STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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September 22, 2000

Date: October 5-6, 2000	*Place:* San Francisco
Oct. 5 (Thurs.) 10:00 am – 5:00 pm Oct. 6 (Fri.) 9:00 am – 4:00 pm	Administrative Office of the Courts Malcom Lucas Board Room 455 Golden Gate Avenue, 3d Floor 415-865-4200
The meeting will be held at the above location. If it is difficult or impossible to convene a quorum at the meeting, a quorum may be established and other action may be taken at the meeting by teleconference, accessible and audible to the public at the above location.	
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please leave contact information at 650-494-1335 and you will be notified of any late changes.**	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	
The California Law Revision Commission is a State Bar of California Approved MCLE Provider. This meeting is approved for 11.5 hours of MCLE credit.	

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, October 5

1. MINUTES OF JULY 20-21, 2000, MEETING (8/18/00)

2. ADMINISTRATIVE MATTERS

   Schedule of Future Meetings
   Memorandum 2000-57 (NS) (8/11/00)

   New Topics and Priorities
   Memorandum 2000-58 (NS) (9/12/00)

   Report of Executive Secretary
   Oral Report. May include budget, personnel, contract, meeting schedule, attendance, or other current agency administrative matters.

3. 2000 LEGISLATIVE PROGRAM

   Final Report
   Memorandum 2000-59 (NS) (9/22/00)

4. RULES OF CONSTRUCTION FOR TRUSTS [STUDY L-605]

Consultant's Study
Memorandum 2000-75 (NS) (8/22/00)

5. ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE [STUDY FHL-911]

Draft of Recommendation
Memorandum 2000-60 (BH) (8/11/00)
First Supplement to Memorandum 2000-60 (to be sent)

6. FAMILY CONSENT IN HEALTH CARE DECISIONMAKING FOR ADULTS [STUDY L-4003]

Discussion of Issues
Memorandum 2000-62 (SU) (9/15/00)

7. STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE [STUDY J-111]

Estate Planning Issues
Memorandum 2000-61 (BG) (to be sent)

8. MECHANIC'S LIENS [STUDY H-820]

Home Improvement Payment Bond
Memorandum 2000-63 (SU) (to be sent)

9. WITHDRAWAL OF PREJUDGMENT DEPOSIT IN EMINENT DOMAIN [STUDY EM-456]

Comments on Tentative Recommendation
Memorandum 2000-64 (NS) (9/18/00)
Tentative Recommendation (July 2000)

10. EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN [STUDY EM-458]

Comments on Tentative Recommendation
Memorandum 2000-65 (NS) (9/19/00)
Tentative Recommendation (July 2000)

☞ **Note: Items not completed on October 5 will be continued to October 6.**

Friday, October 6

11. MUNICIPAL BANKRUPTCY [STUDY D-1100]

Discussion of Issues
Memorandum 2000-66 (SU) (to be sent)

12. RULEMAKING UNDER PENAL CODE SECTION 5058 [STUDY N-304]

Comments on Tentative Recommendation
Memorandum 2000-67 (BH) (9/12/00)
Tentative Recommendation (April 2000)

13. UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT [STUDY B-501]

Discussion of Issues
Memorandum 2000-69 (BH) (9/22/00)
First Supplement to Memorandum 2000-69 (to be sent)

14. LAW LIBRARY BOARD OF TRUSTEES [STUDY J-1307]

Comments on Tentative Recommendation
Memorandum 2000-70 (BG) (to be sent)
Tentative Recommendation (April 2000)

15. CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION [STUDY J-1320]

Elimination of Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases
Memorandum 2000-71 (BG) (to be sent)
Tentative Recommendation (July 2000)

Additional Procedural Issues
Memorandum 2000-72 (BG) (9/19/00)

16. EXPIRED PILOT PROJECTS [STUDY J-1309]

Comments on Tentative Recommendation
Memorandum 2000-73 (BH) (9/19/00)
Tentative Recommendation (June 2000)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 5-6, 2000
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on October 5-6, 2000.

Commission:

Present: David Huebner, Chairperson
Joyce G. Cook, Vice Chairperson
Bill Morrow, Senate Member
Sanford M. Skaggs (Oct. 6)
Howard Wayne, Assembly Member (Oct. 5, teleconference)

Absent: Bion M. Gregory, Legislative Counsel

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel

Consultants: James E. Acret, Mechanic's Liens (Oct. 5)
Edward C. Halbach, Jr., Estate Planning and Probate Law (Oct. 5)
Michael Hone, Unincorporated Nonprofit Association Law (Oct. 6)
William M. McGovern, Probate Law (Oct. 5)
Frederick Tung, Bankruptcy Law (Oct. 6)

Other Persons:

Sam Abdulaziz, Abdulaziz & Grossbart, North Hollywood (Oct. 5)
Herb Bolz, Office of Administrative Law, Sacramento (Oct. 6)
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (Oct. 5)
John Doherty, Aids Legal Services, San Jose (Oct. 5)
Theresa Drought, Kaiser Permanente, Oakland (Oct. 5)
Maxine Ferguson, Department of Transportation, Sacramento (Oct. 5)
Peter C. Freeman, Lumber Association of California & Nevada, Barr Lumber, San Bernardino (Oct. 5)
Ellen Gallagher, Contractors State License Board, Sacramento (Oct. 5)
Janet Grove, Administrative Office of the Courts, San Francisco (Oct. 6)

Jan Hansen, Lumber Association of California & Nevada, Sacramento (Oct. 5)
Keith Honda, Assemblyman Honda's Office, San Jose (Oct. 5)
Regan James, American Contractors Indemnity Company, Los Angeles (Oct. 5)
Barbara J.S. Kalhammer, Pro Bono Project of Silicon Valley, San Jose
Deborah Mattos, Lumber Association of California & Nevada, Mattos & Associates, Sacramento (Oct. 5)
Pat McGinnis, California Advocates for Nursing Home Reform, San Francisco (Oct. 5)
Joseph A. Montoya, Sacramento
Patrick O'Donnell, Administrative Office of the Courts, San Francisco (Oct. 6)
Betty Perry, Older Women's League, Sacramento (Oct. 5)
Michael Siegel, MD, California Medical Association Council on Ethical Affairs, San Mateo (Oct. 5)
Gregory E. Siegler, State Bar Business Law Section, Nonprofit Organizations Committee, San Francisco (Oct. 6)
Harley Spitler, San Francisco (Oct. 5)
Donald R. Travers, State Bar Estate Planning, Trust and Probate Law Section, Paradise (Oct. 5)

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MINUTES OF JULY 20-21, 2000 MEETING

The Commission approved the Minutes of the July 20-21, 2000, Commission meeting as submitted by the staff, subject to the following corrections:

On page 5, line 16, "at" should be changed to "as".

On page 16, line 22, "in" should appear in strike-out.

ADMINISTRATIVE MATTERS

Schedule of Future Meetings

The Commission considered Memorandum 2000-57, relating to the schedule of future Commission meetings.

The Commission tentatively rescheduled the November/December meeting for December 7-8 in Los Angeles. This decision is subject to confirmation with absent Commissioners that the rescheduled date will work for them. If not, the Executive Secretary should consult with the Chairperson in selecting an alternate date for that meeting.

The remainder of the proposed meeting schedule as set out in the memorandum was adopted as submitted.

New Topics and Priorities

The Commission considered Memorandum 2000-58, relating to new topics and priorities. The Commission adopted the staff recommendations summarized at pages 22-23 of the memorandum, subject to the following decisions.

(1) The Commission's authority to study arbitration should be broadened to include other forms of alternative dispute resolution. In addition the Commission will seek to engage an expert consultant to prepare a general review of the existing arbitration statutes (both contractual and judicial), with the view to modernizing them and improving their operation; the study might include a review of developments in other jurisdictions. The staff should report back to the Commission with a proposal on this matter.

(2) As a follow-up to the administrative rulemaking project, the Commission will address immediately two issues that have been identified for possible cleanup legislation in 2000 — (a) the definition of "proposed action" and (b) the conflicting statutes on internet publication. Other cleanup issues that are identified should be held for later attention by the Commission, a year from now.

(3) With regard to the possible study of civil grand juries, the Commission was concerned that such a project could take the Commission into politicized issues it will be unable to deal with effectively. The Commission was also concerned that it currently is occupied with other major priority studies that will preclude it from devoting the careful attention to this matter that it deserves. If the Legislature decides to assign this project to the Commission, the Commission believes it would need an ample amount of time to complete it.

(4) The Commission has received a response from the Supervising Probate Attorney of the Los Angeles Superior Court to its inquiry about problems in trust administration. The Commission requested the Executive Secretary to express its appreciation for the information and indicate that the Commission currently has a full calendar but may be able to turn its attention to this matter in the future.

(5) In connection with its investigation of environmental restrictions that neither run with the land nor are enforceable as equitable servitudes, the staff should check to see whether corrective legislation was adopted in the 2000 legislative session.

Report of Executive Secretary

The Executive Secretary reported that there have been no new appointments to the Commission by the Governor. Currently there are four vacancies to be filled.

The staff attorney hired to begin work in September has decided that he will not work for the Commission. We have begun the process of recruiting a new attorney as a replacement.

The Commission's administrative assistant is leaving due to her family's relocation. We have begun the process of recruiting a new administrative assistant as a replacement.

2000 LEGISLATIVE PROGRAM

The Commission considered Memorandum 2000-59, relating to the Commission's 2000 legislative program. The Executive Secretary updated the memorandum with the information that the Governor had signed all bills sponsored by the Commission that had passed the Legislature. The Governor also signed SB 2140, which directs the Commission by January 1, 2002, to recommend repeal of statutory provisions rendered obsolete by trial court restructuring.

STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

The Commission considered Memorandum 2000-69 and its First Supplement, relating to unincorporated associations. The Commission directed the staff to do the following:

(1) Consolidate existing statutory law into a comprehensive Unincorporated Associations Act, reserving space for provisions that might be added later.

(2) Discuss possible rules for contract and tort liability of members and officers of an unincorporated association.

(3) Discuss possible improvements to the rules governing property ownership and management by an unincorporated association.

(4) Identify the types of governance provisions that could be applied to unincorporated associations and provide a general analysis of the issues raised by each type.

STUDY D-1100 – MUNICIPAL BANKRUPTCY

The Commission considered Memorandum 2000-66 concerning issues in municipal bankruptcy raised in Prof. Frederick Tung's background study. Chairperson Huebner reported that his discussions with the Governor's office indicated they did not think it was appropriate for the Governor to have the gatekeeper role in determining whether a municipality could file for bankruptcy protection. The Commission discussed the issues generally, but deferred making policy decisions until the views of representatives of municipalities can be obtained. The staff will attempt to get commentary from appropriate organizations and their attendance at a future meeting. Senator Morrow offered the assistance of his office in piquing the interest of local entities.

STUDY EM-456 – WITHDRAWAL OF PREJUDGMENT DEPOSIT IN EMINENT DOMAIN

The Commission considered Memorandum 2000-64 and its First Supplement, relating to comments on the tentative recommendation on withdrawal of the prejudgment deposit in eminent domain. After discussion of the matter, the Commission requested that it be rescheduled for further consideration at the next meeting.

STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN

The Commission considered Memorandum 2000-65 and its First Supplement, relating to comments on the tentative recommendation on early disclosure of valuation data and resolution of issues in eminent domain. The Commission

approved the tentative recommendation as a final recommendation with the changes identified in the memorandum, except as follows.

Use of Precondemnation Offer as Admission

The proposed amendment of Government Code Section 7267.1 to protect from admissibility both the condemnor's appraisal and the property owner's valuation opinion, should be limited to matters "prepared for the purpose of negotiation" pursuant to the Relocation Assistance Act.

Impeachment of Prejudgment Deposit Witness

The Commission requested the staff to prepare for its consideration at a subsequent meeting an analysis of issues concerning the prejudgment deposit and its admissibility at trial.

STUDY F-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

See entry in these Minutes under Study L-911.

STUDY H-820 – MECHANIC'S LIENS

The Commission considered Memorandum 2000-63, and its First and Second Supplements, concerning draft proposals for a mandatory home improvement payment bond and other alternatives set out in the supplements. The Commission directed the staff to prepare an analysis of the option of using joint control agencies; this is the one frequently mentioned approach that has not yet been presented. The Commission would also like the staff to see if representatives of general contractors and homeowners groups would be willing to attend the meeting to give their perspective on the issues under consideration.

STUDY H-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

See entry in these Minutes under Study L-911.

STUDY J-1307 - LAW LIBRARY BOARD OF TRUSTEES

The Commission considered Memorandum 2000-70 and its First Supplement, concerning comments on the revised tentative recommendation on *Law Library Board of Trustees*. The Commission directed the staff to prepare a draft recommendation incorporating the following revisions:

Number of Lay Trustees

As recommended by the Council of California County Law Libraries ("CCCLL"), the number of lay trustees serving on a law library board at the same time should be limited to two. CCCLL's proposed language should be revised along the following lines:

> (e) ~~Notwithstanding the above, no~~ No more than two (2) trustees shall be residents of the county who are not judges or members of the ~~bench or~~ bar of the county.

The first clause ("Notwithstanding the above …") is unnecessary because the proposed amendment of Business and Professions Code Section 6301 starts with "Except as otherwise provided by statute …."

Members of the Bar of the County

Business and Professions Code Section 6301 refers to "members of the bar of the county" but does not define this term. The provision should be revised to eliminate this ambiguity. The Commission tentatively determined that "a member of the bar of the county" should include any member of the State Bar who resides in or practices law in the county. The Commission directed the staff to research how the term is used elsewhere in the codes and propose appropriate language on this point.

Trial Court Unification

Business and Professions Code Section 6301 should be reorganized to reflect trial court unification. First, the provision should state how a law library board is to be selected in a county with a unified superior court. Then a separate paragraph should explain how a law library board is to be selected in a county in which the courts have not unified. If the courts in all counties unify, it will then be easy to delete this paragraph and limit the provision to unified superior courts.

STUDY J-1309 – EXPIRED PILOT PROJECTS

The Commission considered Memorandum 2000-73, relating to expired pilot projects. It approved the staff draft recommendation as its final recommendation.

STUDY J-1320 – CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION

The Commission considered Memorandum 2000-72, concerning issues relating to Code of Civil Procedure Section 396a (statement of jurisdictional facts) and technical corrections suggested by Mark Lomax. The Commission determined that the issues relating to Section 396a require further study and should not be addressed in the test proposal for the Commission's joint study with the Judicial Council, which is targeted for introduction in the Legislature in early 2001. The staff should work with staff from the Administrative Office of the Courts ("AOC") to develop a plan for addressing these issues. The Commission suggested that AOC staff take the lead role in this project. With regard to the technical issues raised by Mr. Lomax, the Commission approved the draft attached to Memorandum 2000-72 as a tentative recommendation to be circulated for comment. In addition, the Commission directed the staff to research provisions on filing and entry of judgment, to identify ambiguities, anachronisms, and other clean-up possibilities.

The Commission also considered Memorandum 2000-71, concerning comments on the tentative recommendation on *Elimination of Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*. The Commission made the following decisions:

Code Civ. Proc. § 89. Implied court authority in limited and unlimited civil cases

Proposed Code of Civil Procedure Section 89 should be revised as follows:

> **Code Civ. Proc. § 89 (added). Implied ~~court~~ authority in limited and unlimited civil cases**
>
> SEC. ____. Section 89 is added to the Code of Civil Procedure, to read:
>
> 89. (a) The existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same ~~court~~ authority does or does not exist in an unlimited civil case.
>
> (b) The existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same ~~court~~ authority does or does not exist in a limited civil case.
>
> **Comment.** Section 89 is added to provide guidance in interpreting statutory provisions that expressly authorize particular conduct in a limited civil case but are silent as to an unlimited civil case, or vice versa. See, e.g., Section 402.5 (transfer of limited civil case).

§§ 425.10, 425.11. Pleading personal injury and wrongful death damages

The Commission directed the staff to present further analysis on the best means of conforming Government Code Section 72055 with the proposed amendments of Code of Civil Procedure Sections 425.10 and 425.11. This should include research on why Government Code Section 72055 requires a fee of $90 where the amount demanded exceeds $10,000, and a fee of $83 where the amount demanded is $10,000 or less. The staff should also explore the extent to which guidance as to stating the demand could be provided by a rule of court, rather than in Government Code Section 72055 and Code of Civil Procedure Section 425.10.

§ 489.220. Undertaking for writ of attachment or protective order

The proposed amendment of Code of Civil Procedure Section 489.220 should remain as in the tentative recommendation. The court should not be given discretion to reduce the initial undertaking below $10,000. The preliminary part of the tentative recommendation (narrative discussion) should be revised to more fully explain the reasons for requiring a $10,000 minimum undertaking.

§ 631. Waiver of jury

Code of Civil Procedure Section 631 should be amended along the lines recommended in Memorandum 2000-71:

> **Code Civ. Proc. § 631 (amended). Waiver of trial by jury**
>
> SEC. ____. Section 631 of the Code of Civil Procedure is amended to read:
>
> 631. (a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:
>
> (1) By failing to appear at the trial.
>
> (2) By written consent filed with the clerk or judge.
>
> (3) By oral consent, in open court, entered in the minutes or docket.
>
> (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.
>
> (5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). An advance jury fee deposited pursuant to this paragraph may not exceed a total of one hundred fifty dollars ($150).

(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if allowed by law) of the jury accrued up to that time.

(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any.

(b) ~~In a superior court action, other than a limited civil case, if~~ If a jury is demanded by ~~either party in the memorandum to set the cause for trial~~ a party and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then ~~all adverse parties shall have five days following receipt of the notice of the waiver~~ that party shall promptly notify all other parties of the waiver, in writing or in open court. Each party adverse to the party who waived the trial by jury has five days after notice of the waiver is given to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due. If the party who waived a trial by jury does not promptly notify all other parties of the waiver, any other party, or the clerk or judge, may provide notice of the waiver, but is not required to do so. Where more than one notice of the waiver is given to a party, the five-day period to file and serve a demand for a trial by jury and to deposit advance jury fees commences on giving of the first notice.

(c) When the party who has demanded trial by jury either (1) waives the trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or (2) fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party by either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit the fees, was made, or by failing promptly to deposit the fees described in paragraph (6) of subdivision (a).

(d) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.

Comment. Subdivision (b) of Section 631 is amended to apply to both limited and unlimited civil cases. This codifies existing law. See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 & Comment. For unlimited civil cases, see Section 88. For waiver of a jury in a criminal case, see Cal. Const. art. I, § 16.

Subdivision (b) is also amended to delete the reference to the memorandum to set the cause for trial. The reference is unnecessary and may also be obsolete because in many cases an at-issue memorandum is no longer required. See R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

As amended, subdivision (b) also clarifies that the party who waives a jury after demanding one is responsible for providing notice of the waiver. If that party fails to provide notice of the waiver as required, another party (or the clerk or judge) is permitted but not required to provide the notice instead. Failure to provide timely notice may be grounds for a continuance or other remedial action. See Leslie v. Roe, 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157 (1975).

Finally, the amendment provides that the time period for demanding a jury trial and depositing jury fees runs from the date of giving notice rather than from the date of receiving notice. This is intended to facilitate proof of whether a jury demand is timely. For extension of the five-day period where notice is given by mail or Express Mail, see Section 1013.

§ 685.030. Satisfaction of judgment

The proposed amendment of Code of Civil Procedure Section 685.030 should remain as in the tentative recommendation.

§§ 720.160, 720.260. Undertaking of creditor in case of third party claim

The proposed amendments of Code of Civil Procedure Sections 720.160 and 720.260 should remain as in the tentative recommendation. The court should not be given discretion to reduce the initial undertaking below the lesser of $10,000 or "twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created." The preliminary part should be revised to more fully explain the reasons for this approach.

§ 1134. Confession of judgment

The proposed amendment of Code of Civil Procedure Section 1134 should remain as in the tentative recommendation. This reform should be included in the test proposal for the Commission's joint study with the Judicial Council, not delayed until it can be incorporated into a comprehensive proposal on filing fees.

STUDY L-605 – RULES OF CONSTRUCTION FOR TRUSTS

The Commission considered Memorandum 2000-75, reviewing the Commission consultant's background study on the rules of construction for trusts. The Commission directed the staff to start preparing material for development of a tentative recommendation consistent with the staff recommendations in the memorandum, subject to the following decisions.

Prob. Code § 21102. Intention of transferor; rules of construction apply unless instrument indicates contrary intention

The Comment to subdivision (a) of this section should include discussion of the possibility of reformation for mistake, with reference to appropriate provisions of the Evidence Code and the Parol Evidence Rule. A note should also be added when the proposal is circulated for comment, specifically requesting input as to whether the subdivision requires amendment.

§ 21104. "Testamentary gift" defined

"Testamentary gift" terminology should be left as is for the time being. During the course of this project we will see whether other terminology, such as "at death transfer" or another phrase yet to be suggested, appears to be preferable.

§ 21105. Will passes all property including after-acquired property

This section, which by its terms applies to wills, should not be broadened to apply to other instruments.

§ 21110. Anti-lapse

With respect to the issue whether "mere words of survival" in an instrument should override the anti-lapse statute, the Commission requested the staff to provide it with a more detailed analysis of approaches used in other jurisdictions, and factors that might be taken into consideration in crafting an appropriate anti-lapse statute, including whether a lawyer-drafted instrument or institutional form is involved, whether disinheritance of an entire line would result, whether persons not in being at the time the instrument was drafted would be affected, and whether a specific gift or a residuary gift is involved.

With respect to application of the anti-lapse statute to future interests, the Commission requested the same sort of treatment as with words of survival. The staff should provide additional information about various considerations that might be involved in crafting a finely-tuned anti-lapse statute that takes into account considerations such as anti-lapse effect, limitation to kindred, and the like.

§ 21133. Unpaid proceeds of sale, condemnation, or insurance, property obtained as a result of foreclosure

The Commission felt this section should be preserved but modernized. The staff should look at revised Uniform Probate Code language.

§ 21134. Sale by conservator; payment of proceeds of specifically devised property to conservator

The Commission felt this section should be preserved but modernized. The staff should look at revised Uniform Probate Code language.

§ 21135. Ademption by satisfaction

The Commission felt this section should be preserved but modernized. The staff should look at revised Uniform Probate Code language.

STUDY L-911 – ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE

The Commission considered Memorandum 2000-60 and its First, Second, and Third Supplements, relating to estate planning during dissolution of marriage. It approved the staff draft recommendation as its final recommendation, with the following changes:

Fam. Code § 2040. Automatic temporary restraining order

Proposed subdivision (b) will be revised as follows:

> (b) Nothing in this section restrains any of the following:
> (1) Creation, modification, or revocation of a will.
> (2) Revocation of a nonprobate transfer.
> (3) Elimination of a right of survivorship ~~that is owned jointly by the parties~~.
> (4) Creation of an unfunded living trust.
> (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

The Comment to Section 2040 will be revised as follows:

> **Comment**. Section 2040 is amended to clarify the scope of the automatic temporary restraining order with respect to estate planning changes.
>
> Subdivision (a)(4) restrains modification of a nonprobate transfer "in a manner that affects the disposition of property subject to the transfer." Modifications that are restrained as affecting the disposition of property include a change of beneficiary or a donor's modification of the terms of a power of appointment (this would

not include exercise of a power of appointment by a donee). Modifications that are not restrained include naming a new trustee or successor trustee (so long as the change does not affect the trustee's powers or duties with respect to disposition of trust property).

Subdivision (b) provides that the restraining order does not restrain elimination of a right of survivorship ~~between owners of jointly owned property~~. This codifies *Estate of Mitchell*, 76 Cal. App. 4th 1378, 91 Cal. Rptr. 2d 192 (1999) (restraining order does not restrain severance of joint tenancy). The fact that the restraining order does not restrain revocation of a nonprobate transfer does not mean that such a transfer is necessarily subject to revocation by one party without the consent of the other party. The question of whether a nonprobate transfer is subject to unilateral revocation is governed by the terms of the nonprobate transfer and applicable substantive law. See, e.g., Prob. Code § 5506 (action by all surviving joint owners required to cancel beneficiary registration of jointly-owned security); 31 C.F.R. § 353.51 (restricting changes in ownership of jointly-owned Series EE savings bond).

Subdivision (b)(4) provides that the restraining order does not restrain creation of one or more revocable or irrevocable unfunded living trusts. However, the transfer of property to fund a living trust would be restrained under subdivision (a)(2). An unfunded living trust created during a dissolution proceeding could serve as a receptacle for property subject to a pour-over provision in a will. Such a trust could also be funded by property that has been released from restraint by the restraining order.

Subdivision (d) defines "nonprobate transfer" for the purposes of this section. The definition expressly incorporates instruments described in Probate Code Section 5000, including a "marital property agreement." Thus, an agreement between spouses as to how to divide community property between them on either of their deaths is a nonprobate transfer for the purposes of this section. See Prob. Code § 100(b) (agreement as to division of community property on death of spouse).

STUDY L-4003 – FAMILY CONSENT IN HEALTH CARE DECISIONMAKING FOR ADULTS

The Commission considered Memorandum 2000-62, its First and Second Supplements, and materials distributed at the meeting (see Third Supplement), relating to family consent to health care for incapacitated adults. The Commission discussed the latest draft and its alternatives, and heard the views of interested persons.

Because it has become apparent, after months of considering a variety of drafts, that it is impossible to arrive at a consensus of the interested persons, the Commission decided to abandon efforts to recommend legislation setting standards for family consent or statutory default surrogates. However, there are a number of minor substantive and technical issues that could be addressed in follow-up legislation. Accordingly, the Commission directed the staff to prepare a draft tentative recommendation covering the matters discussed below for consideration at the next meeting:

Prob. Code § 4609. "Capacity"

The proposal to provide a separate capacity standard for execution of an advance directive or selecting or disqualifying a surrogate was approved. The Commission rejected the suggestion that the "sound mind" standard be changed in the witness statement.

§ 4659. Supervising health care provider as agent

The tentative recommendation should include language to make clear that a supervising health care provider cannot be an agent.

§ 4711. Patient's designation of surrogate

The Commission approved the proposal to amend Section 4711 to make clear that designation of a surrogate replaces an agent named in a power of attorney for health care only temporarily, unless the patient also expresses the intent to revoke the agent's authority under Section 4695(a).

However, further consideration should be given to the rule governing the duration of the surrogate's authority, which is limited to the period of treatment or illness or the stay in the health care institution. In the nursing home setting, this rule does not provide any effective limitation on the duration of the surrogate's authority. After a discussion with interested persons, it appeared that the most fruitful approach would be to replace the named agent with the surrogate only while the agent is not available, unless the patient expresses the intent to revoke the agent's authority under Section 4695(a). Where there is not an agent, it may be advisable to restrict the surrogate's authority to a specific time period, such as 30 days. Where there is no agent named in a power of attorney for health care, the existing limitation on oral surrogate designations is acceptable, whether in acute care or long-term care settings, because the orally-

designated surrogate is not replacing an agent named in a formal document that presumptively was carefully prepared.

§§ 4712-4713.5. Family consent

Consideration of the latest draft approach to establishing statutory family consent guidelines and the comments of interested persons at the meeting made clear that forming a consensus in this area is probably impossible. The Commission decided that, lacking a general consensus, it was not fruitful to continue working on this aspect of the Health Care Decisions Law. Attempts to answer the concerns of nursing home reform activists since April 1999 have resulted in draft proposals that are unacceptable to health care professionals. The Commission also decided not to attempt a more modest approach, such as listing potential surrogate decisionmakers without specifying the manner of determining who should have priority.

§ 4769. Notice of hearing to compel compliance

For the purpose of getting comments from interested persons, the tentative recommendation should include a proposal permitting a petition requiring health care providers to honor the agent's health care decisions.

STUDY N-304 – ADMINISTRATIVE RULEMAKING: EXEMPTIONS FROM APA

The Commission considered Memorandum 2000-67, relating to rulemaking under Penal Code Section 5058. The Commission approved the tentative recommendation as its final recommendation, subject to the following changes and limitations:

Penal Code § 5058.1. Pilot program regulations

Proposed Penal Code Section 5058.1 and its Comment will be revised as follows:

> 5058.1. (a) For the purposes of this section, "pilot program" means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.
>
> (b) The adoption, amendment, or repeal of a regulation by the director or the director's designee, to implement a legislatively mandated or authorized pilot program or a departmentally authorized pilot program, is exempt from Chapter 3.5 (commencing

with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the following conditions are met:

(1) A pilot program affecting male inmates affects no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates affects no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates affects no more than 10 percent of the total state inmate population.

(2) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this section. The certification shall include a description of the pilot program and of the methods the department will use to evaluate the results of the pilot program.

(3) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (3) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

(4) ~~The pilot program would not have substantially the same effect as another pilot program implemented under this section.~~

~~(5)~~ An estimate of fiscal impact is completed pursuant to Sections 6650 to 6670, inclusive, of the State Administrative Manual.

(c) The adoption, amendment, or repeal of a regulation pursuant to this section becomes effective immediately upon filing with the Secretary of State.

(d) ~~The adoption, amendment, or repeal of a regulation pursuant to this section lapses by operation of law~~ A regulation adopted pursuant to this section is repealed by operation of law, and the amendment or repeal of a regulation pursuant to this section is reversed by operation of law, two years after the commencement of the pilot program being implemented, unless the adoption, amendment, or repeal of the regulation is promulgated by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purpose of this subdivision, a pilot program commences on the date the first regulatory change implementing the program is filed with the Secretary of State.

Comment. Section 5058.1 continues former Section 5058(d)(1), without substantive change, except as described below:

Subdivision (a) defines "pilot program" for the purposes of this section. While there is no general statutory definition of "pilot program," a survey of statutes establishing pilot programs reveals certain common characteristics: experimental purpose and limited duration and scope. See, e.g., Bus. & Prof. Code § 3537.15 (limited implementation "to test validity and effectiveness" of program

before full implementation); Fam. Code § 3032 (evaluation of program to be reported to Legislature). See also Third New International Dictionary 1716 (P. Gove ed., 1971) ("pilot" means "serving on a small scale … in checking technique or cost preparatory to full scale activity"). Subdivision (a) is consistent with this common usage. Pilot programs may include programs initiated by the department of Corrections in response to a court order or negotiated settlement directing the Department to establish the program.

Subdivisions (b)-(d) provide that the exemption for regulations implementing a pilot program applies to amendment and repeal of a regulation, and not just adoption.

Subdivision (b)(1) requires that the certification that a regulation relates to a pilot program include a description of the pilot program and of the method by which the results of the pilot program will be evaluated.

Subdivision (b)(3) corrects an erroneous reference to Section 6(b)(3)(F) of Title 1 of the California Code of Regulations.

Subdivision (b)(4) ~~prohibits adoption of a pilot program that would have the same effect as another pilot program implemented under this section. This ensures that the two-year time limit on the effectiveness of regulations implementing a pilot program under this subdivision cannot be circumvented by readopting a pilot program, or by adopting a "new" pilot program that has the same effect as another pilot program adopted under this section.~~

~~Subdivision (b)(5)~~ corrects an obsolete reference to the State Administrative Manual.

Subdivision (d) makes clear that the duration of a rulemaking action implementing a pilot program is two years from the date that the pilot program commenced, regardless of when the rulemaking action is taken. Thus, a change to the regulations implementing a pilot program does not extend the two-year maximum duration of the program.

§ 5058.3. Emergency rulemaking

Proposed Penal Code Section 5058.3(a)(1) will be revised as follows:

5058.3. (a) Emergency adoption, amendment, or repeal of a regulation by the director or the director's designee shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except that:

(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency adoption, amendment, or repeal of a regulation shall be 160 days.

This effective period ~~can~~ may only be extended once, by an additional 160 days.

Clarification of Existing Law

The staff will draft minor clarifications of existing law for inclusion in the recommendation. These clarifications will be submitted to the Commission's chair, the Department of Corrections, Senator Polanco, and the Prison Law Office for review. If it is determined that the proposed clarifications would make substantive changes to existing law, or would prove controversial, the chair may direct the staff to remove the problematic clarification, or may direct the staff to prepare a memorandum discussing the proposed clarification for the Commission's consideration. In the latter case, approval of the final recommendation is suspended pending consideration of the memorandum. The proposed clarifications are as follows:

(1) Clarify that the special procedure for emergency rulemaking on the basis of operational necessity provides an alternative to the regular emergency rulemaking procedure and does not preclude use of the regular procedure.

(2) Clarify that the 160-day effective period applies to any rulemaking by the Department of Corrections, regardless of whether the department has proceeded on the basis of operational necessity or under the regular emergency rulemaking procedure.

(3) Clarify that the rule limiting the Department of Corrections to a single readoption of an emergency regulation only applies to regulations adopted on the basis of operational necessity. An emergency regulation adopted under the regular emergency rulemaking procedure may be readopted pursuant to Government Code Section 11346.1(h).

(4) Clarify that a reference to the director includes a reference to the director's designee, and delete all statutory references to the director's designee.

☐ APPROVED AS SUBMITTED

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

_____
Date

_____
Chairperson

_____
Executive Secretary