN JUDGMENTS

See Study J-02.01.

F-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

The Commission considered Memorandum 92-68 and the attached staff draft of the tentative recommendation, together with a letter from Team 2 of the Estate Planning, Probate and Trust Law Section of the State Bar distributed at the meeting (Minutes Exhibit), relating to the effect of joint tenancy title on community property.

After a wide-ranging discussion touching upon such issues as the purpose and meaning of the transmutation statute, the application of joint tenancy statutes to personal property, the role of joint tenancy and community property presumptions, the public policy preference for community property, and the intention of married persons who take joint tenancy title, the Commission concluded there is no present consensus on the Commission concerning either the basis of existing law or the direction the Commission should be taking to address the problems of existing law.

The Commission requested the staff to prepare a memorandum for the January 1993 meeting reviewing the background of the current study, the assumptions on which the tentative recommendation is drafted, and the public policies underlying the draft. The memorandum also should include a discussion of the role of evidentiary burdens, information concerning the transmutation statute, and a more thorough explication of the impact of joint tenancy on creditors' remedies. The memorandum should address the possibility of revision to narrow the transmutation statute and application of the severance statute to personal property such as joint tenancy brokerage accounts.

The Commission also made the following specific decisions concerning the draft of the tentative recommendation attached to Memorandum 92-68:

Civ. Code § 683 (amended). Creation of joint tenancy. The language of subdivision (a)(2)(C), that rules governing creation of joint tenancy are subject to the Family Code community property requirements, should be broadened so that it is clear it governs personal property as well as real property. This might be done by converting the community property reference to a prefatory clause to the section or to a separate subdivision.

Civ. Code § 860. Scope of chapter. The statute should note on its face that it applies to personal as well as real property.

STUDY F-1001 - FAMILY CODE GENERALLY (ISSUES LIST)

The Commission considered Memorandum 92-58, which forwarded "The List" -- the list of potential family law issues collected by the staff during the development and consideration of the Family Code. The Commission also heard the views of several interested persons concerning items they believed should be added to the list. The issue of ex parte modification of custody orders should be added to the list.

STUDY F-1010 - PRELIMINARY PROVISIONS AND DEFINITIONS

The Commission considered Memorandum 92-77 concerning the definition of "community estate." The Commission approved the second alternative suggestion for revision in the memorandum -- that is, to apply a general definition of "community estate" including community property and quasi-community property to the entire Family Code and note in an appropriate Comment that the definition is not intended to alter the fiduciary duties between spouses -- for purposes of proceeding with the issue and soliciting comments. The staff will circulate a draft of the proposal and bring the draft back to the Commission at the January meeting. In addition, the word "property" should be deleted following "community" in Section 2501.

STUDY F-1090 -- CUSTODY OF CHILDREN

The Commission considered Memorandum 92-60 and the First Supplement concerning child custody provisions. The Commission approved the staff resolution of the issues raised in the memorandum. The Commission also made the following decisions.

(1) Inconsistencies between Family Code Sections 3100 and 3101. These sections appear to be in conflict in that one contains very broad and the other very narrow language concerning who may be granted visitation with a child. This should be added to "The List" as a substantive issue that might merit future study.

(2) Comprehensive revision of child custody terminology. The Commission considered the proposal of Mr. Hugh McIsaac regarding changes in the terminology used in child custody. Since the Commission's existing work load is substantial and since this project would likely involve substantive changes that are inappropriate for the Family Code cleanup bill, the Commission decided not to work on this project. This should be taken off "The List." The Executive Secretary will call Mr. McIsaac and inform him of the Commission's decision.

(3) Revision of proposed Section 3031. The last phrase of the introductory paragraph should be revised to refer to "both" of the following findings, rather than to "all."

(4) Adding DVPA to scope provision. The Commission directed the staff to add the Domestic Violence Prevention Act to the scope provision (proposed Section 3021), if possible.

Subject to revisions reflecting Commission decisions, the Commission approved the draft as a tentative recommendation for circulation and comment by interested persons.

STUDY F-1120 -- PREVENTION OF DOMESTIC VIOLENCE

The Commission considered Memorandum 92-67 concerning the comments received regarding the tentative recommendation *Reorganization of Domestic Violence Provisions* (September 1992). The Commission decided that as an initial goal the staff should retain the Family Code provision that includes children in the definition of domestic violence

and attempt to conform the related provisions in other codes. The Commission directed the staff to study expanding the court's authority to issue ex parte visitation orders to apply to unmarried parents and rejected the proposal to eliminate entirely the court's authority to issue ex parte visitation orders under the Domestic Violence Prevention Act. The Commission approved circulation of a revised draft. The staff is to include comments received in a draft recommendation for Commission review at the January meeting.

STUDY F-1130 - JUVENILE COURT LAW

The Commission considered Memorandum 92-55 and the First Supplement to Memorandum 92-55 (distributed at the meeting), relating to relocation of the juvenile dependency statute from the Welfare and Institutions Code to the Family Code. The staff recommended that this matter not be further pursued. The Commission made an initial decision to pursue the matter further, including the possibility of providing physical separation of dependency proceedings in court as well as relocating the dependency statute to the Family Code; the staff was directed to solicit further input more broadly from practitioners and others on the concept of relocating the juvenile dependency statute. Commissioners Plant and Skaggs opposed this decision; Commissioner Byrd abstained.

STUDY F-1170 - IMPLEMENTATION OF 1992 FAMILY LAW LEGISLATION

The Commission considered Memorandum 92-66 concerning implementation of 1992 family law legislation in the Family Code. The Commission approved the staff proposals and, since the December meeting was cancelled, authorized the staff to prepare additional technical amendments and include them in the 1993 Family Code bill, subject to Commission review at a future meeting.

STUDY F-1180 - MINOR SUBSTANTIVE AND TECHNICAL REVISIONS

The Commission considered Memorandum 92-74 concerning minor and technical revisions of the Family Code and approved the draft revisions attached to the memorandum. The staff will add these provisions to the bill draft to be prepared for the 1993 legislative session.

STUDY J-02.01 - CONFLICTS OF JURISDICTION AND
ENFORCEMENT OF FOREIGN JUDGMENTS

The Commission put Memorandum 92-65 over to the next meeting. The Commission asked the staff to confer with Commissioner Kolkey on the drafting of the second alternative proposing to amend the Uniform Foreign Money-Judgments Recognition Act.

STUDY L-521.1 - EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

See Study F-521.1.

STUDY L-659.01 - PARENT-CHILD RELATIONSHIP
FOR INTESTATE SUCCESSION

The Commission considered Memorandum 92-69, the attached staff draft of a *Recommendation: Inheritance Involving Adopted Child*, and the First Supplement and attached alternate draft. The Commission approved the splitting up of Probate Code Section 6408 into a series of shorter sections. The Commission asked the staff to bring back a clean draft to the next meeting along the lines of the draft attached to the First Supplement. There was a consensus that proposed Section 6451 should be revised substantially as follows:

§ 6451. Effect of adoption

6451. (a) ~~The An adoption severs the~~ relationship of parent and child ~~does-not-exist~~ between an adopted person and a natural parent of the adopted person unless both of the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

~~(b) If the adoption is by a person other than the spouse or surviving spouse of a natural parent, neither~~ Neither a natural parent nor a relative of a natural parent (except for a wholeblood brother or sister of the adopted person or the issue of that brother or sister) inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and the natural parent under paragraphs (1) and (2) of subdivision (a) , unless the adoption is by the spouse or surviving spouse of that parent.

(c) For the purpose of this section, a prior adoptive parent and child relationship is treated as a natural parent and child relationship.

The staff should let Judicial Council staff know about the planned renumbering of the provisions now in Section 6408.

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

The Commission considered Memorandum 92-39, the attached staff draft of a *Recommendation: Deposit of Estate Planning Documents With Attorney*, and the First, Second, and Third Supplements. The Commission approved the draft attached to the basic memorandum with the revisions recommended by staff in Exhibit 2 to the Second Supplement. The Commission directed the staff to have a bill prepared for introduction at the 1993 legislative session. The Commission authorized the staff to increase the clerk's fee to \$25 from the presently-proposed \$14 if necessary to obtain their support of the bill, but only after a credible showing by the clerks why the fee should be so high to receive a document they can microfilm and destroy.

STUDY N-201 - JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 92-71. The first portion of the consultant's background study on judicial review was attached to the memorandum. The Commission's consultant, Professor Michael Asimow, presented the material in the background study relating to standing (pages 1-29). The Commission made the following initial policy decisions concerning standing issues. The Commission also decided, with respect to timing of judicial review, that exhaustion of remedies should be jurisdictional rather than discretionary with the court.

Scope of Statute

The statute should apply to local as well as state governments. The statute should apply to standing to sue for any type of government action, not just adjudicative decisions. This would include standing to object to agency regulations. If the Commission finds as it proceeds through the judicial review issues and policies that this approach causes too many problems, the Commission may reconsider and narrow the broad scope of the project.

Notice of this project should be given to local agencies and to state agencies interested in the rulemaking process. Representative organizations such as the League of Cities and the County Supervisors Association should be contacted.

Participation Requirement

Judicial review of state agency adjudication, unlike judicial review of local agency adjudications and other agency actions, should be limited to persons who were parties in the agency proceeding. The staff should present for Commission review any issues that appear appropriate concerning whether nonparty "participants" such as witnesses, objectors, and persons who filed amicus briefs should have judicial review standing, and when other nonparticipants such as persons entitled to notice who didn't receive it or persons who sought to intervene as parties but were denied intervention should have standing.

With respect to other agency actions, a person who was not present or did not participate could seek judicial review if general standards of private interest standing or public interest standing are satisfied. This would not be a change in existing law with respect to state rulemaking but generally would be a change with respect to other agency actions, which require prior participation, subject to a number of exceptions. As a practical matter, however, this will not result in a substantial increase in law suits that are brought, but will simplify the law substantially in eliminating the need to classify various types of agency action.

Private Interest Standing

If agency action has prejudiced or is likely to prejudice a person, the person's private interest is affected. If this standard is satisfied, the person has standing to seek review of nonadjudicative agency action.

Local governments should not be subject to any limitations on private interest standing that do not apply to private persons.

An association would have standing to seek judicial review of a nonadjudicative agency action if a member's private interest is affected, or the private interest of a nonmember the association is required to represent (e.g. a labor union), provided that it is germane to the purposes of the association. There should be a Comment to the effect that there must be an actual member whose private interest is affected, and that discovery is appropriate to ascertain this.

The federal (and Model Act) "zone of interest" and "causation and remediability" limitations should not be imposed on private interest standing for review of nonadjudicative agency actions. Rather, appropriate limitations should be imposed on public interest standing.

Public Interest Standing

For nonadjudicative agency actions, the Commission rejected the federal (and Model Act) positions that public interest standing is not allowed. As a matter of policy, the Commission will not recommend that the existing state right of public access to the courts will be limited.

Under existing law, if a nonadjudicative agency action violates a statutory or constitutional provision intended to protect the general public, public interest standing would be available to any member of the public. The Commission requested to explore ways where actions such as this might be screened, for example by:

(1) A "private Attorney General" type requirement that the plaintiff first notify the Attorney General and give the Attorney General an opportunity to act.

(2) A requirement similar to that applicable in judicial review of workers compensation and public utilities decisions for an initial court screening process.

(3) An attorney's certificate similar to that required in some professional liability cases.

(4) Other general court screening provisions to ensure that the litigant is a proper representative of the public, including requirements of residence or conducting business in the state (and existence of California members in case of a national organization), and legitimacy and adequacy of the public interest representative.

Taxpayer Actions

The taxpayer lawsuit--Code of Civil Procedure Section 526a--should be eliminated in favor of private interest and public interest standing to challenge governmental action.

Jus Tertii

Existing California cases recognize third party standing to seek judicial review on behalf of another person in certain circumstances. The Commission directed the staff to attempt a statutory formulation of the case law.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

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

ChairWILLIAM V. SCHMIDT, *Newport Beach***Vice-Chair**VALERIE J. MERRITT, *Los Angeles***Executive Committee**ARTHUR H. BREDENBECK, *Burlingame*JAMES R. BIRNBERG, *Los Angeles*SANDRA J. CHAN, *Los Angeles*MONICA DELL'OSBO, *Oakland*ROBERT J. DURHAM, JR., *La Jolla*MELITTA FLECK, *La Jolla*DON E. GREEN, *Sacramento*JOHN T. HARRIS, *Gridley*SUSAN T. HOUSE, *Pasadena*JONNIE H. JOHNSON-PARKER, *Inglewood*VALERIE J. MERRITT, *Los Angeles*JAMES J. PHILLIPS, *Pleasanton*NANCY L. POWERS, *San Francisco*WILLIAM V. SCHMIDT, *Newport Beach*THOMAS J. STICKER, *San Francisco*ROBERT L. SULLIVAN, JR., *Fresno*ROBERT E. TEMMERMAN, JR., *Campbell*

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Law Revision Commission
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October 28, 1992

Mr. Nat Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: CLRC Memorandum 92-68
Effect of Joint Tenancy Title on Community Property

Dear Mr. Sterling:

On Monday, October 26, 1992, ten members of Team 2 of the Estate Planning, Probate and Trust Law Section of the State Bar of California participated in a conference call of over two hours duration concerning the above-referenced Memorandum. Participating in the conference call were Clark R. Byam (Pasadena), Elizabeth M. Engh (Oakland), J. Robert Foster (Morgan Hill), David H. Hines (San Francisco), Frank A. Lowe (Berkeley), Robin G. Pulich (Berkeley), James V. Quillinan (Mountain View), Probate Commissioner Julee Robinson (Orange County), Thomas R. Thurmond (Vacaville), and myself.

The views expressed in this letter summarize the position of Team 2 but not those of the Executive Committee of the Estate Planning, Probate and Trust Law Section. With the recent reorganization of Team 2 and the addition of new members to the Executive Committee, Team 2 now has five Executive Committee members participating in its discussions. Team 2 will present its views to the Executive Committee at its next meeting scheduled for December 5, 1992. Until the full Executive Committee of the Section has an opportunity to meet and discuss the revised draft of the Tentative Recommendation relating to the effect of Joint Tenancy title on a Community Property, I believe it has to be assumed that the last position of the Executive Committee opposing the Tentative Recommendation on the grounds that (1) title should mean what it says for the sake of simplicity and to preserve the integrity of the recording system, and (2) the thrust of the draft is overly prejudicial in favor of community property remains the position of the Executive Committee.

Team 2 hopes to persuade the Executive Committee that the revised Draft of the Tentative Recommendation is rewritten in a more neutral manner as between joint tenancy and community property. Pending a review by the full Executive Committee, the views expressed in this letter remain the views of Team 2 only and should not be construed as the views of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California.

Title of Recommendation

Team 2 applauds the Commission's staff in its rewrite of this Tentative Recommendation including the change of the recommendation's title from Community Property in Joint Tenancy Form to Effect of Joint Tenancy Title on Community Property. The members of Team 2 believe that the former title confused the issues being addressed.

Footnote 5

The Commission may wish to consider adding to its litany of cases *Estate of England*, 233 Cal. App. 3d 1 (1991).

Focus of Statute, Page 6

The introduction to the proposed statutory revisions has been redrafted so that the new focus of the statute is to ensure that married couples make a knowing decision when they take title as joint tenants, rather than to discourage the use of joint tenancy. Team 2 applauds the Commission's staff for changing the language from "the law should favor community property over joint tenancy for married persons" to "the law should ensure that married persons who take title as joint tenants should do so knowingly and intentionally".

Civil Code Section 683(b)

The staff note to this Section indicates that the language of Civil Code §683(b) law was inadvertently omitted from the last draft of the Tentative Recommendation.

Team 2 questions the effect of the interaction Civil Code §683(b) with new Family Code §860 *et seq.*

As Team 2 understands the proposed statutes, new Family Code §§860 *et seq.* are intended to ensure that people make a knowing decision when they use community property funds and take title as joint tenants. This should be the result whether the community property is either real property or personal property.

Civil Code §683(b) states that "a joint tenancy in personal property may be created by a written transfer, instrument, or agreement."

Suppose a hypothetical fact situation wherein H and W own community property securities (or other personal property) and establish a brokerage account by signing a simple titling account card that says it is a joint tenancy account. Assume further that the account titling card does not meet the safe harbor statutory provisions set forth in §863. Query whether H and W have created a true joint tenancy by signing a "written transfer, instrument, or agreement" pursuant to Civil Code §683(b). Proposed Family Code §860 has no statutory language that states that the Chapter applies to personal property as well as real property. Clearly, the proposed comment does address the issue. However, Team 2 is concerned that this may not be sufficient. One member of Team 2 suggests that Civil Code §683(b) be amended to read "a joint tenancy in personal property owned by persons other than spouses from community property sources may be created by a written transfer, instrument, or agreement."

Whatever the Commission decides, Team 2 would feel more comfortable if the statute expressly covered personal property so that no unintended dichotomy of treatment results depending upon whether the community property was personal or real.

Family Code §860 - Scope of Chapter

At the September meeting of the CLRC, it was suggested by the Commission's consultant to broaden the coverage to specifically include personal property. As noted above, Team 2 agrees with that position. Indeed, Team 2 would codify the statement "this chapter applies to personal property as well as real property" so that there was no confusion concerning the breadth of coverage.

More than one Team 2 member was expressly concerned about the affect of joint tenancy stock brokerage accounts held between spouses. Team 2 members believe that second only to a married couple's interest in their personal residence, many spouses hold title to significant wealth in jointly owned stock brokerage accounts. Sometimes the assets in the account are the result of the sales proceeds of community real property being deposited in such accounts. Team 2 admits that it has not had adequate opportunity to fully analyze the issue but believes that §860 *et seq.* should specifically apply to a joint tenancy brokerage account since these accounts oftentimes contain significantly appreciated securities at that time of the death of either spouse. One member of Team 2 indicated that Probate Code §5305 applies to funds on deposit at "financial institutions" that are derived

from community property funds. "Financial institution" is defined in Probate Code §5128 by reference to Probate Code §40 as a "state or national bank, savings and loan, credit union, or like organization." Thus it appears that a brokerage account is not covered by the multiple Party Account provisions.

Assuming Probate Code §5305 does not apply to stock brokerage accounts, it appears possible to salvage the double stepped up basis and ability to dispose of such property by will. If the Team 2 analysis is correct, then it believes that the statutory safe harbor form provided in Family Code §863 should specifically apply to stock brokerage accounts if married couples knowingly wish to receive joint tenancy treatment. Team 2 believes that this would go a long way towards alleviating the problems of continued inadvertent joint tenancy brokerage accounts between spouses.

Family Code §861

Team 2 recognizes that this Section specifically added the requirement of the signature of both spouses to affect a transmutation of community property to joint tenancy. Team 2 agrees with this additional requirement and recognizes that it goes further than existing Civil Code §5110.730 as interpreted by the *Estate of MacDonald*, 51 Cal. 3d 262 (1990). This simple addition to the statute will avoid what Team 2 believes to be potential burdensome proof problems of determining what is meant by "joined in, consented to, or accepted by the spouse whose interest is adversely affected."

There was also some discussion among Team 2 members as to whether or not the requirement that the transmutation be signed by both spouses include " or their legal representative". This would of course entail all the issues raised by the law of agency that Team 4 is presently dealing with in its study under Durable Powers of Attorney. Team 2 did feel it was important enough to bring out for discussion and perhaps clarification among the Commission members.

Probate Code §862 - Information Concerning Form of Title

Team 2 was unanimous in its vote to delete this proposed Section in its entirety. Team 2 agrees with the Executive Committee of the Trust and Estate Section of the Los Angeles County Bar Association concerning the imposition of liability on anyone for providing inaccurate or insufficient information to married persons when comparing community property to joint tenancy as a form of holding title to property. As drafted, the section would impose liability if the advisor accurately informs the couple concerning tax consequences, rights of testamentary disposition, intestate succession, but inadvertently fail to discuss management and control. Team 2 believes the such a result would increase malpractice exposure of practicing attorneys and further increase litigation rather than alleviate the litigation quagmire. Accordingly, Team 2 strongly believes that this Section should be deleted in its entirety. If spouses want true joint tenancy they can do so by executing the statutory form provided in proposed Family Code §863.

Equally as important, Team 2 believes that the CLRC would run into significant opposition from financial institutions, realtors, the banking industries, titling insurance industry, and other individuals involved in the titling of property. Such strong opposition could seriously jeopardize what Team 2 believes to be an otherwise very desirable solution to the problems of unintended joint tenancies between married persons.

Family Code §863. Statutory Form

This section provides a statutory "safe harbor" form that permits spouses to create true joint tenancy from community property - if they so desire.

Team 2 believes that there is a delicate balance between providing too much information so the consumer is discouraged from reading the warning and insufficient information.

Management and Control

Team 2 believes that this paragraph should be deleted in its entirety. Team 2 believes that management and control are not significant enough issues for the majority of married couples. Indeed, the collectively experience of Team 2 is that practice varies widely from institution to institution concerning a spouse's unilateral ability to transfer a one-half interest in joint tenancy. Many institutions permit it. Others require both spouse's to join together to transfer funds.

Passage to Surviving Spouse

Team 2 would rewrite this section to read "community property passes to the surviving spouse if there is no will or if the deceased spouse's will gives the property to the surviving spouse." The statute as presently written makes no reference to the fact that the spouse may will his or her community property to the other spouse. While this fact is obvious to the legal practitioner, Team 2 does not believe it is obvious to the lay person. The good intentions of §863 may create more confusion for the non-expert reader, rather than clarify things. Team 2 suggest that the language could be reviewed by a panel of lay persons to determine what meaning they draw from the words.

Right to Will Property

Team 2 suggest restating this first sentence of this provision to read "each spouse may will a one-half interest in community property." Team 2 suggest deleting the example as it is misleading and somewhat limiting. As indicated above, the notice makes no reference to the fact that a spouse may will his or her community property to the other spouse.

Probate

Team 2 suggests rewriting the first sentence in this section to read "[I]f a deceased spouse's will disposes of property to a surviving spouse, or if the deceased spouse dies without a will, community property passes to the surviving spouse without probate, unless the survivor elects probate."

Income Taxes

Team 2 suggests rewriting the last sentence to read "[J]oint tenancy results in a savings in income tax only if property has decreased in value."

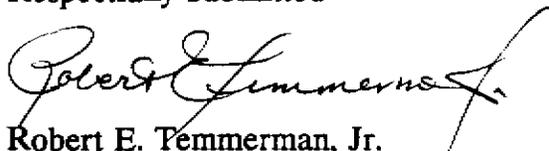
Team 2 recognizes that the longer we make the informational advice in the statutory form, the more complicated and useless the form becomes as the consumer guide to the average married couple.

Conclusion

Although improvements and further refinements to the Tentative Recommendation can still be made, Team 2 supports the revisions to the Tentative Recommendation relating to the Effect of Joint Tenancy Title on Community Property and believes that the emphasis of the revised draft is to ensure that the spouses make an informed and intentional decision should they decide to take title as joint tenants. Accordingly, Team 2 urges the Commission to circulate the Tentative Recommendation in an effort to solicit opinions from a more diverse group of professionals. Team 2 hopes that the family law bar will share its concerns as well as the real estate and banking industries. Team 2 recognizes that the contributions from these groups are important to developing a desirable and workable solution to the problems presented once married couples use community property funds to acquire joint tenancy assets.

Although I will not present to answer questions at the next CLRC meeting, Tom Stikker and Don Green will be serving as the Executive Committee liaisons to the Commission and have been briefed on the results of Team 2's conference call.

Respectfully Submitted



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cc: Valerie J. Merritt, Chair
Thomas J. Stikker, CLRC Liaison
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Team 2 members