

August 14, 1985 0001W

Note. Changes may be made in this Agenda. For meeting information, please call John H. DeMouilly (415) 494-1335.

Time

Aug. 30 (Friday) -10:00 a.m. - 5:00 p.m.  
Aug. 31 (Saturday) -9:00 a.m. - 12:00 noon

Place

Sheraton Townhouse  
2961 Wilshire  
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

August 30-31, 1985

1. Minutes of June 27-28 Meeting (sent 7/23/85)
2. Administrative Matters

Legislative Program

Memorandum 85-67 (enclosed)

Future Meetings

Memorandum 85-55 (enclosed)

Budget for 1986-87

Memorandum 85-70 (enclosed)

3. Study L-640 - Probate Code (Trusts - Spendthrift Trusts)  
Memorandum 85-68 (sent 8/1/85)
4. Study L-1020 - Probate Code (Powers and Duties of Personal Representative)

Note. We will start with Section 7620 on page 15 of draft statute.

Memorandum 85-13 (sent 1/9/85; another copy sent 7/11/85)  
Draft Statute (attached to Memorandum)

Second Supplement to Memorandum 85-13 (sent 3/13/85; another copy sent 7/11/85)

Third Supplement to Memorandum 85-13 (sent 4/1/85; another copy sent 7/11/85)

Fourth Supplement to Memorandum 85-13 (sent 6/18/85; another copy sent 7/11/85)

5. Study L-601 - Probate Code (Multiple-Party Accounts)

Memorandum 85-62 (sent 6/18/85; another copy sent 7/11/85)

Staff Draft of Tentative Recommendation (attached to Memorandum)

6. Study L-830 - Probate Code (Proration of Estate Taxes)

Memorandum 85-69 (enclosed)

Staff Draft of Tentative Recommendation (attached to Memorandum)

7. Study L-1026 - Probate Code (Payment of Demands)

Memorandum 85-35 (sent 2/22/85; another copy sent 7/11/85)

Draft Statute (attached to Memorandum)

Revised First Supplement to Memorandum 85-35 (sent 4/1/85; another copy sent 7/11/85)

Second Supplement to Memorandum 85-35 (sent 5/28/85; another copy sent 7/11/85)

8. Study L-1027 - Probate Code (Accountings)

Memorandum 85-36 (sent 2/28/85; another copy sent 7/11/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-36 (sent 3/8/85; another copy sent 5/28/85)

Revised Second Supplement to Memorandum 85-36 (sent 4/1/85; another copy sent 7/11/85)

9. Study L-1029 - Probate Code (Distribution and Discharge)

Memorandum 85-63 (sent 6/7/85; another copy sent 7/11/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-63 (sent 6/7/85; another copy sent 7/11/85)

10. Study L-800 - Probate Code (Abatement; Distribution of Interest and Income)

Memorandum 85-65 (sent 6/7/85; another copy sent 7/11/85)

First Supplement to Memorandum 85-65 (sent 6/21/85; another copy sent 7/11/85)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
AUGUST 30-31, 1985  
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on August 30-31, 1985.

Law Revision Commission

Present:	James H. Davis, Chairperson	Arthur K. Marshall
	Roger Arnebergh	Edwin K. Marzec
	Bion M. Gregory, Legislative Counsel	Ann E. Stodden

Absent:	Bill Lockyer, Member of Senate	John B. Emerson
	Alister McAlister, Member of Assembly	

Staff Members Present

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

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Edward V. Brennan, California Probate Referees, San Diego  
 Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Aug. 30)  
 Ted Cranston, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles  
 Rusty DeMouilly, Los Altos Hills (Aug. 31)  
 Laura K. Horwitch, Beverly Hills Bar Probate Section, Los Angeles (Aug. 30)  
 Sandra Kass, California Bankers Association, Los Angeles  
 Ralph V. Palmieri, Beverly Hills Bar Probate, Trust and Legislative Subcommittee, Los Angeles (Aug. 31)  
 James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View  
 Matthew S. Rae, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Aug. 31)  
 Lucinda Surber, Menlo Park (Aug. 30)

ADMINISTRATIVE MATTERS

MINUTES OF JUNE 27-28, 1985, MEETING

On page 14, line 26, of the Minutes as presented by the staff, the following change was made: The phrase "At least" was substituted for "Approximately" so that this portion of the Minutes now reads:

Q. How do fees of probate referee compare with private appraiser?

A. At least 25% lower.

At thus corrected, the Minutes were approved as presented by the staff.

1985 LEGISLATIVE PROGRAM

The Executive Secretary made the following report concerning the 1985 Legislative Program.

Enacted

1985 Stats. ch. 41 (Assembly Bill 98) - Creditors' Remedies  
1985 Stats. ch. 90 (Assembly Bill 690) - Uniform Transfers to Minors  
1985 Stats. ch. 157 (Assembly Bill 96) - Property Law  
1985 Stats. ch. 359 (Assembly Bill 97) - Urgency Probate Bill  
1985 Stats. ch. 362 (Assembly Bill 150) - Family Law  
1985 Stats. ch. 403 (Senate Bill 1270) - Powers of Attorney  
1985 Stats. Res. ch. 25 (ACR 4 - Continues Authority to Study  
Previously Authorized Topics

Sent to Floor in Second House

Assembly Bill 196 - Probate Law  
Assembly Bill 1030 - Mediation Privilege

Placed on Inactive File

Assembly Bill 195 - Revision of Law Revision Commission Statute

The Commission considered a request from James Mattesich that Assembly Bill 196 be amended on the floor of the Senate to extend the provisions of Probate Code Section 6402.5 (inheritance by relatives of a predeceased spouse) to personal property as well as real property. The Commission is opposed to this amendment. The Commission is not persuaded that the amendment is a desirable one, and the Commission believes that the change the amendment would make in existing law is so significant that it should not be made by an amendment made in the closing days of the session.

SCHEDULE FOR FUTURE MEETINGS

The Commission changed the place of the October meeting to Stanford and changed the time when the October 10 meeting would commence to 3:30 p.m.

The Commission adopted the following schedule for future meetings and directed the staff to include on the agenda for the next meeting a suggested schedule for future meetings for the remainder of 1986.

September 1985

September 12 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
September 13 (Friday)	9:00 a.m. - 6:00 p.m.	

October 1985

October 10 (Thursday)	3:30 p.m. - 10:00 p.m.	Stanford
October 11 (Friday)	9:00 a.m. - 6:00 p.m.	

December 1985

December 5 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
December 6 (Friday)	9:00 a.m. - 6:00 p.m.	

January 1986

January 9 (Thursday)	3:00 p.m. - 10:00 p.m.	San Diego
January 10 (Friday)	9:00 a.m. - 6:00 p.m.	

March 1986

March 13 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
March 14 (Friday)	9:00 a.m. - 6:00 p.m.	

May 1986

May 15 (Thursday)	3:00 p.m. - 10:00 p.m.	San Francisco
May 16 (Friday)	9:00 a.m. - 6:00 p.m.	

June 1986

June 26 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
June 27 (Friday)	9:00 a.m. - 6:00 p.m.	

Next meeting

The dates for the next meeting were not determined, but it was determined that the meeting will be held in Orange County.

STARTING MEETING AFTER WAITING 30 MINUTES

At the April 1984 meeting, the Commission decided that a Commission meeting should not commence with the Commission acting as a subcommittee if absent members are known to be in the city where the meeting is being held and are known to be planning to attend the meeting. At the August 1985 meeting, the Commission determined that the meeting should not be delayed more than 30 minutes from the originally scheduled starting time to await the arrival of absent members who are known to be planning to attend the meeting.

BUDGET FOR 1986-87

The Commission considered Memorandum 85-70. The Executive Secretary called the Commission's attention to corrections that should be made in the column on yellow page 2 for "Actual 1984-85": Equipment for that year should be 20 thousand instead of 7 thousand; "Totals, Operating Expenses & Equipment" should be 114 thousand instead of 101 thousand; and "Total Expenditures" should be 453 thousand instead of 440 thousand.

The budget as prepared by the staff, with the corrections indicated above, was approved for submission to the Department of Finance. (The fiscal personnel in the Department of General Services--which provides accounting and fiscal services for the Commission--will prepare the actual budget documents that will be submitted to the Department of Finance, using the Commission approved budget as a basis for the documents the department prepares.)

The staff indicated that a memorandum would be prepared for a future meeting listing the various matters that might be the subject of a contract with a research consultant. This memorandum would indicate how the 20 thousand dollars available for research contracts during 1985-86 might be allocated among possible topics where a research study would be useful. The Commission has a policy that the

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staff will periodically report the status of contracts in effect with research consultants so that the Commission will be aware of whether or not the research consultants are producing their background studies accordingly to the schedules set out in their contracts. Commissioner Marzec requested that the memorandum to be prepared also contain a breakdown of amounts encumbered and amounts paid during the 1984-85 fiscal year to research consultants.

#### PROCEDURE TO FOLLOW IN MAKING AMENDMENTS TO COMMISSION RECOMMENDED BILLS

The Commission approved the Minutes of the June 27-28, 1985, Meeting with the understanding that the Commission would give further consideration to whether the staff should be authorized to consent to nonsubstantive technical or clarifying changes in Commission recommended bills at or before legislative hearings without prior approval of the Chairperson or the Commission. Further consideration of this matter was deferred pending the arrival of Commissioner Marzec at the meeting, so that the matter could be discussed when he was present. The Commission did not give further consideration to the matter at the June meeting.

#### EXECUTIVE SECRETARY AUTHORIZED TO CARRY OVER EXCESS VACATION HOURS INTO 1986

In connection with the discussion of the proposed budget, the Commission reaffirmed its intention to draft and submit a new Probate Code for enactment by the 1987 session.

Mr. DeMouilly, the Executive Secretary, reported that he will have approximately two months of accrued vacation that he will lose if it is not taken before the end of 1985 unless the Commission approves his carrying over these excess vacation hours into 1986.

The Commission asked Mr. DeMouilly not to take these approximately two months of accrued vacation in 1985 but instead to carry over into 1986 substantially all of the approximately two months of accrued vacation that he otherwise would lose if not taken. This decision was made so that the staff work on producing the new Probate Code can be kept on schedule and the Commission's objective that the new code be

ready for enactment by the 1987 session can be accomplished. It is expected that Mr. DeMouilly will take the carried over excess accrued vacation during the last part of 1986 when the major portion of the work on producing the new code is scheduled to be completed.

STUDY L-601 - PROBATE CODE - MULTIPLE-PARTY ACCOUNTS

The Commission considered Memorandum 85-62 and the attached staff draft of a Recommendation Relating to Multiple-Party Accounts. Representatives of the State Bar and the California Bankers Association expressed concern about the following provisions:

(1) The provision in Section 5302 requiring "clear and convincing evidence" to overcome the presumption of survivorship. The State Bar and the bankers like the old rule permitting survivorship to be defeated by a mere preponderance of the evidence. It was the State Bar's view that people use joint accounts primarily to have equal access during their lifetimes, and not for the automatic survivorship feature.

(2) The bankers expressed concern about the provision in Section 5305 creating, in effect, a new kind of property--community property with a right of survivorship that cannot be defeated by a contrary will. The bankers thought the matter should be determined according to the testator's intention, with the will being one indication of intention.

(3) The bankers were concerned that the new provisions with respect to payment to minors might impose on banks the duty of petitioning for the appointment of a guardian. The staff agreed that if the bankers continue to have a problem with this, a provision (perhaps uncodified) could be added to make clear that the banks have no such duty, and instead may simply hold money payable to a minor until a parent or other person acts for the minor under Sections 3400-3413.

The State Bar questioned the assertion that credit unions are satisfied with the multiple-party account provisions. The State Bar thought that credit unions were not entirely satisfied with the new

law. The staff agreed to contact credit union representatives to get their experience under the new law. The Commission asked the staff also to determine how Arizona has dealt with the problem of reconciling community property concepts with survivorship under their multiple-party account provisions. The staff should report back to the Commission at a future meeting.

L-640 - PROBATE CODE (SPENDTHRIFT AND OTHER PROTECTIVE TRUSTS)

The Commission considered Memorandum 85-68 and the draft statute relating to spendthrift and other protective trusts. In addition to hearing statements of persons attending the meeting, the Commission considered the written comments of a team of members and advisors of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (see Exhibit 1 attached to these minutes) and some written comments submitted by Professor Russell Niles, a Commission consultant. The Commission made the following decisions with regard to the draft statute:

§ 15300. Forfeiture on alienation

This section relating to forfeiture restraints on alienation should not be included in the statute on spendthrift trusts. It was recognized that the validity of forfeiture restraints need not be dealt with in a statute dealing with disabling restraints and that it would be better to consider this subject in the context of restraints on alienation generally. Professor Niles has previously stated his view that the law of restraints on alienation should be the subject of a separate study; if spendthrift trusts are to be included in the new trust law, the statute should be restricted to disabling restraints. It was also suggested, however, that it may not be sufficient to rely on Section 150 of the Restatement (Second) of Trusts for the validity of forfeiture restraints, if such a rule is desirable. The omission of draft Section 15300 is not to be taken as an expression of a view that forfeiture restraints are invalid.

§ 15301. Restraint on alienation of income

This section which provides for the validity of a restraint on alienation of income should be revised to recognize the various exceptions and limitations on the power to restrain provided in other sections in the draft. See, e.g., Sections 15305 (where settlor is beneficiary), 15306 (claims for support).

§ 15302. Restraint on alienation of principal

The rule that the beneficiary's interest in principal cannot be alienated should be limited to the time during which the income trust continues. Hence, the restraint on alienation of principal would not extend beyond the time that the alienation of income may be restrained.

§ 15303. Trust for support

This section should be revised to make it more flexible; as it reads, it would apply where the trust provided only for education and support of the beneficiary, and not where the trust provided also for payments to the beneficiary for some other purpose. Accordingly, this section should be revised to read substantially as follows:

15303. If by the terms of the trust it is provided that the trustee shall pay or apply ~~only so much of the~~ an amount of income and principal or either ~~as~~ that is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his or her interest and the creditors of the beneficiary cannot reach ~~it~~ the beneficiary's interest.

Any exceptions to this rule in the remainder of the chapter should be noted in this section.

§ 15304. Transferee or creditor cannot compel trustee to exercise discretion; liability of trustee for payment to or for beneficiary

The second sentence of subdivision (a) relating to the liability of a trustee who has been served with process after exercising discretion to pay an amount to the beneficiary should be a separate subdivision. It should also make clear that the trustee is liable only to the extent that payment to the beneficiary is a violation of the creditor's right; the language of the draft can be interpreted to mean that the trustee is automatically liable for a payment even though the creditor is not harmed.

The Commission reaffirmed the policy that the provision in a trust of a standard for exercise of discretion under the trust should not make the beneficiary's interest liable to creditors' claims. Hence, for the purposes of this section, discretionary trusts are treated the same, whether or not they provide absolute discretion or discretion pursuant to a standard.

Subdivision (a) should be revised along the same lines as Section 15303 to eliminate the "only so much" language.

§ 15305. Where settlor is beneficiary

The Commission discussed the problem that could arise under subdivision (b) of this section where a trust has several beneficiaries, but also gives the trustee discretion to pay to the settlor. If the creditor of the settlor can reach any amount that can go to the settlor, the entire trust corpus could be diverted from the other beneficiaries if the trustee has broad discretion. The staff should attempt to deal with the problem in the next draft. One suggested approach is that the trustee could be liable for not paying the creditor in any case where the trustee has determined an amount to be paid to the settlor, similar to the approach of part of Section 15304. Several Commissioners expressed a preference for the approach of subdivision (6) of Section 701.06 of the Wisconsin statute, which makes the settlor's interest liable to the extent of the settlor's proportionate contribution. The staff should attempt a redraft of the Wisconsin approach that deals with the problems arising where community property is placed in the trust without the consent of one spouse.

§ 15306. Claims for child or spousal support

The treatment of minor children as preferred creditors in this section should be retained, but the section should be revised in the case of spousal support to permit the trust instrument to provide that the beneficiary's interest is not subject to claims of a spouse or former spouse.

§ 15307. Claims for public support

The policy of this section protecting trusts for persons who cannot provide for their own care from claims for reimbursement was approved, but subdivision (b) should be revised substantially as follows:

(b) Subdivision (a) does not apply to any trust that is established for the benefit of an individual who has a disability which can be expected to ~~continue indefinitely,~~ substantially ~~impair~~ impair the ~~individual's~~ individual's ability to ~~adequately provide~~ provide for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual.

§ 15308. Surplus income subject to creditors' claims

This section should be revised substantially as follows:

15308. Where a trust ~~is created to receive the income from property held in trust~~ instrument does not contain a valid direction for accumulation of income, ~~the surplus~~ whatever income beyond the sum that is or will be necessary for the education and support ~~of~~ to which the beneficiary is entitled may be applied to the satisfaction of a money judgment against the beneficiary.

The reference to the amount to which the beneficiary is otherwise entitled is intended to avoid the implication that the creditor can reach amounts that are to go to other beneficiaries, which might arise from the deletion of the word "surplus."

The staff should make sure that the interrelation of this section to other sections in the chapter is clear.

Claims for Necessaries

The Commission considered Professor Niles' suggestion that creditors who furnish necessaries should be preferred creditors. The suggestion was not adopted.

§ 15309. Subsequent modification of court's order

§ 15310. Disclaimer not an assignment

These provisions and the conforming revisions and repeals that followed were approved.

STUDY L-800 - PROBATE CODE (ABATEMENT; DISTRIBUTION OF INTEREST AND INCOME)

The Commission considered Memorandum 85-65 and the attached staff draft of provisions concerning abatement and distribution of interest and income accruing during administration. The Commission made the following decisions:

Title of Article

The word "Devises" should appear in the title of the article.

§ 6183. Abatement

The Commission rejected the proposed rule in Section 6183 that would require general devises to be exhausted before resort may be had to specific devises. Instead, the Commission decided to keep the rule of existing Section 750 that general and specific devises abate in proportion to their values, subject to some court discretion to deviate from strict pro rata abatement in order to carry out the intention of the testator. The Commission also decided to keep the rule of existing law (Section 752) that, within classes, devises to the testator's spouse or kindred abate only after abatement of devises to persons not related to the testator. The Commission decided not to broaden this preference to include kindred of the testator's spouse.

The staff should consider whether the abatement provisions should be located separately from the provisions on distribution of interest and income. The staff should make sure that the abatement rules in Sections 6562 and 6573 (spouse and children unprovided for in will) are consistent with the general abatement rules in Section 6183.

The staff should redraft Section 6183 and bring a revised draft back to the Commission. In the Memorandum, the staff should address the question of how broad the court's discretion should be to deviate from strict pro rata abatement to carry out the testator's intention.

§ 6184. Rate of interest

The Commission decided to delete subdivision (b) (compound interest for personal representative's willful breach) and to rely on case law as cited in the Comment. The rule for interest provided by Section 6184 should be consistent with the rules for fiduciaries generally.

§ 6185. Earnings on specific devise

The Commission asked the staff to deal in the statute with the case where the earnings on a specific devise are not sufficient to pay taxes and other expenses of upkeep of the specific devise. Some courts take the view that such expenses are the responsibility of the specific devisee, and if the specific devisee is unable to pay, the

court orders the specifically devised property to be sold for the payment of expenses. This rule has the benefit of not turning on when the estate is closed.

In Los Angeles County, expenses attributable to the specifically devised property are paid out of the residue. There was sentiment for a rule requiring such expenses to be paid out of the residue for one year, and imposing them on the specific devisee thereafter. This might make it disadvantageous for a surviving spouse who is the specific devisee to use the summary set-aside provisions. Despite this possibility, there was general sentiment for this rule. This would include expenses of upkeep, but not improvements in the property.

The staff should bring this back to the Commission for further consideration.

§ 6186. Interest on general pecuniary devise

The Commission decided to not try to deal in the statute with the question of whether and when interest is payable on a general nonpecuniary devise. Most general devises are pecuniary. General nonpecuniary devises are rare. The Comment should note that we do not deal with the question of interest on a general nonpecuniary devise. There was disagreement as to whether the Comment should say that therefore there is no interest on a general nonpecuniary devise, or should say that the question is an open one.

§ 6187. Devise of interest or income; annuities

Professor Halbach raised the question of whether the word "fund" as used in subdivision (a) refers to a fund in existence prior to the testator's death, or refers to a fund created by the testator's will. The question is important because it affects QTIP trusts: In such trusts, does the income accrue from the testator's death as Section 6187 suggests, or commencing one year after death as Section 6186 suggests?

In Professor Halbach's view, "specific fund" does not refer to a pecuniary bequest, such as a QTIP trust. Rather it means the interest or income from a specifically devised fund in existence prior to the testator's death, such as a bank account or securities account. As a result, practitioners generally believe that the pecuniary marital deduction formula bequest does not begin to earn interest until one

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year after the date of death. This result could be ensured by substituting for the word "fund" the words "specific property." This would also have the effect of making Section 6187 not apply to interest or income from a general pecuniary bequest; Section 6186 would apply to such a case. This was generally considered to be the desirable result. The Comment should make the results clear, perhaps with some examples.

There was some concern that subdivision (c) is not clear enough as to how often interest is computed (daily? monthly?). The staff should make this clear.

#### STUDY L-830 - PROBATE CODE (PRORATION OF ESTATE TAXES)

The Commission considered Memorandum 85-69 and the attached draft of the tentative recommendation relating to proration of estate taxes. The Commission approved distribution of the draft for comment after changing the word "article" to "chapter" in Sections 972.010 and 977.010.

#### STUDY L-1020 - PROBATE CODE (POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS)

The Commission resumed consideration of Memorandum 85-13 from the previous meeting, the attached staff draft of new Probate Code provisions concerning powers and duties of personal representatives, and the Second and Third Supplements to Memorandum 85-13. The Commission began at draft Section 7620 and made the following decisions:

##### § 7620. Petition for order

The Comment to Section 7620 should note that the section is broad enough to authorize the court to adjudicate embezzlement claims under existing Sections 612-613, and that *Laing v. Superior Court*, 88 Cal. App.2d 641, 199 P.2d 373 (1948) (holding that the probate court lacked jurisdiction to require a third party to restore decedent's automobile to the estate) is no longer good law.

The staff should consider whether there should be a general provision authorizing beneficiaries of the estate to petition or take action themselves or to compel a personal representative to file a petition or take other action when the personal representative declines to do so.

§ 7621. Notice of hearing

Subdivision (a) of Section 7621 should require that a copy of the petition be furnished along with the notice of hearing. In general, only the notice of hearing is furnished. However, a proceeding under this article may involve persons not parties to the probate proceeding, and notice is therefore analogous to service in a civil action where the parties receive a copy of the complaint as well as a summons.

The staff should check to ensure that the notice provisions in brackets in subdivision (a) [Sections 1200 and 1200.5] are sufficient to continue to include all those who are entitled to notice under existing law (Section 851.5). The staff should consider whether subdivision (c) should include a requirement that the notice state that the person served has 30 days to file a response to the petition.

§ 7625. Abatement of petition if civil action pending

There should be added to the end of Section 7625 the following clause: "unless the civil action has been filed for the purpose of delay." The Comment should note that this clause codifies *Richer v. Superior Court*, 63 Cal. App.3d 748, 756-57, 134 Cal. Rptr. 52 (1976). Section 2525 (guardianship-conservatorship law) should be similarly amended, and should also have the language "prior to the filing of the petition" added to conform to Section 7625.

The staff should consider whether the change of the word "claim" in existing Section 851.5 to "petition" in Section 7625 may have changed the meaning of the section. For example, can a claim be filed in a response to a petition under this section? If "petition" means the same as "claim" and is the preferable word, the Comment should note that no substantive change is intended.

§ 7627. Order

The Comment to Section 7627 should note that "the person entitled thereto" may include the personal representative or the estate in appropriate cases.

§ 7628. Execution of conveyance or transfer; effect of order

The Commission was tentatively of the view that the new statute should have general provisions concerning stay of execution during an appeal, as well as other appeals provisions, drawn from Sections 2750-2752 (guardianship-conservatorship law).

The Comment to Section 7628 should note that a conveyance or transfer by the personal representative passes title as fully as if the decedent had executed it while living, citing Section 7511(c) (drawn in part from the last sentence of former Section 853).

The staff should consider whether there is a better way to say "according to" the terms of the order in subdivision (a).

§ 7640. Borrowing money and encumbering property; exchange of property

Language should be added to subdivision (a) of Section 7640 to authorize the personal representative to borrow money "to preserve and improve property and to pay taxes."

The staff should make sure that by combining the provisions for exchange of property (existing Section 860) with the provisions for borrowing money and mortgaging property (existing Sections 830-834), provisions have not been inadvertently lost. Conceptually, exchanges are more like conveyances than borrowing. This would suggest that exchanges should go in the preceding article rather than this one.

§ 7641. Dedication or conveyance of real property or easement with or without consideration

In subdivision (d), "paragraph (1), (2), or (3)" should be revised to read "subdivision (a), (b), or (c)".

§ 7643. Notice

The reference to the court "or judge" should be replaced by general provisions specifying the power of a judge to act in chambers and elsewhere outside the courtroom. Cf. Code Civ. Proc. § 166. In the meantime, "or judge" should be shown in brackets. The staff should also consider whether a section is needed specifying the powers of a court commissioner. Cf. Code Civ. Proc. §§ 259, 482.060.

§ 7644. Hearing; order; effect of order

The Commission deleted paragraph (3) from subdivision (a) ("[d]irect in what coin or currency the loan shall be paid"), and added a new paragraph (6) to subdivision (a) to read: "(6) Make such other orders concerning the transaction as may be in the best interests of the estate."

In subdivision (d), the following language which was inadvertently omitted was restored following "deed of trust": "if the proceeds of sale of the encumbered property are insufficient to pay the note or notes, the security interest, lien, mortgage, or deed of trust,".

The staff should consider whether Section 7644 should include provisions for a court order concerning exchanges of property. Cf. Section 7640(d).

§ 7650. Court authorization

The Commission decided to increase the monthly rental for a lease of real property of the estate that the personal representative may make without court approval from the \$750 proposed in the staff draft to \$1,500. Section 2555 (guardianship-conservatorship law) should be similarly revised. Section 2555 should also be revised to reduce from two years to one year the maximum term for a lease which the guardian or conservator may make without court approval, consistent with Section 7650.

The Comment to Section 7650 should note that if the lease gives the lessee an option to extend the lease beyond a one-year term, court approval would be required under Section 7650.

§ 7651. Petition; notice

The Commission decided to keep publication of notice under Section 7651. The provision in subdivision (b) for 20 days' notice by mail should be made consistent with the general notice provisions when they are drafted. The words "if any" should be deleted from the last sentence of subdivision (b).

§ 7652. Hearing and order

The reference in subdivision (a) to the court hearing the petition "and any objection thereto" should perhaps go in a general provision.

The staff should try to improve the language of subdivision (b). Perhaps it should be a general provision. Cf. Section 7511.

§ 7653. Terms and conditions of leases

In subdivision (b), the words "production of" were inadvertently omitted preceding "minerals" and should be restored.

§ 7660. Investment in federal or state securities; purchase of annuity

The staff should try to find better language than money "in the hands of" the personal representative.

§ 7661. Investment in direct obligations of the United States

The Commission tentatively decided to delete subdivision (c) (personal representative may, without court approval, invest in mutual funds comprised of repurchase agreements). It should be made clear, however, that the personal representative may make such investments with court approval. This provision was added in 1982 by Assembly Bill 2622 (Harris). The Commission asked the staff to determine what the original source of that provision was, and to report back to the Commission with this information.

Subdivision (b) should be revised to authorize investments in mutual funds which are comprised "solely" of direct obligations of the United States, etc.

§ 7663. Investment of surplus money as provided in will

The language omitted by the staff that the court shall hear the petition "if no objection thereto has been filed by any interested party" should be put back in the section and revised to say that the court may not grant the petition if an objection has been filed.

Paragraph (1) of subdivision (a) ("[t]here is surplus money in the estate") should be put into the introductory clause so it will read: "(a) The personal representative or other interested person may file a [verified] petition for court authorization to invest surplus money in the estate if all of the following conditions are satisfied:".

§ 7664. Common trust funds

The substance of Section 7664 should be put into Section 7661 (permitted investments).

The language "money in his or her hands" should be revised to read "money in possession of the personal representative".

Conforming Revisions

Government Code § 21207 (technical amendment). Minors

A question was raised concerning the meaning of "board" as used in this section. "Board" is a defined term meaning the Board of Administration of the California Public Employees' Retirement System. Gov't Code § 20005.

Probate Code § 21.5 (added). Account in an insured savings and loan association

The staff should make sure that "shares" as used in this section refers to deposits, not equity shares. The staff should try to avoid the use of decimals for section numbers.

Probate Code § 59 (added). Personal representative

A question was raised whether it is appropriate to include "special administrator" in the definition of "personal representative," especially in view of the investment sections giving the personal representative investment powers that special administrators do not ordinarily have. The staff should review the definition of "personal representative" with this in mind, and should consider whether the second sentence ("General personal representative" excludes special administrator") may be essential.

Powers and Duties Provisions Taken From Accounting Article

The Commission considered the Fourth Supplement to Memorandum 85-13 and attached exhibits. The Commission made the following decisions:

§ 7560. Joint personal representatives

The Commission approved the substance of subdivision (d) (liability of one personal representative for act or omission of another). The staff should make sure the language of Section 7560 is consistent with the law applicable to trustees (proposed Sections 16402-16403).

Concern was expressed with the language that makes a consenting personal representative liable as if the acts had been committed by him or her, rather than expressing the liability as derivative liability. This may pose a problem where one personal representative has expert qualifications and the other does not. The liability probably should be expressed as joint and several liability.

Guardianship-conservatorship law (e.g., Section 2105) should also be conformed to the standard of Section 7560.

§ 7574. Interest on deposits by trust company

The staff should check to see if the provision in Section 7574 for the rate of interest is consistent with case law which requires the personal representative to earn a reasonable rate of return on estate funds. There is a pertinent Illinois case, the citation to which will be furnished to the staff by the California Bankers Association. A VandeKamp case was also mentioned.

A provision like Section 7574 should be put into the guardianship-conservatorship law.

§ 8253. Sale for more or less than appraisement

Subdivision (a) requires the personal representative to account for the excess over appraised value when property is sold. The question was raised whether the personal representative does not have the duty to account for the entire amount. The staff should give further thought to this subdivision.

Subdivision (b) (nonliability of personal representative) should be limited to the case where the personal representative is without fault. The staff should give further thought to the meaning of the reference to a sale which is "justly" made. Perhaps "fairly" is a better word.

STUDY L-1026 - PROBATE CODE (PAYMENT OF DEMANDS)

The Commission considered Memorandum 85-35 and the Revised First Supplement and Second Supplement thereto, relating to payment of demands. The Commission made the following decisions concerning the draft statute.

§ 8600. Definitions

Subdivision (a), defining "demand against the estate" should be revised to make clear what is included in a "charge against the estate"; "demand" might also be redefined as a request for payment, as opposed to a "claim" which is formally presented for allowance and approval. The definition of "established claim" in subdivision (b)

should be expanded to include claims properly paid even though not pursuant to the formal claims procedure, including claims under independent administration. The wage claim amount in subdivision (c) should be changed from \$900 to \$2000, subject to checking the amount in the bankruptcy law and other usages in the codes. It should be noted that the language in the various Comments to the sections in this part will be revised to conform to the pattern used to indicate where there is a continuation of existing law without substantive change.

§ 8601. Order of payment

Consideration of subdivision (a)(6) relating to payment of mortgages and liens was deferred until it could be reviewed in connection with other provisions on encumbrances of estate property.

§ 8602. Immediate payment of priority demands

A provision should be added to this section that there must be a sufficient reserve for payment of state and federal claims. Commissioner Stodden offered to send the staff a listing of some of the relevant state and federal statutes for inclusion in the Comment.

Language should be added to make clear that a payment of a demand against the estate, if made without court order, may nonetheless be subsequently approved by the court. However, the statute should also make clear that priority demands must be paid before others, and that they should be paid in the order in which they appear in the statute.

§ 8603. Payment of demands on court order

Subdivision (b) should require notice of a final account where a payment will exhaust the estate. This might be done by adding a notice provision to the section, by interrelating with distribution notice provisions, or by physically relocating to the accounts provisions.

§ 8604. Interest

Subdivision (a) should be replaced by a provision that interest on a claim accrues at the rate payable on a money judgment after a court orders payment to be made, unless a different rate is provided by contract. The staff should do further work on the definition of "demand" as used in subdivision (c).

§ 8605. Enforcement of order for payment

Subdivision (c) should be refined so that it is consistent with general fiduciary obligations of the personal representative.

§ 8606. Disputed and contingent claim

Subdivision (a), requiring payment into court of a reserve for contingent or disputed claims, should be made subject to a court order otherwise. Subdivision (b) should be deleted.

§ 8607. Trust for contingent claim

The reference to "contingent" claims should be deleted, and subdivision (a) should be phrased in terms of application of the section to claims payable in installments or upon the occurrence or nonoccurrence of a stated event. Subdivision (b) should refer to proper investments for a personal representative rather than to legal investments for savings banks.

§ 8608. Deposit for unknown claimant

Subdivision (b) should be revised for brevity and to omit duplicative provisions. The staff should investigate whether simplification of drafting can be done in subdivision (c) as well. The county and state treasurers should again be solicited for comments.

§ 8609. Omitted creditor

Subdivision (a) was revised to refer to a creditor whose "approved" claim was not included in the order for payment. Subdivision (b) should be generalized to refer to any case where the creditor is omitted through the fault of the personal representative, perhaps by deletion of the introductory clause.

§ 8623. Notice of hearing

Reference in this section should be made to an order "to show cause."

§§ 8630-8636. Proration of estate taxes

These provisions are superseded by the Commission's tentative recommendation on the same subject. See Minutes for Study L-830, supra.

STUDY L-1027 - PROBATE CODE (ACCOUNTINGS)

The Commission commenced, but did not complete, consideration of Memorandum 85-36 and the First Supplement and Revised Second Supplement thereto, relating to accountings. The Commission made the following decisions with respect to the matters considered.

§ 8500. Duty to account

The phrase "is chargeable in his or her accounts with" was replaced by the phrase "shall account for".

§ 8501. Contents of account

This section should refer to the report of administration and should be combined with Section 8502.

§ 8502. Alternative contents of account

In subdivision (b), the reference to the books of account should be replaced by a reference to the documents supporting the account. The last sentence of the Comment should read, "It would be unnecessary to show in the summary more than the total amount of each component part making up the total." Reference should be made in the Comment to the model fiduciary accounting standards developed by the College of Probate Counsel.

The guardianship/conservatorship accounting should be conformed to the probate accounting. The staff should also see whether it would be appropriate for application to trusts as well.

§ 8510. Court ordered account

In the first sentence of Section 8510, the brackets should be deleted. The second sentence should be replaced by a provision to the effect that upon request of an interested party made more than a year after issuance of letters or after the last account, the court must order an accounting.

§ 8511. Final account

The word "pay" should be replaced by the word "request".

§ 8512. Account after authority terminated

This section should cover a personal representative who dies as well as one who resigns or is removed. The personal representative should file his or her final account within 90 days unless the time is extended by the court. The Comment should cross-refer to Section 8531 (citation).

§ 8513. Account where personal representative dies or becomes incompetent

Subdivision (b) was revised to provide that the accounts "shall" rather than "may" be filed by the legal representative.

§ 8515. Waiver of accounting

This section should be renumbered 8514. In subdivision (c), the report should "include" rather than "show" the amount of fees or commissions paid. The term "beneficiaries" in subdivision (d) should be replaced by the term "distributees."

"Beneficiaries"

The term "beneficiaries" should be defined to mean heirs or devisees of a decedent's estate or beneficiaries of a trust, and should be used to replace the phrase "heirs or devisees" where it occurs in the statute, unless there appears to be a reason to spell out heirs or devisees in the context of a particular case.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

## EXHIBIT 1

ESTATE PLANNING, TRUST AND  
 PROBATE LAW SECTION  
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August 29, 1985

California Law Revision Commission  
 4000 Middlefield Road, Room D-2  
 Palo Alto, California 94303

Re: Memorandum 85-68 (Spendthrift and  
 Other Protective Trusts)

Dear Commissioners:

The above Memorandum was not received in time for discussion at the most recent meeting of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California. However, it was assigned to a team made up of Executive Committee members and advisors. This letter sets forth the comments of that team.

1. Proposed Section 15300, dealing with forfeiture for alienation, is opposed as unwise policy. The reporter's notes to Restatement of Trusts (Second), appendix, indicate that there are a few jurisdictions which recognize this type of forfeiture as to an income interest and that there is a split of authority as to this type of forfeiture for an interest in principal. No California cases are cited either as to income or principal. It is believed that California law does not now provide for this type of forfeiture.

Further, the forfeiture, as set forth in proposed Section 15300, would result from a beneficiary's creditors' attempts to reach the trust property or upon the beneficiary's bankruptcy. Certainly an attempt by a creditor to reach the funds is beyond the control of the beneficiary and should not cause a forfeiture of the beneficiary's interest. To protect a beneficiary against his creditors is the reason that spendthrift provisions generally are included in wills and trusts.

2. Section 15301. This section is satisfactory. Presumably, if income was payable to a beneficiary after that beneficiary's death, it would be paid to his estate and hence subject to claims by his creditors at that time. An income interest, almost by definition, is either an interest for life or a term of years. Therefore, the limitation set forth in Restatement of Trusts (Second), Section 152, subsection (1), dealing with income accruing during the beneficiary's lifetime, is not a significant limitation in practice. It is noted that Civil Code Section 867 deals with interest during lifetime.

3. Section 15302 is approved as to the first sentence thereof. It is believed that the second sentence should be limited to the following:

"The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary."

The team which reviewed this section objected to the balance of Section 15302 in principal. Memorandum 85-61, a prior memorandum dealing with spendthrift trusts, in discussing "periodic" payments equated periodic payments with any type of regular payment which was made or could be compelled, including payments for support, maintenance, education, based upon an ascertainable standard, etc. The language in Section 15302, it is believed, is broad enough when it refers to "payments of principal [which] have become due and payable" to allow a creditor to attempt to reach such support payments or discretionary payments on the ground that they have become due or payable, the theory being that the beneficiary could compel the payment and therefore the creditor can reach it. It is believed that this provision of Section 15302 therefore has some of the same infirmities as discussed in the objections to Memorandum 85-61 (see letter on behalf of the Estate Planning, Trust and Probate Law Section attached to First Supplement to Memorandum 85-61).

With reference to the policy issues raised in the Memorandum, as to Policy Issue (1), we believe that the restraint on transfer of a remainderman's interest should be valid, even though the remainderman is not an income beneficiary. We do not understand the comment that "If such a provision is valid, it may hamper estate planning".

As to Policy Issue (2), if the principal is to be conveyed to the beneficiary's estate, as the comment to subsection (3) of Section 153 of the Restatement indicates, we believe the matter can be adequately handled by simply making

the principal payment paid to his estate subject to creditors' claims like any other interest. We do not feel that, if a person is given the income for life with the remainder payable to his estate, his creditors during his lifetime should be able to levy on the value of the principal during his lifetime, as is suggested in Illustration 5 following comment on subsection (3), Section 153, Restatement.

As to Policy Issue No. (3), we believe that the limitation in Section 153, Restatement, dealing with having the principal conveyed "at a future time", is not a necessary or desirable limitation. So long as the property is held in the trust, it should be subject to protection, even if the beneficiary could otherwise compel distribution of the property.

4. Section 15303. We approve this section but believe the word "it" at the end of the section should be replaced with the words "income or principal". We believe this would clarify the language.

Our comment is premised upon the deletion of the second portion of Section 15302 dealing with the creditor's right to reach principal which may become due or payable to the beneficiary. If a beneficiary can compel a distribution for education or support, we do not feel that the creditor should be able therefore to compel the trustee to make a distribution to the creditor equal to the funds otherwise necessary for education or support. Section 15304(a) makes it clear that a creditor cannot compel the trustee to make discretionary distributions even if the beneficiary has a right to compel the trustee to pay all or part of the principal or income. We believe that Section 15303 should have a similar limitation or clarification.

5. Section 15304 by definition deals with a trust which does not have a spendthrift provision in it. As worded, it provides that the creditor cannot compel the trustee to exercise his or her discretion, even if there is an ascertainable standard and even if the beneficiary could compel a distribution. This provision is desirable. As written, the section, however, does give the creditor a right to file a claim with the trustee and, in essence, requires the trustee, whenever the trustee exercises his or her discretion to distribute income or principal either for support, maintenance, health or other reason, to pay that money to the creditor rather than the beneficiary. In short, it gives the creditor priority over the beneficiary in this type of discretionary trust which is not otherwise spendthrifted. Obviously, a

creditor can always reach property once it is distributed to a beneficiary and is no longer subject to the trust. Query if the creditor should be given this statutory priority over the beneficiary.

We see no reason to limit Section 15304 to situations where the trustee has "unlimited" discretion.

6. Section 15305. The reference to Section 704.115 of the Code of Civil Procedure is a reference to various private retirement plans, profit sharing plans, etc. Does this mean that public pension plans, such as the California Public Employees Retirement Plan, are subject to a different rule?

As to subparagraph (b), we are not sure what that section means in practice as to the maximum amount which the trustee can pay to the person or apply for the person's benefit. Is that limited by an ascertainable standard, such as support, maintenance, health or education? Does it apply to a spousal election trust where a surviving spouse, for example, submits his or her interest either to probate administration or to administration under the will or trust of the predeceased spouse?

7. Section 15306. While this represents a change in California law, this proposal was suggested as early as Staff Memorandum 83-17. The underlying question is whether the code sections dealing with family law, enforcement of support obligations, etc., are not sufficient to meet claims for child or spousal support. Once again, creditors can obviously levy on property once it is distributed from a trust. Those creditors might include a spouse or child entitled to support. As a basic concept, the team which reviewed this felt that the special exemption for child or spousal support is probably justified. However, it is noted that it has not been reviewed by the full Executive Committee.

8. Section 15307. Paragraph (a) refers to a "statute of this state". Is that limitation appropriate if the party might otherwise, for example, be eligible for social security benefits? The Draftsman's Note raises this issue. The team felt that public support should be broadened to include at least claims under the social security procedures.

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8. Section 15308. Since this section continues existing law, it is supported by the team.

9. Section 15309 is satisfactory.

10. Section 15310 is satisfactory.

We hope the above comments will be of assistance to the Commission and its Staff in evaluating Memorandum 85-68.

Sincerely,



Charles A. Collier, Jr.  
For the Executive Committee

CAC:vjd

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