

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 6, 1978

A meeting of the California Law Revision Commission was held in San Francisco on October 6, 1978.

Law Revision Commission

Present: Howard R. Williams, Chairperson
Beatrice P. Lawson, V. Chairperson
Judith Meisels Ashmann
Laurence N. Walker

Absent: George Deukmejian, Senate Member
Alister McAlister, Assembly Member
George Y. Chinn
Ernest M. Hiroshige
Jean C. Love
Bion M. Gregory, Ex Officio

Staff Members Present

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

Consultant Present

Garrett H. Elmore, Guardianship-Conservatorship

Members of State Bar Subcommittee

Present: David C. Lee
Absent: Arne S. Lindgren, Chairperson
William S. Johnstone, Jr.
Hon. Arthur K. Marshall
Matthew S. Rae, Jr.
Ann E. Stodden

Other Invited Participants Present

W. Allen Bidwell, L.A. County Counsel's Office
G. Sinclair Price, Vice President & Regional Trust Counsel
United California Bank
Edward J. Wise, California Land Title Ass'n

ADMINISTRATIVE MATTERS

Minutes of September Meeting

The Minutes of the September 7-8, 1978, Commission Meeting, were approved as submitted by the staff.

Schedule for Future Meetings

The following schedule was adopted for future meetings. Note that the date for the January meeting has been advanced one week, the third day of the March meeting previously scheduled was canceled, and a meeting is scheduled for March 29-31 at Asilomar.

November

November 2 - 7:00 p.m. - 10:00 p.m. San Francisco
November 3 - 9:00 a.m. - 5:00 p.m.

December

December 7 - 7:00 p.m. - 10:00 p.m. Los Angeles
December 8 - 9:00 a.m. - 5:00 p.m.

January 1979

January 4 - 7:00 p.m. - 10:00 p.m. San Francisco
January 5 - 9:00 a.m. - 5:00 p.m.
January 6 - 9:00 a.m. - 3:00 p.m.

February

February 8 - 7:00 p.m. - 10:00 p.m. Los Angeles
February 9 - 9:00 a.m. - 5:00 p.m.

March

March 1 - 7:00 p.m. - 10:00 p.m. San Francisco
March 2 - 9:00 a.m. - 5:00 p.m.

March 29 - 7:00 p.m. - 10:00 p.m. Asilomar (Pacific
March 30 - 9:00 a.m. - 5:00 p.m. Grove)
March 31 - 9:00 a.m. - 12:00 noon

April

No Meeting

Schedule for Work--Priorities for Topics

The Commission considered Memorandum 78-59, which contained a report on the status of the topics on the Commission's agenda and staff suggestions as to priorities.

General decisions. The Commission determined to complete work on the guardianship-conservatorship revision, including consideration of problems raised in connection with the bills that are introduced to effectuate the Commission's recommendation on this subject.

The Commission determined that it would give a top priority to completing work on the enforcement of judgment recommendation with a view to submitting a recommendation on this subject to the 1980 Legislature.

The Commission determined that the study of community property should be given a top priority during the next few years with a view to submitting a recommendation on this subject to the 1982 legislative session. The first aspect of the topic--creditors' rights with respect to community property--will be included in the recommendation relating to enforcement of judgments. A consultant should be obtained on the equal management and control aspect of the topic shortly after the Commission has had an opportunity to consider the study on community property and creditors' rights therein.

The study of the Evidence Code was deferred and is to be considered only to the extent that it can be worked into the agenda for particular meetings without delaying work on priority topics. The same is true of the study of Civil Code Section 1464 and the study of dismissal for lack of prosecution.

Schedule for submitting recommendations. The following schedule was adopted as setting the goals for submitting recommendations to the Legislature on particular matters:

1979 Legislative Session

Guardianship-conservatorship revision (two or more bills)
Ad valorem taxes when property acquired for public use
Undertakings for costs

1980 Legislative Session

Enforcement of judgments
Evidence of market value
Assessment liens when property acquired by eminent domain
General assignments for benefit of creditors
Quiet title actions

1981 Legislative Session

Miscellaneous child custody revisions
Abandoning or vacating public streets and highways
Offers of compromise

1982 Legislative Session

Community property--equal management and control problems

1983 Legislative Session

Adoption--comprehensive revision

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The above schedule outlines the various matters that will be given some priority during the period covered by the schedule. The study of equal management and control problems with respect to community property will be given a top priority during this period, both in obtaining a consultant and in Commission consideration at meetings. Minor studies not listed may be worked into the meeting agenda for particular meetings to the extent staff time and Commission time permits. The schedule will be reviewed and revised next year in light of developments during the coming year and in view of any new topics added to the Commission's agenda by the next legislative session.

Stay of custody order of trial court while appeal is being determined. The staff was requested to send the pertinent portion of Professor Bodenheimer's article on this subject to the Family Law Section of the State Bar for review and comment. The comments of Judge Sims also should be solicited. When the views of the State Bar Section have been obtained, a memorandum should be prepared for the Commission.

Community property and creditors' rights. The staff reported that the State Bar Family Law Section (pursuant to resolution of the Conference of Delegates) has been requested "to formulate, and to present to the Conference of Delegates in 1979, a resolution to fix the liability of separate, community and quasi-community property for debts incurred by either spouse before marriage and at various times during and after marriage." The staff should write to the State Bar Family Law Section to advise the Section that the Commission is working on this matter and to attempt to coordinate the efforts of the State Bar and the Commission.

Child custody. The staff was requested to write to Professor Brigitte Bodenheimer to determine whether a major study of child custody is needed or whether particular areas only of child custody are in need of study. Also, if a study is needed in this area, the staff should request Professor Bodenheimer to suggest persons who might be qualified and willing to prepare a background study. The State Bar Family Law Section also should be requested to comment on whether a study is needed of child custody.

New Topics

The Commission considered Memorandum 78-64 and determined to request that the next legislative session add two new topics to the Commission's agenda of topics:

(1) Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

(2) Whether the law relating to powers of appointment should be revised.

Report on Statutes Repealed by Implication or Held Unconstitutional

The Commission considered Memorandum 78-60 and the First Supplement to Memorandum 78-60 and approved for inclusion in the Annual Report the report set out in the memorandum as supplemented in the supplement.

Annual Report

The following decisions were made with respect to the Annual Report.

(1) In the list of officers, the officers should be designated as "Chairperson" and "Vice Chairperson."

(2) "Judith Meisels Ashmann" should be substituted for "Judith Ashmann" and her place of residence is Los Angeles.

(3) "Nonprofit corporations" should be listed as a topic to be dropped from the agenda.

(4) The material in Appendix I of the last Annual Report should be omitted, but the List of Publications should be included in the Annual Report.

(5) The "Legislative History" and "Report on Statutes Repealed by Implication or Held Unconstitutional" should follow "Personnel of the Commission."

(6) The draft of the Annual Report should be revised to reflect the fact that the Governor vetoed one bill and to recognize the priorities established by the Commission for the next year or so.

(7) The Comments to AB 393 were approved for inclusion in the Annual Report.

With the above changes, the Annual Report was approved for printing.

STUDY F-30.300 - GUARDIANSHIP-CONSERVATORSHIP REVISION

Capacity of Conservatee

The Commission considered Memorandum 78-61 and the First Supplement thereto relating to the legal capacity of a person for whom a conservator has been appointed. The Commission approved the staff draft for inclusion in the comprehensive statute, with Section 1872 (effect of conservatorship on legal capacity of conservatee) revised to read as follows:

1872. (a) Except as otherwise provided in this article, upon appointment of a conservator of the estate, the legal capacity of the conservatee to bind or obligate the conservatorship estate is limited to transactions into which a reasonably prudent person might enter.

(b) Nothing in this section shall be construed to limit the powers and duties of the conservator under this division.

Community and Homestead Property

The Commission considered Memorandum 78-62 and the attached provisions relating to community and homestead property, along with a staff redraft of Section 3012 (definition of legal capacity), attached hereto as Exhibit 1 (pink). The Commission approved the provisions for inclusion in the comprehensive statute, with the following revisions:

§ 3012. Legal capacity. Subdivision (a) of the staff redraft was revised to read:

(a) A spouse has legal capacity to manage and control, including legal capacity to dispose of, community property and to join in or consent to a transaction involving community or homestead property unless the spouse lacks legal capacity under the applicable standard prescribed in subdivision (b)

§ 3057. Protection of rights of spouse who lacks legal capacity.

The last sentence of this section, which imposed the duty of a fiduciary on a conservator-spouse in managing and controlling the community property, whether or not included in the conservatorship estate, was deleted.

Conforming Revisions

The Commission considered Memorandum 78-40, the attached exhibits setting forth those conforming revisions presenting policy issues, and a staff draft of conforming revisions to Section 24175 of the Health and Safety Code which was handed out at the meeting and is attached to these

Minutes as Exhibit 2. The Commission approved the staff-proposed revisions to Civil Code Section 4510, Code of Civil Procedure Sections 153 and 304, Health and Safety Code Section 24175, and Probate Code Section 650. Two other sections were revised by the Commission as follows:

Civil Code § 4600. Order for child custody

The Commission revised subdivision (a) of Section 4600 of the Civil Code so that in the bill as introduced it will appear as follows:

4600. (a) In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such the child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to a nomination of a guardian of the person of the child by a parent under Article 1, (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

Probate Code § 202. Administration of community property

The Commission revised subdivision (d) proposed to be added to Section 202 of the Probate Code so that in the bill as introduced the subdivision will read:

202. (a)

(d) The election referred to in subdivision (b) or the election and agreement referred to in subdivision (c) may be made by the guardian or conservator without approval of the court in which the guardianship or conservatorship proceeding is pending.

Review of Redrafted Statute

The Commission considered Memorandum 78-43 (review of redrafted statute), the First Supplement to Memorandum 78-43, and staff drafts of proposed Sections 1865 and 2252 which were handed out at the meeting and are attached to these Minutes as Exhibits 3 and 4. Upon completion of the review of the redrafted statute, the Commission approved the statutory portion of the guardianship-conservatorship recommendation for printing subject to the changes listed below. The staff was authorized to make technical and editorial revisions, and revisions necessitated by other revisions made by the Commission. The staff advised the Commission that the preliminary part of the recommendation containing the

narrative summary would be presented to the Commission at the November meeting.

§ 1452. Trial by jury

The Commission deleted the last paragraph of the Comment to proposed Section 1452 which contained a discussion of whether there is a constitutional right to a jury trial in probate proceedings.

§ 1472. Compensation of mandatory court-appointed counsel

The Commission approved the staff draft of proposed Section 1472 (Exhibit 1 to the First Supplement to Memorandum 78-43).

§ 1513. Investigation and report by court-designated officer

The Commission approved the staff recommendation to revise subdivision (c) of proposed Section 1513 to substitute "the court may make an order" for "the court shall make an order."

§ 1827. Law and procedure applicable to hearing

The Commission revised proposed Section 1827 as follows:

1827. ~~(a)~~ The court shall hear and determine the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded.

~~(b) Demand for a court or jury trial shall be made within five days after the hearing on the conservatorship petition. A court or jury trial shall commence within 10 judicial days of the date of demand; except the court shall continue the trial date for a period not to exceed 15 judicial days upon the request of the legal counsel for the proposed conservatee.~~

The Comment should be appropriately revised.

§ 1860. When conservatorship terminates

The Commission revised proposed Section 1860 as follows:

1860. (a) A conservatorship continues until terminated by any of the following:

- (a) The death of the conservatee or by order of the court.
- (b) The marriage of a minor conservatee is adjudged a nullity.
- (c) Order of court.

(b) If a conservatorship is established for the person of a married minor, the conservatorship does not terminate if the marriage is dissolved or is adjudged a nullity.

The Comment should be revised accordingly.

§ 1865. Notification to county clerk of restoration of right to vote

The Commission approved the staff draft of proposed Section 1865 that was handed out at the meeting (see Exhibit 3 to these Minutes).

§ 2108. Additional powers and duties granted guardian nominated by will

The Commission discussed the possibility of expanding proposed Section 2108 to permit a will nominating a guardian to dispense with the requirement that the guardian make periodic accountings to the court, but the Commission decided not to make this change.

§ 2112. Application of federal Indian law

The Commission approved the staff draft of proposed Section 2112 (Exhibit 2 to the First Supplement to Memorandum 78-43).

§ 2252. Powers and duties

The Commission approved the staff draft of subdivision (e) to be added to proposed Section 2252 that was handed out at the meeting (see Exhibit 4 to these Minutes).

§ 2253. Change of conservatee's residence generally

The Commission revised subdivision (h) of proposed Section 2253 as recommended by staff (See Exhibit 5 to these Minutes).

§ 2254. Removal of conservatee from residence in case of emergency or with conservatee's consent for medical treatment

The Commission revised subdivision (a) of proposed Section 2254 as follows:

2254. (a) Notwithstanding Section 2253, a temporary conservator may remove a temporary conservatee from the temporary conservatee's place of residence without court authorization if an emergency exists. For the purposes of this section, an emergency exists if the temporary conservatee's place of residence is unfit for habitation or if the temporary conservatee has a medical condition which presents an immediate threat to the temporary conservatee's physical survival conservator determines in good faith based upon medical advice that the case is an emergency case in which the medical treatment is required because (1) such treatment is required for the the alleviation of severe pain or (2) the temporary conservatee has a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death .

The Comment should be revised accordingly.

§ 2354. Medical treatment of conservatee not adjudicated to lack capacity to give informed consent

The Commission revised subdivision (c) of proposed Section 2354 to refer to "serious disability of death" to correspond to the revision to proposed Section 2254 supra.

§ 2356. Limitations on application of chapter

The Commission approved the staff draft of proposed Section 2356 (Exhibit 4 to the First Supplement to Memorandum 78-43) with the following change to subdivision (a):

2356. (a) No ward or conservatee shall be placed in a mental health treatment facility under the provisions of this division against the ~~conservatee's~~ ward or conservatee's will of the ward or conservatee. Involuntary civil mental health treatment for a ward or conservatee shall be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

§ 2406. Submitting dispute to arbitration

The Commission discussed the possibility of including a specific provision for a petition for approval of an arbitration agreement and notice thereof, but the Commission decided not to do so.

§ 2420. Support, maintenance, and education

The Commission deleted from subdivision (d) of proposed Section 2420 the words "Subject to Section 2230 of the Civil Code," and deleted the last paragraph of the Comment (referring to Section 2230 of the Civil Code).

§ 2580. Petition for approval of proposed action

The Commission discussed the possibility of adding to Section 2580 language to authorize the court to direct modification of the conservatee's will to qualify for a charitable estate tax deduction, but decided not to do so.

§ 2625. Review of sales, purchases, and other transactions

The Commission approved the last paragraph of the Comment to proposed Section 2625.

§ 2644. Contingent fee contract with attorney

The Commission decided that proposed Section 2644 should be revised so that the guardian or conservator may petition the court for approval of a contingent fee contract already executed, or may petition for authorization to execute a contingent fee contract before such execution.

§§ 3700-3708 (personal property of absentees)

The Commission considered the staff suggestion that the Commission reverse its decision to increase the maximum amount of the absentee's property that may be set aside to the absentee's family from \$5,000 to \$20,000. The Commission decided to adhere to its earlier decision to recommend the increase.

EXHIBIT 1

§ 3012. Legal capacity

3012. (a) A spouse has legal capacity to manage and control, including legal capacity to dispose of, community property and to join in or consent to a transaction involving community or homestead property unless the spouse is a person described in subdivision (b).

(b) A spouse lacks legal capacity:

(1) To manage and control, including legal capacity to dispose of, community property if the spouse is substantially unable to manage or control the community property.

(2) To join in or consent to a transaction involving community or homestead property if the spouse does not have legal capacity for the particular transaction measured by principles of law otherwise applicable to the particular transaction.

(3) For any purpose described in this subdivision if the spouse has a conservator.

Comment. Section 3012 prescribes a definition applicable only for the purposes of this part. Section 3000. The legal capacity of a conservatee for other purposes is governed by Sections 1870 to 1896 (legal capacity of conservatee).

Subdivision (a) establishes a presumption that a spouse has legal capacity. Its effect is to impose a burden on a person seeking to show lack of capacity.

Subdivision (b)(3) implements the policy that a conservator of the estate acts for the conservatee under this chapter. See Section 3004 (defining "conservator"). This rule is consistent with the duty of the conservator to manage and control the conservatorship estate and provides needed certainty for property transactions.

Subdivision (b)(1) recognizes that a spouse not having a conservator may lack legal capacity to manage, control, and dispose of community property, if the spouse is substantially unable to do so. The standard of "substantial inability" is consistent with the grounds for appointment of a conservator. Section 1801(b) (person substantially unable to manage his or her own financial resources).

Subdivision (b)(2) recognizes that a spouse not having a conservator may lack legal capacity to join in or consent to a particular transaction, under principles of law otherwise applicable. See, e.g., Civil Code §§ 38, 39. Whether the spouse lacks capacity for the particular purpose depends upon the act involved and the standards otherwise applicable to determine capacity for that act.

It should be noted that a transaction may not be authorized under Chapter 3 (proceeding for particular transaction) against the wishes of a spouse lacking legal capacity for the particular transaction unless

the spouse is also a person for whom a conservator could be appointed. See Section 3145(a)(3). This continues the effect of former Section 1435.2 (transactions involving "incompetent spouse").

CROSS-REFERENCES

Definitions

- Community property, § 3002**
- Conservator, § 3004**
- Homestead, § 3010**

EXHIBIT 2

Staff DraftHealth & Safety Code § 24175 (amended). Consent to medical experiment

24175. (a) Except as otherwise provided in this section, no person shall be subjected to any medical experiment unless the informed consent of such person is obtained.

~~(b)~~ If an adult person, who is incompetent as defined in Section 1435.2 of the Probate Code, is under the care and custody of a guardian pursuant to Division 4 (commencing with Section 1400) of the Probate Code, informed consent for a medical experiment involving such person shall be obtained from such person's guardian.

~~(c)~~ (b) If an adult a person is under a conservatorship of the person or of the person and estate, pursuant to Division 5 4 (commencing with Section ~~1704~~ 1400) of the Probate Code, informed consent for a medical experiment involving such person shall be obtained from such person's conservator :

(1) As provided in Section 2354 of the Probate Code if the person has not been adjudicated to lack the capacity to give informed consent for medical treatment.

(2) As provided in Section 2355 of the Probate Code if the person has been adjudicated to lack the capacity to give informed consent for medical treatment.

~~(d)~~ (c) If an adult person who is gravely disabled, as defined in subdivision (h) of Section 5008 of the Welfare and Institutions Code, and is under a conservatorship of the person or of the person and estate, pursuant to Chapter 3 (commencing with Section 5350) of Article 8 of Part 1 of Division 5 of the Welfare and Institutions Code, informed consent for a medical experiment involving such person shall be obtained from such person, unless the conservator of such person has the right to consent to medical treatment on behalf of the conservatee, pursuant to subdivisions (c) and (d) of Section 5357 and Section 5358 of the Welfare and Institutions Code.

~~(e)~~ (d) If an adult person who is developmentally disabled, as defined in subdivision (a) of Section 4512 of the Welfare and Institutions Code, and has neither a guardian or no conservator and is

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mentally incapable of giving informed consent, informed consent shall be obtained for a medical experiment involving such person, pursuant to subdivision (c) of Section 4655 of the Welfare and Institutions Code.

~~(f)~~ (e) Informed consent given by a person other than the human subject pursuant to subdivisions (b) through ~~(e)~~ (d), inclusive, of this section shall only be for medical experiments related to maintaining or improving the health of the human subject or related to obtaining information about a pathological condition of the human subject.

Comment. Section 24175 is amended to delete former subdivision (b) which related to an adult incompetent person under guardianship. The Probate Code provisions relating to guardianship of an adult incompetent have been repealed in connection with the revision of guardianship-conservatorship law. Section 24175 is also amended to adopt by reference the Probate Code procedures for obtaining consent where the patient is subject to a Probate Code conservatorship. Other technical revisions are also made.

[Note. Section 24175 was enacted by 1978 Cal. Stats., Ch. 360.]

EXHIBIT 3

Staff Draft

§ 1865. Notification to county clerk of restoration of right to
vote

1865. If the conservatee has been disqualified from voting pursuant to Section 707.5 or 707.6 of the Elections Code, upon termination of the conservatorship the court shall notify the county clerk of the county of residence of the former conservatee that the former conservatee's right to register to vote is restored.

Comment. Section 1865 continues the substance of the eleventh sentence of former Section 1755 and the last paragraph of former Section 1851.1.

CROSS-REFERENCES

Definition, court, § 1418

EXHIBIT 4

Staff Draft

§ 2252. Powers and duties

2252. (a)

(e) The A temporary conservator shall not be permitted to sell or relinquish, on the conservatee's behalf, any lease or estate in real or personal property used as or within the conservatee's place of residence without the specific approval of the court. Such approval shall be granted only if the conservatee has been served with notice of the hearing, such notice to be served in the same manner as is provided for the service of the petition personally delivered to the temporary conservatee unless the court for good cause otherwise orders, and only if the court finds ; based upon a preponderance of the evidence; that the conservatee will be unable to return to the residence and exercise dominion over it, and that such action is necessary to avert irreparable harm to the conservatee. The temporary conservator shall not be permitted to sell or relinquish on the conservatee's behalf any estate or interest in other real or personal property without specific approval of the court, which may be granted only upon a finding based on a preponderance of the evidence that such action is necessary to avert irreparable harm to the conservatee. A finding of irreparable harm as to real property may be based upon a reasonable showing that ~~such~~ the real property is vacant, that it cannot reasonably be rented, and that it is impossible or impractical to obtain fire or liability insurance on ~~such~~ the property.

Comment.

Subdivision (e) continues the substance of the second, third, fourth, and fifth sentences of the last paragraph of former Section 2201. The requirement of personal delivery of notice to the temporary conservatee unless the court otherwise orders has been substituted for the former requirement that notice is "to be served in the same manner as is provided for the service of the petition." The former references to proof by a "preponderance of the evidence" have been omitted as unnecessary.

[Note. The staff has added subdivision (e) to proposed Section 2252 (powers and duties) to continue the substance of a portion of

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Senate Bill 1682 (Holmdahl) which has just been signed into law. 1978 Cal. Stats., Ch. 1268. The ~~strikeout~~ and underscore in the draft provisions above indicate changes made from the bill as enacted. Subdivision (e) also supersedes and replaces the last two sentences of subdivision (h) of proposed Section 2253 (change of conservatee's residence generally). The first sentence of subdivision (h) of proposed Section 2253 should be revised as indicated below.]

EXHIBIT 5

§ 2253. Change of conservatee's residence generally

2253. (a)

. . . .

(h) The Subject to subdivision (e) of Section 2252, the court shall also order the temporary conservator to take all reasonable steps to preserve the status quo concerning the conservatee's place of residence. [The remainder of subdivision (h) is deleted; appropriate adjustments should be made in the Comment to Section 2253.]

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STUDY J-100 - SECURITY FOR COSTS

The Commission considered Memorandum 78-53 and the attached staff draft of a recommendation relating to security for costs, proposing the repeal of six unconstitutional cost bond provisions and the revision of two others. The Commission approved the recommendation to print, subject to editorial changes submitted by the Commissioners to the staff.

APPROVED AS SUBMITTED _____

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

Date

Chairman

Executive Secretary