

MINUTES OF MEETING

of

NOVEMBER 5-6, 1982

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on November 5-6, 1982.

Law Revision Commission

Present:	Robert J. Berton, Chairperson	James H. Davis (November 6)
	Beatrice P. Lawson, Vice Chairperson	Debra S. Frank
	(November 5)	Bion M. Gregory (November 5)
		David Rosenberg
Absent:	Alister McAlister, Member of Assembly	Roslyn P. Chasan
	Omer L. Rains, Member of Senate	John B. Emerson

Staff Members Present

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

Consultants Present

Carol S. Bruch, Community Property (November 5)
William A. Reppy, Community Property and Creditors' Remedies (November 5)

Other Persons Present

Jan C. Gabrielson, State Bar Family Law Section, Los Angeles (November 5)
Jim Goodwin, State Bar Probate Section, San Diego (November 6)
Leslie Steven Rothenberg, Los Angeles (November 6)
Irene Silverman, Chair, Los Angeles County Bar Ass'n Bioethics Committee,
Los Angeles (November 6)
Andrea Slade, State Bar Debtor/Creditor Relations Subcommittee, Los Angeles
(November 5)

ADMINISTRATIVE MATTERS

MINUTES OF SEPTEMBER 1982 MEETING

The Minutes of the September 23-25, 1982, Meeting were approved as submitted by the staff.

ELECTION OF OFFICERS

David Rosenberg was unanimously elected as Chairperson, and Debra S. Frank was unanimously elected as Vice Chairperson, for a one-year term commencing on December 31, 1982.

SCHEDULING OF MEETINGS

The Commission determined that meetings ordinarily should be scheduled so that the meeting is held on Friday evening rather than on Thursday evening. Specifically, a meeting ordinarily should be scheduled as follows:

Friday - 10:00 a.m. - 5:00 p.m.
 7:00 p.m. - 10:00 p.m. (if necessary)
Saturday - 9:00 a.m. - 12:00 noon

Meeting on Friday evening instead of Thursday evening will minimize the expense of meetings and will require that the Commissioners, consultants, and others who attend meetings be away from their offices for less time.

SCHEDULE FOR FUTURE MEETINGS

The Commission made changes in the dates and times previously scheduled for meetings. The following is the revised schedule for future meetings:

January 1983

January 21 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco
 7:00 p.m. - 10:00 p.m. (if necessary)
January 22 (Saturday) - 9:00 a.m. - 12:00 noon

February 1983

No meeting

March 1983

March 18 (Friday) - 10:00 a.m. - 5:00 p.m. Los Angeles
 7:00 p.m. - 10:00 p.m. (if necessary)
March 19 (Saturday) - 9:00 a.m. - 12:00 noon

April 1983

No meeting

May 1983

No meeting

June 1983

June 3 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco
 7:00 p.m. - 10:00 p.m. (if necessary)
June 4 (Saturday) - 9:00 a.m. - 12:00 noon

July 1983

No meeting

August 1983

No meeting

September 1983

September 22 (Thursday) - 7:00 p.m. - 10:00 p.m. San Diego
September 23 (Friday) - 9:00 a.m. - 5:00 p.m.
September 24 (Saturday) - 9:00 a.m. - 4:00 p.m.

1982 LEGISLATIVE PROGRAM

The Commission received a final report (set out below) on 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)
- Ch. 269, Stats. 1982 - Assembly Bill 2643 (pay-on-death accounts)
- Ch. 497, Stats. 1982 - Assembly Bill 798 (conforming revisions to enforcement of judgments bill) (companion bill to Assembly Bill 707)
- Ch. 517, Stats. 1982 - Assembly Bill 2750 (conforming revisions to bonds and undertakings statute)(companion bill to Assembly Bill 2751)
- Ch. 998, Stats. 1982 - Assembly Bill 2751 (bonds and undertakings)
- Ch. 1198, Stats. 1982 - Assembly Bill 2332 (prejudgment attachment)
- Ch. 1268, Stats. 1982 - Assembly Bill 2416 (marketable title)
- Ch. 1364, Stats. 1982 - Assembly Bill 707 (enforcement of judgments)

- Res. Ch. 18, Stats. 1982 - ACR 76 (continues authority to study previously authorized topics)
- Res. Ch. 44, Stats. 1982 - AJR 63 (federal pensions and benefits subject to state marital property law)

Dead

Assembly Bill 325 (nonprobate transfers) (This recommendation was effectuated in part by Chapter 269 (AB 2643)--above--which was enacted)

STUDY D-312 - LIABILITY OF MARITAL PROPERTY FOR DEBTS

The Commission considered Memorandum 82-33 and the First Supplement thereto relating to the liability of marital property for debts. The Commission made the following decisions with respect to this matter:

§ 5120.030. Liability for necessities

The liability of the separate property of a nondebtor spouse for necessities debts incurred by the debtor spouse should be rephrased in terms of the liability of the spouse rather than the liability of the property. This change is intended to help clarify the procedural aspects of the liability as well as to limit the liability of the nondebtor spouse's property in bankruptcy.

The liability of a nondebtor spouse after separation should be limited to "common necessities" of the debtor spouse. The liability should continue during separation until a court order is obtained prescribing the amount of support for which the nondebtor spouse is liable.

In the case of debts incurred after separation other than for common necessities, the debt should be the obligation of the spouse that incurred it. This rule would not apply if the debt was incurred for production or preservation of community property. This is consistent with the policy of Section 5118 that post-separation earnings are the separate property of the spouse that earns them.

The statutory language governing the liability of a nondebtor spouse should be clarified in the manner suggested by the State Bar Business Law Section as set out in Exhibit 6 to Memorandum 82-33.

There should be a reimbursement right, rather than an order of satisfaction, where a necessities debt is satisfied out of separate property of the nondebtor spouse when other property that would be liable for the debt is not used to satisfy the debt. The staff should consider whether there should be a statute of limitation on this reimbursement right consistent with the limitation periods proposed for the other reimbursement rights.

§ 5120.050. Liability of property after division

The Commission discussed, but did not finally resolve, issues surrounding the liability of the former spouses after dissolution of marriage. The Commission was concerned about constitutional as well as

equitable and practical problems in attempting to limit the ability of a creditor to satisfy an obligation. There was some sentiment favoring something like a three-year amortization or cut-off period before a creditor is excluded from reaching property of the spouse other than the spouse to whom the debt was assigned. Any legislation in this area perhaps should be prospective only.

§ 5120.070. Liability for support obligation

The draft of Section 5120.070 set out in Exhibit 1 to the First Supplement to Memorandum 82-33, which permits the taking of the earnings of the non-obligor spouse for a support obligation if no other property is reasonably available and the taking would be equitable, was approved after deleting the phrase, "taking into account all relevant matters including, but not limited to, the situation and relationship of the parties and the adequacy of the earnings." A support obligation incurred during marriage for a child born outside the marriage should be treated the same as a separate tort obligation of the spouse.

§ 5120.210. Reimbursement for torts

The tort reimbursement provision should be enacted instead of an order of satisfaction provision. If the Commission is unable to finalize action on the liability recommendation for the 1983 legislative session, the Commission may consider a separate recommendation to replace existing Section 5122 with a tort reimbursement provision.

§ 5120.230. Reimbursement for improvement or benefit to property

Reimbursement for contracts and other obligations generally should not be authorized. The provision governing reimbursement for improvement or benefit to property should be expanded and possibly made into a separate recommendation for introduction in the 1983 legislative session. The expansion should cover not only improvements made to property but also expenditures for acquisition or creation of the property or for the production of income. Marital property should be presumed to be community but the presumption should be rebuttable by tracing to a separate property source or by proof of an agreement between the spouses as to the character of the property. The Comment should note that the provision allowing reimbursement does not address the measure of reimbursement and is not intended to affect existing law governing the measure. The staff should review transitional provisions to ensure that the new rules are applied

to as many cases not yet final as practical, paying particular attention to the situation that could arise if a dissolution proceeding is commenced before the operative date but not brought to trial until many years later.

§ 5120.240. Reimbursement for support payments

The Commission approved Section 5120.240 as set out in Exhibit 3 to the First Supplement to Memorandum 82-33, which permits reimbursement of the community where a support obligation of one spouse is satisfied out of community funds; there should be a three-year statute of limitation on the reimbursement right, however.

STUDY G-100 - GOVERNMENTAL LIABILITY
(NOTICE OF REJECTION OF LATE CLAIMS)

The Commission considered Memorandum 82-112 and the attached staff draft of the Recommendation Relating to Notice of Rejection of Late Claims Against Public Entities. The recommendation was approved for printing subject to editorial changes. The proposed legislation was approved in substance in the following form, which was distributed at the meeting:

An act to amend Section 913 of the Government Code, relating to claims against public entities.

The people of the State of California do enact as follows:

SECTION 1. Section 913 of the Government Code is amended to read:

913. (a) Written notice of the action taken under Section 912.6 or 912.8 or the inaction which is deemed rejection under Section 912.4 shall be given in the manner prescribed by Section 915.4. Such notice may be in substantially the following form:

"Notice is hereby given that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of \$_____ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law)."

If the claim is rejected because it was not presented within the time prescribed by law, the notice required by this subdivision shall include the substance of the following statement:

"Your claim was rejected because it was not presented within the time allowed by law."

(b) If the claim is rejected in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form:

"WARNING

"Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6. If your claim was rejected because it was not presented within the time allowed by law, you should apply to the public entity without delay for leave to present a late claim if you wish to protect your right to file a court action on the claim. See Government Code Section 911.4.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

STUDY J-600 - DISMISSAL FOR LACK OF PROSECUTION

The Commission considered Memorandum 82-108 and a letter from Garrett H. Elmore distributed at the meeting (a copy of which is attached to these Minutes as an Exhibit), relating to problems with dismissal for lack of prosecution caused by referral to judicial arbitration. The Commission decided to attempt to deal with the problems by legislation along the following lines:

(1) Code of Civil Procedure Section 1141.17 should be amended to make clear that referral to judicial arbitration tolls the five-year statute if the arbitration is pending within six months before expiration of the five-year period. This is consistent with Court Rule 1601(d) and with cases interpreting Section 1141.17.

(2) A provision should be added to the law that if the arbitration award is filed within six months before expiration of the five-year period, as adjusted for tolling, the plaintiff has an additional six months to bring the action to trial. If the plaintiff fails to bring the action to trial within six months, the plaintiff may nonetheless use any of the general excuses available (such as impossibility, impracticability, or futility) for failure to bring to trial within the five-year period.

The Commission plans at the January 1983 meeting to review language of these amendments prepared by the staff before the proposed legislation is amended.

GARRETT H. ELMORE
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November 2, 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study J-600, Dismissal of actions-Ex. 1, Memo. 82-108
ERRATA and supplement to Elmore letter of October 25, 1982

Dear Members, Mr. DeMouilly and Mr. Sterling:

ERRATA. The last sentence commencing with "The request..."(p) should be corrected to read: The request for trial de novo was made by a co-defendant who was held () liable by the arbitrator." The second sentence of "NOTE" on the attachment page containing draft Sec. 583.355 should refer to CCP 1141.17 (rather than to CCP 1141.20). The errors are regretted.

FORM OF SUGGESTED Sec. 583.35. The writer agrees with staff that the drafting submitted should be improved, for greater clarity. I therefore suggest the following:

§ 583.355. Extension of mandatory period in certain instances.
§ 583.355. If one or more of the conditions described in section 583.350 arises, or continues to exist, within 180 days of the expiration of the time allowed by this article to bring the action to trial, the mandatory time period for dismissal shall be the later of the following periods: 120 days after such time expiration or 120 days after the date on which the condition, or last condition, ceased to exist. For good cause,, the court, upon motion of a party or upon its own motion, may order a trial date before expiration of the mandatory period for dismissal. In the absence of such earlier trial date upon court order, a trial date within the extended time provided by this section satisfies the requirement that the action be brought to trial within a reasonable period in the circumstances stated in this section. Nothing in this section is intended to shorten the mandatory time for bringing the action to trial, under other sections of this article.

(No doubt the above can be shortened and placed in better form)

POLICY Staff has outlined policy choices for the Commission. The writer's individual belief is that a section of this type should be included in the Recommendation, recognizing that some change may be required after a bill is introduced.

Yours very truly,
Garrett H. Elmore

STUDY L-625 - PROBATE LAW AND PROCEDURE

PRELIMINARY PORTION

The Commission considered Memorandum 82-92 and the attached staff draft of the preliminary portion of the tentative recommendation relating to wills and intestate succession. The Commission approved the draft for printing subject to further editorial revisions by the staff. The staff will further revise the preliminary portion to reflect decisions made at this meeting. Commissioners having editorial revisions will submit them to the staff.

120-HOUR SURVIVAL REQUIREMENT

The Commission considered the letter dated October 28, 1982, from attorney Kenneth M. Klug of the State Bar Estate Planning, Probate and Trust Law Section relating to the proposed 120-hour survival requirement. The Commission decided to delete the 120-hour survival requirement from the wills and intestate succession recommendation. No time of survival requirement should be included in the recommended legislation. However, the provision of existing law--that death shall be treated as simultaneous if there is "no sufficient evidence" that the persons have died other than simultaneously (see Prob. Code §§ 296-296.42)--should be revised to require "clear and convincing evidence" to overcome the presumption of simultaneous death. This should avoid the undesirable result in cases like Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (one person found to have survived the other by 1/150,000 of a second, applying a preponderance of the evidence test).

RECAPTURE OF GIFTS OF QUASI-COMMUNITY PROPERTY

The Commission considered Memorandum 82-109 concerning recapture of gifts of quasi-community property. The Commission decided not to provide for a setoff against the surviving spouse's right of recapture as is done in Idaho. Proposed Section 110.030 should be kept in the form in which it presently exists in the draft statute.

FORMALITIES FOR EXECUTION OF WILLS

The Commission considered a letter dated November 3, 1982, from attorney James D. Devine of the State Bar Estate Planning, Probate and Trust Law Section objecting to relaxation of the requirements for execution

of a witnessed will. The Commission decided to eliminate the option under the proposed law permitting the testator to acknowledge first to one witness that a signature on a will is the testator's, and then to acknowledge the signature to a second witness, perhaps a long time later. Both witnesses should be present for the execution ceremony at the same time. As previously decided, the testator should also have the option of executing the will before one notary public.

RULES OF CONSTRUCTION OF WILLS

The Commission considered Memorandum 82-107 relating to rules of construction of wills. The Commission made the following decisions:

§ 204.090. Scope of disposition to a class; afterborn member of class

The Commission revised subdivision (a) of proposed Section 204.090 as follows:

204.090. (a) ~~A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.~~ A testamentary disposition, whether directly or in trust, to the testator's or another designated person's "heirs," "next of kin," "relatives," or "family," or to "the persons entitled thereto under the intestate succession laws," or to persons described by words of similar import, means "heirs" as defined in Section 100.090 determined as if the testator or other designated person were to die intestate at the time when the testamentary disposition is to take effect in enjoyment.

§ 204.100. Vesting

The Commission revised proposed Section 204.100 as follows:

204.100. ~~(a) Testamentary dispositions, including devises to a person on attaining majority, are presumed to vest at the testator's death.~~

~~(b) A devise of property to more than one person vests the property in them as owners in common.~~

§ 204.130. Death of devisee of limited interest

The Commission deleted proposed Section 204.130 which provided that "[t]he death of a devisee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator."

§ 204.210. Conditional disposition

§ 204.220. Condition precedent

§ 204.230. Condition subsequent

The Commission deleted proposed Sections 204.210, 204.220, and 204.230 relating to conditions precedent and subsequent.

§ 204.330. Clear and distinct devise

The Commission deleted proposed Section 204.330 which provided that a "clear and distinct devise" is not affected by any reasons given for the devise, any other words not equally clear and distinct, inference or argument from other parts of the will, or an inaccurate reference to or recital of its contents in another part of the will.

§ 204.350. Words referring to death or survivorship

The Commission deleted proposed Section 204.350 which provided that "[w]ords in a will referring simply to death or survivorship relate to the time of the testator's death unless possession of devised property is postponed, in which case the words relate to the time of possession."

COMPREHENSIVE RULES OF CONSTRUCTION FOR CLASS GIFTS

The Commission considered the First Supplement to Memorandum 82-107 relating to rules of construction of wills. The Commission decided for the present not to try to codify a comprehensive set of rules of construction for determining when the membership of a class is determined in the case of class gifts, and decided not to make a contract with Professor Edward Halbach for this purpose in the current fiscal year. No funds are available during the current fiscal year. If Professor Halbach still thinks this is a desirable project, the Commission would be pleased to have his views, and could consider whether to make a contract with him in a later fiscal year if funds are available for this purpose.

The Commission asked the staff to invite Professor Halbach to a Commission meeting in San Francisco to elaborate his views if he so desires, and to be the Commission's guest for lunch. If he prefers, the Commission would be happy to have him submit his comments by letter. If he has any comments on the proposed chapter on rules of construction of wills, the Commission would appreciate receiving those.

MISCELLANEOUS PROBLEMS IN WILLS AND INTESTATE SUCCESSION

The Commission considered Memorandum 82-111 concerning miscellaneous problems in wills and intestate succession. The Commission made the following decisions:

§ 220.030. Intestate share of heirs other than surviving spouse

The Commission decided not to extend a right of inheritance to issue of a deceased stepchild of the decedent. If there is no surviving stepchild, the issue of a deceased stepchild would have a right to claim in an escheat proceeding property of the decedent that has escheated.

§ 372.5 (added). Challenge of gift to witness despite no-contest clause

The Commission approved the staff draft of Section 372.5 to permit any person interested to contest a will provision which benefits a witness to the will, notwithstanding a no-contest clause in the will.

§ 1026 (added). Delay in closing estate to pay family allowance

The Commission approved the staff draft of Section 1026 to make clear that the court may delay closing the estate to pay family allowance, and setting forth the conditions for such action by the court.

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OF COUNSEL
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October 28, 1982

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Oakland, California 94643

Re: Law Revision Commission Memorandum 82-91
(Comprehensive Statute) 120 Hour Survival

Dear Jim and Bill:

I am still very much opposed to the concept of the 120 hour survival rule as stated in sections 114.010 et seq. of the Law Revision Commission's Comprehensive Statute relating to wills and intestate succession. I believe the proposal is ill-conceived for the following reasons:

1. It will complicate administration and increase expense to families of decedents;
2. It will require redrafting of many wills, resulting in another expense to the public;
3. It would alter the classes of persons taking under intestacy, for no apparent good purpose;
4. It will have an adverse impact on Federal estate taxes.

In an attempt to solve what is probably a very rare problem (that could have been easily solved by the affected persons if they had cared to do so) the proposed 120 hour survival rule will have an adverse impact on persons who attempted to carefully plan their estates.

Allow me to further elaborate my position.

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The 120 Hour Rule will complicate administration

Insofar as the 120 hour rule proposes to affect joint tenancies, it will require double probates. Under present law, if two joint tenants die within 120 hours of the other, the interest of the first decedent can be terminated simply and inexpensively with no court involvement. Probate administration would be required in the second estate. Under the proposal, the interest of the first decedent would not pass to the survivor, and would be probated. Thus, there would be two probates rather than one.

If the total value of property owned in joint tenancy was \$100,000, there would be little or no expense in terminating the first decedent's interest under the present law. The statutory fees in probating the second decedent's interest (\$100,000) would be \$6,300. Under the proposal, the first decedent's interest would need to be probated, as would the second decedent's interest. Two probates of two \$50,000 estates would result in statutory fees of \$6,600. In a \$1,000,000 total estate, the fees for one probate would be \$42,300; the statutory fees for probating two \$500,000 estates would be \$44,600.

But the statutory fee only scratches the surface. Suppose a probate sale of real property were involved. Under the 120 hour rule, two sales would need to be made, one in each estate, and the agreement of both executors would need to be obtained. Two court confirmations would be required. In effect, all of the expenses (except brokers' commission) involved in the sale would double. Other expenses would also double, such as preparation of fiduciary income tax returns and court filing fees.

The recent history of probate law in California has been to simplify administration, to reduce costs, and in many cases, to allow more people to solve more of their own problems without the necessity of hiring lawyers. The 120 hour rule as proposed is a step backwards.

Application to Wills

The legislature should be circumspect about enacting legislation which retroactively changes dispositions contained in wills. Present wills which provide for straight survivorship should be left alone, so that straight survivorship is required, rather than 120 hour survivorship. If the

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testator wanted a 120 hour survivorship, he could have placed that provision in the will. It is not a sufficient answer for the proposed legislation to permit the will to expressly override the 120 hour rule. Testators should not be forced to the expense of new wills.

Nor is it an answer to exempt existing wills from the 120 hour rule. A law which applies prospectively to wills executed on or after a certain date would eliminate the problem of legislative interference with present dispositive plans, but would create two separate laws based on dates of wills. Having two separate laws is confusing and will create traps for the unwary. I am opposed to prospective changes which require application of contradictory laws, unless there is very good reason to make the change.

There are many wills which do not contain gifts over in the event of the death of a beneficiary, which could result in intestacies. For example, if testator makes a bequest to his son, and his son dies within 120 hours of the testator's death, then the 120 hour rule would create an intestacy in the testator's estate, unless an anti-lapse statute came into play. Again, if the testator wanted a 120 hour rule, he could have utilized a survivorship provision. Presumably, his failure to utilize a survivorship provision was the result of a desire that the gift be based on straight survival.

Take the common situation where the elderly testator provides in his will for a bequest to his middle-aged child. Suppose further that the middle-aged child is a professional who has built up a substantial estate, and who has several minor children. If the testator has a modest estate, he is not likely to have a complicated will; he is more likely to have a simple will leaving his entire estate to his adult child on straight survivorship. On the other hand, the adult child is likely to have a more complicated will containing trust provisions for his children. Suppose further that the adult child dies within 120 hours of the testator's death.

Under present law, the testator's bequest would pass to the child's estate, and then pursuant to the child's will, into the trusts established for his children. Under the proposed 120 hour rule, the testator's bequest would pass, not to the child's estate, but directly to the testator's

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minor grandchildren, requiring the establishment of guardianships and outright distribution to the grandchildren upon attaining age eighteen.

Similar problems can arise with children who are retarded or who require special medical care. The immediate parent is the one more likely to have provided for those children than a grandparent. It is impractical to expect grandparents of modest means to draft expensive wills with complicated provisions for grandchildren, who are unlikely to have an interest in the grandparent's estate. The complicated plan should be at the immediate parent's level.

I submit that the 120 hour rule would create unwarranted results in situations such as these where persons do the best they can to plan for themselves and their families. There is certainly nothing wrong with attempting to protect those people who don't plan to provide for their families in unusual circumstances, but for the legislature to enact a rule that would have an adverse impact on those who do make plans is unfair.

The 120 Hour Rule should not apply to intestacy

In intestate situations, the application of a 120 hour rule could affect the ultimate takers. Admittedly, that is the reason the proponents of the rule favor it. But the rule won't always produce the equitable results the proponents claim. Again, an example would be appropriate. Suppose the intestate has an adult child who is involved in a second marriage, and who has children by a prior marriage. Suppose further that the second marriage for the child has lasted a substantial time, say 15 or 20 years, and that the child has raised a stepchild whom he considers as his own, but whom he has never formally adopted (perhaps because the natural father would not consent). In such cases, it is common for the child to provide in his will for his spouse and stepchild. Under present law, the share of the child vests on the intestate's death, and even if the child dies within 120 hours, the intestate's share would pass under the child's will and provide for his spouse and stepchild. Under the proposal, the child would be deemed to have pre-deceased the intestate, and the intestate's estate would then pass to collaterals, or to the child's issue, to the exclusion of the child's spouse and stepchild.

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Adverse Tax Effects

In addition to the foregoing, there would be adverse tax impacts on estates by the 120 hour rule. Presently drawn wills commonly provide for an exemption-equivalent bypass trust and a QTIP trust if the spouse survives. In many cases, the wills contain provisions creating a presumption of survivorship in the event of common accident, but all wills do not contain such provisions. Imposition of the 120 hour rule would prevent funding of the QTIP trust, with the result that in many cases the exemption available in the spouse's estate may not be utilized, substantially increasing the estate tax.

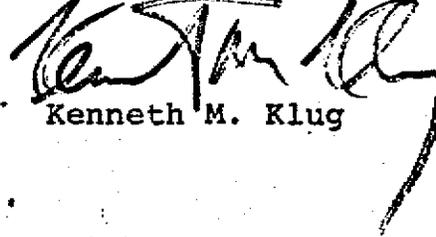
In one of my examples above, I alluded to a common situation where a parent may make provision for a stepchild. The proposed 120 hour rule would adversely affect a Section 2032A special valuation election under that set of facts. Suppose that a grandparent, parent and stepchild conduct a farming operation together. Suppose that the grandparent owns the qualified real property, and the grandparent's will provides that grandparent's estate shall pass to parent if parent survives, but if parent does not survive, then to parent's stepchild. Under present law, if grandparent died, and if parent died within 120 hours, Section 2032A could be elected in the grandparent's estate, and in the parent's estate, with the result that the least amount of estate tax would be payable and the family farm operation could continue without jeopardy. If the 120 hour survival rule were enacted, nothing would pass from grandparent to parent, but rather would pass from grandparent to parent's stepchild. The stepchild is not a qualified heir of the grandparent, so special valuation could not be elected, and the estate tax would be calculated on fair market value. Depending on the relative values, the estate tax cost of the 120 hour rule could be as much as \$375,000, or more. The results would be the same if the property were held in joint tenancy between grandparent and parent.

There are other examples where the 120 hour survival rule would be adverse, and I believe that more thought should be given to the question. It is unreasonable to enact a rule to prevent a few abuses involving people who do not plan their affairs, if the rule has an adverse impact

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on other people who do attempt to plan their affairs.
Neither the Law Revision Commission nor the legislature
should endorse such a result.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Ken M. Klug", written in a cursive style. The signature is positioned above the printed name "Kenneth M. Klug".

Kenneth M. Klug

cc: John H. DeMouilly
Charles A. Collier, Jr.
Harley J. Spitler
H. Neal Wells III

EHRMAN, FLAVIN & MORRIS, INC.

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ATTORNEYS AT LAW
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TELEPHONE 372-7535

November 3, 1982

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

Dear John:

I am writing to pass on to you the results of our Executive Committee meeting and the more significant critical comments relating to your Study L-625 on Probate Law and Procedure.

My comments are limited to those areas where the Executive Committee members still have strong feelings. I have failed to mention many of the proposals. In some cases, we support them. In some cases, our opposition has been stated on several occasions, rejected by the Commission, and we have nothing new to offer.

Wills and Intestate Succession Memorandum 82-92

The first paragraph of the Summary of Report contains the statement "but many changes are made to minimize delay and expense in probate". While this is a worthy objective, I believe you are leaving yourself open to critics if you claim this is a primary goal of the proposed legislation. In my opinion, your proposals will have no significant effect either on delay or expense, and in some cases, such as the family allowance proposal, may actually cause additional delay. In 17 years practicing law in Los Angeles and Monterey, I have only seen one case where tracing or an heir search had any effect on the length of administration or the cost of probate. It seems to me that you have good reasons for your program without claiming one which may be easily attacked and undermine the credibility of your proposals.

Formal Requirements

Our Executive Committee still opposes the changes of the formal requirements for a witnessed will. We believe there is value in the existing procedure. We are particularly concerned that the witnesses may not be together and sign simultaneously. Our concern is that the testator may never get around to getting the second witness. This may lead to more wills which are invalid on their face. An Executive Committee member who has served as a superior court probate commissioner for many years believes that wills which have some technical defect not shown on their face are routinely admitted to probate because no one objects. Technical defects are raised when there are also objections based on undue influence, lack of testamentary capa-

city, etc. If the new proposals result in more wills which are invalid on their face for the lack of two witnesses, the proposals may have a result opposite to the stated goals.

We asked one of our sub-committees to prepare an analysis of this proposal, but I have not yet received that analysis. I will forward it to you when I do.

Interested Witness

The Executive Committee is strongly opposed to the proposal which does not disqualify a witness from taking under the will. The introduction to the recommendation states that "The law should attempt to minimize the opportunity for fraud or undue influence on the decedent". We believe this proposal increases that opportunity. When balancing the interests, we believe the interest of guarding against undue influence outweighs the interest of preserving the witness-beneficiary's inheritance. We are not persuaded by the contention that this rule will not deter the sophisticated wrongdoer who will simply find another witness who will perjure himself for the benefit of the beneficiary. It may not be possible to find a witness willing to perjure himself. Even if it is, we should at least deter the unsophisticated wrongdoer.

120-Hour Survival

Our Executive Committee still strongly opposes the 120-hour survival proposal. I am enclosing a copy of a letter dated October 28, 1982, from Kenneth Klug, which states the position of the Committee. I believe you have already received a copy of this letter.

Rules of Construction - Memorandum 82-107

I am enclosing the comments of one of our study teams, which covers among other things, rules of construction.

Recapture of Gifts of Quasi-Community Property - Memorandum 82-109

I have not yet received any comments on this Memorandum. While I am sympathetic to the concerns expressed by Professor Niles, I personally am in agreement with the staff recommendation.

Disclaimers - Memorandum 82-110

I have not yet received final analyses of these proposals from our study teams. Kenneth Klug, who has spent a great deal of time on these proposals, has indicated that he believes the current proposal is satisfactory.

Mr. John H. DeMouilly
November 3, 1982

Page -3-

Miscellaneous Problems - Memorandum 82-111

I have not yet received comments on the material in this memorandum, other than those already made in connection with related material in other memoranda. I believe that example points up some of the difficulties with the pretermission proposal. The Commission should reconsider the effect of those rules.

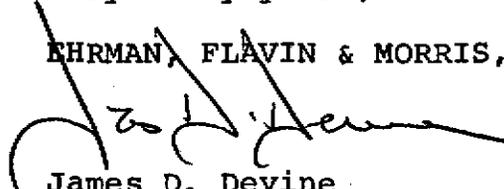
Appointment of Health Care Representative - Memorandum 82-82

Copies of letters dated September 23, 1982, and October 1, 1982, from Executive Committee study teams are enclosed.

The consensus of the Committee was that this is an area which should have a comprehensive study rather than approaching health problems piecemeal. We currently have probate conservatorships, L.P.S. conservatorships, the Natural Death Act, and the Durable Power of Attorney as vehicles for dealing with health problems. The proliferation of documents seems to our committee to be a move in the wrong direction. We believe the Commission should attempt to review and coordinate existing statutes dealing with health care. We have referred this to one of our sub-committees for further study. Many committee members feel the Commission should examine use of the durable power of attorney as the vehicle for designating a health care representative. If the durable power provisions need to be strengthened, execution requirements changed, etc., work on making those changes rather than creating a new vehicle.

Very truly yours,

EHRMAN, FLAVIN & MORRIS, Inc.



James D. Devine

JDD:dv
Enclosures

cc: William H. Plageman, Jr., Esq.
Charles A. Collier, Jr., Esq.
Harley J. Spitler, Esq.
H. Neal Wells, III, Esq.
Robert J. Berton, Esq.

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September 23, 1982

Mr. James D. Devine
400 El Estero
Monterey, CA 93940

Mr. William H. Plageman, Jr.
Two Embarcadero Center, Ste. 2200
San Francisco, CA 94111

Re: Law Revision Commission
Study Numbers L-703 and L-627

Dear Jim and Bill:

At the request of Ken Klug, I sent the above studies to our Conservatorship Committee Chairs and Vice Chairs for comment and discussion at the Sacramento meeting. Unfortunately I do not have a report, and consequently the following are my own observations:

Study L-703-
Appointment of Health Care Representative:

In view of Jim's comments by telephone that the staff will probably withdraw this study from the commission's consideration at this evening's meeting, I will not attempt to dissect the complete draft of the proposed legislation. The Uniform Health Care Consent Act has apparently already received considerable criticism from various health organizations and from individual attorneys and medical professionals, and from Harley Spitler, the new Chair of our Executive Committee.

I disagree with the staff's premise that the Uniform Durable Power of Attorney Act does not authorize the delegation of responsibility for health care. Even if their premise is correct, the statutory delegation of health care in the Civil Code, Probate Code and Welfare and Institutions Code provides guarantees for responsible health care. This proposal seemingly creates a vehicle for assisting with one's health care decisions, but then completely erodes the delegation by creating limitations on the type of medical decisions and also by allowing the representative to easily refuse to make the medical decisions.

I believe it would be preferable for any future consideration of this proposal that the authorization of the health care representative be effective only upon the incapacity of the appointor. This would be similar to the increasingly well-known procedures found in the Durable Power of Attorney Act.

The disqualification of persons who could otherwise make health care decisions is a very good aspect of the proposal and one which I believe would be appropriate for consideration in the future.

Eliminating the authorization of a health care representative from consent to procedures such as (1) commitment to a mental health facility, (2) administration of experimental drugs, (3) convulsive treatment and (4) sterilization, really takes the thrust out of the proposal. These are typical health care decisions that really create the dilemma when a health care representative's consent would be needed. If life sustaining measures can be removed at the consent of a health care representative then limitations for the above procedures does not seem appropriate.

I also disagree that an heir at law standing to inherit should not be automatically disqualified as the health care representative, although the concern of the staff for potential conflicting interests is recognizable. I believe the policy decision is better served by allowing the immediate family members with an obvious pecuniary interest is still more appropriate than preventing them from participating in acting as a health care representative.

Perhaps the staff could consider adding to the Durable Power of Attorney Act some of the better ideas contained in their recommendations so that once and for all there is clarification that a Power of Attorney can make medical as well as financial decisions for the principal.

Study L-627-

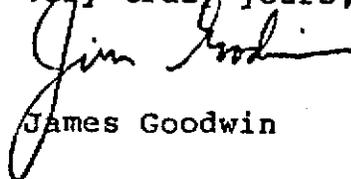
Notice in Limited Conservatorship Proceedings:

This proposal merely adds to the list of recipients of the written assessment by a regional center, the attorney for the petitioner in a Limited Conservatorship, and requires the mailing of same within five days of the Court hearing.

As a practical matter, I have always received the written assessment, but perhaps there are inconsistent practices

in some other counties. This proposal will help clarify procedures and make certain that those interested in the assessment are given timely notice of the regional center's evaluation.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jim Goodwin".

James Goodwin

JG:pcw

COMMENTS RE
LAW REVISION COMMISSION
MEMORANDUM 82-91
BY TEAM 1
(Bilter, Homer and Collier)

The following are comments of Team 1 relating to various revisions set forth in Memorandum 82-91. These take into account the minutes of the Law Revision Commission meeting on September 23 - 25. These comments are as follows:

1. Section 100.060. Sets forth certain specialized definitions of community property. Query: Whether it is not best to incorporate at this point also the basic definition of community property from Civil Code Section 5110 so that all community property definitions be found in one place.

2. Section 100.220. Query: Whether (a)(3) referring to a "fiduciary" would also include a person acting pursuant to a power of attorney. Is a holder of a power an agent or a fiduciary?

3. Section 100.500. Perhaps includes a "special" trustee within the word "additional". If not, it might be made more specific by adding the word "special" as an additional category of trustee.

4. Sections 111.020(a)(1) and (2). Are probably broad enough to cover transfers of property pursuant to Probate Code Sections 202A, 630 and 650. However, this should be considered by the Commission.

5. Section 111.060. Referring to a waiver of "all rights", perhaps can be deleted or modified to refer only to the rights in Section 111.020. Essentially the only rights apparently referred to under Section 111.060 are "probate rights".

6. Section 111.070. Speaks of enforcement and agreement against a party and seems to repeat many of the criteria for enforcement set forth in Sections 111.040 and 111.050. Query: Why all three of these sections are necessary. There appears to be duplication.

7. With reference to this article dealing with the surviving spouse's waiver of rights, the Commission might consider the effect of Civil Code Sections 5113.5, 5125 and 5127 with reference to the problem of waiver.

8. Section 111.060. Refers to Section 204.050. That reference appears incorrect.

9. Section 114.010 and subsequent sections dealing with the 120-hour survivorship requirements should all be put together in one article. The 120-hour survivorship requirement, for example, is listed in Section 110.040.

10. Section 200.030. Appears largely unnecessary in light of the definition of person contained in Section 100.310.

11. Section 201.010. Subpart (end of b) refers to an acknowledgment that the testator signed the will or that

it is the testator's will. Perhaps the language should be made consistent with subdivision (a) which refers to the testator's name being signed in his presence by another at his direction.

12. Section 203.010. Should allow incorporation by reference of a code section or document including amendments made prior to the testator's death even though made after the date of the will.

13. Section 204.120. This treats real property to be converted to money as personal property. Query: Whether this requires a bond for the amount of that real property at the date of death or only at the point of conversion.

14. Section 204.330. Raises a question of whether a gift to a person whose relationship is mentioned such as to a brother-in-law, sister-in-law, mother-in-law, etc., is conditioned upon that relationship or whether that constitutes an outright devise. The Commission might want to consider this.

15. Section 204.430. Refers to sale of property by a conservator. Query: Whether that should not also refer to a person acting pursuant to a durable power of attorney.

16. Section 204.450. Perhaps should refer to the property being subject to the terms of the agreement rather than the remedies of the purchaser or transferee.

17. Sections 208.010-208.070. Although the language of 208.050 was modified by the Commission at its September meeting, it would appear necessary to get a certificate from the Secretary of State before actually starting a probate to determine the persons to whom notice should be given since persons named in wills on file might be entitled to statutory notice on the commencement of a probate. A likelihood is that the filing of the certificate with the court would be mandatory although the language had been modified to make it voluntary. Also, the sections do not seem to allow the testator during his lifetime to inquire as to whether any wills are on file with the Secretary of State. The Ethics Committee of the State Bar has been giving some consideration to the files of an attorney who closes his office. Perhaps the Commission staff should contact that committee for its input.

18. Section 220.020. Dealing with intestate succession, differs from the modified version of Section 254.010 as modified in the September minutes of the Commission. Query: Whether these shares should be different. If so, what is the rationalization for the difference in the shares?

19. Section 220.100. Seems to incorporate much of the language from Section 204.440. Query: Why this repetition occurs.

20. Section 250.010. This refers to the time until an inventory is filed. It is often the practice to file a series of partial inventories. Query: Whether the word "inventory" means the final inventory or the first inventory filed, which often will be a partial inventory. The same question is raised by Sections 250.110 and 251.010.

21. Section 254.010. Was modified by the Commission at its September meeting. Query: Whether that modification now covers issue of a deceased child or whether only a afterborn child is to be entitled to an intestate share.

The following are comments on additional memoranda assigned to Team 1:

1. Memorandum 82-93. This deals with the definition of "all rights" under Section 111.060. It has been discussed above in the context of that section.

2. Memorandum 82-94. This relates to disclaimers. The Commission at its September meeting made various modifications in the proposed disclaimer law. The team felt that the staff recommendations on joint tenancy were correct. The modification allowing a disclaimer without a court order where there is independent administration appears appropriate so as to remain consistent with the concept of independent administration. The team felt other situations were ones where a court order would be appropriate. The remaining comments on that memorandum, I believe, have

been addressed by the Commission and no further comment is necessary.

3. Memorandum 82-96. This relates to the statutory will and no comment is required.

cc: Harley J. Spitler, Esq.
Kenneth M. Klug, Esq.
Ms. Colleen Claire
D. Keith Bilter, Esq.
Lloyd W. Homer, Esq.
K. Bruce Friedman, Esq.
Charles A. Collier, Jr., Esq.

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William H. Plageman, Jr., Esq.
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Gentlemen:

The purpose of this letter is to summarize the comments of Team 2 pertaining to the materials regarding Law Revision Commission Memoranda 82-82 and 82-100 which were furnished by Ken Klug by his letter of September 21, 1982. Please note that Irwin Goldring is going to be telephoning in his comments separately to Jim Devine early in the week of October 4.

Law Revision Commission Memorandum 82-82

It is my understanding that the Law Revision Commission has decided to put the proposed legislation encompassed by Memorandum 82-82 on the back burner. However, because of the question which has been raised as to whether the Durable Power of Attorney legislation encompasses health care decisions, the team members feel strongly that the legislature should act quickly to clarify one way or the

James D. Devine, Esq.
William H. Plageman, Jr., Esq.
Page Two

other whether such legislation does cover health care decisions. The team members feel that the materials indicating that the Durable Power of Attorney Act was meant to include health care decisions are quite persuasive. Nevertheless, the team members believe that the points raised by the Law Revision Commission create doubt in this area, which causes a very difficult situation as to durable powers of attorney which have already been executed.

The team members all agree that any future legislation should have as an important objective the avoidance of requiring a proliferation of documents. One team member suggested that the Natural Death Act legislation should be unified with any future legislation pertaining to a health care representative. The other team members agreed with the objective; however, it was pointed out by one team member that as a practical matter it will probably not be possible to change the Natural Death Act in any regard because of the problems surrounding its initial passage.

All team members strongly agree with the proposition that if health care decisions are to be authorized under a power of attorney something more than a notarized signature by the principal should be required. Suggestions for safeguards were that two "independent" witnesses be required, that the language pertaining to health care decisions should be read to the principal in front of the witnesses, that the principal should orally acknowledge in front of the witnesses his understanding of the health care authorization, and that the language pertaining to health care would have to be typed or printed in bold face. The members expressed some concern as to whether a form power of attorney should be used to authorize health care decisions. Although such forms are utilized under the Natural Death Act, the distinction is that under the durable power of attorney property decisions and health care decisions could be mixed together.

The team members feel that it is important to recognize that any new legislation pertaining to health care decisions must have as its objective the providing of protection to the power holder as well as to the principal. Any new legislation must also consider the effect on previously executed powers of attorney.

The team members were split as to whether a conservator or a health care representative should prevail in making decisions as to medical treatment.

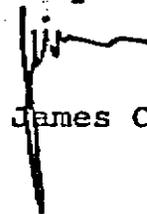
James D. Devine, Esq.
William H. Plageman, Jr., Esq.
Page Three

John McDonnell suggested that this subject is one which could be assigned to the Pre-Death Planning Committee for consideration.

Law Revision Commission Memorandum 82-100

It is my understanding that the Law Revision Commission has already acted to approve this proposal. The team members were opposed to the proposal three to one.

Very truly yours,



James C. Opel

JCO:ejb

STUDY L-625 - PROBATE LAW (DISCLAIMERS)

The Commission considered Memorandum 82-110 and the attached Recommendation Relating to Disclaimer of Testamentary and Other Interests. The Commission approved the substance of the revision proposed by the staff to make clear that acceptance of a joint tenancy at the time of creation of the joint tenancy is not an acceptance of the interest taken by the surviving joint tenant upon the death of the other joint tenant. The recommendation as revised was again approved to print.

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OF COUNSEL
FENTON WILLIAMSON, JR.

November 1, 1982

Mr. Stan G. Ulrich
Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Disclaimer Statute, Memorandum 82-110

Dear Mr. Ulrich:

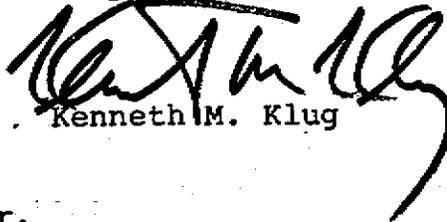
I believe that the revision you proposed in Memorandum 82-110 handles the Federal tax problem about as well as it can be handled, in view of the uncertainty still present in Federal law.

Your previous memoranda do not address the question of whether or not one who creates a joint tenancy should be allowed to disclaim the survivorship accretion. For example, if A owns Blackacre as his separate property, and conveys it to himself and B, as joint tenants, it may not be desirable to permit A to disclaim the survivorship right on B's death. Under the proposed statute, A would not have "accepted" the survivorship right, but he could be deemed to have "reserved" it when he created the joint tenancy. (In such case, it is clear that the disclaimer would be ineffective for Federal gift tax purposes.) From a purely administrative standpoint, it may be preferable to allow the joint tenant to disclaim irrespective of who created the joint tenancy, to eliminate problems of tracing in the event the validity of the disclaimer were ever questioned. On balance, it is my opinion that allowing disclaimers of the survivorship accretion by all joint tenants is more desirable than a policy which would prohibit the creator of the joint tenancy from disclaiming the survivorship accretion.

Mr. Stan G. Ulrich
November 1, 1982
Page Two

I commend you again for your good job on the disclaimer proposal.

Very truly yours,



Kenneth M. Klug

Staff

- cc: William H. Plageman, Jr.
James D. Devine
Charles A. Collier, Jr.
Harley J. Spitler
H. Neal Wells
Kathryn A. Ballsun

of

that all

STUDY L-703 - APPOINTMENT OF HEALTH CARE REPRESENTATIVE

The Commission considered Memorandum 82-82 and the First and Second Supplements thereto relating to the appointment of health care representatives. The Commission also considered the written remarks of several representatives of the State Bar Estate Planning, Trust and Probate Law Section which were distributed at the meeting. The Commission heard the views of Leslie Steven Rothenberg and of Irene L. Silverman who attended the meeting.

The Commission decided not to pursue the approach set out in the staff draft recommendation that was attached to Memorandum 82-82. The Commission instead directed the staff to prepare a draft statute for the January 1983 meeting consisting of revisions of the Uniform Durable Power of Attorney Act (Civil Code §§ 2400-2407). It was suggested that the staff should try to keep the new provisions as simple as possible. The view was expressed that by working within the framework of the Uniform Durable Power of Attorney Act the need for another document would be avoided. The staff is to consider what limitations, protections, and formalities should be provided if a power of attorney is to cover health care decisions.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA



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H. NEAL WELLS, III, LOS ANGELES

JAMES A. WILLETT, SACRAMENTO

November 3, 1982

Mr. Stan G. Ulrich
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

RE: APPOINTMENT OF HEALTH CARE REPRESENTATIVE
First and Second Supplements to Memorandum 82-82

Dear Mr. Ulrich:

Kindly refer to my letter to you dated September 3, 1982 regarding Staff Draft #6-627. That letter set forth my views, as an individual, and not as the Chairman of the Executive Committee (herein called "Executive Committee") of the Estate Planning, Trust and Probate Law Section of the State Bar of California.

This letter sets forth the preliminary views of the Executive Committee.

At its October 23, 1982 meeting, the Executive Committee discussed at some length the Law Revision Commission's Memorandum 82-82. Our conclusion was to submit the matter to one of our committees for study with particular attention to the following:

1. What is the interplay between the proposed Appointment of a Health Care Representative statute and the Uniform Durable Power of Attorney Act - which was also sponsored by the California Law Revision Commission?

2. As a matter of public policy, what should be the scope of conduct that can be regulated by the Uniform Durable

Mr. Stan G. Ulrich
November 3, 1982
Page Two

Power of Attorney Act? That is to say, should it be narrowly restricted to matters pertaining to property - as is suggested by your Memorandum 82-82? Or, should it be wholly unrestricted, as it is at the present time, to the end that the principal may use the Durable Power of Attorney for any matter - whether property or personal care - subject only to the laws of agency.

We strongly recommend that the Law Revision Commission defer further consideration of the Appointment of Health Care Representative statute until the Executive Committee is in a position to make a firm recommendation to you. We estimate that our recommendation will be forthcoming within 30-45 days.

We note in passing the following which appear to us to be supportive of our suggestion that the Appointment of Health Care Representative statute should be deferred:

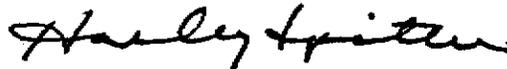
A. The Bioethics Committee of the Los Angeles County Bar Association has submitted the subject matter to a Committee for review and comment. See Exhibit 1 to the Second Supplement to Memorandum 82-82.

B. Legal counsel for the California Medical Association has noted that the proposed legislation might be somewhat inferior to California's existing statutory and case law framework. See Exhibit 4 to the First Supplement to Memorandum 82-82.

3. The California Hospital Association does not feel sufficiently moved to take any position. See Exhibit 2 to First Supplement to Memorandum 82-82.

We urge the Law Revision Commission to defer the matter until more consideration can be given to the wisdom of the proposed statute.

Sincerely,



Harley J. Spitler
Chairman