

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 18-20, 1982

A meeting of the California Law Revision Commission was held in San Francisco on March 18-20, 1982.

Law Revision Commission

Present:	Jean C. Love, Chairperson (March 18-19 only)	Robert J. Berton
	Beatrice P. Lawson, Vice Chairperson (March 18-19 only)	Bion M. Gregory
		Thomas S. Loo
		David Rosenberg
Absent:	Omer L. Rains, Senate Member	Alister McAlister, Assembly Member

Staff Members Present

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

Consultants Present

Paul Basye, Property Law (March 18-19)
Gail B. Bird, Probate Law (March 18-19)
James L. Blawie, Property Law and Probate Law
Carol S. Bruch, Community Property (March 18-19)
Jesse Dukeminier, Real Property and Probate Law
Russell Niles, Real Property and Probate Law
Bruce Wolk, Community Property (March 19-20)

Others Present

James D. Devine, State Bar, Estate Planning, Trust and Probate Law
Section, Monterey
John McDonnell, State Bar, Estate Planning, Trust and Probate Law
Section, Oakland (March 18 only)
William H. Plageman, Jr., State Bar, Estate Planning, Trust and Probate
Law Section, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF THE JANUARY 1982 MEETING

The Minutes of the January 21-22, 1982, meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The following schedule for future meetings was adopted.

April

April 15 - 7:00 p.m. - 10:00 p.m. San Francisco
April 16 - 9:00 a.m. - 4:00 p.m.

May

No meeting

June

June 11 - 10:00 a.m. - 5:00 p.m. San Francisco
June 12 - 9:00 a.m. - 4:00 p.m.

July (previously scheduled)

July 22 - 7:00 p.m. - 10:00 p.m. San Francisco
July 23 - 9:00 a.m. - 5:00 p.m.
July 24 - 9:00 a.m. - 12:00 noon

CONSULTANTS' CONTRACTS

The Commission considered Memorandum 82-34 and Memorandum 82-35, relating to consultants' contracts. The following actions were taken by the Commission.

Contract with Professor Gerald F. Uelman. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor Gerald F. Uelman of Loyola Law School to prepare a background study on the statutes of limitations for felonies in California. The study is described in more detail in the Scope of Study Statement attached to Memorandum 82-34, which is to be revised to require that the study include (1) a discussion of federal law and (2) a discussion the extent to which changes in the law in this area may be made retroactive. The compensation for the study is to be \$4,000 and, in addition, not more than \$500 is to be provided for travel expenses of the consultant in attending Commission meetings and legislative hearings when requested to attend by the Commission through its Executive Secretary. The background study is to be submitted in the form of a draft of a law review article no later than March 1, 1983. In all other respects, the contract is to conform to the ordinary form of Law Revision Commission contracts with consultants retained to prepare background studies and is to include the additional provision set out on pages 3 and 4 of the Minutes of the January 18-20, 1982, Meeting of the Law Revision Commission.

Contract with Professor Bruce Wolk. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, an addendum to the contract with Professor Bruce Wolk, Agreement 1980-81(1), dated October 1, 1980, to extend the term of the agreement for one year and to change the date of termination from June 30, 1982, to June 30, 1983.

Contract with Professor Paul E. Basye. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor Paul E. Basye of the Hastings College of Law to provide not more than \$500 for travel expenses in attending meetings of the Law Revision Commission and legislative hearings on Law Revision Commission recommendations concerning the law relating to real property and probate. The contract is to expire on June 30, 1984.

Contract with Professor James L. Blawie. The Commission approved, and directed the Executive Secretary to execute on behalf of the Commission, a contract with Professor James L. Blawie of the School of Law, University of Santa Clara, to provide not more than \$500 for travel expenses in attending meetings of the Law Revision Commission and legislative hearings on Law Revision Commission recommendations concerning the law relating to real property and probate. The contract is to expire on June 30, 1984.

PRIORITIES FOR WORK DURING 1982

The Commission considered a portion of Memorandum 82-14 concerning the 1983 legislative program. The Commission determined that the study of intestate succession and wills should be given a top priority with the objective of submitting a comprehensive statute on these matters to the 1983 legislative session.

The Commission determined that the recommendation on creditors' rights in marital property should also be given a priority with a view of submitting a recommendation on this matter to the 1983 legislative session. In addition, to the extent staff resources and Commission meeting time permit, the staff should review the "dirty dozen" of California cases provided by Professor Reppy and the four code sections he listed to determine whether any one or more of those matters are matters in need of urgent legislative attention and could be made the subject of separate recommendations to the 1983 legislative session.

Consideration of the remainder of the memorandum was deferred.

1982 LEGISLATIVE PROGRAM

The following is a report of the 1982 legislative program of the Law Revision Commission.

Enacted

Assembly Concurrent Resolution 76 (Continues Authority to Study Topics)

Passed First House

Assembly Bill 707 (Enforcement of Judgments) (Heard by Senate Judiciary Committee on March 2 - substantial amendments being drafted)

Assembly Bill 798 (Conforming Changes - Enforcement of Judgments) (Heard by Senate Judiciary Committee on March 2 - held until AB 707 approved)

Assembly Joint Resolution 63 (Federal Pensions and Benefits Subject to State Marital Property Law) (Set for hearing by Senate Rules Committee on March 31)

Assembly Bill 2331 (Holographic Wills) (Set for hearing by Senate Judiciary Committee on March 30)

Assembly Bill 2341 (Escheat) (Set for hearing by Senate Judiciary Committee on March 30)

Senate Bill 203 (Interest Rate on Judgments)

Sent to Floor in First House

Assembly Bill 2643 (Pay-on-Death Accounts) (Approved by Assembly Judiciary Committee on March 24)

Approved by Policy Committee in First House; to be Heard by Fiscal Committee in First House

Assembly Bill 2416 (Marketable Title) (Approved by Assembly Judiciary Committee on February 24 with amendments)

Assembly Bill 2332 (Attachment) (Approved by Assembly Judiciary Committee on March 17)

Set for Hearing in First House

Assembly Bill 2750 (Bonds and Undertakings--Conforming Changes to AB 2751) (Set for hearing by Assembly Judiciary Committee on March 31)

Assembly Bill 2751 (Comprehensive Bonds and Undertakings Statute) (Set for hearing by Assembly Judiciary Committee on March 31)

Dead

Assembly Bill 325 (Nonprobate Transfers) (But see AB 2643--above--which would effectuate this recommendation in part)

STUDY L-602 - PROBATE LAW (INTESTATE SUCCESSION)

The Commission considered Memorandum 82-8 (intestate succession), the attached staff draft of Tentative Revisions of Intestate Succession Provisions of Uniform Probate Code, the First Supplement to Memorandum 82-8 (disposition of existing California intestate succession provisions), and the attached staff draft disposing of existing provisions. These were all approved by the Commission, except as noted below.

Intestate Share of Surviving Spouse in Separate Property

The Commission gave additional consideration to its earlier decision to recommend that all of the decedent's separate property should pass by intestacy to the surviving spouse unless the decedent has issue of some other union. The Commission considered either (1) retaining existing California law which gives a share of the decedent's separate property to the decedent's children, parents, or issue of parents (Prob. Code §§ 221, 223) in the case where the decedent's marriage has been of short duration, or (2) adopting the UPC scheme which gives the surviving spouse a fixed dollar share of separate property and divides any excess between the surviving spouse and children. However, the Commission rejected both of these alternatives. The Commission reaffirmed its original recommendation because in most cases it seems to carry out what the decedent would likely want, and it promotes simplicity in the administration of intestate estates by avoiding the need to sort out separate from community property.

Cutting Off the "Laughing Heir"

The Commission considered the argument that to eliminate inheritance by remote collaterals of the decedent (the "laughing heir") might increase the incidence of escheat. The Commission decided to adhere to its original recommendation to eliminate such inheritance because it greatly simplifies the problem of locating and giving notice to possible heirs, minimizes the possibility of an unmeritorious will contest brought by remote heirs for the purpose of coercing an unjust settlement, and avoids a windfall benefit to someone whom the decedent probably did not know.

Inheritance by Relatives of a Predeceased Spouse of Decedent

The Commission reconsidered its earlier decision to retain the provision of existing California law to permit inheritance by relatives of a predeceased spouse of a decedent (Prob. Code § 229). The Commission decided to replace inheritance by such persons with a procedure allowing such persons to claim property that has escheated. This will avoid the burdensome problem under present law of having to locate and give notice to relatives of a predeceased spouse. See Prob. Code §§ 229 (right of inheritance), 328 (notice must be given to "each heir"). Professor Blawie will send appropriate references to similar legislation in other states to assist the staff in drafting a statute for Commission consideration. The staff should consider whether persons dependent on the decedent and perhaps other persons should also be able to claim escheated property.

Distribution Per Capita or Per Stirpes

Both under existing California law and under the Commission's proposal to adopt the UPC rule of distribution, the following problem may occur: If the last surviving member of a generation disclaims his or her intestate share and is therefore treated as having predeceased the decedent (see Prob. Code § 190.6), that might result in the intestate estate being redistributed per capita at the next generation. The Commission was of the view that it should not be possible for a disclaimer to change the shares of other lines, and the staff should draft language to foreclose this possibility.

STUDY L-603 - PROBATE LAW (WILLS)

Consolidated Draft of Commission's Previous Decisions on Wills

The Commission considered Memorandum 82-9 (wills), the attached staff draft of Tentative Revisions of the Uniform Probate Code Provisions relating to Wills, and the First, Second, Third, Fourth, and Fifth Supplements to Memorandum 82-9. Except as noted below, the Commission approved Memorandum 82-9, the attached staff draft, and the various supplements.

Substantial compliance with execution formalities. The Commission reconsidered its earlier decision to recommend a substantial compliance provision which would permit the court in some cases to admit to probate a defectively executed will. The Commission decided to reject the substantial compliance doctrine. The UPC's execution provision being recommended by the Commission would significantly relax the California requirements for execution of a will, and the court should not have discretion to relax these minimal requirements still further.

Revocation by divorce. The Commission reaffirmed its earlier decision to approve UPC Section 2-508 to the effect that a divorce or annulment revokes dispositive provisions in favor of the former spouse unless the will expressly provides otherwise. However, the Commission decided to retain the California requirement that a final decree of dissolution or of nullity give notice to the parties of how the proceeding affects their wills (Civil Code § 4352), but to revise the notice in light of the proposed change of the law. The Commission was of the view that the interlocutory decree should contain a similar notice. The notice should also state what effect the law will have on other benefits such as life insurance.

Testamentary capacity of minors. The Commission decided to depart from existing California law and the UPC (which do not permit a minor to make a will) to permit an emancipated minor to make a will. This would apply to a minor who is emancipated either as provided in the Emancipation of Minors Act (Civil Code §§ 60-70) or under California decisional law (see Civil Code § 61). This may be accomplished by adding the power to make a will to the list of things an emancipated minor may do under Civil Code Section 63.

Bequest or devise to nonprofit charitable corporation appointed guardian or conservator. The Commission decided not to continue Probate Code Section 22.1 which makes invalid a bequest or devise to a nonprofit charitable corporation if within six months thereafter the corporation is appointed the testator's guardian or conservator. The section serves no useful purpose since it is so easily circumvented by a substitutional gift to a trusted friend, and the section unfairly penalizes the nonprofit charitable corporation. The section apparently does not invalidate a devise or bequest in a will executed after the corporation is appointed guardian or conservator, and this distinction cannot be justified.

Holographic will (Assembly Bill 2331). The Commission approved the amendments to Assembly Bill 2331 set forth in the Fifth Supplement to Memorandum 82-9, and the amendment orally reported by the Executive Secretary to include a subdivision (c) in Probate Code Section 53 to define "will" as the term is used in the section. The definition would be the UPC definition that "will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

Self-Proved Will

The Commission considered Memorandum 82-10 (self-proved will), and decided to reject the UPC provision that a will executed in proper form before a notary is conclusively presumed to comply with signature requirements for execution. The Commission was concerned that the conclusive presumption might preclude attack in meritorious cases, and that to include the notarization procedure might have the practical effect of requiring attorneys to have all wills notarized as a precautionary measure. The Commission found the existing California provision for the testimony of a subscribing witness to be presented by affidavit in uncontested cases (Prob. Code §§ 329, 1233) to be satisfactory.

Validity of Will Under Law of Another State or Country

The Commission considered Memorandum 82-11 and the First Supplement thereto. The Commission approved the staff recommendation to adopt UPC Section 2-506 in place of Probate Code Section 26, and to leave the question of choice of law as to revocation to case law development.

Reference to Matters Outside the Will

The Commission considered Memorandum 82-12 and made the following decisions:

(1) Approved the staff recommendation to adopt UPC Section 2-510 (incorporation by reference), but disapproved the staff-proposed revision of the UPC language. There was a division of opinion whether UPC Section 2-510 would preclude resort to surrounding circumstances to identify the writing to be incorporated or to show the testator's intent to incorporate. This question will ultimately be resolved in some UPC jurisdiction, and the Law Revision Commission Comment to the section should take no position on the question.

(2) Approved the staff recommendation to adopt UPC Section 2-512 (acts and events of independent significance).

(3) Disapproved the staff recommendation to adopt UPC Section 2-513 (separate writing identifying bequest of tangible personal property). The Commission thought this section was not of great importance in California because of the California provision authorizing holographic wills.

STUDY L-604 - PROBATE LAW (FAMILY PROTECTION)

Elective Share of Surviving Spouse

The Commission considered Memorandum 82-15 concerning elective share of surviving spouse. The Commission decided not to recommend that the surviving spouse be given any statutory share of the deceased spouse's separate property, preferring instead to include the surviving spouse within family maintenance legislation (see discussion below).

With respect to quasi-community property, the Commission decided to recommend that such property be treated upon the death of one spouse as though it were community property under California law, including giving the nonacquiring spouse testamentary power over half of the acquiring spouse's quasi-community property. However, people who become newly domiciled in California should have a limited period of time in which to elect not to have the property so treated. The staff should examine whether such a change in California law may be constitutionally accomplished, and in particular whether Paley v. Bank of America, 159 Cal. App.2d 500, 324 P.2d 35 (1958) (unconstitutional to give nonacquiring spouse testamentary power over half of acquiring spouse's quasi-community property) may no longer be good law. Both federal and state constitutional requirements should be considered. Professor Bruch agreed to provide a research memorandum on the constitutional question to the staff. The staff should distribute copies of this memorandum to the Commission when the draft statute is distributed.

The Commission was also of the view that California law should make clear that community property acquired while the spouses are domiciled in some other community property state is to be treated as community property when one of the spouses dies domiciled here. If this is done,

the quasi-community property provisions should be conformed so instead of applying to property acquired by the decedent while domiciled "elsewhere," they would apply to property acquired by the decedent while domiciled in a non-community property jurisdiction.

Family Maintenance Legislation

The Commission considered Memorandum 82-16 concerning family maintenance legislation and pretermission. The Commission approved in concept a family maintenance scheme which would permit the surviving spouse and minor or dependent children to obtain a long-term support order payable out of the estate and based on need. The staff should draft a proposed statute for Commission consideration. The staff should consider the following problems:

- (1) Whether persons other than the surviving spouse and children (e.g., the decedent's dependent parents) should be authorized to apply for a support award.
- (2) Whether lump-sum awards should be encouraged to avoid the need to hold the estate open for many years.
- (3) Whether the statute should have a recapture provision to prevent the decedent from defeating the family allowance by making inter vivos gifts.
- (4) Whether the right to family maintenance should be subject to waiver by agreement between the spouses.
- (5) Whether the pretermission statute is unnecessary in view of the decision to recommend family maintenance legislation which includes children.

Family Allowance, Small Estate Set Aside, Probate Homestead, and Exempt Property

The Commission considered Memorandum 82-17 and approved the staff recommendations, except that the staff was directed to draft provisions which consolidate the small estate set-aside provisions (Prob. Code §§ 640-647) with the provisions for collection of small estates by declaration (Prob. Code §§ 630-632). The purpose of the consolidated provisions will be to permit summary probate of small estates (not limited to personal property), and not to provide another support device.

Waiver of Rights in Spouse's Estate

The Commission considered Memorandum 82-13 and approved the staff recommendation to adopt UPC Section 2-204 (as modified) in place of Probate Code Section 80.

Item or Aggregate Theory in Community Property

The Commission considered Memorandum 82-38 concerning the item and aggregate theories for dividing community property at death. The Commission was of the view that, although the item theory appears not to create serious problems under existing practice, it would be useful to have statutory authorization for the probate court to make an aggregate theory division of community property at death in appropriate cases. The proposed section set out in the memorandum should be retained in the proposed legislation to get the reaction of persons who will be asked to comment. The staff should give further thought to the following problems:

(1) The problem of whether the item theory, when combined with the bar against dead-hand management, may invalidate half of many pecuniary legacies as suggested by Professor Reppy.

(2) The problem of valuing a legatee's half interest in a community property business, since the value of that interest may be less than half of the value of the whole interest because a half interest is not a controlling interest. Tax consequences may be important.

STUDY L-605 - PROBATE LAW (RULES OF CONSTRUCTION)

The Commission considered Memorandum 82-18 and the attached staff draft concerning rules of construction. The Commission approved the staff recommendations in the Memorandum, with the following exceptions:

(1) The Commission thought the language "persons born out of wedlock" in UPC Section 2-611 was obsolete in the context of California usage. The staff was asked to find suitable substitute language, such as "persons who establish a parent and child relationship."

(2) The Commission decided not to repeal existing Probate Code Sections 102, 103, 104, and 106, but to recodify those in the proposed legislation.

(3) The staff should review Section 1073 of the Civil Code (abolishing the inter vivos branch of the doctrine of worthier title) to see if the drafting might be improved, and if the section might better be consolidated with the section abolishing the testamentary branch of the doctrine.

STUDY L-606 - PROBATE CODE (CONTRACTS CONCERNING SUCCESSION
AND PROVISIONS RELATING TO EFFECT OF DEATH)

The Commission considered Memorandum 82-19 and approved the attached staff draft.

STUDY L-607 - PROBATE LAW (GENERAL PROVISIONS)

Disclaimers

The Commission considered Memorandum 82-20 pertaining to disclaimers. The staff will give further consideration to whether existing law should be revised to qualify disclaimers under Section 2518 of the Internal Revenue Code. As noted in the discussion of "Distribution Per Capita or Per Stirpes" supra, the Commission decided that exercise of the right to disclaim should not alter the shares of those who ultimately take.

Meaning of "Surviving Spouse"

The Commission considered Memorandum 82-21 and approved the adoption of UPC Section 2-802.

Effect of Homicide

The Commission considered Memorandum 82-22 and approved the adoption of UPC Section 2-803 in place of Probate Code Section 258.

STUDY L-608 - PROBATE LAW (CUSTODY AND DEPOSIT OF WILLS)

The Commission considered Memorandum 82-23 and the First Supplement. The Commission agreed with the staff recommendation not to adopt UPC Section 2-901 for deposit of a will with the court during the testator's lifetime. It was thought that any benefit to be gained by the provision was outweighed by the costs of storage, handling, and recordkeeping.

The Commission considered the possibility of recommending a provision for voluntary registration of a notice of the existence of a will such

as the system in effect in British Columbia or as provided in the International Wills Act. The Commission decided to include such a provision in the proposed legislation. The staff should draft language for Commission consideration, which would include a provision for confidentiality of the information registered as under the International Wills Act. (See Prob. Code § 60.8).

The Commission approved the staff recommendation to adopt the UPC Section 2-902 in place of Probate Code Section 320 (duty of custodian to deliver will after testator's death), except that the staff should consider whether the last sentence of UPC Section 2-902 (contempt sanction) should replace Probate Code Section 321 (petition and order for production of will) or whether the more detailed language of Section 321 is preferable.

STUDY L-609 - PROBATE LAW (INTERNATIONAL WILLS)

The Commission considered Memorandum 82-24 and the attached staff draft of the Uniform International Wills Act. The draft was approved as submitted.

STUDY L-610 - PROBATE LAW (ABSENTEES)

The Commission considered Memorandum 82-25 and the attached staff draft pertaining to the nonjudicial procedure for dealing with a limited amount of property of absent federal personnel. The staff draft was approved as submitted.

STUDY L-611 - PROBATE LAW (MISSING PERSONS)

The Commission considered Memorandum 82-26 and the attached staff draft of a statute relating to the appointment of a conservator for the estate of a person missing less than seven years. The staff draft was approved as submitted, but the staff is to consider some written suggestions of the State Bar.

The Commission also considered the First Supplement to Memorandum 82-26 and the attached staff draft dealing with the presumption of death

and the administration of estates of persons missing seven years. The Commission approved the draft as submitted but directed the staff to give consideration to whether substantive improvements might be made in the statute.

STUDY L-612 - PROBATE LAW (SIMULTANEOUS DEATH)

The Commission considered Memorandum 82-27 relating to simultaneous death and the 120-hour survival rule. The Commission disapproved the staff proposal to apply the 120-hour survival rule to the disposition of all property upon death, including joint tenancy, community property, life insurance, and property that passes by intestate succession or under a will. The Commission approved the 120-hour survival rule for property that passes by intestate succession (as provided in UPC Section 2-104) or under a will (as provided in UPC Section 2-601). The Commission decided that a 12-hour survival rule should apply in nonprobate situations if two or more persons die in a common accident or event. As applied to joint tenancy property, this rule would require evidence that a person survived for at least 12 hours in order to take by survivorship if the joint tenants die as a result of a common accident. In nonprobate situations, where the persons have not died as the result of a common accident, the Commission decided to retain the Uniform Simultaneous Death Act which applies if it is not established that the decedents died other than simultaneously. The staff will draft a statute to implement these decisions for consideration at the April meeting.

STUDY L-613 - PROBATE LAW (TESTAMENTARY ADDITIONS TO TRUSTS; LIFE INSURANCE AND OTHER TRUSTS)

The Commission considered Memorandum 82-28. The Commission approved the staff recommendation to continue the California statutory provisions on testamentary additions to trusts (Prob. Code §§ 170-171) and life insurance and other trusts (Prob. Code §§ 175-184). The draft section in Exhibit 2 to Memorandum 82-28 should be revised to add the word "not" to the third sentence so the sentence will read: "Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be

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held under a testamentary trust of the testator" This will conform the draft section to the UPC and existing California law, and will correct an inadvertent omission.

The staff should review the draft section for possible inconsistencies in the use of the terms "devise or bequest" in some places, and the use of the term "devise" in others. ("Devise" is a defined term which means a testamentary disposition of real or personal property. See UPC § 1-201(7).)

STUDY L-614 - PROBATE LAW (BEQUESTS TO MINORS)

The Commission considered Memorandum 82-29 and the attached staff draft relating to bequests to minors. The Commission directed the staff to recommend substantive changes in the bequests to minors statute to make it more useful. The staff should consider raising the amount of property that may be paid or delivered to a custodial parent under Probate Code Section 3401. The nature of property governed by the bequests to minors statute should also be considered. Since the bequests to minors statute is bound up with the Uniform Gifts to Minors Act (Civil Code §§ 1154-1165), the staff should consider revising the uniform act.

STUDY L-615 - PROBATE LAW (ESCHEAT)

The Commission considered Memorandum 82-30 and the attached staff draft relating to escheat of decedents' estates when there are no takers. The draft was approved as submitted.

STUDY L-616 - PROBATE LAW (DEFINITIONS)

The Commission considered Memorandum 82-31. The Commission approved the definitions set forth in the Exhibit, subject to revision of the definition of "quasi-community property" in view of the Commission's decision to treat quasi-community property as though it were community property. See discussion supra under heading "Elective Share of Surviving Spouse." If "community property" is ultimately to be a defined term, it should be defined to include community property acquired in some other community property state. See id.

STUDY L-601 - PROBATE LAW (NONPROBATE TRANSFERS)

The Commission considered Memorandum 82-36 and the attached staff draft of a Recommendation relating to Non-Probate Transfers. The Commission approved the staff draft for distribution for comment prefatory to introducing legislation at the 1983 session of the Legislature.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary