

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

jd10  
11/25/86

<u>Time</u>		<u>Place</u>
December 4 (Thursday)	3:00 p.m. - 8:00 p.m.	Holiday Inn
December 5 (Friday)	9:00 a.m. - 4:00 p.m.	150 E. Angeleno Burbank 91510 (818) 841-4770

### FINAL AGENDA

for meeting of

### CALIFORNIA LAW REVISION COMMISSION

Burbank

December 4-5, 1986

1. Minutes of October 16-17, 1986, Meeting (sent 11/3/86)

Correction to Minutes (sent 11/3/86)

2. Administrative Matters

Suggested Schedule for Future Meetings

See Schedule attached to this Agenda

3. Approval for Printing and Submission to Legislature

(a) Annual Report

Memorandum 86-97 (to be sent)  
Draft of Annual Report (attached to Memorandum)

(b) Study L-1028 — Independent Administration of Estates Act

Draft of Preliminary Portion

First Supplement to Memorandum 86-83 (sent 11/13/86)

Revised Draft Statute

Memorandum 86-83 (sent 11/03/86)

**(c) Study L-642 — Technical Revisions in the Trust Law**

Memorandum 86-95 (sent 10/29/86)  
First Supplement to Memorandum 86-95 (sent 11/17/86)  
Draft of Recommendation (attached to Supplement)

**Note.** This Recommendation has already been approved to print. In Memorandum 86-95, the staff suggests additions to the approved Recommendation to deal with transitional and technical matters.

**(d) Study L-1047 — Notice in Guardianship and Conservatorship Proceedings**

Memorandum 86-93 (sent 10/09/86)  
Draft of Recommendation (attached to Memorandum)

**(e) Study L-1045 — Preliminary Provisions and Definitions**

Memorandum 86-98 (sent 11/19/86)  
Draft of Recommendation (attached to Memorandum)  
First Supplement to Memorandum 86-98 (sent 11/24/86)

**(f) Study L-1041 — Procedural Provisions for 1987 Legislation**

Memorandum 86-100 (sent 11/24/86)  
Draft of Legislation (attached to Memorandum)

**4. Study L-1025 - Creditor Claims**

**Comments on Tentative Recommendation**

Memorandum 86-202 (sent 11/3/86)  
Revised Tentative Recommendation (attached to Memorandum)

**Claims by State Taxing Authorities**

First Supplement to Memorandum 86-202 (sent 10/29/86)

**Actions Involving Decedent**

Second Supplement to Memorandum 86-202 (enclosed)

**Notice to Creditors**

Third Supplement to Memorandum 86-202 (sent 11/20/86)

**Further Comments on Tentative Recommendation**

Fourth Supplement to Memorandum 86-202 (to be sent)

**5. Study L-1055 — General Provisions Relating to Notice**

Memorandum 86-99 (enclosed)  
Draft of Recommendation (attached to Memorandum)

**6. Study L-1041 — Rules of Procedure**

**Draft of Statute**

Memorandum 86-91 (sent 9/24/86)

**Comments on Draft**

First Supplement to Memorandum 86-91 (sent 10/30//86)

**Note.** The letter referred to in this supplement is attached to the First Supplement to Memorandum 86-88.

**7. Study L-655 - Inventory and Appraisal**

**Draft of Tentative Recommendation**

Memorandum 86-84 (sent 10/1/86)

**Governor's Veto Message**

First Supplement to Memorandum 86-84 (sent 10/9/86)

**Comments on Draft**

Second Supplement to Memorandum 86-84 (sent 10/10/86)

**Letter from Matthew S. Rae, Jr.**

Third Supplement to Memorandum 86-84 (sent 11/10/86)

**More Comments on Draft**

Fourth Supplement to Memorandum 86-84 (sent 11/20/86)

**Letter from California Probate Referees Association**

Fifth Supplement to Memorandum 86-84 (enclosed)

**8. Study L-1047 - Estate and Trust Code (Appeals)**

**Draft of Tentative Recommendation**

Memorandum 86-90 (sent 9/25/86)

**Comments on Draft**

First Supplement to Memorandum 86-90 (sent 11/19/86)

**9. Study L-1029 - Marital Deduction Gifts**

**Draft of Tentative Recommendation**

Memorandum 86-88 (sent 9/30/86)

**Comments on Draft**

First Supplement to Memorandum 86-88 (sent 10/30/86)

**Note.** The letter referred to in this supplement is attached to the First Supplement to Memorandum 86-91.

FUTURE MEETING SCHEDULE

January 1987

15 (Thursday)	3:00 p.m. - 8:00 p.m.	State Bar Bldg.
16 (Friday)	9:00 a.m. - 4:00 p.m.	San Francisco

February 1987

19 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
20 (Friday)	9:00 a.m. - 4:00 p.m.	

March 1987

12 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
13 (Friday)	9:00 a.m. - 3:30 p.m.	

SUGGESTED SCHEDULE FOR APRIL - JULY 1987 MEETINGS

APRIL 1987

9 (Thursday)	3:00 p.m. - 8:00 p.m.	San Francisco
10 (Friday)	9:00 a.m. - 4:00 p.m.	

MAY 1987

14 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
15 (Friday)	9:00 a.m. - 3:30 p.m.	

JUNE 1987

11 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles
12 (Friday)	9:00 a.m. - 4:00 p.m.	

JULY 1987

16 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
17 (Friday)	9:00 a.m. - 3:30 p.m.	

SCHEDULE FOR WORK

December 1986 Meeting

Approval for Printing and Submission to Legislature

Annual Report

Recommendation Relating to Independent Administration of Estates Act

Recommendation Relating to Technical Revisions in Trust Law

Recommendation Relating to Notice in Guardianship and Conservatorship Proceedings

Recommendation Relating to Preliminary Provisions and Definitions

Note. The Recommendation Relating to Estate Management was approved for printing and submission to the Legislature at the October meeting.

Determination of Rules of Procedure Provisions to be Included in 1987 Bill

Review of Draft of Recommendation

Recommendation Relating to Notice in Probate Proceedings

Recommendation Relating to Creditor Claims Against Decedent

Review Draft Statute

Rules of Procedure

Approval of Tentative Recommendation for Distribution for Review and Comment

Tentative Recommendation Relating to Marital Deduction Gifts

Tentative Recommendation Relating to Appeals

Tentative Recommendation Relating to Inventory and Appraisal

January 1987 Meeting

Approval for Printing and Submission to Legislature

Recommendation Relating to Creditor Claims Against Decedent

Recommendation Relating to Notice in Probate Proceedings

Additional Aspects of Legislation to be Introduced in 1987

Transitional Provisions

Comments from Interested Persons and Organizations

Review Comments on Tentative Recommendation

Opening Estate Administration

Distribution and Discharge

Nonresident Decedent

Determining Class Membership

Public Guardian and Public Administrator

Approval of Tentative Recommendation for Distribution for Comment

Rules of Procedure  
Accounts

Work on Estate and Trusts Code

Interest and Income Accruing During Administration  
Abatement

February 1987 Meeting

Review of Comments on 1987 Legislation

Approve Tentative Recommendation to Send Out for Review and Comment

Interest and Income Accruing During Administration  
Abatement

Work on Estate and Trusts Code

Multiple Party Accounts

March 1987 Meeting

Approval for Inclusion in Estate and Trust Code

Opening Estate Administration  
Distribution and Discharge  
Nonresident Decedent  
Determining Class Membership  
Public Guardian and Public Administrator

Work on Estate and Trust Code

Compensation and Fees  
Antilapse Statute  
Operative Date and Transitional Provisions

Review of comments on Tentative Recommendations

Marital Deduction Gifts  
Appeals  
Inventory and Appraisal

Approve Tentative Recommendation for Distribution for Review and Comment

Tentative Recommendation Relating to Multiple Party Accounts

April 1987 Meeting

Approval for Inclusion in Estate and Trust Code

Marital Deduction Gifts  
Appeals  
Inventory and Appraisal

Approve Tentative Recommendation for Distribution for Comment

Compensation and Fees  
Antilapse Statute  
Operative Date and Transitional Provisions

Review Comments on Tentative Recommendations Sent out for Comment

Rules of Procedure  
Accounts

June 1987 Meeting

Approve for Inclusion in Estate and Trust Code

Rules of Procedure  
Accounts

Review for Technical and Substantive Changes and Prepare Official Comments

Preliminary Provisions and Definitions  
General Provisions  
Disclaimers  
Guardianship-Conservatorship Law  
Management and Disposition of Community Property Where Spouse Lacks Legal Capacity  
Authorization of Medical Treatment of Adult Without Conservator  
Other Protective Proceedings  
California Uniform Transfers to Minors Act  
Wills  
Intestate Succession  
Family Protection  
Escheat of Decedent's Property  
Disposition Without Administration  
Trusts

Review Comments on Tentative Recommendations Sent Out for Comment

Compensation and Fees  
Antilapse Statute  
Operative Date and Transitional Provisions  
Multiple Party Accounts  
Interest and Income Accruing During Administration  
Abatement

July 1987 Meeting

Approve Text of New Estate and Trust Code for Preprint Bill

Approve Text of Recommendation for Estate and Trust Code for Printing

September 1987 Meeting

Conforming Revisions of Sections in Other Codes

October 1987

Printed Commission Recommendation Available for Distribution

Interim Legislative Hearing on Proposed New Code

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
DECEMBER 4-5, 1986  
BURBANK

A meeting of the California Law Revision Commission was held in Burbank on December 4-5, 1986.

Law Revision Commission

Present: Arthur K. Marshall, Chairperson                    Roger Arnebergh  
          Ann E. Stodden, Vice Chairperson                Edwin K. Marzec

Absent: Bill Lockyer, Member of Senate                    Tim Paone  
          Bion M. Gregory

Staff Members

Present: John H. DeMouilly                                    Stan G. Ulrich  
          Nathaniel Sterling

Absent: Robert J. Murphy III

Consultants Present

None

Other Persons Present

James Bessolo, Bank of America, Los Angeles (Dec. 4)  
Edward V. Brennan, California Probate Referees Association,  
San Diego  
Sam Buckles, Department of Developmental Services, Sacramento  
(Dec. 5)  
Phyllis Cardoza, Beverly Hills Bar Association, Probate,  
Trust and Estate Planning Section, Beverly Hills  
Charles Collier, State Bar Estate Planning, Trust and  
Probate Law Section, Los Angeles  
Irwin D. Goldring, Executive Committee, State Bar Estate  
Planning, Trust and Probate Law Section, Beverly Hills  
Patricia Hart, Franchise Tax Board, Sacramento (Dec. 4)  
Sandra S. Kass, California Bankers Association, Los Angeles  
(Dec. 4)  
Valerie J. Merritt, Probate and Trust Law Section, Los  
Angeles County Bar Association, Los Angeles  
Ralph Palmieri, Beverly Hills Bar Association, Probate,  
Trust and Estate Planning Section, Beverly Hills (Oct. 17)  
Kenneth Petrulis, Beverly Hills Bar Association, Probate,  
Trust and Estate Planning Section, Beverly Hills  
James C. Opel, Executive Committee, State Bar Estate  
Planning, Trust and Probate Law Section, Los Angeles  
Neal Wells, State Bar Estate Planning, Trust and Probate  
Law Section, Irvine  
Shirley Yawitz, California Probate Referees' Association, San  
Francisco

ADMINISTRATIVE MATTERS

MINUTES OF OCTOBER 16-17, 1986, MEETING

The Commission approved the Minutes of the October 16-17, 1986, Meeting, with the following addition: On page 6, before the heading "STUDY L-1028 - INDEPENDENT ADMINISTRATION," the following was added:

STUDY L-642 - TRUSTS (APPLICATION OF TRUST LAW)

The Commission approved the draft of amendments to the Trust Law that were attached to Memorandum 86-87 to be prepared for introduction in the 1987 legislative session, subject to the following revisions:

Probate Code § 82. "Trust" defined

Subdivision (c) of draft Section 82 was deleted. This provision read as follows: "For the purposes of Division 9 (commencing with Section 15000) (Trust Law), 'trust' does not include a charitable trust that is not subject to the jurisdiction of the Attorney General." The relation between the Trust Law and the Attorney General's authority over charitable trusts is dealt with in Section 15004 in the Trust Law. Subdivision (c) would have unnecessarily linked charitable trusts governed by the Trust Law to those that are subject to the jurisdiction of the Attorney General.

Subdivision (d) was also deleted as unnecessary. Subdivision (d) provided a cross-reference to Section 15002.5 (to be renumbered as Section 15003(c)) relating to the application of the Trust Law to an entity or relationship that is excluded from the definition of "trust" in Section 82. A cross-reference should, however, be included in the comment.

Probate Code § 15002.5. Application of division to entity or relationship not included in definition of "trust"

In order to avoid a decimal section number, this provision should be added to some other provision, such as Section 15003 (constructive and resulting trusts and fiduciary relationships not affected), or moved elsewhere.

Probate Code § 16063. Contents of account

Section 16063, providing the contents of a trustee's account, should be revised, in part, as follows:

16063. An account furnished pursuant to Section 16062 shall contain the following information:

. . . .  
(b) A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or ~~since the last account~~ as of the end of the period covered by the account.

OBTAINING APPROVAL OF ABSENT MEMBERS

The Commission directed the Executive Secretary to contact Bion Gregory and Tim Paone and request that they approve the following actions of the Commission at the December meeting:

- (1) Approval of the Minutes of the October meeting.
- (2) Approval for printing and submission to the Legislature of the following:

- (a) Recommendation Relating to Supervised Administration of Decedent's Estate (one section revised at December meeting).

- (b) Statutory provisions relating to Notice in Probate Proceedings (provisions approved for inclusion in bill to be introduced in 1987; recommendation to be reviewed at January meeting).

- (c) Recommendation Relating to Preliminary Provisions and Definitions of the Probate Code.

- (d) Recommendation Relating to Technical Revisions in the Trust Law.

- (e) Recommendation Relating to Notice in Guardianship and Conservatorship Proceedings.

- (f) Statutory provisions relating to Procedural Provisions (provisions to be included in 1987 statute, not the entire statute governing procedural provisions which will be the subject of a recommendation to be considered by the Commission at a subsequent meeting).

PRESENTATION OF PLAQUE TO COMMISSIONER MARZEC

Chairperson Marshall, on behalf of the Commission, presented former Chairperson Edwin K. Marzec with a gavel plaque in recognition of his service as Chairperson of the Commission.

OBTAINING APPOINTMENTS TO FILL VACANCIES

The Commission adopted a motion that the Chairperson should write a letter to the Governor's Appointments Secretary requesting that the Governor fill the two vacancies on the Commission.

FUTURE MEETINGS

The following schedule was adopted for future meetings of the Commission:

January 1987

15 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles Airport
16 (Friday)	9:00 a.m. - 3:30 p.m.	

February 1987

19 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
20 (Friday)	9:00 a.m. - 4:00 p.m.	

March 1987

12 (Thursday)	3:00 p.m. - 8:00 p.m.	San Francisco
13 (Friday)	9:00 a.m. - 4:00 p.m.	

April 1987

9 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
10 (Friday)	9:00 a.m. - 3:30 p.m.	

May 1987

14 (Thursday)	3:00 p.m. - 8:00 p.m.	Los Angeles Airport
15 (Friday)	9:00 a.m. - 4:00 p.m.	

June 1987

11 (Thursday)	3:00 p.m. - 8:00 p.m.	San Diego
12 (Friday)	9:00 a.m. - 4:00 p.m.	

July 1987

16 (Thursday)	3:00 p.m. - 8:00 p.m.	Newport Beach
17 (Friday)	9:00 a.m. - 4:00 p.m.	

ANNUAL REPORT

The Commission considered Memorandum 86-97 and the attached draft of the Annual Report. The draft was approved for printing after "Technical Revisions in the Trust Law" was substituted for "Revision of the Trust Law" on pages 3 and 10.

STUDY L-642 - TRUSTS

The Commission considered Memorandum 86-95 and the First Supplement thereto relating to technical revisions in the Trust Law. Subject to the decisions noted below, the recommendation was approved for printing and introduction in the 1987 legislative session. Redrafted sections will be included in the bill, but the Commission will have a chance to review the language and can make any necessary changes by amending the bill.

Probate Code § 16062 (amended). Duty to account to beneficiaries

Subdivision (b)(2) should be revised to make its meaning clearer; the clause beginning with "unless" is not sufficiently clear.

The reference to 1987 in the first part of subdivision (c) of this section should be changed to 1977, paralleling the operative date of the amendments that ended the necessity of continuing court jurisdiction.

To implement these decisions, Section 16062 would be revised substantially as follows:

16062. (a) Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustees, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, ~~or of a~~ is not subject to the duty to account provided by subdivision (a).

(c) A trustee of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided in this section, but the requirement of an by subdivision (a), except that if the trust is removed from continuing court jurisdiction pursuant to Article 2 (commencing with Section 17350) of Chapter 4 of Part 5, the duty to account provided by subdivision (a) applies to the trustee.

(d) Except as provided in Section 16064, the duty of a trustee to account pursuant to former Section 1120.1a of the Probate Code (as repealed by Chapter 820 of the Statutes of 1986), under a trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former Section 1120.1a, continues to

apply after July 1, 1987. The duty to account under former Section 1120.1a may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

#### STUDY L-655 - INVENTORY AND APPRAISAL

The Probate Referees Association stated its position that the current draft of the inventory and appraisal statute has been extensively worked over and represents a satisfactory compromise and should be submitted for enactment. The Executive Secretary stated that the Commission has a few more comments on the draft to review, after which the tentative recommendation should be distributed for comment. The Commission took no action on these matters at the meeting.

#### STUDY L-1025 - CREDITOR CLAIMS

The Commission considered Memorandum 86-202 and the first, third, and fourth supplements to the memorandum, together with letters from State Bar study Team 3 (attached to these Minutes as Exhibits 1 and 2), relating to creditor claims in probate. The Commission made the following revisions of the draft legislation.

##### § 9000. "Claim" defined

The introductory portion of this section was revised to add the words "whether due, not due, or contingent, and whether liquidated or unliquidated."

Subdivision (a) was revised to except only tax liens and assessments secured by real property, and the words "gift taxes, and estate taxes" were deleted.

As a separate matter, the staff should investigate the handling of specific performance of obligations (e.g., demands for conveyance of specific property of the decedent). This may be done in connection with Probate Code Section 850 or as part of the claim procedure.

##### § 9003. Payment of claims

A reference should be added in the Comment to provisions requiring immediate payment of priority claims.

§ 9050. Notice required

The word "actual" should be deleted from the phrase "actual knowledge" in the statute. The statute should make clear that "knowledge" means information that comes to the attention of the personal representative, and that the statute does not impose a duty on the personal representative to make a search for creditors. The Comment should explain that the statute requires actual knowledge received by the personal representative either orally or in writing, and does not include constructive knowledge of a demand that the personal representative might have discovered through a search. However, the personal representative may not willfully ignore information that would impart knowledge, and presumptions and inferences are available to prove receipt of knowledge by the personal representative.

It should be made clear that mailing is an acceptable form of service of notice on creditors, as well as delivery.

§ 9051. Time of notice

The requirement that proof of service be filed was deleted from the section. The personal representative should serve notice within the later of four months after issuance of letters or 30 days after first receiving knowledge of a creditor within the four month period. The Comment should note that failure of the personal representative to give notice within the time required by this section does not preclude a creditor from making a claim within the time prescribed in Section 9100.

§ 9052. Form of notice

The proof of service should be deleted from the form. [Staff note: The final draft may retain proof of service so the creditor will know date from which the 30 day claim period runs.]

§ 9053. Immunity of personal representative and attorney

This section should provide an immunity for acts made on the basis of a "good faith" belief rather than on the basis of a "reasonable" belief that notice is required. The converse should also be added to the section--in the absence of bad faith, neither the personal representative nor attorney is personally liable for a failure to give the required notice to a creditor; the liability, if any, is on the estate.

§ 9100. Claim period

The staff should review the "later of the following times" usage in the introductory portion of this section. An alternate construction could be "the following times, whichever is later".

The word "actual" was deleted from subdivision (a)(2). The Comment should make clear that knowledge does not include constructive knowledge.

§ 9104. Amended or revised claim

An amendment or revision should not be made to increase the amount of the claim after the creditor claim period has expired.

The staff should check to see that "general personal representative" is adequately defined for purposes of the 1987 probate legislation.

§ 9150. How claim is made

This section should be revised to require the creditor to file the claim both with the court and with the personal representative. A claim is not barred so long as filed with either. The claim is deemed filed when first received by either. The statute or Comment should note that the court clerk must accept the claim when received and is not to reject the claim on the basis of formal defects. The notice to creditor form should notify the creditor of the dual filing requirement, and should note that the claim form may be obtained from the court clerk. The notice should suggest that the creditor may wish to file the claim with the personal representative by certified mail, return receipt requested. The Judicial Council should be authorized to prescribe the form of the claim. The staff should consider whether the claim should be "filed", "presented", "mailed or delivered", or other appropriate manner of filing with the personal representative.

§ 9151. Documentary support of claim

In subdivision (a)(1) the reference to the amount justly due should be replaced by a reference to "the amount of the claim and the facts supporting the claim." In subdivision (a)(2) the reference to the particulars of the claim should be replaced by a reference to "the facts supporting the claim."

§ 9152. Claim based on written instrument

The phrase "its loss or destruction shall be stated" should be preceded by the phrase "the fact of", or a similar change made for clarity. The Comment to the section should note that a secured interest may be enforced directly against the security without making a claim, but the creditor is limited to the security in this case; if the creditor seeks a deficiency judgment, a claim is necessary.

§ 9153. Waiver of formal defects

This section should require that the creditor's demand for payment be written. The \$500 limit should be deleted and should be replaced by the standards of Section 929 (accounts), which should be incorporated in this section. The section should apply only to claims paid before 30 days after expiration of the four month creditor claim period.

§ 9251. Claims governed by other statutes

If no notice or written request is made under the listed tax laws, the claim is barred at the time otherwise provided in the "law or code", rather than the "statute." The draft should make clear that claims under the various tax laws are governed by those laws and not by the claim requirements of the Probate Code. The Commission decided not to attempt to develop a uniform notice form or claim period for the taxing agencies.

STUDY L-1028 -INDEPENDENT ADMINISTRATION OF ESTATES

The Commission considered Memorandum 86-83 and the attached draft statute, the First Supplement to Memorandum 86-83 and the attached draft of the Preliminary Portion of the Recommendation, and two letters presented to the Commission at the meeting: (1) a letter dated December 4, 1986, from Charles A. Collier, Jr. (attached to these Minutes as Exhibit 3), and (2) a letter dated December 1, 1986, from Team 4 to James V. Quillinan (attached to these Minutes as Exhibit 4).

Preliminary Portion of Recommendation

The Commission reviewed the preliminary portion of the recommendation which was attached to the First Supplement to Memorandum 86-83. It was recognized that the preliminary portion will have to be

rewritten to reflect any changes made in the draft statute. The following revisions were made in the preliminary portion:

(1) The second paragraph of the letter of transmittal was revised to read:

The Commission has decided not to delay submitting all recommendations for the improvement of probate law until work on the new code is completed. This recommendation is one of those being submitted for enactment prior to submission of the entire code.

(2) The last portion of the second sentence of the last paragraph was revised to read: "changes which the section would make in existing law."

(3) The following paragraph was added at the end of the text of the letter of transmittal:

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

#### Draft Statute

The Commission considered the draft statute attached to Memorandum 86-83 and made the following decisions.

The Commission decided to consider the policy issues raised by the State Bar Section and others. The staff will redraft the statute to reflect the Commission decisions made on these policy issues. In preparing the redrafted statute, the staff also should consider the technical matters raised in the letters which are attached as Exhibits 1 and 2 to these Minutes.

§ 10402. "Full authority" defined

§ 10403. "Limited authority" defined

The Estate Planning, Trust and Probate Section objected to subdivision (d) of each section. This subdivision is an addition to existing law and requires a personal representative who has only limited authority to obtain court approval to borrow money on the security of real property of the estate.

Ever since the independent administration act was enacted, even though the personal representative did not have authority to sell real property, the personal representative has had authority to borrow money using real property as security for the loan. The subcommittee was of

the view that a personal representative who has only limited authority should not have independent administration authority to borrow money using real property of the estate as security for the loan.

The amount of the bond when the personal representative is granted only limited authority does not cover the value of the real property. This is because the real property cannot be sold. However, the personal representative who has only limited authority and borrows money using the real property as security for the loan will have a bond that is not sufficient to cover the loan proceeds.

The representative of the State Bar Section stated that the proposed new limitation on independent administration authority is a change in existing law that is not desirable. When money is borrowed on estate real property, it usually is borrowed to pay taxes or debts. Whether to borrow to pay taxes and debts is a business judgment that has to be made, and such borrowing should not be a power the exercise of which requires court approval. The representative of the Los Angeles County Bar Estate and Trust Section stated that his personal view is that he agrees with the State Bar Section on this matter. Taxes need to be paid within nine months of death, and the loan may take time to process and the need to obtain court approval of the loan can create problems when the need to borrow is discovered close to the deadline for payment of the taxes.

Commissioner Stodden stated that she has seen cases where borrowing money on estate property under independent administration authority has resulted in losses to estates because the bond was not adequate to cover the loss. Commissioner Marshall stated that the proposed changes should create no problem because the personal representative can always ask for full authority in which case the money can be borrowed without the need for court approval. The Commission decided not to delete subdivision (d) of the two sections.

Structure of statute

The statute should be revised so that the provisions covering powers and provisions covering the requirement that advice of proposed action with respect to the exercise of various powers are not separated. In other words, the statute needs to be reorganized: One article can deal with powers that can be exercised without giving

advice of proposed action; another article could deal with powers that can be exercised only with advice of proposed action; and perhaps another article can cover cases where a power can be exercised in some cases without giving advice of proposed action and in other cases only where advice of proposed action is required (like, for example, paying a family allowance or operating a nonpartnership business).

The requirement of advice of proposed action with respect to particular powers

"Notice" of proposed action. The staff should consider whether "notice" of proposed action should be required instead of "advice" of proposed action. Unless the staff finds some reason why notice should not be substituted for "advice," the staff should use notice of proposed action when redrafting the statute.

Power to "convey." The general power to "convey" is being dropped as a general power. The statute should make clear that there is a power to "convey" where property is being conveyed pursuant to a specific power.

Actions not requiring advice of proposed action. The Commission considered those situations where the subcommittee at the October meeting had proposed that advice of proposed action be required where it is not now required. The Commission made the following decisions concerning when advice of proposed action should be required and when it should not be required.

The Commission determined that advice of proposed action should not be required for any of the following:

(1) Exercising security subscription or conversion right -- Section 10553(b) of the staff draft.

(2) Purchasing annuity granted by will -- Section 10557 of the staff draft.

(3) Exercising restricted options -- Section 10562 of the staff draft.

(4) Making extraordinary repairs or alterations in property -- Section 10563 of staff draft.

(5) Accepting deed in lieu of foreclosure or trustee's sale -- Section 10564 of staff draft.

It was noted that the personal representative may give advice of proposed action in the cases described above even though not required. Unless such advice of proposed action is given, the action taken can be reviewed on the final accounting and the personal representative can be surcharged if the action taken was improper.

In place of Section 10567 (extending exclusive right to sell property), the substance of the following provision was added to the proposed legislation:

Advice of proposed action is required for extending an exclusive right to sell property if the period covered by the extension, together with the period of the original exclusive right to sell agreement and the periods of any previous extensions, will exceed 270 days.

The Commission approved requiring advice of proposed action for both of the following:

(1) Transferring or conveying to a person given an option to purchase real or personal property in the will.

(2) Making a disclaimer.

Review of other portions of draft statute. The Commission did not review the other portions of the draft statute. The recommendation is to be revised and considered at the January meeting for possible approval for printing and submission to the 1987 session of the Legislature.

#### STUDY L-1037 - ESTATE MANAGEMENT

The Commission considered proposed Section 9612 of the estate management recommendation as handed out by staff at the meeting. A copy of the handout is attached to these minutes as Exhibit 5.

The Commission revised proposed Section 9612 as follows:

9612. (a) When a judgment or order made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, "order" includes an order settling an account of the personal representative, whether an interim or final account.

~~(b) This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. For the purposes of this subdivision, misrepresentation includes, but is not limited to, the omission of a material fact.~~

The Comment to Section 9612 should note that the section is subject to case law exceptions relating to fraud, citing Lazzarone v. Bank of America, 181 Cal. App.3d 581, 226 Cal. Rptr. 855 (1986), and perhaps also Bank of America v. Superior Court, 181 Cal. App.3d 705, 226 Cal Rptr. 685 (1986). The Comment should not cite Estate of Anderson, 149 Cal App.3d 336, 196 Cal. Rptr. 782 (1983).

#### STUDY L-1041 -- PROCEDURAL PROVISIONS FOR 1987 LEGISLATION

The Commission considered Memorandum 86-100 and the attached draft of procedural provisions to be included in the 1987 probate legislation. The Commission approved the legislation with the following changes.

##### Prob. Code § 303 (amended). Disqualification of judge

The provision relating should require the clerk to transmit papers only "upon receipt of the clerk's fee." This section should be held for inclusion in the probate legislation in connection with creditor claims.

##### Prob. Code § 1280. Trials

The second sentence was revised to read, "The party affirming is deemed plaintiff, and the one denying or avoiding is deemed defendant."

##### Prob. Code § 1282. Costs

The staff should check the reference to the "court on appeal" to make sure it is not a typographical error.

##### Prob. Code § 1290. Recital of jurisdictional facts

The text of this section should read:

1290. Orders and decrees made by the court or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which

the jurisdiction of the court or judge may depend, but it is only necessary that they contain the matters ordered or adjudged, except as otherwise provided in this code.

When this section is revised, the Comment should note exceptions to the rule requiring recitation of jurisdictional facts.

Prob. Code § 1293. Transfer or conveyance of property pursuant to court order

The personal representative should be required to record either the court order or the deed or other instrument that effectuates the transaction.

STUDY L-1045 - PROBATE CODE (PRELIMINARY PROVISIONS AND DEFINITIONS)

The Commission considered Memorandum 86-98 and the First Supplement thereto relating to preliminary provisions and definitions in the Probate Code. The Commission approved the draft recommendation for printing and inclusion in the 1987 probate bill, subject to the following decisions:

Probate Code § 2 (amended). Continuation of existing law; construction of provisions drawn from uniform acts

Subdivision (b) of this section should be revised as follows:

(b) A provision of this code, insofar as it is the same in substance as a provision of ~~the Uniform Probate Code~~ a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision ~~of the Uniform Probate Code~~.

Probate Code § 24 (amended). Beneficiary

This section should be revised as follows:

24. "Beneficiary":

(a) As it relates to ~~a beneficiary~~ of the estate of a decedent who died intestate, means an heir and, as it relates to ~~a beneficiary~~ of the estate of a decedent who died intestate testate, means a devisee.

(b) As it relates to a trust beneficiary, means a beneficiary person who has any present or future interest, vested or contingent, and includes an owner of an interest by assignment or by other transfer.

(c) As it relates to a ~~beneficiary~~ of a charitable trust, includes any person entitled to enforce the trust.

Probate Code § 52 (added). Letters

This section should be revised as follows:

52. "Letters," as used in Division 7 (commencing with Section 7000), means letters testamentary, letters of administration, letters of administration with the will annexed, and or letters of special administration.

The comment to this section should include a statement that the context determines the meaning of "letters." For example, if a particular power is not available to a special administrator, then the use of "letters" in that power would not include letters of special administration.

Probate Code § 59 (amended). Predeceased spouse

This section should be drafted consistently with Section 78, defining "surviving spouse." If Section 78 is omitted from the 1987 bill, then Section 59 should also be omitted.

Probate Code § 78 (amended). Surviving spouse

This section should be omitted from the 1987 bill. The staff should prepare an analysis for a future meeting of the issue whether and under what conditions a remarried spouse should be considered a surviving spouse for the purposes of the family protection provisions. The staff should consider whether the remarried surviving spouse should be excluded from the definition or whether it would be best to exclude such persons from the coverage of particular rights where appropriate.

STUDY L-1047 - NOTICE IN GUARDIANSHIP-CONSERVATORSHIP PROCEEDINGS

The Commission considered Memorandum 86-93 and the attached draft of a Recommendation relating to Notice in Guardianship-Conservatorship Proceedings. The Commission made the following decisions:

Capacity to Consent to Medical Treatment

The Memorandum asks whether notice of a petition for an order concerning capacity to consent to medical treatment should be given by personal service, rather than by mail as provided in the draft. The Commission thought mailed notice is sufficient.

Probate Code § 2614. Objections to appraisals

Section 2614 should provide for mailed notice of a hearing on objections to an appraisal to be given to the probate referee when the objection concerns the referee's appraisal.

Approval for Printing

The Commission approved the Recommendation as revised for printing and submission to the Legislature.

STUDY L-1055 - PROBATE CODE (GENERAL PROVISIONS RELATING TO NOTICE)

The Commission considered Memorandum 86-99 concerning general provisions relating to notice under the Probate Code. The staff draft was approved for inclusion in the 1987 probate bill subject to the following decisions:

§ 1203. Order shortening time

This provision should apply only to notice that is required or permitted to be mailed. The staff should give careful consideration to the various notice requirements and include as exceptions to the authority to shorten time any proceedings where time should not be shortened. As a general rule, where an existing statute specifically requires 20 or 30 days notice, without the authority to shorten time, such proceedings should be excluded from this section. Where existing law simply incorporates the manner of giving notice provided by Section 1200.5, it would be appropriate to make such notice subject to the

authority to shorten time. For the next meeting, the staff will review notice provisions in probate proceedings and add to this section cross-references to any proceedings where time should not be shortened.

As an alternative approach, the Commission considered locating this section in the article on mailed notice, where it could be combined with the provision for dispensing with mailed notice set out in draft Section 1221(d).

§ 1206. Notice to known heirs or devisees

As drafted, this section would require notice to heirs or devisees who no longer have an interest in the estate. The staff should revise this section to eliminate the need to give notice to persons whose interests in the estate have been satisfied. As revised, this provision should be included in the 1987 probate bill, and should also be flagged for later approval by the Commission.

§ 1208. Notice to trust beneficiaries where personal representative and trustee are same person

This section should be revised to provide that where the personal representative and trustee are the same person, notice should be given the persons who would be income beneficiaries if the trust were in effect or, if there are no income beneficiaries, to the persons who would be entitled to principal if the trust were terminated.

§ 1209. Notice to State of California

A copy of this provision governing the manner of giving notice to the State of California should be sent to the Attorney General's office for review. It was suggested that once the Attorney General has appeared in the proceeding, notice should be sent to the local office of the Attorney General if the local address is indicated on the notice of appearance.

Article 2. Mailing of Notice

§ 1220. Application of article

Subdivision (b) should be revised to provide that, where a particular proceeding does not provide for the manner of giving notice, notice is to be given by mail as provided in this article or as otherwise ordered by the court or judge.

§ 1222. Manner of mailing; when mailing complete

In this section, or elsewhere in this article, it should be made clear that the 15-day notice period is not extended as it is when notice is mailed under the Code of Civil Procedure. It should also be made clear that express mail is included in the permissible forms of sending notice by mail.

Article 4. Personal Service

§ 1235. Manner of personal service

The comment to this section should make clear that this section governs only the manner and not the period of notice.

Article 6. Request for Special Notice

§ 1250. Request for special notice

Subdivision (c)(1) should be revised to permit a request for special notice of any proceeding, not just proceedings for which notice of hearing is required.

The word "personal" should be deleted from subdivision (e) which requires a copy of the request for special notice to be served on the personal representative or the attorney for the personal representative.

§ 1252. New request for special notice

This section should be omitted. It is not needed since a request for special notice in estate administration proceedings does not expire, as it does in guardianship and conservatorship proceedings.

Article 7. Proof of Giving of Notice

§ 1260. Proof of giving of notice of hearing required

This section should be revised for clarity as follows:

1260. If notice of a hearing is required, proof of giving notice of the hearing shall be made ~~at or before the hearing~~ to the satisfaction of the court at or before the hearing.

§ 1265. Proof by testimony at hearing

This section should be revised to read as follows:

1265. Proof of notice, however given, may be made by ~~testimonial~~ evidence presented at the hearing.

§ 1266. Conclusiveness of order that notice regularly given or waived

The exception to the conclusiveness of an order in the case of fraud, conspiracy, or misrepresentation provided in subdivision (b) should be omitted from the statute. This matter should be left to the common law.

Article 8. Form for Notice of Hearing

§ 1270. Form for notice of hearing

This section setting out a statutory form should be omitted because it is not needed. The Comment to the existing form in Section 1200.1 will explain that the statutory form is not continued because it has been superseded by a Judicial Council form.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

OSCAR LAWLER  
1896-1968  
MAX FELIX  
1922-1954  
JOHN M. HALL  
1916-1973

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H. NEAL WELLS III  
PARTNER

November 26, 1986

James V. Quillinan, Esq.  
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Re: Third Supplement to Memorandum 86-202  
Creditors Claim

Dear Jim:

The Third Supplement states the staff's position with respect to the above memorandum. The positions taken by the staff are in accordance with positions previously approved by Team 3 and/or the Executive Committee. Accordingly, we are supportive of the Supplement.

Sincerely yours,



H. Neal Wells III

cc: Valerie Merritt  
Charles G. Schulz  
Leonard Pollard  
John A. Gromala  
Lloyd W. Homer  
D. Keith Bilter  
Hermione K. Brown  
Anne K. Hilker  
James D. Devine  
James C. Opel  
Irwin D. Goldring  
Charles A. Collier, Jr.

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PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

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December 3, 1986

*Executive Committee*  
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DIANE C. YU, *Oakland*

James V. Quillinan, Esq.  
444 Castro Street  
Suite 900  
Mountain View, CA 94041

Re: Memorandum 86-202  
Study L-1025  
Dated 10/31/86 (Creditor's Claims)

Dear Jim:

Study team 3 has reviewed the above memorandum and submitted various portions of it to the Executive Committee for consideration. The recommendations of the study team and, where applicable, the joint recommendations of the Executive Committee and the study team, are as follows:

Section 9000--"Claim Defined": The study team favors the staff's suggestion to eliminate gift and estate taxes from subdivision (a)(2). A liability for gift and estate taxes could be incurred by the decedent before death as a beneficiary or transferee (instead of as a donor or transferor) and owed to the donor (or to the personal representative of the deceased donor's estate). This liability to the donor (or to the donor's personal representative) should be treated as any other debt of the decedent.

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The study team further suggests that the phrase "property taxes, special assessments and assessments" be modified to read "property taxes and assessments secured by real property tax liens" consistent with the staff's intent as expressed in the note to this Section.

Section 9002--"Claim Requirement": The study team and the Executive Committee generally favor existing law with respect to the filing or presentment of claims. It is requested that the section be drafted to recognize both presentment and filing.

Section 9003--"Payment of Claims": The study team concurs in the staff recommendation to include the cross reference in the comment.

Section 9050--"Notice Required": The study team concurs in the staff's suggestion of combining the two concepts as set forth in paragraph 2 of the note to this Section.

Section 9051--"Time of Notice": The study team concurs in the staff's suggested change.

Section 9053--"Immunity of Personal Representative and Attorney": The study team and the Executive Committee concur with James C. Opel that both the personal representative and the attorney for the personal representative should be free from liability for failure to give notice if such failure is because the personal representative or attorney reasonably believes notice

to a particular creditor is not required. Neither the study team nor the Executive Committee wish to encourage negligent or sloppy practices.

On the other hand, neither wish to stir up litigation by creating an atmosphere in which notice is given to potential claimants solely out of fear of surcharge or malpractice actions.

The comment to Section 9050 favoring the giving of notice, together with a good faith belief requirement in Section 9053 would adequately balance the scales in favor of notice.

The study team and the Executive Committee oppose the staff suggestion of transferee liability. One of the most important benefits of a probate proceeding is finality. Once heirs or creditors have awaited distribution or payment of property and actually received it, they should be free to dispose of or spend the property as they wish without fear that some creditor, or alleged creditor, of the decedent will file suit to retake property they no longer have. Heirs and creditors are protected by the decree of distribution against after discovered heirs or beneficiaries. Shouldn't they likewise be protected against after discovered creditors? Moreover, the creditor who has not been given notice has had the entire time of the estate administration to file a claim. Such a creditor has usually slept on his rights and should not be the cause of altering a primary benefit of the probate procedure.

Section 9100--"Claim Period": The study team concurs in the staff's note to this Section.

Section 9103--"Late Claims": The study team concurs in the staff's note to this Section.

Section 9104--"Amended or Revised Claim": The study team and the Executive Committee are generally in accord with this Section. However, an amendment affecting the amount of a claim after the general creditors claims period has expired should be permitted only upon a showing of good cause. Permitting an amendment of the amount of a claim upward after the expiration of the general claims period may be a change in existing law.

Section 9150--"How Claim is Made": The study team believes that the making of a claim should be as simple and easy as possible so that unsophisticated creditors are not barred by technicalities from receiving payments to which they are due. The study team further believes that claims should be presented to the personal representative (or the attorney) whenever practicable so that the claim may be acted upon promptly and with a minimum of administrative expense. The study team further believes that the rights of the creditor who presents a claim to the personal representative should be protected by one or more of the following: (1) permissive presentment of the claim by certified mail, return receipt requested, (2) permissive filing

of a duplicate claim with the court, and (3) permissive filing of a proof of service with the court.

"Permissive" is emphasized because mandatory use of certified mail, duplicate filing, or filing of a proof of service would be a technical trap for unsophisticated creditors. Use of the safeguards could be encouraged by the judicial council and publishers by placing upon printed claim forms an admonishment that "For your protection, you are encouraged to ..."

To minimize creditor confusion, the study team recommends retention of the present optional presentment or filing procedure, augmented by permissive filing of a proof of service or duplicate claim with the court, and an admonition on printed claim forms.

Section 9153--"Waiver of Formal Defects": The comments of the study team are noted by the staff for consideration by the Commission. The team further notes that the concern of the Los Angeles County Bar Association could be obviated by moving the successor to Probate Code Section 929 (to be drafted) into the creditor's claim chapter rather than leaving it for the accounting chapter.

Section 9200--"Claim by Surviving Spouse for Payment of Debt by Decedent": The portions of existing section 704.2 which the study team were unable to trace into proposed section 9200 were: (1) the provision that "the personal representative, guardian of the estate, or the conservator of the estate of the

surviving spouse" may file the claim as well as the surviving spouse and (2) the provision that the claim may be filed anytime prior to the filing of a petition for final distribution.

The study team assumes that the former provision was deleted as surplusage because personal representatives, guardians and conservators have the power to file claims as a part of their general powers.

The comment to section 9200 infers that the deletion of the extended claim period for the surviving spouse is intentional. The study team has not experienced difficulties with the extended claims period and would prefer to retain it to cover situations where the surviving spouse pays debts during the claims period but for one reason or another does not call them to the attention of the attorney for the personal representative until after the claims period has expired.

Section 9201--"Claim by Surviving Spouse for Payment of Debt of Surviving Spouse": The staff note satisfies the study team's concerns respecting this Section.

Section 9302--"Where Personal Representative is Creditor": The study team does not share Warren L. Sanborn's concern respecting claims by the attorney for the personal representative. The fees of an attorney for conservatorship proceedings prior to death are generally fixed by the court in the conservatorship and need not be reviewed again by the court

James V. Quillinan, Esq.  
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in the probate. Other fees can be submitted by the personal representative to the court for approval if the personal representative has any question about them. The study team would change its mind if advised by the court that pre-death claims by attorneys for personal representatives are subject to abuse or constitute a problem.

Section 11423--"Interest": The study team and the Executive Committee prefer this section, as written, instead of the interest limitation suggested by the Beverly Hills Bar Association.

Respectfully submitted,



cc/ Valerie Merritt  
Charles G. Schulz  
Leonard Pollard  
John A. Gromala  
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December 4, 1986

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94303

Re: Memorandum 86-83 - Independent  
Administration of Estates

Dear John:

By letter of June 5, 1986, I forwarded to you my personal comments on the Tentative Recommendation relating to independent administration of estates, which Recommendation was dated March 1986. My comments and those of many others were reviewed in Memorandum 86-85 and the Supplements thereto.

The following are my personal comments on Memorandum 86-83. I have received a copy of the report of Team Four dated December 1, which comments are very extensive and detailed. The purpose of this letter is not to repeat items raised in that letter.

I hope the comments which follow will be of assistance to the Commission and Staff. These comments are by section number for easy reference:

1. Section 10403: The use of the word "limited authority" is based upon the Judicial Council forms and was suggested by this writer for inclusion in this statute. Team Four indicates that this has created some problems with brokers. Perhaps the phrase should be changed to refer to "full authority except real estate powers."

2. Section 10405: This requires clarification. As worded, it seems to suggest that the grant of general powers would be concurrent with the appointment of the special administrator as it refers to the language "unless the special administrator is appointed with the powers of a general administrator." The comments suggest that the special administrator might be appointed and thereafter be granted these additional powers. However, the code section needs revision. See also the final sentence of the comment in Section 10450 which indicates that the special administrator

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not be granted independent administration authority unless the special administrator is appointed with the powers of a general administrator. This again, I believe, is inaccurate.

3. Section 10406: Query whether paragraphs (a)(2) and (3) are adequate to reflect any changes in the Independent Administration of Estates Act that became effective as of January 1, 1986. The Commission sponsored legislation in 1985 which added provisions on the advice of proposed action, etc. Are these changes adequately covered in Section 10406?

4. Section 10452: If a person objected to the grant of full independent powers, could the court under this section nonetheless grant limited powers?

5. Section 10454: Query whether under this section the court could cut back the personal representative's powers from full power to limited power or whether complete revocation is the only option.

6. Section 10501: Does subsection (i) preclude the court from approving a creditor's claim filed by the personal representative as is now done or does it require a formal petition and hearing? There are other possibilities of self-dealing in a probate estate, such as the personal representative being the spouse and seeking a family allowance. Will this require a court petition in all such cases as opposed to an advice of the initial payment?

7. Section 10511 and subsequent: These sections, which run from 10511 through 10540, are confusing in that they are a mixture of those powers which can be exercised without advice and those powers which require an advice. Current Probate Code Section 591.6 lists those powers which can be exercised without an advice. Probate Code Section 591.3 lists those powers which require an advice. Proposed new Sections 10511 through 10540 mix these up and add confusion rather than clarification. To illustrate the point, Section 10514 provides for no advice. Section 10515 provides for an advice. Section 10516 provides for an advice. Section 10517 requires an advice. Section 10518 requires no advice. Section 10519 requires no advice. Section 10520 requires no advice for sale but requires an advice for exercise of a subscription right. Section 10521 requires an advice after a specified period of time but no initial advice. Section 10522 requires no advice. Section 10523 does appear to initially require an advice. Section 10524 requires no advice for ordinary repairs but would be require an advice for extraordinary repairs. Section 10525 provides for no

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advice. Section 10526 provides for no advice. Section 10527 provides for advice in some situations, not in others. Section 10528 does not require an advice. Section 10529 requires an advice. Section 10530 requires no advice. Section 10531 requires no advice with exceptions. Section 10532 requires an advice as to realty in some cases, but not all cases require advice as to personalty. Section 10533 requires an advice. Section 10534 requires no initial advice but requires an advice for an extension. Section 10535 requires an advice. Section 10536 does appear to require an advice. Section 10537 requires an advice. Section 10538 requires a limited advice. Section 10539 requires no advice. Section 10540 requires an advice.

Section 10550 and subsequent restates many of these powers with the specific requirement of advice. The reference to advice above is that found in the comment. I believe the powers can be grouped much more succinctly by listing all of the powers which can be exercised without advice under one chapter and all powers which can be exercised with advice in another chapter. My prior letter to you of June 5, which is attachment 5 to Memorandum 86-85, sought some clarification for certain powers which seemed to be exercisable both with or without advice, such as the power of borrowing. The proposed structure of the Independent Administration of Estates Act in Memorandum 86-83, I believe, adds confusion, not clarification.

8. Section 10512: The words "exposure to the market" might be added following the words "brokers' commissions" on the seventh line for clarity. This is referred to in the note and mentions "the efforts" to obtain the highest and best price.

9. Section 10513: Deletion of the word "partition" is undesirable. Even though partition is handled by litigation, it connotes a certain type of relief and I believe should remain in the code section.

10. Section 10520: Differentiating between "selling" and "exercising" of security subscription or conversion rights is unnecessary, confusing and not helpful.

11. Section 10521: Section 10554 refers to a "venture." This section does not. Existing language refers to a business "wholly or partly owned at decedent's death." Such language would be broad enough to include a joint venture, but the current language would not seem to include that. The power to continue as a general partner is normally dependent upon the partnership agreement. If the partnership agreement

Mr. John H. DeMouilly  
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provides that the partnership will wind up on the death of a general partner, does proposed Section (b) purport to override that and let the estate continue as a general partner? The comment states in the first sentence that this restates subdivision (1) of former Probate Code Section 591.6 without substantive change. I do not believe this is an accurate statement. Perhaps subpart (a) restates that but the balance seems to be distinctly different than what is now found in 591.6.

12. Section 10523: The introductory phrase "subject to subdivision (b)" does not appear clear or necessary. The power to borrow has been one that is confusing under existing law because 591.3 requires an advice for borrowing whereas 591.6(c) appears to allow borrowing without such advice.

13. Section 10524: Differentiating between ordinary and extraordinary repairs seems unnecessary and a source of dispute and confusion.

14. Section 10550 and subsequent: A number of additional actions under these proposed sections would require advice. In the notice provisions, advice if mailed now requires 20 days' notice, which is about the same time required for a court petition. Adding additional advice requirements represents a lessening of independent action by the personal representative and does not appear to be necessary. It is believed that the notice of advice required in 591.3 is adequate to cover major areas of administration and that additional requirements of an advice are not appropriate or necessary. In particular, no advice seems necessary for exercising a security subscription or conversion right (Section 10553(b)), purchasing an annuity granted by will (Section 10557), exercising option rights (Section 10562), making extraordinary repairs (Section 10563), accepting a deed in lieu of foreclosure (Section 10564), transferring property pursuant to option granted in the will (Section 10565), extending an exclusive right to sell property (Section 10567), and making a disclaimer (Section 10568).

15. Section 10585: This appears to make use of the Judicial Council form for advice of proposed action mandatory. The use of the form is certainly desirable but should not be mandatory. The reference to "properly completed" would open many advices of proposed action to subsequent challenge because there were some portions that were not completed, even if they were not relevant. I believe that concept should be deleted, unless the lack of proper completion does not affect the validity of the advice.

Mr. John H. DeMouilly  
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16. Sections 10587 and 10588: These differentiate between a written objection which can only be used by someone who actually received the advice and a temporary restraining order that can be used by anyone who was entitled to advice but didn't receive it. In a family in many cases, one person might not receive advice, but yet be aware of the advice and the proposed action. Is it necessary to get a temporary restraining order rather than being able to use a written objection? In short, is the distinction made in Sections 10587 and 10588 either necessary or desirable?

17. Section 10589: Subparts (a) and (b) as discussed in the comments, I believe, require some clarification. Subsection (d) more logically would belong in a general section dealing with failure of the fiduciary to comply with the requirements of the act generally. It does not seem appropriate to put this kind of comment in a single section.

18. Section 10600: The waiver of notice of proposed action in paragraph 3 would be confusing to anyone not familiar with the nature of the independent powers. A listing of categories of powers, such as that found in the statutory general power of attorney for property matters, would be helpful, such as a listing of real property transactions, personal property transactions, etc.

As the comments in this letter and the comments of Team Four in its letter of December 1 indicate, there appear to be a number of drafting problems in connection with Memorandum 86-83. There also are a number of structural problems as to the listing of truly independent powers and the listing of those powers which require advice. In addition, there is a basic policy issue as to whether the scope of independent administration should be narrowed as Memorandum 86-83 proposes by requiring advice of proposed action in many additional situations.

Because of these multiple questions and because the Commission undoubtedly has not as yet received comments from many interested groups, such as it received on its tentative recommendation circulated last spring, it would seem inappropriate to offer a further bill in the 1987 legislative session on independent administration. The Commission has already revised the sections twice, once in the 1983 act and again in the 1985 act. Independent administration

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Mr. John H. DeMouilly  
December 4, 1986  
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works reasonably well and, while some further clarification may be appropriate, it would seem that a delay in suggesting legislative change for another year would be in order.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Lloyd Homer, Esq.  
James Quillinan, Esq.  
James Devine, Esq.  
Irwin Goldring, Esq.  
James Opel, Esq.

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KATHRYN A. BALLSUN  
PAUL L. STANTON  
LESLIE K. STUART

FEDERAL EXPRESS

December 1, 1986

James V. Quillinan, Esq.  
444 Castro Street  
Mountain View, CA 94041

Re: LRC Memorandum 86-83, IAEA and First Supplement

Dear Jim:

On November 17, 24 and 26, 1986, Team 4 (Harley Spitler, Janet Wright, William Hosington, James Willet and I) discussed LRC Memorandum 86-83, IAEA and the First Supplement thereto.

Our comments to the Memorandum and the Supplement are:

**I. Comments With Regard to Background Explanation.**

**A. General Comments.**

1. In general, Team 4 believes that the concept of limited authority should be eliminated. In any event, limited authority should not be expanded in the manner set forth in Memorandum 86-83; our specific comments are set forth below.
2. On the other hand, Team 4 believes that although additional refinements are necessary, the provisions respecting conflict of interest situations involving the personal representative are useful.

**B. Additional Transactions For Which Advice of Proposed Action Is Required.**

1. The general power to convey should be reinstated. Specific examples could be used although not to limit the power.
2. An advice of proposed action should not be required to exercise a stock subscription or conversion right.

3. An advice of proposed action should not be required to purchase an annuity granted by will.
4. An advice of proposed action should not be required to exercise a restricted option.
5. An advice of proposed action should not be required to make extraordinary repairs or alterations that are not minor.
6. An advice of proposed action should not be required to accept a deed in lieu of foreclosure or trustee's sale.
7. An advice of proposed action should be required to convey to a person given an option to purchase in the will.
8. As Team 4 stated in its October 14, 1982 letter addressed to James V. Quillinan:

"Team 4 and the Executive Committee believe that the personal representative should be able to grant an exclusive right to sell for a period not to exceed one year. [Further . . .] an advice of proposed action should not be required each time an exclusive right to sell was renewed unless such notice was required initially; the majority [of the Executive Committee] believed that such initial notice should not be required."

9. An advice of proposed action should be required in making a disclaimer.

**C. Policy Issues Deferred for Decision Until November Meeting.**

1. Team 4 agrees with the proposed revision dealing with the effect of failure to object to a proposed action.
2. Team 4 agrees with the proposed revisions of the statutory form for Waiver of Proposed Action, particularly those provisions suggested by Mr. Collier.

**II. Proposed December 5, 1986 Letter of Arthur K. Marshall.**

Paragraph 3 of said letter stated in pertinent part: "A few substantive changes are proposed. Experience under the Act indicates that these changes are needed."

Team 4 believes that the characterization of the proposed changes is inaccurate. In fact, major substantive changes are being proposed. In addition, the collective experience of Team 4 is contrary to the statement that proposed changes are supported by experience under the Act.

**III. Division 7. Administration of Estates of Decedents;  
Part 6. Independent Administration of Estates;  
Tentative Draft.**

**A. General Provisions.**

**1. Proposed Section 10402:**

Team 4 believes that full authority should not be extended to borrowing money with the loan secured by an encumbrance upon real property (§10402(d)). Team 4 believes that the requirement is not justified inasmuch as: i) the presumed advantages of a court auction do not apply to borrowing; and ii) the requirement of court approval has only been extended to borrowing against real property.

**2. Proposed Section 10403:**

As set forth in I, General Comments, Team 4 believes that the concept of limited authority should be eliminated. Further, note should be given to the fact that major stock brokerage houses are consistently refusing to deal with personal representatives who only have been granted "limited authority". In other words, brokers are requiring a court order before they will sell or otherwise transfer stocks.

**3. Proposed Section 10405:**

Team 4 suggests that Section 10405 be redrafted as follows:

"A special administrator may be granted authority to administer the estate under this part if the special administrator is appointed with the powers of a general administrator."

4. Proposed Section 10406:

4.1 The section number is misstated as Section 1406. The Section should be 10406.

4.2 Although the provisions are acceptable in principle, Team 4 believes that the impact of the proposed changes on existing estates should be given additional and careful consideration.

**B. Granting or Revoking Independent Administration Authority.**

1. Proposed Section 10451:

1.1 Team 4 believes that notice should be given to those persons required to be given notice of the initial petition for probate and that the language of Section 10451 should be consistent with that language.

1.2 Team 4 suggests that the second and third sentences of the notice of hearing of the Petition for Authority to Administer under the IAEA be revised as follows:

"This authority will permit the personal representative to act without court supervision but within definite limitations. You will receive notice of certain transactions as required by the Probate Code."

The final sentence of the proposed notice should remain.

2. Proposed Section 10453:

The third line of Section 10453 should be modified by: i) deleting the word "may" and substituting therefor the word "shall"; and ii) deleting the word "less" and substituting therefor the word "more".

3. Proposed Section 10454(b):

The last sentence of Section 10454(b), commencing with the word "Service" should be deleted.

**C. Administration Under Independent Administration Authority.**

1. Proposed Section 10500(a):

(Specific wording of this several and other comments provided by Harley J. Spitler.) The words "and the applicable fiduciary duties" should be deleted. Those words imply that in exercising independent powers, the personal representative has higher fiduciary duties than when he acts, as a personal representative, without independent powers. This is not the law. Every personal representative is bound to respond to "applicable fiduciary duties" -- whether he acts with or without independent powers.

2. Proposed Section 10501:

2.1 Team 4 believes that for the reasons set forth above, the personal representative should not be required to obtain court approval when borrowing money with the loan secured by an encumbrance against real property.

2.2 With respect to proposed subsections (f) through (k) inclusive, please see Team 4's comments set forth above.

2.3 The last sentence of the underscored language, page 14, appears to be unreasonable. Court approval should not be required when the personal representative is the only beneficiary.

3. Proposed Section 10510:

For the reasons set forth above, the words "applicable fiduciary duties" should be deleted.

4. In general, Team 4 believes that individually delineated powers should be set forth in one section in order to: i) reduce the wordage; and ii) consolidate the comments. Team 4 believes that the numerous sections containing the same wording except for the particular power will result in practitioner confusion. Team 4 suggests

that the statutory language be consolidated by stating that the personal representative has the following powers and that the powers be listed. Even if the powers are not so consolidated, the comments should be condensed, in part by eliminating language which repeats verbatim what already has been stated.

5. Proposed Section 10516:

5.1 On line 2, the word "admitted" should be deleted and the word "authorized" substituted therefor.

5.2 Team 4 believes that the section would be clarified by deleting the last 14 words and substituting: "An annuity payable to a devisee named in the will."

6. Proposed Section 10517:

Team 4 believes the section should be revised to read:

"The personal representative has the power to exercise an option right."

7. Proposed Section 10519:

Team 4 believes the section should be revised to read:

"The personal representative has the power to hold a security in the name of a nominee or in any other form that does not disclose the name of the estate."

No reason exists to make the personal representative liable for any act of the nominee.

8. Proposed Section 10521(b):

The second sentence of the subsection should be deleted. The power of the personal representative to continue as a general partner derives from the general partnership agreement, not from the Uniform Partnership Act.

9. Proposed Section 10522:

Subsection (a) should be deleted. Section 10522(b) seems sufficient to cover worthless or valueless items.

10. Proposed Section 10524:
  - 10.1 In line 2, the word "alterations" should be deleted, and the word "improvements" substituted therefor. The staff note uses the term "improvements."
  - 10.2 If the other sections concerning extraordinary repairs are modified in the manner suggested by Team 4, then the words "ordinary or extraordinary" should be deleted.
  
11. Proposed Section 10527(b):

Team 4 believes that the section should be restated as follows:

"The power to release, in whole or in part, any claim belonging to the estate to the extent that the estimated costs of collection exceed the amount of the claim."
  
12. Proposed Section 10528:
  - 12.1 Team 4 believes that the words "running in favor of" should be deleted.
  - 12.2 The word "obligation" should be deleted, and the term "indebtedness" substituted therefor.
  - 12.3 The section is somewhat confusing; a redraft is urged.
  
13. Proposed Section 10530:

The term "trust deed" should be changed to "deed of trust" in order to conform to the wording of Section 10529.
  
14. Proposed Section 10531:
  - 14.1 The section should be divided into two sections. The first section should deal with general leasing of property. The second should deal with the leasing of minerals.
  - 14.2 On line 5, the word "utilization" should be "unitization".
  - 14.3 The seventh line should read "rental and royalty."
  
15. Proposed Section 10534:
  - 15.1 Please see comments set forth in Team 4's October 14, 1986 letter to James Quillinan. A copy is attached for reference.
  - 15.2 Both paragraphs (a) and (b) should end with the word "property".

16. Proposed Section 10535:  
The Section is unclear and requires redrafting.
17. Proposed Section 10536:  
The section should end with the word "decedent".
18. Proposed Section 10539:
  - 18.1 The word "other", line 2, should be deleted.
  - 18.2 What are the specific taxes to which the section refers?
  - 18.3 Does the word "incurred" mean that the personal representative can only deal with expenses "incurred" after the date of death?

**D. Advice of Proposed Action.**

1. Proposed Section 10552(b)(2):  
Team 4 does not understand the reason for the addition. Securities may be sold in a number of ways.
2. Proposed Section 10553:  
An advice of proposed action should not be required to exercise a security subscription or conversion right.
3. Proposed Section 10557, 10559 and 10562:  
Please see Team 4's comments, supra.
4. Proposed Section 10563:  
Team 4 believes that no notice should be required of any repairs. In the event that an advice is required, then it should only be for major improvements and extraordinary repairs.
5. Proposed Section 10564:  
Please see Team 4's comments, supra.
6. Proposed Section 10566(b):  
The words "more than" should be added immediately following the word "commencing".
7. Proposed Section 10567:  
Please see Team 4's comments, supra.

8. Proposed Section 10581:

Please see Team 4's comments set forth in its October 14, 1986 letter to James Quillinan. A copy is attached. Team 4 believes that notice should only be given to those affected by the action.

9. Proposed Section 10585:

Team 4 believes that as long as all the information required by law is set forth, the use of Judicial Council Forms should not be mandated.

10. Proposed Section 10587:

The word "so", line 4, should be deleted and "provided that" substituted therefor.

11. Proposed Section 10588:

11.1 The word "may", third line from last, should be deleted, and "shall" substituted therefor.

10589 [ 11.2 Team 4 does not see a substantial difference between subsections (a) and (b). The subsections should be reexamined.

11.3 Subsection (d) should be deleted.

12. Proposed Section 10600:

12.1 Team 4 suggests two forms. One should be for a waiver, and one should be for a cancellation.

12.2 If the two forms are not used, then the title of the proposed form should be:

Waiver of Notice of Proposed Actions  
And a Cancellation of Waiver  
(California Probate Code, Section 10600)

12.3 The language of paragraph 3 should be modified in the manner suggested by Team 4.

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12/01/86

§ 9612. Effect of court authorization or approval

9612. (a) When a judgment or order made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, "order" includes an order settling an account of the personal representative, whether an interim or final account.

(b) This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. For the purposes of this subdivision, misrepresentation includes, but is not limited to, the omission of a material fact.

Comment. Section 9612 is a new provision drawn from Section 2103 (guardianship-conservatorship law). Under subdivision (b), the personal representative is not released from liability for transactions which are not fully disclosed to the court. Subdivision (b) codifies existing law. See *Bank of America v. Superior Court*, 181 Cal. App.3d 705, 226 Cal. Rptr. 685 (1986); *Lazzarone v. Bank of America*, 181 Cal. App.3d 581, 226 Cal. Rptr. 855 (1986); *Estate of Anderson*, 149 Cal. App. 3d 336, 196 Cal. Rptr 782 (1983); 8 B. Witkin, *California Procedure Attack on Judgment in Trial Court* §§ 204-207, at 602-07 (3d ed. 1985). As to when a judgment or order made pursuant to this division becomes final, see Section [to be drafted].

## CROSS-REFERENCES

## Definitions

Devisee § 34

Heirs § 44

Personal representative § 58

## COMPARABLE PROVISIONS

## Guardianship-conservatorship § 2103

*Note.* Section 2103 (guardianship and conservatorship) should be conformed to Section 9612.

*Note.* Section 2103 reads:

2103. (a) Unless reversed on appeal, a judgment, order, or decree made pursuant to this division is final and releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in

the judgment, order, or decree. For the purposes of this section, "order" includes an order settling an account of the guardian or conservator, whether an intermediate or final account.

(b) This section does not apply where the judgement, order, or decree is obtained by fraud or conspiracy or by misrepresentation contained in th4e petition or account or in the judgment, order, or decree as to any material fact. For the purposes of this subdivision, misrepresentation includes but is not limited to, the omission of a material fact.

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November 26, 1986

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94303

Re: Estate Management - Proposed Section 9612(b)

Dear John:

This letter is written on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California. The Executive Committee strongly opposes inclusion of subpart (b) in Section 9612 as proposed, as well as inclusion of similar language in any proposed sections of the Estate and Trust Code. Team reports in the past have also voiced strong opposition to that proposed language.

The Executive Committee's grounds of opposition include the following:

1. Existing Probate Code Section 1003 (preliminary distribution), Section 1021 (final distribution), Section 1042 (distribution to domiciliary representative), and Section 1123 (trust administration) each provide that when the order becomes final it shall be conclusive upon all persons in interest whether or not they are in being. Proposed Section 11605 (Study L-1029) continues this language without the addition of what is contained in subpart (b).

2. Most other orders made by the Probate Court are independent final orders and are subject to appeal pursuant to Probate Code Section 1240 and, when the time for appeal has expired, become final.

3. The concept of probate in California is an in rem or quasi-in rem proceeding intended to bind all parties interested in the assets of the probate estate. Petitions

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which are set for hearing by the court require notice to all interested parties pursuant to Probate Code Section 1200.5 or other applicable sections, thereby giving all interested parties an opportunity to appear and object to the proposed action, accounting or other proceeding. The court order binds those who received notice but failed to appear.

4. A final decree, for example, has been held to be subject to collateral attack only for extrinsic fraud (see Marshall, California Probate Procedure, 4th Ed., Section 1984.3 and cases cited therein).

5. Subsection (b) of proposed Section 9612 refers to "fraud." There are two types of fraud, extrinsic fraud and intrinsic fraud. The distinction between extrinsic and intrinsic fraud is set forth with clarity in the case of Westphal v. Westphal, 20 Cal.2d 393, 397 (1942), as follows:

"The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic [Citations]. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court [Citations]. If an unsuccessful party to an action has been kept in ignorance thereof [Citations] or has been prevented from fully participating therein [Citation], there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary [Citations]. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack [Citations].

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6. Intrinsic fraud is not a ground for equitable relief. See 8 Witkin, California Procedure, 3rd Ed., "Attack on Judgment in Trial Court," Section 221, and cases cited therein, including a number of probate cases, such as Gale v. Witt, 31 Cal.2d 362, 365-366 (1948).

7. Where transactions have been disclosed on trustee accounts approved by the court and the beneficiaries receive notice thereof, those accounts are res judicata and cannot be attacked as constituting extrinsic fraud. Lazzarone v. Bank of America, 181 Cal.App.3d 581 (1986). A similar rule applies to other independent orders in probate.

8. Where a fiduciary has concealed information that the fiduciary has a duty to disclose, this institutes a type of extrinsic fraud. Lazzarone v. Bank of America, supra, 181 Cal.App.3d at 597 and cases cited therein. It is not a separate basis for equitable relief.

9. Any court judgment, whether in probate, family law or other areas of litigation, is subject to attack in equity based on a claim of extrinsic fraud. We are not aware of any provisions in the Code of Civil Procedure, for example, comparable to what is proposed as subdivision (b) of proposed Section 9412. Extrinsic fraud must be pleaded with particularity in order to state a cause of action. Lazzarone v. Bank of America, supra, 181 Cal. App.3d at 598. Reliance on the fraudulent representation or omission, for example, must be pleaded.

10. The word "fraud" in proposed Section 9612(b) obviously is imprecise and inaccurate as it does not limit itself to extrinsic fraud.

11. Since extrinsic fraud is a form of equitable relief dependent upon case law and the particular facts involved, attempting to codify a very broad concept of fraud in proposed Section 9612 seems inappropriate. Probate orders generally are only conclusive as to matters passed upon by the court (they are not binding as to those matters not passed upon). Estate of de Laveaga, 50 Cal.2d 484, 487 (1958). This concept is clearly defined in other cases in addition.

12. While Estate of Anderson, 149 Cal.App.3d 336 (1983), gave the concept of extrinsic fraud a broad interpretation, it is only one of dozens, or perhaps hundreds, of cases that have evolved over the last century on what constitutes extrinsic or intrinsic fraud. As yet, the case has not yet been cited in other appellate decisions.

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13. Section 2103 of the Probate Code dealing with conservatorships and guardianships has been in effect for a number of years and was in effect prior to the Estate of Anderson decision. A guardianship or conservatorship, of course, is fundamentally different from an estate where the party is deceased and the rights of creditors and third parties are to be finally determined and the assets distributed. A conservatorship or guardianship normally represents an ongoing procedure where all of the assets are retained except to the extent necessary for expenses of the conservatee or ward. Without debating the merits of Probate Code Section 2103, the concept found therein seems inappropriate in the context of probate and trust administration.

14. Proposed Section 9612(b) refers to "omission of a material fact." As worded, this suggests that any omission of a material fact makes the order one lacking in finality. The language is much broader than simply stating that, if a material fact was omitted, the order is not res judicata as to that omitted fact. See Estate of de Laveaga, supra, 50 Cal.2d at 480.

15. There are few orders in probate where someone could not claim that a fact, perhaps even a material fact, had not been included in the court petition or order. The very broad language used in proposed Section 9612(b) would appear to open up most probate orders to attack for alleged misrepresentation, not just the type of misrepresentation which might under the cases be treated as extrinsic fraud.

16. Finality of probate orders is essential for orderly administration and distribution of estates. Proposed Section 9612(b), it is submitted, undercuts that finality not only as to final orders of distribution, but as to all orders in probate.

17. Given the broad wording of proposed Section 9612(b), would it ever be appropriate to exonerate a bonding company, since an action for fraud generally is barred only three years from discovery? CCP § 338, subdivision 4.

18. If an order of distribution involving real property is subject to attack because of any omission of a material fact, whether or not related to the real property in question, will a title insurance company insure title in the name of the distributee?

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The Executive Committee strongly urges the Commission to delete subsection (b) of proposed Section 9612 and delete such language from any other proposed sections of the Code. Although it does not seem necessary, the comment to Section 9612(a) might indicate that probate orders, like any other court orders, are subject to attack whenever extrinsic fraud exists.

Sincerely,



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