

CALIFORNIA LAW REVISION COMMISSION

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 (415) 494-1335



04/30/93

DATE: • May 13 & 14	PLACE: • Sacramento
• May 13 (Thursday) 10:00 am - 5:00 pm	State Capitol
• May 14 (Friday) 9:00 am - 4:00 pm	Room 2040
<p>NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the proper amount made out to the "California Law Revision Commission".</p>	

FINAL AGENDA*for meeting of***CALIFORNIA LAW REVISION COMMISSION**Thursday, May 13, 1993

1. MINUTES OF MARCH 25-26, 1993, COMMISSION MEETING (sent 4/23/93)

Ratification of Decisions Made as Subcommittee

2. ADMINISTRATIVE MATTERS

Budget Matters

Oral Report by Executive Secretary

Consultant Contracts

Oral Report by Executive Secretary

Communications from Interested Persons

3. 1993 LEGISLATIVE PROGRAM

Status of Legislative Program
Memorandum 93-28 (NS) (to be sent)

Study F-1001 - Family Code Cleanup (AB 1500)
First Supplement to Memorandum 93-28 (SU) (sent 4/22/93) (\$5.50)

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

Comments on Tentative Recommendation
Memorandum 93-32 (NS) (to be sent)

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

Work in Progress
Memorandum 93-20 (SU) (sent 3/17/93) (\$25.00)
*Note. We will continue consideration of the draft statute
with modification and revocation issues (§ 8150 et seq.)*
First Supplement to Memorandum 93-20 (to be sent)

6. STUDY J-801 - ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

Memorandum 93-27 (RJM) (sent 4/22/93) (\$8.50)

Friday, May 14, 1993

7. STUDY N-100 - ADMINISTRATIVE ADJUDICATION

Draft of Tentative Recommendation
Memorandum 93-30 (NS) (sent 4/26/93)
First Supplement to Memorandum 93-30 (enclosed) (\$5.50)

8. STUDY N-201 - JUDICIAL REVIEW OF AGENCY ACTION--STANDING AND TIMING

Draft of Initial Decisions
Memorandum 93-22 (NS) (sent 3/11/93) (\$8.50)

9. STUDY N-202 - JUDICIAL REVIEW OF AGENCY ACTION--SCOPE OF REVIEW

Draft of Initial Decisions
Memorandum 93-31 (NS) (enclosed) (\$8.50)

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MEETING SCHEDULE

May 1993

May 13 (Thur.) 10:00 a.m. - 5:00 p.m.
May 14 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

June 1993

No Meeting

July 1993

July 22 (Thur.) 10:00 a.m. - 5:00 p.m.
July 23 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

August 1993

No Meeting

September 1993

Sep. 23 (Thur.) 10:00 a.m. - 5:00 p.m.
Sep. 24 (Fri.) 9:00 a.m. - 4:00 p.m.

Sacramento

October 1993

No Meeting

November 1993

Nov. 18 (Thur.) 10:00 a.m. - 6:00 p.m.
Nov. 19 (Fri.) 9:00 a.m. - 4:00 p.m.

Los Angeles

December 1993

No Meeting

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
MAY 13-14, 1993
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on May 13-14, 1993.

Commission:

Present: Arthur K. Marshall, Chairperson
Sanford Skaggs, Vice Chairperson (May 13)
Bion M. Gregory, Legislative Counsel (May 13)
Daniel M. Kolkey (May 14)
Edwin K. Marzec
Forrest A. Plant

Absent: Christine W.S. Byrd
Terry B. Friedman, Assembly Member
Bill Lockyer, Senate Member
Colin Wied

Staff:

Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary (May 13)
Robert J. Murphy, Staff Counsel

Consultants:

Michael Asimow, Administrative Law (May 14)
Robert J. Sullivan, Administrative Law (May 14)

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento (May 14)
William M. Chamberlain, California Energy Commission, Sacramento (May 14)
Ted Cobb, State Water Resources Control Board, Sacramento (May 14)
Denny Davis, Office of Administrative Hearings, Sacramento (May 14)
Karl Engeman, Office of Administrative Hearings, Sacramento (May 14)
William Foley, California Public Utilities Commission, San Francisco (May 14)
Greg Gorges, Department of Consumer Affairs, Sacramento (May 14)
Dawn Gray, California Family Law Report, Inc., Sausalito (May 13)
Don E. Green, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (May 13)
Melanie McClure, State Teachers' Retirement System, Sacramento (May 14)
Joel S. Primes, Office of the Attorney General, Sacramento (May 14)
James D. Simon, State Department of Social Services, Sacramento (May 14)
Jan Stevens, Office of the Attorney General, Sacramento (May 14)

Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (May 13)

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MINUTES OF MARCH 25-26, 1993, COMMISSION MEETING

The Commission approved the Minutes of the March 25-26, 1993, Commission meeting with the following changes:

On page 4, line 1, reference should be made to quieting title to personal property.

On page 8, line 18, reference should be made to arguments for peremptory challenges.

The Commission ratified the decisions made by the Commission acting as a subcommittee at that meeting.

ADMINISTRATIVE MATTERS

Budget Matters

The Executive Secretary reported that the Commission's austerity program for the 1992-93 fiscal year has paid off and the Commission is in a position to encumber funds to print its anticipated reports. The Commission may also be in a position to execute consultant contracts for its priority projects, depending on final accounting numbers for the fiscal year.

The Executive Secretary reported that the Commission's budget for the 1993-94 fiscal year had been approved by the Assembly budget committee but not by the Senate budget committee. Senate Budget Subcommittee No. 2 was scheduled to meet that day to make a final determination. The Commission decided that as many Commissioners as possible should be present at the hearing. [The subcommittee did not fund the Commission, with the result that the Commission's budget was a conference committee item. The conference committee approved the Commission's budget, less 15%.]

Consultant Contracts

The Commission authorized the Executive Secretary to execute consultant contracts payable out of the 1992-93 fiscal year budget. The Executive Secretary should exercise this authority only to the extent the Executive Secretary determines that funds remaining in the 1992-93 fiscal year budget are sufficient. The contracts should be in the amount the Executive Secretary determines is appropriate for the particular subject, but no contract should exceed \$7,500 plus \$1,000 for travel expenses in attending commission meetings and legislative hearings.

The consultant contracts may be in any of the following fields authorized in SCR 4 (1993):

- Administrative Law and Procedure
- Derivative Actions
- Business Judgment Rule
- Unfair Business Practices
- Uniform Unincorporated Nonprofit Association Act

The Executive Secretary should determine which contracts are appropriate in light amount of the available funds. The Executive Secretary should select an appropriate consultant for each contract, with the advice and consultation of Commission members where the Executive Secretary believes that would be useful.

STATUS OF LEGISLATIVE PROGRAM

The Commission considered Memorandum 93-28 concerning the status of the 1993 legislative program. The Executive Secretary updated the memorandum with the information that AB 209 and 1704 and SCR 4 are set for hearing May 19, and AB 1500 is set for hearing May 26.

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

The Commission considered Memorandum 93-32 and its First and Second Supplements, along with a letter from the Executive Committee of the Trusts and Estates Section of the Los Angeles County Bar Association (attached to these Minutes as Exhibit pp. 1-3), relating to comments on the tentative recommendation on the effect of joint tenancy title on community property.

The Commission directed the staff to prepare for Commission consideration a revised version of the recommendation that includes the changes recommended in the staff memorandum, including prospective operation, clarification of the right to clear title by affidavit of death, and treatment of separate property with community property under the transmutation.

The Commission also requested the staff to prepare for it a chart comparing the major alternative approaches to treatment of the effect of joint tenancy title on community property for such purposes as right to will or pass under trust, rights of creditors, tax treatment, political feasibility, and other significant consequences. The major approaches should include (1) require a transmutation in order for the community property to be given joint tenancy treatment, (2) preclude joint tenancy tenure between married persons, (3) treat the property as community property with right of survivorship, (4) do nothing (or revert to pre-1985 law as to effect of transmutation on rights at death).

STUDY F-1001 – FAMILY CODE CLEANUP

The Commission considered the First Supplement to Memorandum 93-28 relating to the Family Code cleanup bill. The Commission approved the amendments to the bill outlined in the memorandum. Several Commissioners expressed a preference that the Commission continue its Family Code maintenance and cleanup efforts over the next year or two but not engage in substantive studies in this area on The List.

STUDY J-801 – ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

The Commission considered Memorandum 93-27 and the attached staff draft of a Tentative Recommendation on *Orders to Show Cause and Temporary Restraining Orders*. The Commission approved the Tentative Recommendation for circulation for comment.

STUDY L-3044 – COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission continued its consideration of Memorandum 93-20 and the staff draft comprehensive power of attorney statute. The Commission made the following decisions:

§ 8101. Priority of provision of power of attorney

This section should be revised as follows:

8101. Except as otherwise provided in this part, the principal may limit the application of any provision of this part to a power of attorney by an express provision in the power of attorney or by providing a different rule in the power of attorney.

Comments to any sections in the statute that provide default rules subject to the general principle of this section should contain cross-references to this section.

§ 8152. Termination of power of attorney

§ 8153. Termination of attorney-in-fact's authority

The Commission decided not to give further consideration to the proposal to extend the duration of a durable power of attorney past the date of the principal's death for purposes of winding up the principal's estate.

The statute should make clear that a power of attorney instrument may be valid for other purposes, such as a nomination of a conservator, consent to autopsy, or an anatomical disposition, even though the power may be ineffective. Parts of Section 8152 may be read to preclude the instrument having any other effect — most troublesome are subdivisions (a)(2) concerning extinction of the subject or fulfillment of the purpose of the power of attorney and subdivision (a)(5) concerning death, incapacity, resignation, refusal to act, or other disqualification of all attorneys-in-fact. It may be appropriate to make explicit exceptions for anatomical gifts and disposition of remains, particularly in light of subdivision (a)(4) which terminates the power of attorney on the date of the principal's death.

Consideration should be given to adding a provision that a temporary incapacity of the attorney-in-fact suspends, but does not terminate, the authority of the attorney-in-fact. This would be a limitation on the broad rule of Section 8153(a)(3).

In the Comments to these sections, the first sentence of the second paragraph should be deleted, since the rule concerning powers coupled with an interest has been generalized in Section 8050(b)(1). In the Comment to Section 8153, the reference to Section 8150 should be corrected to refer to Section 8152.

§ 8154. Effect of dissolution, annulment, or legal separation

This section should be conformed, to the extent practicable, to the rules concerning the effect of dissolution, annulment, or legal separation on wills. Subdivision (b) should be reorganized to state only the special rules applicable to federal absentees and only to the extent that federal law requires such special rules. The basic rule applicable to all durable powers of attorney, including those where the principal is a federal absentee, should be stated in subdivision (a). Commencing a proceeding for dissolution or annulment should not have any effect on a power of attorney. The introductory clause concerning contrary provisions in the power of attorney should be eliminated since this is the general rule as provided in Section 8101.

§ 8155. Termination of nondurable power of attorney on principal's incapacity

This section should be reviewed along with Sections 8152 and 8153 to determine whether it would be better phrased in terms of termination of the attorney-in-fact's authority instead of the power of attorney itself.

§ 8200. Qualifications of attorney-in-fact

This section should be revised to read: "A Only a person having the capacity to contract is qualified to act as an attorney-in-fact."

§ 8201. Effect of designating unqualified person as attorney-in-fact

This section should be reviewed after the duties of the attorney-in-fact are determined.

§ 8202. Multiple attorneys-in-fact

Subdivision (a) should be revised as follows:

8202. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney and may provide that the authority conferred on two or more attorneys-in-fact shall or may be exercised either jointly or severally or in a manner, with the priority, and with respect to particular subjects, provided in the power of attorney.

The stricken material may be appropriate for inclusion in the Comment, providing examples of what might be provided in a power of attorney.

§ 8205. Delegation of attorney-in-fact's authority

This section should be replaced with the default rule that delegation is forbidden, except as to mechanical tasks.

§ 8206. Relation of attorney-in-fact to court-appointed fiduciary

This section should be redrafted for clarity, taking into account its origin in the Uniform Durable Power of Attorney Act. Subdivision (a) should be made subject to any required court approval in another state.

§ 8207. Attorney-in-fact's authority when principal missing in foreign country

This section is deleted from the draft.

§ 8230. When duties commence

The staff should redraft this section to provide a right to resign as attorney-in-fact if an alternate agrees to serve or in any case where the principal is competent, on giving notice to the principal. The attorney-in-fact would remain accountable for actions during the attorney-in-fact's term. In addition, the sections concerning judicial proceedings should permit an attorney-in-fact to resign with court approval; this proceeding might also be consolidated with a petition for a conservator. The procedure for resignation should be clarified, particularly since resignation may occur outside of court proceedings.

§ 8234. Duty to keep principal informed and follow instructions

The statute should make clear that the attorney-in-fact can disobey instructions of the principal if a court finds that it is clearly in the principal's interest. In the phrase "reasonably practical under the circumstances," "practical" should be changed to "practicable."

§ 8235. Consultation

This section should be limited to situations where the principal is incapacitated — it should not apply where the principal is absent. The right to seek information should be limited to the extent needed to carry out the attorney-in-fact's duties. The staff should investigate making this section more forceful. In its present form, it appears to be largely advisory and does not compel a third person to give the attorney-in-fact the information sought.

STUDY N-100 – ADMINISTRATIVE ADJUDICATION

The Commission considered Memorandum 93-30 and its First and Second Supplements, relating to the draft of the tentative recommendation on administrative adjudication. The Commission approved the tentative recommendation to circulate for comment after making the following decisions.

The draft circulated for comment should be accompanied by a note to affected agencies that it is intended that the draft will supersede special statutes relating to administrative adjudication by the agencies, and requesting the agencies to call attention to special statutes that need to be preserved and the reasons for it. Also, agencies that have requested exemption from the new administrative adjudication statute should be informed that we have revised the draft in an effort to accommodate their concerns and asking that they review the draft in this light.

§ 641.480. Study of administrative law and procedure

The draft should provide a division of study authority of adjudication and rulemaking between OAH and OAL as specified in the Second Supplement.

§ 643.210. Grounds for disqualification of presiding officer

The words “Has served as, or” were deleted from subdivision (b)(4).

§ 643.230. Procedure for disqualification of presiding officer

The requirement in subdivision (c) that the determination of the disqualification request state facts and reasons should be limited to instances where the disqualification request is refused.

§ 643.330. When separation not required

Subdivision (a)(4) was revised to add a requirement that any advice be disclosed on the record and all parties have an opportunity to comment.

§ 647.240. Confidentiality and admissibility of ADR communications

The substance of Evidence Code Section 703.5 should be restated in Section 647.240. The Comment should be revised to refer to subdivision (b) rather than (a)(2)

§ 648.140. Open hearings

This section should not be subject to modification by agency regulation.

§ 648.630. Monetary sanctions for bad faith actions or tactics

The Comment should be revised to describe the standard for imposition of discovery sanctions consistently with the standard in Code of Civil Procedure Section 128.5.

§ 649.120. Form and contents of decision

The words “and reasons” were deleted from subdivision (a), so it requires only a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

§ 649.240. Decision or remand

The statute should state more clearly that the agency head may not rehear the case de novo on review.

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

Date

Chairperson

Executive Secretary

RONALD C. PEARSON

ATTORNEY AT LAW

FOX PLAZA

2121 AVENUE OF THE STARS, SUITE 1700
LOS ANGELES, CALIFORNIA 90067

TEL (310) 201-0338

FAX (310) 552-3229

Law Revision Commission

RECEIVED

MAY 10 1993

File: _____
Key: _____

May 12, 1993

VIA FAX

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study F-521.1/L-521.1 - Effect of
Joint Tenancy Title on Community Property.

Dear Nat:

The Executive Committee of the Trusts and Estates Section of the Los Angeles County Bar Association (the "Committee") has reviewed the Tentative Recommendation relating to the Effect of Joint Tenancy Title on Community Property and has requested that I communicate their views to you.

1. Joint Tenancy with Right of Survivorship. As I have indicated in my prior letters, the Committee believes the presumption of community property should apply for all purposes during life; except, that at death the right of survivorship should apply to convey the deceased spouse's interest in joint tenancy property to the surviving spouse. Unfortunately, it appears the Committee's view (which is followed by the Probate and Trust Section of the Beverly Hills Bar Association) is now the minority view, which the LRC has apparently decided against. Accordingly, other than to reiterate our position, I will not delve further into this issue.

2. Clearing Title to Property Held in Joint Tenancy.

a. Joint Tenancy - Express Transmutation. Under your Tentative Recommendation, if husband and wife make an "express and knowing transmutation" of the community property to joint tenancy, the community property presumption set forth in proposed Probate Code Section 861 may be rebutted. In this instance, the joint tenancy form of title will control. Upon the death of the first spouse, the surviving spouse may clear title immediately by executing and recording an Affidavit of Death of Joint Tenant.

b. **Community Property.** As your Tentative Recommendation points out, if husband and wife take title as community property, upon the death of the first spouse, the surviving spouse may clear title quickly either by a Section 13540 affidavit or by summary court proceeding. If an affidavit is used, the surviving spouse must wait 40 days; thereafter, the property may be sold or otherwise transferred to a third party who will take title free of the rights of the estate or creditors of the deceased spouse. In this manner, the integrity of our title system is preserved.

c. **Joint Tenancy - Defective Transmutation.** Under your Tentative Recommendation, if husband and wife fail to make an "express and knowing transmutation" of the community property to joint tenancy, the community property presumption set forth in proposed Section 861 will control for all purposes; including, testamentary disposition. Your Tentative Recommendation points out that treating defective joint tenancy property as community property at death, will not restrict the surviving spouse's ability to clear title quickly. The surviving spouse may clear title in the same manner as discussed in 2.b. above (i.e., by a 13540 affidavit or summary court proceeding).

However, there does not appear to be any restriction on the surviving spouse from immediately (i.e., without waiting 40 days as required for the 13540 affidavit procedure) clearing title to defective joint tenancy property by executing and recording an Affidavit of Death of Joint Tenant. Thereafter, the surviving spouse could immediately sell or otherwise transfer the property to third parties. Query, if the deceased spouse made a contrary testamentary disposition (e.g., to his or her children), what are the rights of the heirs as against the third party and the surviving spouse? At the very least, litigation would ensue and the integrity of our title recording system would be impaired.

One alternative would be to place the same 40 day time period (as required for a Section 13540 affidavit) before which an Affidavit of Death of Joint Tenant could be recorded (particularly relating to a spousal joint tenancy).

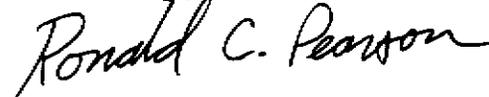
3. **Probate Code Section 13540 Affidavit.** Memorandum 93-32 provides that the Commission should propose language that augments or clarifies the availability of the Section 13540 affidavit procedure. The Committee recommends that language be adopted similar in format to that provided for a Section 13101 Affidavit (possibly including the requirement that a copy of the decedent's will be attached).

Mr. Nathaniel Sterling
May 12, 1993
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4. Expert v. Attorney Advice. Proposed Section 864 provides a form of advice and transmutation for creating a joint tenancy. The form states that "you may wish to seek expert advice before signing this declaration." The Commission apparently decided that "requiring consultation with a lawyer is self-serving." The Committee wishes to note that there is no requirement in the form that the parties contact a lawyer; only a suggestion. As such, the statement is not self-serving and, instead, offers prudent advice to the parties (e.g., because very few individuals, especially nonlawyers, are competent to advise the parties on the advantages and disadvantages of taking title as joint tenants or as community property). Accordingly, the Committee recommends that the form suggest that the parties contact a lawyer for expert advice before signing the declaration.

Thank you for your consideration of our comments. If you have any questions, please do not hesitate to contact me.

Sincerely,



RONALD C. PEARSON

RCP:ms
cc: Executive Committee