

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 13, 14, and 15, 1982

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on May 13, 14, and 15, 1982.

Law Revision Commission

Present:	Robert J. Berton, Chairperson	John B. Emerson
	Beatrice P. Lawson, Vice Chairperson	Debra S. Frank
	James H. Davis	Bion M. Gregory
Absent:	Roslyn P. Chasan	Omer L. Rains, Member of Senate
	Alister McAlister, Member of Assembly	David Rosenberg

Staff Members Present

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

Consultants Present

Gail B. Bird, Property and Probate Law (May 14-15)
James L. Blawie, Property and Probate Law (May 14)
Carol S. Bruch, Community Property (May 13)
Susan French, Property and Probate Law (May 14-15)
Russell Niles, Property and Probate Law (May 14-15)
William A. Reppy, Community Property (May 13)

Other Persons Present

Michael E. Barber, California District Attorney's Family Support Council,
Sacramento (May 13)
James D. Devine, State Bar, Estate Planning, Trust and Probate Law
Section, Monterey (May 14)
Jan C. Gabrielson, Executive Committee, State Bar, Family Law Section,
Los Angeles (May 13-15)
John Hamilton, Attorney, Dallas, Texas (May 15)
Alan Pedlar, Executive Committee, State Bar, Business Law Section, Los
Angeles (May 13)
William H. Plageman, Jr., State Bar, Estate Planning, Trust and Probate
Law Section, San Francisco (May 14)
Rick Schwartz, Senior Counsel, Bank of America and Representative,
California Bankers Association, Los Angeles (May 13)

ADMINISTRATIVE MATTERS

MINUTES OF MARCH 1982 MEETING

The Minutes of the March 18-20, 1982, meeting as submitted by the staff were approved after the following changes were made:

On page 3, the following was substituted for the second and third paragraphs:

Contract with Professor Paul E. Basye. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor Paul E. Basye of the Hastings College of Law to provide expert advice at Commission meetings and legislative hearings concerning the law relating to real and personal property and probate. The contract is to provide for payment of \$50 compensation for each day of attendance at a Commission meeting or legislative hearing, and for travel expenses in attending the meeting or hearing, when requested by the Commission through its Executive Secretary. The total amount to be expended pursuant to the contract is not to exceed \$500. The contract is to expire on June 30, 1984.

Contract with Professor James L. Blawie. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor James L. Blawie of the School of Law, University of Santa Clara, to provide expert advice at Commission meetings and legislative hearings concerning the law relating to real and personal property and probate. The contract is to provide for payment of \$50 compensation for each day of attendance at a Commission meeting or legislative hearing, and for travel expenses in attending the meeting or hearing, when requested by the Commission through its Executive Secretary. The total amount to be expended pursuant to the contract is not to exceed \$500. The contract is to expire on June 30, 1984.

On page 13, the following was substituted for the first full paragraph:

The Commission approved the staff recommendation to retain Probate Code Section 320 (duty of custodian to deliver will after testator's death) in preference to UPC Section 2-902, except that the staff should consider whether the last sentence of UPC Section 2-902 (contempt sanction) should replace Probate Code Section 321 (petition and order for production of will) or whether the more detailed language of Section 321 is preferable.

ELECTION OF CHAIRPERSON

Robert J. Berton was unanimously elected as Chairperson for a term which expires on December 31, 1982, this being the remainder of the unexpired term of the former Chairperson Jean C. Love.

PRESENTATIONS OF PLAQUES AND CERTIFICATES

The Commission awarded a plaque to former Chairperson Jean C. Love and former Chairperson Beatrice P. Lawson. A certificate of distinguished service was awarded to former Commissioner Thomas S. Loo and former Commissioner Jean C. Love.

TIMES AND PLACES OF MEETINGS

The Commission determined that meetings ordinarily should be held on Thursday evening and Friday rather than on Friday evening and Saturday.

The Commission determined that two out of every three meetings should be held in the South and the other meeting should be held in the North.

SCHEDULE FOR FUTURE MEETINGS

The following schedule for future meetings was adopted.

June 1982

No meeting

July 1982

July 22 (Thursday) - 7:00 p.m. - 10:00 p.m.	San Francisco
July 23 (Friday) - 9:00 a.m. - 5:00 p.m.	
July 24 (Saturday) - 9:00 a.m. - 12:00 noon	

August 1982

No meeting

September 1982

September 23 (Thursday) - 7:00 p.m. - 10:00 p.m.	San Diego
September 24 (Friday) - 9:00 a.m. - 5:00 p.m.	
September 25 (Saturday) - 9:00 a.m. - 12:00 noon	

October 1982

No meeting

November 1982

November 4 (Thursday) - 7:00 p.m. - 10:00 p.m.	Los Angeles
November 5 (Friday) - 9:00 a.m. - 4:00 p.m.	

December 1982

No meeting

CONSULTANT CONTRACT

The Commission considered Memorandum 82-61 and approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor Jesse Dukeminier of the UCLA Law School to provide expert advice at Commission meetings and legislative hearings concerning the law relating to real and personal property and probate. The contract is to provide for payment of \$50 compensation for each day of attendance at a Commission meeting or legislative hearing, and for travel expenses in attending the meeting or hearing, when requested by the Commission through its Executive Secretary. The total amount to be expended pursuant to the contract is not to exceed \$1,500. The contract is to expire on June 30, 1984.

LEASE FOR OFFICE SPACE

The Executive Secretary reported that the Commission plans to reduce its office space by approximately one-third in order to avoid expending additional moneys for office rent during 1982-83. The office space is leased to the Commission by the Palo Alto Unified School District. The Commission approved the new lease outlined by the Executive Secretary which provides for a rental of approximately 80 cents per square foot.

1982 LEGISLATIVE PROGRAM

The Commission received the following report concerning the 1982 Legislative Program.

Enacted

- Ch. 150, Stats. 1982 - Senate Bill 203 (Increases interest rate to 10 percent as recommended by Commission. Also provides for prejudgment interest in personal injury actions.)
- Ch. 182, Stats. 1982 - Assembly Bill 2341 (escheat)
- Ch. 187, Stats. 1982 - Assembly Bill 2331 (holographic wills and oral wills)
- Res. Ch. 18, Stats. 1982 - Assembly Concurrent Resolution 76 (continues authority to study previously authorized topics)

Sent to Floor in Second House

- Assembly Joint Resolution 63 (federal pensions and benefits subject to state marital property law)

Passed First House

Assembly Bill 707 (enforcement of judgments) (to be set for hearing after Commission's May meeting)
Assembly Bill 798 (conforming revisions to enforcement of judgments bill) (companion bill to AB 707)
Assembly Bill 2332 (prejudgment attachment) (companion bill to AB 707)
Assembly Bill 2416 (marketable title)
Assembly Bill 2643 (Pay-on-death accounts)
Assembly Bill 2750 (conforming revisions to bonds and undertakings statute)

Pending in Fiscal Committee First House

Assembly Bill 2751 (bonds and undertakings law)

Dead

Assembly Bill 325 (nonprobate transfers) (But see AB 2643--above--which would effectuate this recommendation in part)

STUDY D-300 - ENFORCEMENT OF JUDGMENTS

ASSEMBLY BILL 707 (ENFORCEMENT OF JUDGMENTS STATUTE)

Operative date. The Commission considered a letter from the California Land Title Association (a copy of which is attached to these Minutes) strongly urging that AB 707 and AB 798 (relating to enforcement of judgments) be amended to provide for a January 1, 1984, operative date. Representatives of the California Bankers Association and the State Bar Business Law Section indicated that the operative date presently provided in the bill--July 1, 1983--was satisfactory and recommended that this operative date be retained. Taking into consideration the view expressed by representatives of the groups most affected by the proposed legislation, the Commission decided to retain the existing operative date.

Amendments relating to homesteads. The Commission considered Memorandum 82-63 and determined that AB 707 should not be amended prior to the next hearing to make the amendments that would satisfy the objection of the California Association of Collectors. The amendments attached to Memorandum 82-63 should be made available to the Senate

Judiciary Committee and its staff and others prior to the hearing, so that the Committee will have the amendments available should it wish to make them. However, the Commission representative should advise the Committee that the Commission does not recommend those amendments. The Committee should be advised that the Commission recommends the bill in its present form (with only a few technical amendments and an amendment to provide an exemption for financial aid provided by an institution of higher education). The representative of the California Bankers Association and the representative of the Subcommittee on Debtor/Creditor Relations indicated that they supported the bill in its unamended form and would oppose the amendment urged by the California Association of Collectors.

Exemption for student aid. The Commission considered Memorandum 82-50 and the First Supplement to Memorandum 82-50. The Commission determined to amend Assembly Bill 707 to add the new provision set out in Exhibit 2 of Memorandum 82-50. The new provision reads:

704.190. (a) As used in this section, "institution of higher education" means "institution of higher education" as defined in Section 1141(a) of Title 20 of the United States Code, as amended.

(b) Before payment, financial aid for expenses while attending school provided to a student by an institution of higher education is exempt without making a claim. After payment, the aid is exempt.

The Comment set out in Exhibit 2 also was approved.

ASSEMBLY BILL 2332 (PREJUDGMENT ATTACHMENT)

The Commission considered Memorandum 82-66 relating to the proposed legislation to effectuate the Commission's recommendation relating to prejudgment attachment. The Commission noted the objection of the State Bar Subcommittee and the California Bankers Association to the proposed provision that permits release of an attachment lien on a dwelling without regard to the value of the dwelling. The Commission determined to eliminate this provision from the bill and to make the necessary conforming revisions in the bill to reflect the elimination of the provision.

CALIFORNIA LAND TITLE ASSOCIATION

P.O. BOX 13968 • SACRAMENTO, CALIFORNIA 95813 • (916) 444-2647

April 6, 1982

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

The Legislative Committee of the CLTA has recently reviewed Assembly Bills 707 and 798 and while we have no substantive objections to either of these two measures we strongly urge that they be amended to incorporate a January 1, 1984, effective date.

This request is being made based upon the following factors:

(1) Both measures contemplate major substantive changes in law.

(2) Alerting and preparing the bar, via CEB courses and other means, for this change in law is essential, yet time-consuming and a one-year lead time will serve to insure a smooth transition from old to new practices.

(3) Necessary lead time to analyze and develop practice recommendations for member companies.

(4) Experience with other major substantive changes in the law affecting interest in real property, i.e., probate homesteads, community property reform.

(5) In the event unforeseen and undesirable results would be occasioned by application of the new law, sufficient time would exist to enact necessary remedial legislation.

(6) Allow sufficient time for the Judicial Council to develop forms necessary to the implementation of the new law.

Mr. John H. DeMouilly
April 6, 1982
ABs 707 and 798 - Page 2

I trust the above will satisfy you and members of the Commission and that the one-year delayed operative date we are asking for is a reasonable request, one that is intended to insure a smooth transition in law.

Respectfully yours,



Sean E. McCarthy
Executive Vice President
and Counsel

SEM:vo

STUDY D-312 - DEBTOR-CREDITOR RELATIONS (LIABILITY OF MARITAL
PROPERTY FOR DEBTS AND OBLIGATIONS)

The Commission commenced, but did not complete, consideration of Memorandum 82-33, relating to the liability of marital property for debts and obligations. The Commission made the following determinations with respect to the matters considered.

Support obligations. The Commission heard a presentation from Michael E. Barber on behalf of the District Attorney's Family Support Council; a copy of Mr. Barber's written remarks are attached. Mr. Barber's comments were addressed to the Commission's decision to preclude garnishment of the earnings of a non-debtor spouse to satisfy a support obligation of the debtor spouse. The Commission felt that the earnings of a non-obligor spouse should be taken into account in setting the amount of the support obligation of the obligor spouse. The Commission felt that as a general rule the earnings of the non-obligor spouse should not be subject to garnishment on the support obligation. However, the Commission also requested the staff to draft an exception to the general rule to allow garnishment if there are no other assets readily available to satisfy the support obligation and it would not be inequitable to allow garnishment of the earnings of the non-debtor spouse in the circumstances of the particular case. The Commission will review the staff draft before it finalizes any policy decisions on this matter.

Reimbursement. With respect to tort debts, the Commission requested the staff to prepare a memorandum on liability and reimbursement after separation of the spouses, analyzing the 1982 State Bar Conference of Delegates resolution on this matter. With respect to contract debts and other obligations, the Commission requested the staff to prepare a memorandum on the extent to which reimbursement is presently allowed, whether there are other cases to which reimbursement should be extended, and whether a statute of limitation, such as the three-year statute for tort reimbursement, should be provided for any of these situations.



DISTRICT ATTORNEY
SACRAMENTO COUNTY

DOMESTIC RELATIONS

P.O. Box 180837 • 1725 - 28th Street • Sacramento, California 95816
(916) 440-5811

May 13, 1982

HERB JACKSON
District Attorney

L. ANTHONY WHITE
Chief Deputy

MICHAEL E. BARBER
Supervising Deputy

JON T. HEINZER
Division Chief

John H. DeMouley
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D
Palo Alto, California 94306

RE: May 13 Meeting of Law Revision Commission
Agenda Item 1 - Liability of Marital Pro-
perty for Debts and Obligations

Dear Mr. DeMouley

I wish to state on the record the opposition of the District Attorney's Family Support Council to the proposal to alter the law concerning liability of community earnings for support of children. The proposal now before the Commission is a step backward for both the rights of children and taxpayers in this area, and will create nothing but confusion.

The problem revolves around the definition of "debts" under Section 5120.005 Civil Code and the exception from the community carved out for "earnings" under proposed Section 5120.010 (b) Civil Code. On the surface, it would appear that these proposals would help the rights of the two groups described above. But in fact they are better protected under existing law.

To make my point clearer, a brief review of existing law is in order. There is within the staff report the assumption that Section 199 Civil Code limits the ability to enforce support obligations where the earnings of a second spouse are the objective of the enforcement action. In fact, Section 199 Civil Code was effectively repealed in Brown v. Brown (1979) 99 CA3d 702, 160 C.R. 524. The holding in that case was that the section was confined in its application to support actions arising under the chapter in which it was found. Since support actions could be based on Section 4700 Civil Code, Section 7000 Civil Code, or Section 11350 Welfare and Institutions Code, the section became moot and, unless otherwise protected, the second spouse's earnings became available as a basis for establishing a support order and presumably for its enforcement.

John H. DeMoulley
May 13, 1982
Page Two

In the context of public assistance, the income of second spouses has been by statute made available for support of children in a household (Section 5127.6 Civil Code), a statute consistent with Section 4807 Civil Code making community property available for the support of children. It should be noted the staff analysis appears to ignore Section 4807 Civil Code and its interpretation of the Brown case (supra) as granting access to a second marriage's community property as a basis for an increased support order.

In addition to being rendered moot, Section 199 Civil Code has been deemed unconstitutional by the Attorney General. He found it discriminates in favor of out of wedlock children and against children whose rights have been adjudicated in a dissolution. (59 Ops. A.G. 15 (1976)). Also, the interpretation the Brown court gave Section 199 Civil Code is supported by Markey, California Family Law Practice and Procedure, Section 23.19(2), page 23-26.1:

"One way to make these two sections consistent is to confine Section 199 to support obligations under the chapter mentioned therein and to allow Section 5127.6 to govern support obligations under Civil Code Section 4700, which is in a different chapter and equally provides for orders of child support. If the statutes are inconsistent, Section 5127.6 will prevail because it was enacted later."

Finally, the federal government has adopted regulations that support Section 5127.6 Civil Code. These are in 45 C.F.R. 233.20 (3) XIV. In essence, they provide that second spouse's income will be included in a family budget before welfare eligibility is deemed to exist.

Your proposal fixes the date of the support debt at the time the order for support is entered, notwithstanding later modifications. While the following proposed section subjects community property to this obligation, it specifically exempts community earnings of a second marriage if the support order was entered prior to the second marriage. Thus it repeals the Brown case, which permitted community earnings of a second spouse to be taken into consideration in a modification proceeding. Notwithstanding later disclaimers, it also adversely impacts the public interest in limiting welfare eligibility to truly needy households. While the proposed statute may be preempted by the above-referred to federal regulations, the conflict is unnecessary, and creates a needless potential for litigation.

The proposed starting date of the obligation is open to a second objection. It unfairly and probably unconstitutionally

John H. DeMoulley
May 13, 1982
Page Three

discriminates against children of a divorce heard in California or any jurisdiction where support could be awarded, and in favor of all children whose support rights are litigated only after a second marriage. This problem is partially redressed by the last clause of your proposed Section 5120.005(b)(4) which says the debt occurs "In other cases, at the time the obligation arises."

If the word "obligation" therein means at the earliest date on which under California law a support order could have been entered, then the bulk of children for whom support may be sought would be covered by this rule, harsh as it is. Still omitted would be out of wedlock children conceived after marriage. In the case of these children, the income of a spouse would be liable for support. However, it is far more likely, because Section 5120.005(b)(3) deals with cases where support orders have been entered, that the word "obligation" would be interpreted to mean the date on which a support order was entered. In this case, all children of a first marriage who lacked sufficient jurisdiction to secure a support order at the time of divorce are better off than those who get a support order or the court reserves jurisdiction on this issue. Of course, all out of wedlock children will be better off suing married men with working spouses for support, than single men of comparable income. Quite likely the whole statute will be struck down as a result of this inconsistency.

It is therefore recommended that the date on which a support obligation is incurred be changed to the date on which a court ordered installment thereon comes due. Such a treatment is consistent with the statute of limitations for these debts and with welfare law at the national level. Where there is an unliquidated support obligation the obligation shall be construed to accrue as the child matures, rather than revert back to the date of conception or birth of the child. By this, the objective of not complicating welfare eligibility will be achieved, since this will permit the consideration of a second spouses income in that process. Finally, Brown should be ratified by permitting community "earnings" to be considered in any modification proceeding.

It is my understanding that this position has been opposed in the Commission as potentially threatening second marriages. I have noticed no upsurge in the dissolution of second marriages since the Brown case or the enactment of Section 5127.6 Civil Code. The position taken by the Brown court and the legislature in Section 5127.6 Civil Code have had a positive effect on both the rights of children and welfare generally.

Enforcement of support has now been able to proceed where the concept of second spouse "earnings" has been been a sham to conceal a community business venture. In such cases, the obligated parent would use the appearance of separate management and control

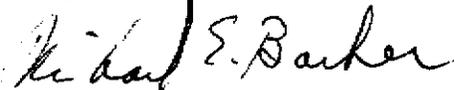
John H. DeMoulley
May 13, 1982
Page Four

as a vehicle for hiding both assets from which to pay and resources on which to base an order. While the opening paragraph of proposed Section 5120.010(b) Civil Code making community property available regardless of management, the concept of "earnings" leaves a rather large loophole.

The development of the philosophy behind Section 5127.6 Civil Code has been consistent with the public's determination eliminate what it perceives as a loophole in A.F.D.C. eligibility. One persistent, and grating, complaint I have heard about A.F.D.C. eligibility concerns those situations where the household income was in five figures, yet A.F.D.C. was being paid to the household. In fact, one prosecutor in Michigan several years ago identified a household where the income exceeded \$100,000 and yet A.F.D.C. was being paid to that household. To now attempt to reopen this loophole, in our present economic situation, is to invite legislative rejection of this revision. Such debate as this proposal will stir up will work to the detriment of those A.F.D.C. recipients who have not had the good fortune to remarry (or marry) well.

In conclusion, the present law reflects the true state of family finances, and the public's desires as to the support of children. Weakening parental responsibility, as this proposal would, is not in the public interest. The draft before you will probably not pass the constitutional test of equal protection. It is hoped you will revise an otherwise good proposal.

Very truly yours



Michael E. Barber
Legislative Representative
District Attorney's Family Support Council

MEB:js

STUDY F-600 - COMMUNITY PROPERTY (DISPOSITION OF
REAL AND PERSONAL PROPERTY)

The Commission considered Memorandum 82-59 and the First and Third Supplements thereto, relating to limitations on the disposition of community real and personal property by one spouse acting alone. With respect to community real property, the rule should be the same as for community personal property--either spouse acting alone may dispose of the property, subject to a duty of good faith, but may not make a gift of the property. However, these rules would be subject to the state of the title to the property, whether in the name of one or both spouses, and joint action would still be required for disposition of the family home. With respect to community personal property, either spouse should be able to make a usual or moderate gift, in accordance with the Commission's earlier decision. The Comment to this provision should state that in making a determination after death whether a gift was usual or moderate the court must take into account such matters as amounts received at death by the surviving spouse.

STUDY F-600 - COMMUNITY PROPERTY (TITLE PRESUMPTIONS
AND TRANSMUTATIONS)

The Commission considered the Second Supplement to Memorandum 82-59, relating to title presumptions and transmutations of separate and community property. The Commission requested the staff to draft provisions along the following lines. There should be a general community property presumption for property of married persons, rebuttable by tracing to a separate source or evidence of a transmutation by the spouses. The form of title should not create a presumption or inference as to the character of the property. Transmutation of real property should be in writing. The staff should consider whether formalities are necessary for transmutation of personal property based upon the nature of the property, including whether title to the property normally is evidenced by written documentation. In this connection the staff should review decisions made by the Commission at the May 1981 meeting concerning personal and household type items and the value of the item.

STUDY H-400 - MARKETABLE TITLE

The Commission considered a letter from W.F. Robinson, writing on behalf of the California Consumer Finance Association, concerning Assembly Bill 2416 (introduced to effectuate the Commission's recommendation relating to marketable title to real property). The letter pointed out that the four-year expiration period for the lien of a deed of trust provided by AB 2416 is unduly short. A copy of the letter is attached. The Commission decided to amend AB 2416 to provide that the lien of a deed of trust expires ten years after the obligation that it secures matures, except that the lien can be extended for an additional ten-year period by recording a notice of intent to preserve the interest.



May 5, 1982

Mr. John H. De Mouly, Executive Secretary
California Law Revision Commission
4000 Middlefield Road., Room D-2
Palo Alto, California 94306

Re: AB 2416

Dear Mr. DeMouly:

I am writing to you at the suggestion of Mr. Richard Wright, Executive Vice President of the California Consumer Finance Association.

As Chairman of the Law Committee of the California Consumer Finance Association, I am expressing the consensus of that Committee and of the membership of the Association.

First of all, we agree that the general intent of AB 2416, which I understand was drafted by the Law Revision Committee, is understandable and has merit. However, we do take exception to the bill's provisions relating to so-called "ancient" deeds of trust.

As you know, deeds of trust are presently unlimited by time [Travelli v. Bowman, 150 C 587]. Section 820.010 of AB 2416 says in effect that the period in which a power of sale can be exercised shall be determined by the limitation period of the underlying obligation. The underlying obligation to a deed of trust is ordinarily a promissory note. CCP §§335, 337 provide that an action must be "commenced" on a promissory note within four years [after default] or the action is barred. Under CCP §350, an action is "commenced" within the meaning of §§335, 337 "when the complaint is filed." This raises the question: How would this apply to a power of sale if the four-year limitation period is applied? No complaint is filed when foreclosure is by power of sale. In fact, no action can be taken on the promissory note without foreclosure under the "one action" rule of CCP §726, and foreclosure by power of sale effectively bars any action on the note for a deficiency [CCP §580(d)].

Mr. John H. DeMouilly
Re: AB 2416
May 5, 1982

The result is that AB 2416 creates an ambiguity as to what type of action in connection with a deed of trust will successfully toll the four-year limitation period. For example, does the filing of a Notice of Default [the statutory prerequisite to exercising a power of sale (CC §2924)] constitute the "commencement" of an action within the limitation period prescribed by CCP §337? Or, by accelerating the balance due, does it merely trigger the four-year limitation period? Must the sale be noticed within four years [CC §2924f], or must the property be completely sold within that period? These are questions that some court will have to decide if AB 2416 is enacted in its present form. I am sure you agree that legislation should be drafted, if possible, to remove ambiguities at the very outset.

There is still another defect in AB 2416 which, to a creditor, may be of even more importance. The desire to expunge truly "ancient" mortgages and deeds of trust from the record is a commendable objective. But a trust deed of four-years' duration is hardly "ancient." Certainly, it is much less so than a judgment lien which has a statutory life of ten years and may be further extended under special circumstances [CCP §674]. In this period of declining housing values and shrinking equities, many creditors find that it is not expedient to begin the exercise of a power of sale immediately when a default occurs. To do so, could mean a certain loss. However, what would ordinarily be a loss may eventually be recovered in full when the house is sold some years later. Certainly, we would agree that there may be an element of uncertainty and unfairness in permitting the deed of trust to be a cloud on the debtor's title indefinitely unless discharged by a reconveyance. But, using the analogy to a ten-year judgment lien, four years is too short a limitation period for a deed of trust, particularly when substantial sums can be involved.

We would suggest that a maximum limitation period of twenty years would be more appropriate. Then there would be no misnomer in calling a deed of trust exceeding twenty years an "ancient" deed of trust subject to elimination, and the purpose and intent of AB 2416 would be more truthfully and fairly achieved.

Under these circumstances, I would respectfully suggest the following amendments:

1. On page 8 of the printed bill as amended in Assembly March 18, 1982, strike out lines 21 to 28, inclusive.

Mr. John H. DeMouilly
Re: AB 2416
May 5, 1982

2. On page 8, line 32, strike out "pursuant to Section 882.010."
3. On page 8, line 38, strike out "10" and insert "20."

Perhaps you can draft language that would more adequately solve the problems mentioned above. If I can be of any assistance, please let me know.

Very truly yours,


W. F. Robinson
Vice President,
General Counsel & Secretary

R:f

c: Assemblyman Alister McAlister

STUDY H-510 - JOINT TENANCY

The Commission considered Memorandum 82-32 and the First and Second Supplements thereto, relating to joint tenancy. The Commission made the following decisions with the view to preparation of a comprehensive statute governing joint tenancy:

Severance. The rule of Riddle v. Harmon, that a joint tenant may sever the joint tenancy by written declaration without the necessity of a strawman conveyance, should be codified. Such a written declaration should be in a recordable form in the case of real property, but need not be recorded to be effective. A notice requirement should not be imposed as a condition of making the severance.

Effect of survivorship on secured creditors. A security interest on the share of a joint tenant should survive the death of the joint tenant. The survivor should take the interest of the decedent subject to the security interest.

Effect of survivorship on unsecured creditors. The share of a joint tenant who dies should continue to pass to the survivor free of the claims of unsecured creditors of the decedent.

Testamentary disposition of joint tenancy interest. The Commission decided not to permit a joint tenant to dispose of the joint tenancy interest by will.

Effect of survivorship on lessees. If a joint tenant makes a lease of the joint tenancy property without the joinder of the other joint tenant, upon the death of the lessor the survivor takes the joint tenancy property subject to the leasehold interest of the lessee in the decedent's share.

Effect of simultaneous death. See Minutes on Study L-612 - Probate Law (Simultaneous Death).

Ownership of joint bank accounts. The Commission's recommendation on joint bank accounts should be revised to include a presumption of equal ownership of funds in an account. The staff should review the statutory language and Comment relating to the ability of a bank to create a convenience or joint management account without right of survivorship, and make any suggested changes in wording to the Commission. Community property forms should not be mandated.

Joint tenancy and community property. Where title to property acquired with community funds is taken in joint tenancy form, the property should be presumed to be community with a right of survivorship. The right of survivorship would be terminated by severance of the joint tenancy. The community property presumption could be rebutted by a separate transmutation or by a clear indication in the deed of the intent to transmute to separate property. Ownership of property in joint tenancy form would be based on proportionate contributions, subject to agreement otherwise by the parties. Third parties such as creditors would be bound by these rules as well.

As a separate recommendation, property held in common by the spouses, whether as joint tenants, tenants in common, or partnership, should be subject to jurisdiction of the court at dissolution. This will give the court greater flexibility to make a sound distribution of the marital assets on an aggregate basis. If joint tenancy property is not disposed of on dissolution, the rule should be that dissolution severs the joint tenancy and creates tenancy in common, without right of survivorship.

Transitional provisions and retroactivity. The staff should give careful attention to transitional provisions, particularly where a new requirement of writing is imposed. The Commission felt that the new provisions should be made retroactive to the extent practical. In this connection, the Commission felt there would not be a constitutional impediment in cases where a burden of proof, as opposed to a vested right, is being affected.

STUDY L-401 - RIGHTS AND DISABILITIES OF MINORS
(EMANCIPATED MINORS)

The Commission considered Memorandum 82-53 and approved for distribution for review and comment the tentative recommendation attached to the Memorandum. Any necessary editorial revisions should be made in the tentative recommendation before it is distributed for review and comment.

STUDY L-604 - PROBATE LAW (FAMILY PROTECTION)

Election to Take Against the Will

The Commission considered Memorandum 82-47 concerning election to take against the will. The Commission disapproved the staff recommendation to require the surviving spouse to elect between community property rights and benefits under the decedent's will unless the will expressly permits the surviving spouse to take both under the will and against the will. The Commission decided that existing law should be retained under which the surviving spouse need not make an election unless the will expressly requires it or where such an intent on the part of the decedent may be implied from the fact that not to require an election would thwart the decedent's estate plan.

The staff should consider whether the opposite rule applicable to quasi-community property (Prob. Code § 201.7) should be brought into line with the rule on community property.

Family Maintenance

The Commission considered Memorandum 82-41 concerning family maintenance. The Commission approved the staff draft attached to the Memorandum with the following changes:

(1) Those eligible for a family maintenance order under draft Section 253.010 should be limited to the surviving spouse of the decedent, a minor child of the decedent who is not emancipated, a child of the decedent who was in fact being supported by the decedent, and a parent of the decedent entitled to support under Section 206 of the Civil Code. The Comment to the section should note that the section does not change the law with respect to the right of a former spouse of the decedent to obtain support from the estate when a support order or agreement between the spouses so provides. There was some discussion of whether the section should make express provision for an "equitable adoptee" of the decedent, but the Commission ultimately decided not to do so. The rights of an equitable adoptee would therefore be whatever California case law provides. See generally Estate of Wilson, 111 Cal. App.3d 242, 168 Cal. Rptr. 553 (1980).

(2) Draft Section 253.040, which sets forth the circumstances to be considered by the court in making its determination, should be revised as follows:

§ 253.040. Circumstances to be considered by court

253.040. In determining whether to make an order under this chapter, and, if the court determines to make such an order, what amount should be awarded, the court shall consider all of the facts and circumstances of the case including, but not limited to, the following:

~~(a)~~ The decedent's reasons for making the dispositions in his or her will or for not making any provision or any further provision for persons whom the decedent is legally obligated to support.

~~(b)~~ (a) The needs of the decedent's heirs or devisees whose interests would be adversely affected if an order under this chapter were made.

~~(c)~~ (b) The needs of the person the decedent is legally obligated to support in whose favor the order is to be made, taking into account all of the following:

(1) Property otherwise passing to the person from the decedent's estate, whether under the decedent's will or by intestate succession.

(2) Property or benefits provided for the person by the decedent, including insurance, death benefits, joint tenancy, non-probate transfer, or inter vivos gift.

(3) Other property and income that the person has or is likely to receive in the future.

~~(d)~~ Whether the character or conduct of the person the decedent is legally obligated to support is or has been such as in the opinion of the court disentitles the person to the benefit of the order.

(c) The extent of support, if any, that was provided to the person by the decedent before the decedent's death.

~~(e)~~ (d) If the person the decedent is legally obligated to support is a surviving spouse or former spouse of the decedent, the circumstances set forth in Section 4801 of the Civil Code.

The staff should consider whether the notice prescribed for a petition for family maintenance under the staff-proposed revision of Probate Code Section 1200.5 is insufficient. Arguably, broader notice should be given which would include all those with a potential interest in the estate, and not be limited to those who have requested special notice or who have given notice of appearance in the estate.

Pretermission

The Commission considered Memorandum 82-64 concerning pretermission. The Commission requested the staff to give further consideration to the following questions:

(1) The draft statute precludes a share for an omitted child if it "appears from the will that the omission was intentional." Do the words "from the will" keep out evidence of surrounding circumstances or of oral declarations of the testator? If so, should these words be deleted or the language otherwise revised to permit such evidence to be admitted? There was a difference of views on this point at the meeting.

(2) Instead of providing an intestate share for an omitted child, would it be more equitable to provide a share comparable to shares given to other children by the decedent's will?

(3) Is the provision precluding a share for an omitted child when the testator has devised substantially all the estate to the child's other parent worth keeping in view of the limited situation to which it will apply? If the share of an omitted child is to be an intestate share, the importance of the pretermission statute will be reduced by the fact that the child has no intestate share in community property and, under the Commission's recommendation, will have an intestate share of separate property only if the decedent is unmarried, or is married and has one or more children of a prior marriage. Therefore, the exception to the pretermission statute where substantially all the estate is devised to the omitted child's other parent will apply only where the decedent is married to the child's other parent, has substantial separate property, and has one or more children of a prior marriage. The exception will be meaningless in the following cases:

(A) If all the decedent's children are of the present marriage, the omitted child will have no intestate share under the Commission's recommendation, and will not be protected by the pretermission statute in any event. The exception is therefore meaningless in this case.

(B) If the decedent is divorced from the omitted child's other parent, the divorce revokes dispositive provisions in favor of the former spouse under the Commission's recommendation. Assuming the decedent has not made a new will in favor of the former spouse, the decedent will therefore not have devised substantially all the estate to the omitted child's other parent, and the exception will not apply.

(C) If after divorce the decedent makes a new will in favor of the former spouse, the omitted child (if born during the marriage) will not have been "born or adopted after the execution of the will" and will not

be protected by the pretermission statute in any event. The exception is therefore meaningless in this case. The exception would apply, however, if the decedent is divorced, makes a new will in favor of the former spouse, and then has a child out of wedlock with the former spouse, the child not being mentioned in the will. However, this would seem to be an extremely rare case.

Small Estate Set-Aside

The Commission considered Memorandum 82-42 relating to small estate set-aside. The Commission approved the staff recommendation to retain the provisions of existing law (Prob. Code §§ 640-647), subject to further study when the Commission considers administration of estates. These provisions would be retained in Division 3 of the Probate Code where they are now found, and not be recodified in the family protection provisions of the Commission's tentative recommendation on wills and intestate succession.

Item or Aggregate Theory of Community Property Ownership

The Commission considered Memorandum 82-58. The Commission reconsidered its previous decision to include a section permitting the whole interest in certain items of community property to be awarded to the surviving spouse, notwithstanding that the decedent has given his or her half interest to a third person by will or inter vivos gift. The Commission decided not to include such a provision in the recommended legislation, and disapproved the draft section attached to the Memorandum.

The staff was requested to draft for Commission consideration some language to make clear that the item theory of community property ownership does not preclude a sale of the decedent's half interest in community property to raise enough cash to pay a pecuniary legacy in the decedent's will.

STUDY L-607 - PROBATE LAW (DISCLAIMERS)

The Commission considered Memorandum 82-40 and the attached staff draft of the disclaimer statute. The staff reported on the Beverly Hills Bar Association's project to revise the disclaimer statutes. The staff will present the substance of the Beverly Hills Bar Association's draft at the next meeting. The Commission considered some written comments of Professor Jesse Dukeminier relating to the draft of Section

2-106 (to be renumbered as § 220.060) (representation in disclaimer situation) and directed the staff to revise this section to make clearer its intent that the disclaimer of an intestate share is not to decrease the intestate share of another person.

STUDY L-608 - PROBATE LAW (NOTICE OF WILL)

The Commission considered Memorandum 82-57 and the attached staff draft of a statute providing a procedure for filing notices of wills with the Secretary of State. The Commission approved the concept of the statute but directed the staff to investigate the potential cost of the system in consultation with Commissioner Bion Gregory, the Legislative Counsel, and with the Office of the Secretary of State.

Probate Code § 293.050. Filing of certificate in probate and other proceedings. This section should be revised to establish a later time in probate proceedings for filing a certificate of the Secretary of State relating to whether there is a notice of will on file. The requirement of filing a certificate should not delay the filing of a petition for probate, but the certificate should be filed before any property is distributed or the time for contesting a will has expired.

STUDY L-611 - PROBATE LAW (PRESUMPTION OF DEATH)

The Commission considered Memorandum 82-56 and the attached staff draft of a statute relating to the presumption of death. The draft statute was approved subject to the following changes:

Probate Code § 1306. Rights of missing person upon reappearance. This section should provide a five-year statute of limitations on actions to recover distributed property by reappearing missing persons or persons claiming under them running from the date of distribution of the property.

Evidence Code § 667. General presumption of death. The staff should consider applying the more detailed standard of proposed Probate Code Section 1300 in nonprobate situations in place of the standard set forth in Evidence Code Section 667.

STUDY L-611 - PROBATE LAW (MISSING PERSONS)

The Commission considered Memorandum 82-49 relating to missing persons. The Commission approved the draft statute attached as Exhibit 2 to Memorandum 82-49.

STUDY L-612 - PROBATE LAW (SIMULTANEOUS DEATH)

The Commission considered Memorandum 82-39 relating to simultaneous death. After considerable discussion, the Commission determined that a general 120-hour survival requirement should be incorporated into the Uniform Simultaneous Death Act provisions.

A provision should be added to make clear that the statute does not require a 120-hour delay in making payments from a joint account in a financial institution. Thus, where a survivor has the right to withdraw funds from a joint account, the death of another party to the account does not limit that right unless the deposit agreement otherwise provides.

The statute will serve three purposes: (1) Litigation concerning which of the parties survived for a few seconds or less will be avoided, (2) The property will be distributed to both sides of the family where a childless couple or parties to a second marriage die within the 120-hour period, and (3) In some instances the need for including property in the estate of each of the parties who die within the 120-hour period will be avoided.

STUDY L-615 - PROBATE LAW (ESCHEAT)

The Commission considered Memorandum 82-44, relating to the right of heirs of a predeceased spouse to take property of the decedent's estate that has escheated. The Commission decided to limit the right to the heirs of the deceased spouse specified in the memorandum and not to extend it to other persons such as persons the decedent was legally obligated to support, as recommended in the memorandum. The Commission requested the staff to review the possibility of having the claims of the heirs of the deceased spouse determined in an administrative rather than a judicial proceeding.

STUDY L-618 - PROBATE LAW (UNIFORM GIFTS TO MINORS ACT)

The Commission considered Memorandum 82-45 concerning the possibility of revising the California Uniform Gifts to Minors Act (Civil Code §§ 1154-1165) and approved the staff proposal to await the conclusion of the study being undertaken by the Commissioners on Uniform State Laws before further considering this subject. Accordingly, the law concerning bequests to minors which depends upon the Uniform Gifts to Minors Act should be continued without substantive change for the time being.

STUDY L-619 - PROBATE LAW (CALIFORNIA STATUTORY WILL)

The Commission considered Memorandum 82-65 which contained an attached draft of provisions that would incorporate the substance of Assembly Bill No. 2452 (providing for a statutory form of will) into the comprehensive statute being drafted by the Commission. The Commission generally approved adding the provisions of AB 2452, including any changes made in those provisions by amendments to the bill before it is enacted. The substance of the following revisions should be made in the draft attached to Memorandum 82-65:

(1) A question was raised about the provisions which appear as a practical matter to exclude adult adoptions (Section 205.060), but no change was made in the provision. The question of whether the provision should cut out equitably adopted children was raised. The staff should check with the State Bar concerning the policies reflected in this section.

(2) Section 205.090 should be revised to replace this provision with one consistent with the Uniform Probate Code provision on the manner of distribution to descendants.

(3) A question was raised whether it would be better to disregard the statutory will entirely if alterations or additions are made to the will form. See Section 205.250. In any case, if Section 205.250 is retained without change, paragraph 4 of Section 205.510 should be revised to indicate what happens if a person makes a change or alteration. A statement might be added: "Any change or addition you make will be disregarded and this will will be given effect without such change or addition." Also, the problem of whether deletions might constitute a

revocation of the will or a portion thereof was raised and whether Section 205.250 would apply to a revocation by deletion of a major portion of the will after its execution. Apparently, the section requires that a codicil be a separate instrument; a subsequent revision of the statutory form to change it in some way could not be given effect as a holographic codicil. Also, the problem was raised that a statutory form will with two witnesses could be given effect as an ordinary witnessed will under the general provisions applicable to witnessed wills without regard to the provisions relating to statutory wills.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary