

0518a
April 3, 1986

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

Time

April 10 (Thursday) 2:00 p.m. - 8:00 p.m.
April 11 (Friday) 8:30 a.m. - 5:00 p.m.

Place

Red Lion Motor Inn
1929 Fourth Street
Eureka, CA 95501
(707) 445-0844

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Eureka

April 10-11, 1986

1. Minutes of March 13-14, 1986, Meeting (sent 4/2/86)
2. Administrative Matters
3. 1986 Legislative Program
Legislative Program Generally
Memorandum 86-32 (to be sent)
4. Study L - Assembly Bill 2625 - Comprehensive Probate Bill

Memorandum 86-33 (sent 3/28/86)
Amended AB 2625 (sent 4/2/86)
First Supplement to Memorandum 86-33 (sent 4/2/86)

5. Study L-1037 - Estate and Trust Code (Estate Management)

Generally

Memorandum 86-38 (sent 3/18/86)
Draft Statute (attached to Memorandum)
First Supplement to Memorandum 86-38 (to be sent)
Second Supplement to Memorandum 86-38 (to be sent)

Compromise of Claims and Actions; Extension, Renewal, or Modification of Obligations

Memorandum 86-39 (sent 3/28/86)
Draft Statute (attached to Memorandum)

Costs

Memorandum 86-42 (sent 3/28/86)

6. **Study L - Assembly Bill 2652 - Comprehensive Trust Bill**
Memorandum 86-34 (to be sent)
Amended AB 2652 (enclosed)
First Supplement to Memorandum 86-34 (sent 4/2/86)
7. **Study L-1026 - Estate and Trust Code (Presentation and Payment of Claims)**
Memorandum 86-35 (sent 3/28/86)
Draft of Tentative Recommendation (attached to Memorandum)
8. **Study L-1029 - Estate and Trust Code (Distribution and Discharge)**
Memorandum 86-36 (sent 3/21/86)
Draft of Tentative Recommendation (attached to Memorandum)
9. **Study L-1036 - Estate and Trust Code (Attorney's Fees)**
Memorandum 86-37 (enclosed)
Questionnaire (attached to Memorandum)
Background Study (attached to Memorandum)
10. **Study L-1030 - Estate and Trust Code (Distribution Without Administration)**
Memorandum 86-41 (sent 3/18/86)
11. **Study L-1045 - Estate and Trust Code (Definitions)**
Memorandum 86-31 (sent 2/26/86; another copy sent 3/21/86)
Draft Statute (attached to Memorandum)
12. **Study L - Terminology Used in Comments to Indicate How New Section Compares With Existing Law**
Memorandum 85-113 (sent 1/10/86; another copy sent 3/21/86)

To be Considered if Time Permits

13. **Handbook of Practices and Procedures**
Memorandum 85-107 (sent 12/12/85; another copy to be sent)
Draft of Revised Handbook (attached to Memorandum)
14. **Topics and Priorities for 1988 and Thereafter**
Memorandum 85-94 (sent 1/23/86; another copy to be sent)
First Supplement to Memorandum 85-94 (sent 1/23/86; another copy to be sent)
Second Supplement to Memorandum 85-94 (sent 3/5/86; another copy to be sent)

3/15/86

SCHEDULE FOR WORK ON ESTATE AND TRUST CODE

PORTIONS APPROVED FOR DISTRIBUTION FOR REVIEW AND COMMENT

Opening Estate Administration
Independent Administration

APRIL MEETING

Approve Tentative Recommendations for Distribution for Comment

Distribution and Discharge
Presentation and Payment of Claims

Approval for Distribution

Compensation, Commissions, and Fees (Staff Prepared Questionnaire)

Preliminary Consideration of New Material

Estate Management
Definitions

MAY MEETING

Approve Tentative Recommendations for Distribution for Comment

Definitions
Public Administrators
Establishing Identity of Heirs
Administration of Estates of Missing Persons Presumed Dead
Estate Management

Preliminary Consideration of New Material

Inventory and Appraisal (including Probate Referees)
Abatement
Distribution of Interest and Income
Allocation of Broker's Commissions
Ancillary Administration
Anti-Lapse Statute

JUNE MEETING

Approve Tentative Recommendation for Distribution for Comment

Inventory and Appraisal (including Probate Referees)
Ancillary Administration

Preliminary Consideration of New Material

Notices
Rules of Procedure
Orders
Appeals
Operative Date of New Code
Multiple-Party Accounts

JULY MEETING

Approve Tentative Recommendations for Distribution for Comment

Anti-Lapse Statute
Abatement
Distribution of Interest and Income
Notices
Rules of Procedure
Orders
Appeals
Operative Date of New Code
Multiple-Party Accounts

Preliminary Consideration of New Material

Compensation, Commissions, and Fees

Review for technical and substantive changes and prepare Comments

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

SEPTEMBER MEETING

Approve Tentative Recommendation for Distribution for Comment

Compensation, Commissions, and Fees

Preliminary Consideration of New Material

Conforming Revisions of Sections in Other Codes

Review Comments on Tentative Recommendations Sent Out For Comment

OCTOBER MEETING

Approve Text of New Estates and Trusts Code for Introduction

Arrange for introduction as preprinted bill

Approve Printing of Recommendation for Estates and Trusts Code

NOVEMBER AND DECEMBER

Staff prepares Recommendation for Printing

FEBRUARY 1987 MEETING

Printed bill available for review and distribution

MARCH 1987 MEETING

Printed Commission Recommendation Available for Distribution

Review Comments from Interested Persons on Bill Proposing New Code

NEW PROBATE STUDIES TO BE COMMENCED IN 1987

Prepare Statutory 630 Affidavit Form (for inclusion in new code)

Uniform Transfers to Minors Act

Make possible to make outright gift to remain in custody until
age 25

Co-custodians

Draft new Division 3 (Powers of Attorney; Powers of Appointment)

Claims Procedure for Trusts

Rights of Estranged Spouse

Anti-lapse and Construction of Instruments

Trustee's Use of Section 650 Procedure

Ancestral Property Doctrine

Directive to Physicians (Uniform Act)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
April 10, 1986
EUREKA

A meeting of the California Law Revision Commission was held in Eureka on April 10, 1986. Lacking a quorum, the members of the Commission present acted as a subcommittee.

Law Revision Commission

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

Absent: Arthur K. Marshall, Vice Chairperson
 Bion M. Gregory, Legislative Counsel
 Bill Lockyer, Member of Senate
 Alister McAlister, Member of Assembly
 Tim Paone

Staff Members

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

Other Persons Present

Phyllis Cardoza, Beverly Hills Bar Association Probate Section, Los Angeles
James D. Devine, State Bar Estate Planning, Trust, and Probate Law Section, Monterey
Michael Harrington, Los Angeles County Bar Association, Los Angeles
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View

ADMINISTRATIVE MATTERS

MINUTES OF MARCH 13-14, 1986, MEETING

The Minutes of the March 13-14, 1986, Meeting were approved as submitted by the staff.

FUTURE MEETINGS

Future meetings are scheduled as follows:

May 1986

15 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
16 (Friday)	9:00 a.m. - 4:15 p.m.	

June 1986

26 (Thursday)	3:00 p.m. - 8:00 p.m.	Monterey
27 (Friday)	9:00 a.m. - 4:00 p.m.	

July 1986

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

September 1986

4 (Thursday)	3:00 p.m. - 8:00 p.m.	Sacramento
5 (Friday)	9:00 a.m. - 4:15 p.m.	

November 1986

13 (Thursday)	3:00 p.m. - 8:00 p.m.	Orange County
14 (Friday)	9:00 a.m. - 4:00 p.m.	

December 1986

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

1986 LEGISLATIVE PROGRAM

The following report on the 1986 Legislative Program was presented to the Commission.

Enacted - Signed by the Governor

Assembly Bill 625 - Buol case urgency bill - provides that 1983 statute applies only to proceedings commenced after January 1, 1984

Passed by First House

Assembly Concurrent Resolution 93 - Continues Commission Authority to Study Topics Previously Authorized for Study

Set for Hearing in First House

Assembly Bill 2625 - Comprehensive Probate Bill (Disposition of Estate Without Administration; Small Estate Set-Aside; Proration of Estate Taxes; Technical and Clarifying Revisions) (Set for Hearing by Assembly Judiciary Committee on April 15)

Held in Committee in First House

Assembly Bill 2652 - Comprehensive Trust Statute (Heard by Assembly Judiciary Committee on April 1. Bill held in Committee because there were not enough members of the Committee voting in favor of the bill to report it out of the Committee)

Dead

Assembly Bill 2626 - Reservation of Legislative Power for Disposition of Property in Marriage Dissolution Cases (Heard by Assembly Judiciary Committee on February 25 and not sufficient votes in favor of bill to approve it)

Assembly Bill 2652. The Chairperson reported on the hearing on Assembly Bill 2652 (trust bill). Concerning spendthrift trusts, there was little, if any, support on the part of the legislative committee for the Commission's proposal to eliminate the right of an ordinary creditor to reach that portion of a periodic payment from the trust to the beneficiary that would be substantially equal to the amount that would be withheld by an employer on a like amount of earnings in case of a wage garnishment. Assembly Member McAlister offered an amendment to retain the substance of the existing law, and the legislative committee approved the amendment. The precise wording of the amendment is to be worked out by the staff of the legislative committee, Assembly Member McAlister, Assembly Member Connelly, and the staff of the Law Revision Commission.

The Chairperson reported that amendments were offered by Assembly Member McAlister with the agreement of the Chairperson to clarify the application of Section 16402 in a case where the trustee has no power to direct the act of the agent, no authority with respect to the selection or retention of the agent, and no authority to supervise the agent. The amendment revised paragraphs (5) and (6) of Section 16402 to reflect that these paragraphs will apply only to that case.

The Chairperson reported that the bill was defeated in the legislative committee because of the opposition of the California Trial Lawyers Association to Section 16442 of the bill. Section 16442 provides for a three times actual damages limitation on the award by the court of exemplary damages. Assembly Member McAlister agreed to

amend the section to provide for a limitation of three times the amount of actual damages or \$50,000, whichever is greater. As so amended, the bill was put to a vote of the legislative committee. The bill as so amended was opposed by the California Trial Lawyers Association and was defeated one vote short of the votes needed to approve the bill.

After considerable discussion, the Commission directed the Executive Secretary to seek to revive the bill. The Commission approved the amendments to Assembly Bill 2652 that are attached as Exhibit 1. If necessary to obtain enactment of the bill, the Executive Secretary is authorized to agree to the deletion of the provisions relating to spendthrift trusts from the bill and to the restoration of the existing provisions relating to spendthrift trusts. Before the bill is finally enacted, it should be made clear that the total of all court orders made under the new provision added to the spendthrift provisions should not exceed 25 percent of the amount paid to the beneficiary.

The Commission also approved the following revision of Civil Code Section 5110.150 and the Comment to that section. If Assembly Bill 2652 is approved by the Assembly Committee on Judiciary, the amendment to Civil Code Section 5110.150 will be made in the Senate.

Civil Code § 5110.150 (added). Revocable living trust of community property

5110.150. (a) Unless the trust instrument or the instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended before or after the transfer, provides that the trust is revocable as to that property during the marriage and the power, if any, to modify the trust as to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.

(b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal.

(c) The trustee may convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of the husband or wife unless the trust expressly requires the joinder or consent of one or both spouses.

(d) This section applies to a transfer made before, on, or after July 1, 1987. Nothing in this section affects the community character of property that is transferred before, on, or after July 1, 1987, in a manner or to a trust other than described in this section.

Comment. Section 5110.150 replaces former Section 5113.5. It should be noted that a transfer in trust by a married person is not exempt from the general limitations on transfers and transmutations by married persons acting alone. See Sections 5125 and 5127 (joinder or consent) and Sections 5110.710-5110.740 (transmutation).

Subdivision (a) states the rule that a revocable living trust of community property retains its community character regardless of the lack of other trust provisions referred to in former Section 5113.5. Although subdivision (a) is intended to be consistent with Revenue Ruling 66-283 in order to obtain community property income tax treatment for the trust property under Internal Revenue Code Section 1014(b)(6), whether the terms of a particular trust are sufficient to obtain such treatment is ultimately a matter of federal law.

One consequence of retention of its community character is that the trust property is subject to claims of creditors and to division at dissolution to the same extent as any other community property. See Civil Code § 5120.010 et seq.; Prob. Code § 18200 (creditors' rights against revocable trust during settlor's lifetime). Likewise, the interest of the decedent in the community property is subject to testamentary disposition at death unless a contrary method of disposition is provided in the trust instrument, as is typically the case. Prob. Code § 104. In this situation, the spouses' traditional community property right of testamentary disposition is substantially preserved by the unilateral power of revocation. See subdivision (b). Where the trust requires joint action for revocation, the trust could preserve the power of testamentary disposition by granting the first spouse to die a testamentary power of modification, appointment, or disposition as to the spouse's share of the community property.

Subdivision (b) establishes the presumption that either spouse acting alone may revoke the trust as to the community property. Prior law was not clear. The statute makes clear, however, that a unilateral revocation does not change the community property character of property received by the revoking spouse.

Subdivision (c) makes clear that the trustee may manage the trust community property in the same manner as other trust assets, free from the general limitations on disposition of

community property imposed on spouses, unless the trust expressly provides such limitations.

Section 5110.150 is not restrictive and does not provide the exclusive means by which community property may be held in trust without loss of its community character. See subdivision (d).

Assembly Bill 2625. The Executive Secretary reported that the legislative committee was unwilling to approve Assembly Bill 2625 at the hearing held on April 1. The legislative committee directed that the bill be amended before it is next heard to include amendments to deal with the concerns of the Los Angeles County Bar Probate Section. The bill was amended on April 8 to deal with those concerns. The amendment were drafted by the Commission's staff to reflect decisions acceptable to Commissioner Stodden. (It was not possible to reach the Chairperson to obtain his approval of the amendments.) The amendments were approved by the representative of the Los Angeles County Bar Probate Section who wrote a letter to the Assembly Committee on Judiciary giving the unqualified support of the Section for Assembly Bill 2625 as so amended.

The Commission approved the amendments made to Assembly Bill 2625 on April 8, 1986, but decided that the operative date of the bill should be January 1, 1987. This decision concerning the operative date was made with the understanding that the Judicial Council has withdrawn its objection to the operative date of the bill being January 1, 1987.

STUDY L-1026 - ESTATE AND TRUST CODE (CREDITOR CLAIMS)

The Commission considered Memorandum 86-35, containing a draft of the provisions relating to creditor claims, along with a memorandum distributed at the meeting by Phyllis Cardoza on behalf of the Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association (copy attached as Exhibit 2 to these Minutes). The Commission made the following decisions with respect to the draft of the provisions:

§ 9001. Notice to creditors. The State Bar reported that it is working on a draft, together with a statement of reasons, of the concept of requiring service of notice on known creditors in addition to publication, with a 4 month cutoff of claims and ability of the personal representative to waive a formal claim in the case of a creditor who becomes known during the 4 month period. Any creditor who fails to receive actual notice would be able to make a claim for a period of up to one year, upon a showing that notice was not received. The Commission will await the State Bar draft on this matter before taking further action. The Commission requested the Bar to also take into consideration the following concepts:

(1) Failure of the decedent to pay a periodic bill or payment for 90 days puts the creditor on notice of the decedent's death.

(2) Amendments of defective claims after the time for submission.

(3) Whether a creditor who receives actual notice should have 30 days to make a claim or 4 months if the notice is given at the opening of estate administration.

§ 9050. Four month claim period. In the Comment the word "nonclaim" should be changed to claim.

§ 9100. How claim is made. Failure of the creditor to serve a copy of the claim on the personal representative should affect the validity of the claim. The claim form should state clearly that the copy must be served, and should include a form for return of proof of service. Because service is now mandatory, the statute should be rephrased that a claim is made by filing and serving within the prescribed time. These changes should be called to the attention of the full Commission at the next meeting.

§ 9102. Claim founded upon written instrument. The cross-references should include a reference to Section 9151 (enforcement of security interest). The staff should also investigate use of the phrase "at" chambers as opposed to "in" chambers.

§ 9103. Where personal representative is creditor. This section should be relocated to the provisions relating to allowing claims.

§§ 9150 et seq. Claims in civil actions. The Commission will review these provisions at a future meeting taking into account the comments of the Beverly Hills Bar Association and the trial lawyer who

has worked with them to suggest improvements in the law in this area. To some extent, the claims procedure proposed by the State Bar may also impact on this area.

§ 9250. Claim by public entity required. In this section "article" should be change to "chapter" and "chapter" should be changed to "part". The Comment should note that obligations owed to the United States are not covered by the section.

§ 9251. Claims governed by other statutes.

§ 9254. Claim by Director of Health Services. The staff should pick up any changes in the law affecting these sections that go through this year. It is also possible that the general notice to creditor procedures may eliminate the need for these sections. If so, the staff should work with the affected governmental agencies on this. Cross-references to this section might be added to the general notice and creditor notice provisions, or subdivision (a) might be relocated to the notice provisions.

§ 9300. Procedure by personal representative. The Comment should include a note that claims under Independent Administration are not ordinarily approved by the court, but certain claims involving interested parties are. The claim form (or perhaps the notice of allowance or rejection form) should note that the claimant has 3 months in which to bring an action on a rejected claim.

§ 9303. Allowed and approved claims. Subdivision (a) should be relocated to payment of claims.

§ 9305. Failure of personal representative or court to act. In the Comment, the reference to Section 9304 should be changed to 9305. A cross-reference should be made to Section 9302 on tolling the statute of limitations. The staff should check out the appropriate conforming change noted in the Note.

§ 9306. Action on rejected claim. The staff should see whether the contingent claim provision of subdivision (a) can be worked into the existing concept of payment into a trust fund so that the estate can be closed. The drafting of subdivision (b) should be tightened up, perhaps by combining the two sentences into one. The statute should require the action to be brought in the county in which the probate proceeding is pending.

§ 9307. Reference to determine disputed claim. The reference to Section 9304 should be changed to 9305. The reference to "statement of decision" should be conformed to Code of Civil Procedure Section 632, so that a writing is not required. The section might be generalized to apply to all disputes, not just to disputed claims. If the section is generalized and relocated, perhaps a cross-reference should be left in the claims provisions.

§ 9308. Submission of claim to arbitration. This section might be generalized to apply to all disputes, not just to disputed claims. If the section is generalized and relocated, perhaps a cross-reference should be left in the claims provisions. The fact that the arbitration is binding might be noted in the Comment.

§ 9350. Money judgment against decedent. Subdivision (a) should provide that the judgment is not enforceable "by execution or otherwise". In subdivision (b) the reference to "presented" claims should be deleted. The Comment should note that this applies to federal judgments as well.

STUDY L-1038 - ESTATE AND TRUST CODE (ATTORNEY'S FEES)

The Commission considered Memorandum 86-37 and the attached questionnaire. The Commission made the revisions in the questionnaire indicated below and approved sending the revised questionnaire to the persons and organizations that have indicated an interest in probate law.

Make Questionnaire More Compact

The Commission requested the staff to seek to make the questionnaire more compact so that it would not appear to be as burdensome to answer.

Cover

In the second paragraph of the cover, the substance of the following should be added: "YOU ARE NOT EXPECTED TO REFER TO YOUR RECORDS TO ANSWER THIS QUESTIONNAIRE. YOUR ANSWERS CAN BE BASED ON THE BEST ESTIMATE YOU CAN MAKE WITHOUT CONSULTING YOUR RECORDS

6. Types of Decedent's Estates You Handle

An additional part should be added to this question:

Of the decedents' estates you handle that are covered by a living trust, give your estimate of the percentage where a small amount of the assets are "probated" in order to cut off claims of creditors. _____ percent

Question 7. Sizes of Decedent's Estates You Handle

In the last sentence of the italic instructions, "four" was changed to "five."

Question 8. Keeping Time Records

This question should be drafted so that it can be determined what the practice is in a case where there is an ordinary probate covered by a statutory fee and what the practice is in a case where there is no ordinary probate.

Question 9. Use of Paralegal Assistants

Two additional questions should be asked:

(1) Where you claim a fee for extraordinary services, do you show the cost for the services of a paralegal at a paralegal's rate?

(2) How do you define a "paralegal assistant"?

Question 11. Method of Handling Estates You Handle

An additional category should be added to this question:

(d) Use Section 650 petition for some assets and use regular probate administration for other assets.

Question 19. Attorney as Executor or Trustee

This question was deleted.

Question 20. Your Suggestions for Changes in Existing Attorney Fee Provisions

"\$10 million" was substituted for "\$1 million" in part (c) of question 20.

Additional Suggestion

The staff should make an effort to obtain completed questionnaires from as many probate lawyers as possible. It was suggested that local probate bar sections be asked to assist in obtaining the cooperation of members of their sections in completing the questionnaire.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

EXHIBIT 1

84953
RECORD #

110 BF:

APR 15 1986 86105 9:29
RN 86 007871 PAGE NO. 1

Substantive

AMENDMENTS TO ASSEMBLY BILL NO. 2652
AS AMENDED IN ASSEMBLY MARCH 31, 1986

Amendment 1

On page 44, between lines 18 and 19, insert:

15306.5. (a) Notwithstanding a restraint on transfer of the beneficiary's interest in the trust under Section 15300 or 15301, and subject to the limitations of this section, upon a judgment creditor's petition under Section 709.010 of the Code of Civil Procedure, the court may make an order directing the trustee to satisfy all or part of the judgment out of the payments to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined or determines in the future to pay to the beneficiary.

(b) An order under this section may not require that the trustee pay in satisfaction of the judgment an amount exceeding 25 percent of the payment that otherwise would be made to, or for the benefit of, the beneficiary.

(c) An order under this section may not require that the trustee pay in satisfaction of the judgment any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support.

(d) An order for satisfaction of a support judgment, as defined in Section 15305, has priority over an order to satisfy a judgment under this section. Any amount ordered to be applied to the satisfaction of a judgment under this section shall be reduced by the amount of an order for satisfaction of a support judgment under Section 15305, regardless of whether the order for satisfaction of the support judgment was made before or after the order under this section.

(e) If the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in this section affects or limits that discretion in any manner. The trustee has no duty to oppose a petition to satisfy a judgment under this section or to make any claim for exemption on behalf of the beneficiary. The trustee is not liable for any action taken, or omitted to be taken, in compliance with any court order made under this section.

Amendment 2

84953

86105 9:29

RECORD #

130 BF:

RN 86 007871

PAGE NO. 2

On page 44, line 34, after "15306," insert:

15306.5,

Amendment 3

On page 81, lines 32 and 33, strike out
"approves, knowingly acquiesces in, or"

Amendment 4

On page 81, strike out lines 36 and 37 and
insert:

where the trustee knows of the agent's

Amendment 5

On page 84, strike out lines 24 to 28, inclusive.

EXHIBIT 2

Phyllis Cordozo
Independent Legal Assistant

1100 Glendon Avenue, Suite 1529
Los Angeles, California 90024
(213) 879-4174
(213) 208-6087

April 9, 1986

BY HAND TO COMMISSION MEETING ON APRIL 10, 1986

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Study L-1026, Memorandum 86-35
Creditor Claims

Dear Mr. DeMouilly:

I am writing on behalf of the Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association.

We have examined the draft of tentative recommendation, in addition to surveying the members of the Section, and have the following comments:

Chapter 1. General Provisions

§9001. Notice to creditors

Aside from the larger question of actual notice to all creditors, we appreciate the reference in the Comment to the notice requirements to public entities.

Regarding actual notice, while several members of the Legislative Committee favor it, the survey of the members of our Section found that all of those responding ~~are~~ against it for the following reasons:

1. An investigation to find known or unknown creditors, as well as mailing the notice of death with a claim form to those creditors, would be burdensome on the personal representative;
2. If creditors who did not receive notice could file late claims, the administration of the estate could be unduly lengthened.

However, if actual notice to creditors were to be required, our Section members are evenly divided on filing the notice with a proof of service.

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
Re: Study L-1026, Memorandum 86-35
April 9, 1986
Page 2

Chapter 2. Time for Making Claims

§9050. Four month claim period

We suggest the second sentence of the Comment, which begins the same period if a special administrator has general powers, be incorporated into the code section. In addition, shouldn't the second word after the comma be "claim" rather than "nonclaim"?

Chapter 3. Making of Claims

§9100. How claim is made

Subsection (a):

At the June, 1985 meeting, I recall that the Commission talked about filing the claim with the clerk within the time the claim is required to be made, as well as serving a copy of it within that time. Thus, we suggest the following language added at the end of Subsection (a):

"A claim . . . the clerk, within the time prescribed in Section 9050."

Subsection (c):

If this is not done, then if the claim is not served on time, as set forth in the last sentence of Subsection (c), there is no way to assure the claim is timely made.

Additionally, if failure to serve on the personal representative does not affect the validity of the claim, how can the personal representative learn about the claim in order to allow or reject it? Would the representative now be expected to go to the courthouse to examine every probate file at the end of 4 months after appointment (and 30 days after actual notice) to be sure no one filed a claim?

Finally, the last sentence of the Comment would seem to contradict the last sentence of Subsection (c).

§9102. Claim founded upon written instrument

We suggest a cross reference to §9151, Enforcement of security interest.

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
Re: Study L-1026, Memorandum 86-35
April 9, 1986
Page 3

Chapter 3. Making of Claims, cont.

§9104. Form of claim.

Regarding amendments to claims, we suggest the following language:

"Regardless of any defects in the form of a timely filed claim, amendments may be made after the deadline for submitting the claim but before the claim is allowed or rejected by the personal representative. These amendments could include addition of verification by the claimant, changing the amount, elaboration of the description of the claim, and addition of supporting documents."

To comply with Section 9100(c), the Judicial Council claim form itself should contain a proof of service form similar to that in the Notice of Hearing (Probate) form.

Chapter 4. Claims in civil actions

§9152. Claim involving pending action

Our Section members polled are against the requirement in Subsection (a) that a claim be made if an action was pending at date of death.

§§9152, 9153, 9154

Our Legislative Committee consulted with experienced trial attorney Jeffrey S. Pop (9025 Wilshire Blvd., Suite 415, Beverly Hills, CA 90211). Mr. Pop has drafted proposed language to amend these sections, which we have discussed and attach to this letter for the Commission's consideration. Note that Sections 9152 and 9153 are combined into one section, and Section 9154 is substantially the same except for the addition of a final subparagraph.

Our Section members polled want the *defending the pending action* personal representative or insurance company to give notice of death to the opposing party in a cause of action.

When asked if the Section members wanted to bring wrongful death actions into estates, the answer was a resounding no!

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
Re: Study L-1026, Memorandum 86-35
April 9, 1986
Page 4

Chapter 6. Claims by Public Entities

§9254. Claims by Director of Health Services

Aside from cross-referencing in the general notice statutes, we suggest a cross-reference to §9001 re notice to creditors.

Perhaps the Judicial Council could add the following language to the instructions under Attachment 8 of the Petition for Probate form to alert the petitioner to the necessity for notice to the Director:

" . . . and including the Director of Health Services if notice is to be given under Probate Code Section 9254 with a copy of the death certificate."

Chapter 7. Allowance and Rejection of Claims

§9300. Procedure by personal representative

Subsection (b):

Along the lines of the letter from Judge Harlan K. Veal of San Mateo County Superior Court, we suggest the addition of a subsection (9) as follows, in order to alert the claimant and the personal representative that the claim cannot be allowed under the Independent Administration of Estates Act but must be submitted to a court under Section 9301:

"(9) Whether the claimant is the personal representative, attorney for the personal representative and had previously represented the decedent, or a judge of the court before whom the estate is pending."

Perhaps a cross-reference should be added to Section 7062 regarding disqualification of judge as creditor.

Subsection (c):

Are the first and second sentences about satisfying these requirements in the Judicial Council form contradictory?

Perhaps a line could be added to the prescribed Judicial Council form to the effect that:

"To the claimant: If your claim is rejected, you have three months from the date of service of this rejection to file an action [in the probate court] under Probate Code Section 9306."

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Chapter 7. Allowance and Rejection of Claims, cont.

§9301. Procedure by court

Again, to alert the clerk of the court to the necessity of presenting the claim to the court, we suggest adding to the end of the first sentence the following:

" . . . Estates Act, or if claimant is a person described in Section 9300(b)(9):

In addition, as mentioned in the "Disposition of Repealed Sections for §707(a), a cross reference here to Government Code §§69845-6 would be helpful (register of actions; preservations of records).

9306. Action on Rejected Claim

Subsection (a):

Subsection (2):

Our Section members responding to our poll determined that the suit should be filed within 3 months after notice of rejection even if the debt is not due until a future time. The theory advanced by our Legislative Committee is that the rejection of the future debt is an anticipatory breach. Therefore, why should the claimant have to wait until perhaps years to sue, which also would unduly delay the closing of the estate.

Interrelationship with Section 9305:

If the personal representative fails to act on a claim, and the claimant deems it rejected after 30 days (under Section 9305), it isn't clear if the three-month period for filing suit on a rejection begins on that 30th day.

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Chapter 7. Allowance and Rejection of Claims, cont.

9306. Action on Rejected Claim, cont.

Subsection (a), cont.:

Thus, we propose that Subsections (1) and (2) be combined and added on to Subsection (a) as follows:

"9306. (a) A rejected claim is barred unless the claimant brings an action on the claim or the matter is referred to a referee or to arbitration, within the following time, excluding the time there is a vacancy in the administration, within three months after the date of service of the notice of rejection, or of the time it is deemed rejected under Section 9305, whether or not the claim is then due."

Subsection (b):

We suggest eliminating the duplication of language so that it reads as one sentence:

" . . . in the estate proceedings a notice of the pendency of the action, which shall be mailed to the personal representative"

Did the Commission wish to eliminate the language that formerly was at the end of the section? If so, note of the removal should probably be in the Comment. It read as follows:

"Personal service of a copy of the summons and complaint upon the personal representative within the 10-day period is equivalent to filing the notice."

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Chapter 7. Allowance and Rejection of Claims, cont.

9306. Action on Rejected Claim, cont.

Proper county for filing action:

In Estates of Zimmerman ("E001346) 64 MetNews 6, P. 1 (1-13-86) and the modification filed February 27, 1986 but declared not for publication, the 4th District, Division 2, judges were confused about the "proper county" for filing the action. The first opinion said it must be the county of the probate proceeding, but the second opinion said if the action was brought in the "wrong" county, it could be transferred to the estate's county, referring to Code of Civil Procedure Section 396 as controlling.

Our Section members were evenly divided on whether the action may originally be brought only in the estate's county. Perhaps this should be cleared up here.

Note re hearing civil actions in probate court:

Our Section members polled overwhelmingly agree, but only if more judges and commissioners are assigned to the probate courts. However, they would not want a jury trial in probate court.

If the probate court did not have jurisdiction to hear actions on rejected claims, our Section members would then want them to have priority in civil court, as drafted into proposed §9152(a) as drafted by Attorney Pop (below).

If the Commission retains the concurrent jurisdiction of the probate court over creditor claims, perhaps this major change in policy should be set out in a separate code section, rather than in a cross-reference.

§9307. Reference to determine disputed claim

First sentence, third line:

Should the reference be to Section 9305 instead of 9304?

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Chapter 8. Claims Established by Judgment

§9350. Money judgment against decedent

Subsection (a):

Subsection (3):

Add to the end of the sentence:

" . . . ; provided, however, that if the judgment is for money not yet due, said judgment shall not accelerate the date of payment, but the distributees shall take the assets subject to said judgment."

Subsection (b):

Delete "or presented" from the second line, as we no longer have presentation of claims under §9100(a).

Additional Matters

We call the Commission's attention to the following present Probate Code Sections which would be appropriate in this draft of provision re presentation of creditor claims:

§§578a and 718.5 regarding compromise of claims

Thank you for your attention to our comments.

Sincerely,


PHYLLIS CARDOZA

cc: Beverly Hills Bar Association Probate, Trust, and Estate Plng. Section
Sussan H. Shore, Esq., Chair of Section
Laura K. Horwitch, Esq., Chair, Legislative Committee
Jeffrey S. Pop, Esq.

MORE . . .

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ADDENDUM

Chapter 4. Claims in Civil Actions

§9152. Claim against decedent or made by decedent's representatives

9152. (a) All claims including pending actions filed in Superior Court against decedent shall be entitled to the priority granted under Code of Civil Procedure §36(b).

(b) In order to bring an action against the decedent or maintain an action pending at the time of death, the plaintiff shall make a claim ^{within} ~~at least~~ 30 days ^{of receipt of} ~~after~~ actual notice ^{of the decedent's} ~~to the~~ ^{death, or within} ~~plaintiff, but not less than~~ 4 months after issuance of Letters to the personal representative, ^{whichever is later} in the same manner as if no action is pending. However, the plaintiff shall not be required to make a claim if the plaintiff is not notified in writing of its obligation to present such a claim by the decedent's representatives or by any insurance company representing the decedent's interests.

(c) Any written notification required by §9152(b) shall be of no effect and void unless given at least 30 days before the order for filing distribution of the decedent's estate.

(d) Notwithstanding subdivision (a) of this Section 9152, if the claim is not made within the time for making a claim, the court may thereafter allow the claim to be filed, upon the claimant's verified petition and notice of hearing given pursuant to Section [1200.5], if the court finds that the claim was not timely made because neither the claimant nor the claimant's attorney had actual knowledge of the decedent's death at least 20 days before expiration

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① Had actual knowledge of the claim and failed to take the appropriate action to advise the claimant of the decedent's death, pursuant to the provisions of this Chapter, such person

Chapter 4. Claims in Civil Actions, cont.

§9152. Claim against decedent or made by decedent's representatives, cont.

of the time for making a claim. No relief shall be granted unless the petition is filed within a reasonable time after discovery of the decedent's death, and in any event within one year after expiration of the time for making a claim and before the petition for final distribution has been filed. Allowance of the claim shall be on such terms as may be just and equitable, and shall be subject to the following conditions:

(1) Any property distributed pursuant to court order or any payment properly made before notice of the petition is served is not subject to the claim.

(2) If, at the time of filing the petition, assets of the estate have been paid to general creditors or distributed by decree of preliminary distribution to heirs or devisees [in either case after expiration of the time for making a claim], and it appears that the filing and later establishment of the claim, in the circumstances, would cause or tend to cause unequal treatment between heirs, devisees, or creditors, then permission to file the claim shall be denied.

(3) Neither the filing of a claim pursuant to this section nor its later establishment, in whole or in part, shall make property distributed pursuant to court order or any payments properly made before notice of the application subject to the claim. ^{Unless} ~~The~~ personal representative, distributee, or payee ^① is not liable on account of the prior distribution or payment.

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Chapter 4. Claims in Civil Actions, cont.

§9152. Claim against decedent or made by decedent's representatives, cont.

Regarding proposed Section 9152(b):

While our Probate Section members disfavor the filing of a claim where there is a pending action that is secured or insured, the Legislative Committee has the following ideas if the action is not pending:

1. The personal representative should check the civil index for actions as of the decedent's date of death, in the following counties:
 - a. residence
 - b. principal place(s) of business
 - c. real property ownership
 - d. probate proceedings
2. Once the personal representative acquires actual knowledge in this manner of any cause(s) of action, the representative gives written notice to the plaintiff, filing the original with a proof of service. Thereupon, the plaintiff must file a claim within 30 days or 4 months (pursuant to proposed Sections 9001 and 9051).

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Chapter 4. Claims in Civil Actions, cont.

§9153. Claims covered by insurance

9153. (a) Notwithstanding any other provision of law and without prior court approval, the making of a claim shall not be required, and a civil action that commenced before or after the death of the decedent may be maintained, by a claimant to establish, to the limits of the insurance protection only, a liability of the decedent for which the decedent was protected by liability insurance.

(b) The action by the claimant under Subsection (a) above shall name as the defendant "Estate of (name of decedent), Deceased." Summons shall be served upon the insurer. Further proceedings shall be in the name of the estate, but otherwise shall be conducted in the same manner and have the same effect as if the action were against the personal representative. For good cause, the court in which the civil action is pending, upon motion of an interested person or upon its own motion, may order the appointment and substitution of a personal representative as the defendant.

(c) The insurer may deny or otherwise contest its liability by cross-complaint in the action or by an independent action against the claimant, but the judgment on the cross-complaint or in the independent action shall not adjudicate rights by or against the estate.

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Chapter 4. Claims in Civil Actions, cont.

§9153. Claims covered by insurance, cont.

(d) A judgment in favor of the claimant in an action pursuant to this section shall be enforceable only from the insurance protection and shall not create a lien upon any property of the estate.

(e) The remedies of this section are cumulative, and may be pursued concurrently with other remedies.

(f) Any insurer defending a claim under this Section 9153 shall file a claim against the decedent or his estate if the insurer desires reimbursement under its insurance policy for any liability arising out of its contractual relationship with the insured, such as any attorney fees or costs that may be reimbursed or paid to the insurer. If the insurer does not (1) file a timely claim in the same manner as if no action were pending, and (2) serve it upon any party who has brought the action which the insurer is defending, then the insurer is deemed to waive reimbursement from the decedent's estate for any and all claims which the insurer may have possessed against decedent's estate in accordance with the terms of its contractual relationship with the insured.

Regarding the above-proposed Section 9153(f):

The Legislative Committee would add that the insurer would also waive recovery of the deductible amount in the policy if it did not follow the last sentence of subsection (f).

XXX