

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

September 19, 1983

<u>Time</u>	<u>Place</u>
Sept. 22 (Thursday) - 7:00 p.m. - 10:00 p.m. )	California First Bank
Sept. 23 (Friday) - 9:00 a.m. - 5:00 p.m. )	Sala Rosa, 10th Floor
)	530 "B" Street
)	San Diego, CA
Sept. 24 (Saturday) - 9:00 a.m. - 4:00 p.m.	Travelodge Tower at Harbor Island
	1960 Harbor Island Drive
	San Diego, CA 92101
	(619) 291-6700

REVISED

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Diego

September 22-24, 1983

September 22 (Thursday evening)

1. Minutes of June 2-4, 1983, Meeting (sent 7/22/83)

Special (2. Study M-100 - Statute of Limitations for Felonies  
order of (  
business (  
at 7:30 (  
p.m. (  
(

3. Administrative Matters

1983 Legislative Program

Memorandum 83-45 (sent 9/14/83)

Consultant Contracts

Memorandum 83-46 (sent 8/9/83)

Priority for Study of Topics

Memorandum 83-48 (sent 9/8/83)

First Supplement to Memorandum 83-48 (sent 9/12/83)

New Topics

Memorandum 83-47 (sent 8/9/83)

Budget for 1984-85

Memorandum 83-77 (sent 9/6/83)

Practices and Procedures

Memorandum 83-81 (sent 8/23/83)

Handbook (attached to Memorandum)

Memorandum 83-79 (sent 8/23/83)

First Supplement to Memorandum 83-79 (sent 9/12/83)

4. Study H-500 - Quiet Title
  - Memorandum 83-50 (sent 9/12/83)
  - Tentative Recommendation (attached to Memorandum)
5. Study H-402 - Dormant Mineral Rights
  - Memorandum 83-51 (sent 9/14/83)
  - Tentative Recommendation (attached to Memorandum)
6. Study D-326 - Bonds and Undertakings
  - Memorandum 83-52 (sent 8/9/83)
7. Study D-302 - Creditors' Remedies
  - Memorandum 83-53 (sent 8/23/83)
  - First Supplement to Memorandum 83-53 (sent 9/15/83)
  - Memorandum 83-69 (sent 8/9/83)
  - Memorandum 83-74 (sent 9/16/83)
8. Study H-510 - Rights Among Cotenants
  - Memorandum 83-85 (sent 9/8/83)
  - Tentative Recommendation (attached to Memorandum)

September 23 (Friday)

Special  
order of  
business at  
9:00 a.m.

- (9. Study L-655 - Probate Referees
  - ( Memorandum 83-62 (sent 9/6/83)
  - ( First Supplement to Memorandum 83-62 (sent 9/12/83)
  - (
10. Study L-704 - Statutory Forms for Durable Power of Attorney
  - Memorandum 83-61 (sent 9/6/83)
  - Draft of Tentative Recommendation (attached to Memorandum)
  - Senate Bill 762 (attached to Memorandum)
  - First Supplement to Memorandum 83-61 (sent 9/16/83)
  - Memorandum 83-78 (sent 8/23/83)
  - Draft of Legislation (attached to Memorandum)
11. Study L-650 - Execution of Witnessed Will
  - Memorandum 83-54 (sent 7/22/83)
  - Draft of Recommendation (attached to Memorandum)
  - First Supplement to Memorandum 83-54 (sent 9/12/83)
  - Second Supplement to Memorandum 83-54 (sent 9/14/83)
12. Study L-612 - Simultaneous Deaths and Survival
  - Memorandum 83-55 (sent 8/9/83)
  - Draft of Recommendation (attached to Memorandum)
  - First Supplement to Memorandum 83-55 (sent 9/12/83)
  - Second Supplement to Memorandum 83-55 (sent 9/14/83)
13. Study L-652 - Nonprobate Transfers
  - Memorandum 83-56 (sent 9/8/83)
  - 1983 Cal. Stats. ch. 92 (attached to Memorandum)

14. Study L-653 - Notice of Will

Memorandum 83-57 (sent 8/9/83)  
Draft of Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-57 (sent 9/12/83)

Special  
order of  
business at  
1:30 p.m.

(15. Study L-826 - Distribution of Decedent's Estate Without Administration

(  
( Memorandum 83-58 (sent 8/9/83)  
( Tentative Recommendation (attached to Memorandum)  
( First Supplement to Memorandum 83-58 (sent 9/15/83)

(16. Study L-654 - Ancestral Property Doctrine

(  
( Memorandum 83-63 (sent 8/23/83)  
( First Supplement to Memorandum 83-63 (sent 9/12/83)  
( Second Supplement to Memorandum 83-63 (sent 9/14/83)

17. Study L-810 - Independent Administration of Decedent's Estate

Memorandum 83-59 (sent 8/9/83)  
Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-59 (sent 9/16/83)

18. Study L-641 - Creditor's Right to Reach Payments From Trust

Memorandum 83-60 (sent 8/9/83)  
Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-60 (sent 9/12/83)  
Second Supplement to Memorandum 83-60 (sent 9/14/83)

19. Study L-626 - Wills and Intestate Succession (Technical and Substantive Revisions)

Memorandum 83-64 (sent 9/15/83)  
Assembly Bill 25 - 1983 Cal. Stats. ch. 842 (attached to Memorandum)

20. Study L-651 - Recording Affidavit of Death

Memorandum 83-73 (sent 8/9/83)  
Draft of Tentative Recommendation (attached to Memorandum)

21. Study L-656 - Bond for Special Administrator

Memorandum 83-82 (sent 9/6/83)  
Draft of Recommendation (attached to Memorandum)

22. Study L-700 - Periodic Review of Conservatorship

Memorandum 83-84 (sent 9/8/83)

23. Study L-640 - Construction and Interpretation of Trusts

Memorandum 83-86 (sent 9/15/83)

September 24 (Saturday)

24. Study F-640 - Marital Property Presumptions and Transmutations

Memorandum 83-65 (sent 9/14/83)  
Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-65 (sent 9/16/83)

25. Study F-641 - Limitations on Disposition of Community Property  
Memorandum 83-75 (sent 9/12/83)  
Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-75 (sent 9/16/83)
26. Study F-631 - Marital Agreements  
Memorandum 83-71 (sent 9/6/83)  
Draft of Statute (attached to Memorandum)
27. Study F-650 - Liability of Stepparent for Child Support  
Memorandum 83-67 (sent 8/9/83)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 83-67 (sent 9/15/83)
28. Study F-632 - Reimbursement of Educational Expenses  
Memorandum 83-72 (sent 8/23/83)  
Draft of Tentative Recommendation (attached to Memorandum)
29. Study H-510 - Joint Tenancy and Community Property  
Memorandum 83-76 (sent 9/12/83)  
Draft of Recommendation (attached to Memorandum)
30. Study F-660 - Awarding Temporary Use of Family Home  
Memorandum 83-66 (sent 7/22/83)  
Draft of Tentative Recommendation (attached to Memorandum)
31. Study F-662 - Special Appearance in Family Law Proceedings  
Memorandum 83-70 (sent 8/9/83)  
Draft of Tentative Recommendation (attached to Memorandum)
32. Study F-661 - Support After Death of Support Obligor  
Memorandum 83-49 (sent 9/12/83)  
First Supplement to Memorandum 83-49 (sent 9/16/83)
33. Study F-642 - Combined Separate and Community Property  
Memorandum 83-68 (sent 8/23/83)
34. Study F-633 - Division of Pensions  
Memorandum 83-83 (sent 9/6/83)

Continuation of consideration of items scheduled for September 22 and 23 if consideration of item not completed on scheduled date.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 22-24, 1983

SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on September 22-24, 1983.

Law Revision Commission

Present:	David Rosenberg, Chairperson	James H. Davis
	Debra S. Frank, Vice Chairperson	Bion M. Gregory
	Robert J. Berton	Beatrice P. Lawson (September 23 and 24)
Absent:	Barry Keene, Member of Senate	Roslyn P. Chasan
	Alister McAlister, Member of Assembly	John B. Emerson

Staff Members Present

John H. DeMouilly	Nathaniel Sterling
Robert J. Murphy III (September 22 and 23)	Stan G. Ulrich

Consultants Present

Paul E. Basye, Property and Probate Law (September 23 and 24)  
Gerald F. Uelmen, Statutes of Limitation (September 22)

Other Persons Present

Stephen A. Brandenburger, Attorney, Files, McMurchie, Foley, Brandenburger & Weill, Sacramento (September 23)  
Edward V. Brennan, Probate Referee, San Diego (September 23)  
John Wilson Brown, Attorney, Chair, San Diego County Bar Estate Planning, Probate and Trust Law Section, San Diego (September 23)  
Theodore Cranston, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Diego (September 23 and 24)  
Bill Davis, Files, McMurchie, Foley, Brandenburger & Weill, Sacramento (September 23)  
Jan C. Gabrielson, State Bar, Family Law Section, Los Angeles (September 24)  
Jim Mattesich, Livingston & Mattesich, Sacramento (September 23)  
Matthew S. Rae, Jr., State Bar, Estate Planning, Trust and Probate Law Section, Los Angeles (September 23)  
Charles Sevilla, State Public Defender, San Diego (September 22)  
Christine Sevilla, Rochester, New York (September 22)  
Vincent A. Telling, American Research Bureau, Los Angeles (September 23)

ADMINISTRATIVE MATTERS

MINUTES OF JUNE 2-4, 1983, MEETING

The Minutes for the June 2-4, 1983, Meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The Commission decided not to meet in December and scheduled a meeting for January 1984.

The following schedule was adopted for future meetings:

November 1983

November 4 (Friday)	7:00 p.m. - 10:00 p.m.	San Francisco
November 5 (Saturday)	9:00 a.m. - 4:00 p.m.	

December 1983

No meeting

January 1984

January 5 (Thursday)	7:00 p.m. - 10:00 p.m.	Sacramento
January 6 (Friday)	9:00 a.m. - 5:00 p.m.	
January 7 (Saturday)	9:00 a.m. - 12:00 noon	

1983 LEGISLATIVE PROGRAM

The Commission considered Memorandum 83-45.

The Executive Secretary made the following report concerning the 1983 Legislative Program:

Enacted

1983 Stats. ch. 6 (Assembly Bill 29) - Emancipated Minors (Probate Study)  
1983 Stats. ch. 17 (Assembly Bill 28) - Disclaimers (Probate Study)  
1983 Stats. ch. 18 (Assembly Bill 31) - Bonds and Undertakings  
1983 Stats. ch. 52 (Assembly Bill 69) - Vacation of Streets, Highways, and Public Service Easements  
1983 Stats. ch. 72 (Assembly Bill 27) - Limited Conservatorships (Probate Study)  
1983 Stats. ch. 92 (Assembly Bill 53) - Nonprobate Transfers (Probate Study)  
1983 Stats. ch. 107 (Assembly Bill 30) - Claims Against Public Entities  
1983 Stats. ch. 155 (Assembly Bill 99) - Creditors' Remedies  
1983 Stats. ch. 201 (Assembly Bill 24) - Missing Persons (Probate Study)  
1983 Stats. ch. 342 (Assembly Bill 26) - Division of Marital Property  
1983 Stats. ch. 842 (Assembly Bill 25) - Wills and Intestate Succession and Related Matters (Probate Study) (The provisions of AB 68-- conforming revisions--were incorporated into AB 25 as passed by the Legislature)  
1983 Stats. res. ch. 40 (ACR No. 2) - Authority to Study Topics

Sent to Governor

Senate Bill 762 - Durable Power of Attorney for Health Care (Probate Study)

Two-Year Bill

Assembly Bill 1460 - Liability of Marital Property for Debts

Dead

Assembly Bill 835 - Support After Death of Support Obligor

The Commission also considered the letter relating to Senate Bill 762. This letter, attached to Memorandum 83-45, was approved in a slightly revised form to be sent to the Governor over the signature of the Chairperson of the Commission.

CONSULTANT CONTRACTS

The Commission considered Memorandum 83-46. The Commission approved the following contracts, in the amounts indicated, the contracts to provide reimbursement for travel expenses only (with a provision that lodging expenses will be reimbursed up to a maximum of \$60 when supported by a receipt and \$35 in the absence of any supporting receipt):

Russell D. Niles	\$2,000
Susan French	\$1,000
Edward C. Halbach, Jr.	\$1,000

The Executive Secretary was directed to execute the contracts on behalf of the Commission.

BUDGET FOR 1984-85

The Commission considered Memorandum 83-77 which contains the staff proposed revised budget for 1983-84 and the proposed budget for 1984-85. The Commission approved the revised and proposed budgets as recommended by the staff.

The Commission directed that a special committee of the Commission and the Executive Secretary should meet with the Department of Finance to clarify the status of the Law Revision Commission as a legislative agency and thus exempt from Department of Finance provisions relating to hiring freezes, consultant employment freezes, and the like. The special committee consists of the Chairman and Commissioner Gregory. The special committee was directed to arrange a meeting with respect to this matter as soon as convenient.

PRIORITY FOR STUDY OF TOPICS

The Commission considered Memorandum 83-48 and the First Supplement to Memorandum 83-48.

The Commission determined the following priorities should be followed during 1984:

- (1) Completion of work on the recommendations to the 1984 session.
- (2) Preparation of a new Probate Code with a view to submitting the new code for enactment in 1985 if possible.
- (3) Selected aspects of family law:
  - (a) Marital Property Agreements
  - (b) Division of Pensions
  - (c) Remainder of Reppy's "Dirty Dozen" of Bad Family Law Decisions
- (4) Technical and substantive revisions of legislation enacted upon Commission Recommendation.

The Commission also decided that the following matters should be considered during 1984 if the Commission's meeting schedule and staff resources permit:

- (1) Judicial Council forms for subpoenas and subpoenas duces tecum in connection with arbitration proceedings to be issued by attorney for a party. This was suggested by Peter D. Collisson and is described in more detail in the First Supplement to Memorandum 83-48.
- (2) Interrogatories to nonparties. This topic is described in Memorandum 83-47. The burden that such interrogatories impose should be considered; perhaps the number of interrogatories could be limited to 20. See the Federal Rules of Civil Procedure for provisions relating to interrogatories to nonparties. The local rules should also be considered in determining appropriation limitations.
- (3) Enforcement of condominium assessment liens in municipal court. This topic is described in Memorandum 83-47. The staff should prepare a draft of a bill that could be submitted in 1984, perhaps as a part of the cleanup bill on creditors' remedies.

NEW TOPICS

The Commission was advised that the Legislature may direct the Commission to study the topic of injunctions.

The Commission considered Memorandum 83-47. The Commission decided to consider the topic of mediation at its November meeting with a view

to obtaining further information that would permit the Commission to determine whether this is a matter in need of a study and recommendation by the Commission. The staff is to consult with the Chairperson and with Commissioner Berton to determine who should be invited to the November meeting. It was suggested that this matter be scheduled for Saturday morning at the November meeting.

The Commission also decided to consider when time permits the topics of interrogatories to nonparties and the enforcement of condominium assessment liens in municipal court. See the discussion under PRIORITY FOR STUDY OF TOPICS supra.

With respect to the remaining topics described in Memorandum 83-47, the Commission decided either that the topic would require more staff and Commission resources than are now available or that the topic would not be appropriate for consideration by the Commission.

#### HANDBOOK OF PRACTICES AND PROCEDURES

The Commission considered the Handbook of Commission Practices and Procedures (attached to Memorandum 83-81). No changes were made in the Handbook.

#### MEETING ATTENDANCE

The Commission reviewed the report concerning attendance of members of the Commission (attached to Memorandum 83-79) and noted that attendance of Commissioners at meetings is one factor that is considered significant by the Department of Finance in recommendations concerning the continued existence and level of funding of commissions (see First Supplement to Memorandum 83-79).

STUDY D-302 - CREDITORS' REMEDIES

The Commission considered Memorandum 83-69 and Memorandum 83-74 which proposed revisions of the Attachment Law and the Enforcement of Judgments Law. The revisions proposed in these memorandums were approved as modified. The staff will prepare a draft recommendation for approval at the November meeting.

Code Civ. Proc. § 704.740. Application of general exemption procedure. This section should be amended only if the Judicial Council does not correct the Notice of Levy form (EJ-150) to make clear that real property dwelling exemptions are determined under a separate procedure. If amendment is needed, the staff should give further consideration to the appropriate language.

Code Civ. Proc. § 704.995. Effect of death of homestead owner. Subdivision (a) of this section should be revised to read:

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the homestead owner if, at the time of the decedent's death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

Code Civ. Proc. § 708.110. Examination of judgment debtor. The Commission approved the staff suggestion to limit the lien obtained by service of an order for examination of the debtor to a one-year duration.

The Commission postponed consideration of Memorandum 83-53 and the First Supplement thereto which concerned priorities between judgment liens on personal property and security interests until the November meeting. This was done to afford sufficient time to resolve some professional differences in interpretation of the relevant statutes.

STUDY D-326 - BONDS AND UNDERTAKINGS

The Commission considered Memorandum 83-52 and the attached draft of a tentative recommendation relating to changes in the bond and undertaking law. The Commission approved the good cause exception to the 10-day objection period, but the Comment should state that, "Facts constituting good cause might include inadequate time, under the circumstances, to investigate and respond."

The Commission also approved basing the defendant's claim and delivery undertaking on the amount of the plaintiff's claim. The statute should not include the language in the draft in the memorandum relating to the plaintiff's claim in the application for a writ, but the staff should investigate whether the plaintiff should be required to make such a claim in the application, rather than an estimate of the value of the property.

The bond and undertaking revisions should be combined with creditors' remedies revisions for next session.

STUDY F-632 - REIMBURSEMENT OF EDUCATIONAL EXPENSES

The Commission considered Memorandum 83-72 and the attached draft of a tentative recommendation relating to reimbursement of community property spent for educational expenses of a spouse. The Commission approved the recommendation for submission to the 1984 legislative session with the following changes:

(1) The statute or Comments should make clear that the reimbursement right is provided in lieu of an award for "enhanced earning capacity" that may result from the education. This should be done carefully so as not to create an implication that enhanced earning capacity would otherwise be subject to division.

(2) The amount of reimbursement should be based on the actual expenditures of the community and not on the "reasonable value of the time spent" during marriage by the spouse receiving the education.

(3) Reimbursement should be allowed if the education substantially (rather than significantly) enhances the earning capacity of a party.

(4) Reimbursement should be made with interest accruing at the legal rate from the end of the year in which the expenditures were made. The year-end provision is intended to simplify accounting for numerous small expenditures made over time.

(5) The amount to be reimbursed should be reduced to the extent circumstances (rather than "extraordinary" circumstances) render the reimbursement unjust.

(6) The amount to be reimbursed should be reduced to the extent the community has substantially benefited from the "education, training, or loan for education or training."

(7) Expenditures for education or training of each party should be offset, regardless whether the amount to be offset is substantial.

(8) The party to whom subdivision (c)(3) of the draft applies should be made clear.

(9) To be effective, a contrary agreement of the parties should be in writing.

STUDY F-640 - MARITAL PROPERTY PRESUMPTIONS  
AND TRANSMUTATIONS

The Commission considered Memorandum 83-65 and the First Supplement thereto, along with the tentative recommendation relating to marital property presumptions and transmutations. The Commission approved the recommendation for submission to the 1984 legislative session with the following changes:

§ 5110.110. All property acquired during marriage is community

The phrase "while domiciled in this state" was inserted in the definition of community property. The Comment to the section should point out that the effect of defining community property to include out of state real property is that the property is treated as community in California, and that the treatment given the property in the jurisdiction in which it is located will be determined by applicable choice of law rules.

§ 5110.620. Community property presumption

This section was revised to read, "Except as otherwise provided by statute, property of either spouse is presumed to be community property." The Comment should point out that the effect of this rule is to put the burden of proof on a person who claims that marital property is separate rather than community.

§ 5110.630. Title presumptions

Subdivision (b) was deleted from this section--the general community property presumption should apply at death as well as during marriage.

§ 5110.640. Gift presumptions

The Comment to this section should indicate that an automobile would not be an article of a personal nature within the meaning of the section.

§ 5110.730. Form of transmutation

The provision relating to oral transmutation of personal property should be consistent with the gift presumption--it should permit oral transmutation only of tangible articles of a personal nature that are not "substantial in value taking into account the circumstances of the marriage." The statute should also provide that a statement in a will as to the character of property is not evidence of the character of the property and does not effect a transmutation of the property except at death. This would overrule the case of In re Marriage of Lotz, 120 Cal. App.3d 379, 174 Cal. Rptr. 618 (1981).

Transitional Provisions

The provisions on transmutation should be applied retroactively. The Comment should explain the need for retroactive application and the impact of retroactive application, for constitutional purposes.

STUDY F-641 - LIMITATIONS ON DISPOSITION  
OF COMMUNITY PROPERTY

The Commission considered Memorandum 83-75 and the First Supplement thereto, reviewing comments received on the tentative recommendation relating to limitations on disposition of community property. The Commission decided to drop the proposal that joinder not generally be required for a disposition of real property. The Commission decided to add a provision that, as between the spouses, each has the right to have his or her name added to any title papers to the property. The staff was directed to refine the definition of "disposition" so it does not literally apply to any transaction that "affects" property. As so revised, the recommendation was approved for submission to the 1984 legislative session.

STUDY F-660 - AWARDING TEMPORARY USE OF FAMILY HOME

The Commission considered Memorandum 83-66 and the attached draft of a tentative recommendation relating to awarding temporary use of the family home. The Commission approved the tentative recommendation to distribute for comment, after moving the words "at the request of a party" so that they do not appear to give the court jurisdiction.

STUDY F-661 - SUPPORT AFTER DEATH OF SUPPORT OBLIGOR

The Commission considered Memorandum 83-49 and the First Supplement to Memorandum 83-49, relating to support after the death of the support obligor. The Commission decided not to resubmit a recommendation on this subject to the 1984 legislative session.

STUDY F-662 - SPECIAL APPEARANCE IN FAMILY  
LAW PROCEEDINGS

The Commission considered Memorandum 83-70 and the attached draft of a tentative recommendation relating to special appearances in family law proceedings. The Commission approved the recommendation for submission to the 1984 legislative session.

STUDY H-402 - DORMANT MINERAL RIGHTS

The Commission considered Memorandum 83-51 and the attached tentative recommendation with comments on the dormant mineral rights proposal. The Commission approved the recommendation for submission to the Legislature.

STUDY H-500 - QUIET TITLE

The Commission considered Memorandum 83-50 and the attached tentative recommendation relating to the effect of quiet title and partition judgments. The Commission approved the recommendation for submission to the Legislature with the change set out in the memorandum.

STUDY H-510 - RIGHTS AMONG COTENANTS

The Commission considered Memorandum 83-35 and the attached tentative recommendation relating to rights among cotenants in possession and out of possession of real property. The Commission made clarifying revisions in the recommendation as suggested in the memorandum. As so revised, the Commission believed the recommendation serves a number of useful functions. It helps make clear when an ouster occurs; it is a formal means of initiating negotiations between the parties; it helps avoid a premature partition action by giving the out-tenant an interim remedy.

The Commission approved the revised recommendation to print and directed the staff to send a copy of it to the State Bar Real Property Section. The Commission will reconsider the recommendation if the State Bar still has substantial objections to the recommendation as revised.

STUDY H-510 - JOINT TENANCY AND  
COMMUNITY PROPERTY

The Commission considered Memorandum 83-76 and the attached copy of the Commission's recommendation relating to joint tenancy and community property. The Commission decided to print the recommendation in the form previously approved except that the Comments should make clear that an affidavit of death may be filed with respect to community property with right of survivorship in the same manner as joint tenancy property, since community property with right of survivorship is analogous to joint tenancy in that it is not subject to testamentary disposition.

STUDY L-612 - SIMULTANEOUS DEATHS

The Commission considered Memorandum 83-55, the attached staff draft of the Tentative Recommendation Relating to Simultaneous Deaths and Survival (August 1, 1983), and the First and Second Supplements to Memorandum 83-55. The Commission approved the recommendation to print, subject to revision to make clear that wills executed before the operative date that simply require survival in order to take would not be subject to the 120-hour survival rule. A will provision executed after the operative date requiring survival would be subject to the 120-hour rule.

STUDY L-641 - CREDITOR'S RIGHT TO REACH PAYMENTS FROM TRUST

The Commission considered Memorandum 83-60, the First and Second Supplements thereto, and the Tentative Recommendation Relating to Garnishment of Amounts Payable to Trust Beneficiary (August 1, 1983). The recommendation was approved to print, subject to editorial revision to provide more emphasis of the point that it is undesirable as a matter of public policy to protect income from a trust to a greater extent than earned income. It was also noted that Professor Russell Niles removed his objections to this recommendation which were expressed in a letter attached to the Second Supplement to Memorandum 83-60.

STUDY L-650 - EXECUTION OF WITNESSED WILL

The Commission considered Memorandum 83-54, the attached Tentative Recommendation Relating to Execution of Witnessed Wills, and the First and Second Supplements to Memorandum 83-54 with attached comments on the tentative recommendation. The Commission reaffirmed its previous decision to abolish the requirement that the two witnesses to a will must be "present at the same time," but decided to require that if the two witnesses sign at different times, they must sign within 24 hours of each other. The burden of proof would be on the party seeking to establish the invalidity of the will that the witnesses signed more than 24 hours apart from each other. This will avoid the bad cases where wills are invalidated because a witness leaves the room during the execution ceremony, and yet will avoid the other undesirable extreme of having the two witnesses sign the will perhaps months apart.

The Commission reaffirmed its previous decision to recommend the alternative of the testator acknowledging the will before a notary public at any place within this state.

As thus revised, the Commission approved the recommendation for printing.

STUDY L-651 - RECORDING AFFIDAVIT OF DEATH

The Commission considered Memorandum 83-73 and the attached draft of a tentative recommendation relating to recording an affidavit of death. The Commission decided to send the tentative recommendation to

title companies and county recorders and other interested persons for comment, with the request that comments be returned quickly. The letter of transmittal should solicit suggestions as to language to effectuate statements in an affidavit of death that the person named in a death certificate is the same person whose name is of record on property title.

STUDY L-652 - NONPROBATE TRANSFERS

The Commission considered Memorandum 83-56 and the attached copy of 1983 Cal. Stats. ch. 92.

The Commission decided not to submit a recommendation on this matter to the 1984 session of the Legislature. Instead, the staff is to contact the California Bankers Association with a view to developing legislation that will make the provisions governing the rights between the parties to a multiple-party account (during lifetime and upon the death of a party) applicable generally to accounts in all types of financial institutions and to retain existing provisions that provide protection to banks and savings and loan institutions. The effort should be to produce a noncontroversial bill that can be introduced at the 1985 session of the Legislature.

STUDY L-653 - NOTICE OF WILL

The Commission considered Memorandum 83-57, the attached Tentative Recommendation Relating to Notice of Will, and the First Supplement to Memorandum 83-57. The recommendation was approved to print subject to revision of proposed Probate Code Section 6361 to make clear that no inference that a will has not been revoked may be drawn from the failure to file a notice of revocation.

STUDY L-654 - ANCESTRAL PROPERTY DOCTRINE

The Commission considered Memorandum 83-63 and the First and Second Supplements concerning the ancestral property doctrine. The Commission also considered a letter (handed out at the meeting) from James M. Mattesich. A copy of this letter is attached as Exhibit 1 to these Minutes. The Commission decided not to propose any amendments to the

newly-enacted ancestral property doctrine provision set forth in new Section 6402.5 of the Probate Code.

STUDY L-655 - PROBATE REFEREES

The Commission considered Memorandum 83-62 and the First Supplement to Memorandum 83-62.

The Commission reaffirmed its decision not to make a determination whether the probate referee system should be retained in its present form or be modified or eliminated until the Commission has completed its study of the provisions of the Probate Code relating to the administration of a decedent's estate. The Commission also decided that the matter of how the fees of the attorney and executor should be fixed should be given some priority.

It was suggested that if an appraisal is objected to there should be some means to have it reviewed so that the Probate Court could reject the appraisal.

STUDY L-656 - BONDS FOR PERSONAL REPRESENTATIVES

The Commission considered Memorandum 83-82 and the attached draft statute. Amendments to Sections 462 and 541 of the Probate Code were approved in substance in the form set out below. The amendments should be included in other Commission recommended legislation in order to avoid the need for a separate bill.

2956

SEC. \_\_. Section 462 of the Probate Code is amended to read:

462. (a) Before letters issue to a special administrator, except to a public administrator, ~~he must give~~ the special administrator shall do both of the following:

(1) Except as provided in subdivision (c), give a bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned ~~for the faithful performance of his duties; and he must take that the special administrator shall faithfully execute the duties of the trust according to law.~~

(2) Take the usual oath, and have the same indorsed on ~~his~~ the letters.

(b) Thereupon When the requirements of this section are satisfied,  
the clerk shall issue special letters of administration to ~~him~~ the  
special administrator.

(c) Unless the will provides for a requirement of a bond, if a  
verified petition for special letters of administration alleges that all  
beneficiaries under the decedent's will, or that all the decedent's  
heirs if there is no will, have waived the filing of a bond, the court,  
if the petition so requests, shall direct that no bond be filed. If  
the will waives the requirement of a bond for the executor and the  
person named as executor in the will is appointed special administrator,  
the court shall direct that no bond be filed.

Comment. Subdivision (c) is added to Section 462 to dispense with  
bond of the special administrator where all the persons interested in  
the estate waive the filing of a bond or where the will waives the bond  
for the executor who is appointed special administrator. Subdivision  
(c) is drawn in part from subdivision (b) of Section 541 (bond of person  
to whom letters testamentary or of administration are directed to issue).  
The revisions of subdivisions (a) and (b) make no substantive change.

2957

SEC. \_\_. Section 541 of the Probate Code is amended to read:

541. (a) Except as otherwise provided in this section, every  
person to whom letters testamentary or of administration are directed to  
issue (unless the testator has waived such requirement) shall, before  
receiving them, execute a bond to the State of California, to be approved  
by a judge of the superior court, conditioned that the executor or  
administrator shall faithfully execute the duties of the trust according  
to law. If the bond is to be given by personal sureties, the amount  
shall be not less than twice the value of the personal property and  
twice the value of the probable annual income from the real property  
belonging to the estate, which values shall be ascertained by the court  
or judge by examining on oath the party applying, and any other persons.  
If the bond is to be given by an admitted surety insurer, the court in  
its discretion may fix the amount of the bond at not less than the value  
of the personal property and the probable value of the annual rents,  
issues and profits of all of the property belonging to the estate.

(b) Unless the will provides for a requirement of a bond, if a  
verified petition for letters testamentary or of administration alleges  
that all beneficiaries under the ~~last will and testament of the decedent~~

decendent's will, or that all ~~heirs at law of the decedent~~ the decedent's heirs if there is no will, have waived the filing of a bond, the court, on the hearing of the petition, if the petition so requests, ~~may~~ shall direct that no bond be filed.

Comment. Subdivision (b) of Section 541 is amended to substitute "shall" for "may." The other revisions are not substantive.

STUDY L-700 - USE OF COURT INVESTIGATORS  
IN CONSERVATORSHIP PROCEEDINGS

The Commission considered Memorandum 83-84. The Commission discussed the letter from Harold A. Irish, forwarded to the Commission by Senator Barry Keene. The Commission concluded that no change should be made in the existing law. The Executive Secretary was directed to write to Mr. Irish to inform him of the Commission's conclusion and the reasons that motivated it. A copy of the letter should be sent to Senator Keene.

STUDY L-704 - STATUTORY FORMS FOR DURABLE POWER OF ATTORNEY

The Commission considered Memorandum 83-61 and the attached draft of a Tentative Recommendation and the attached Senate Bill 762, the First Supplement to Memorandum 83-61, and Memorandum 83-78. The Commission also considered the letters from Dean George J. Alexander and from Dr. Edward Howard Bordin, copies of which are attached to these Minutes as Exhibits 2 and 3.

Durable Power of Attorney For Health Care

The Executive Secretary reported that a number of persons had called or written to give their views concerning whether it would be desirable to have statutory forms and what the forms should contain.

Byron Chell, a lawyer involved in this field of practice, is in favor of the concept of a form. He would omit all the detail as to life-prolonging choices so that the form merely permits designation of the person to make health care decisions. He would omit the statutory provisions that spell out in detail the specific grants of authority as to permitting decisions not to authorize or to withdraw life support systems.

The Bioethics Committee of the Los Angeles County Bar Association believes that the choice that the staff draft of the form gives as to life-prolonging treatment is too black and white, too inflexible.

Dr. Kenneth Mitzner, who represents a prolife point of view, believes that the section of the statute that spells out the detail of what is authorized when the attorney in fact is authorized not to prolong life is completely unacceptable.

The National Association of Retired Persons strongly supports the concept of a statutory form. The representative of the association indicated that the association does not feel qualified to comment on the technical details of the form, leaving that matter to the Commission.

Dean Alexander, in a letter attached as Exhibit 2 to these Minutes states, in part, that the portion of the form stating the desires of the patient to refuse life-prolonging procedures should be phrased to provide an objective standard, perhaps based on reasonable medical expectations, for determining when the principal desires the refusal of life-prolonging procedures. The powers that the attorney in fact is given by one choice or the other should be stated in the form itself, not in a statute. The principal could then strike out any powers that did not express his or her intent.

Dr. Edward Howard Bordin, letter attached as Exhibit 3 to these Minutes, believes that some type of statutory form is imperative and generally reacts favorably to the form. He suggests some improvements in the form and in the statute sections that spell out in detail the powers granted by the statutory choice made in the form.

The representative of the Estate Planning, Probate and Trust Law Section of the State Bar stated at the meeting that the Section has some concern that the concept of a statutory form was not desirable and that persons may not be able to understand the form. It was noted, however, that the decisions of the Commission concerning the staff drafted form will greatly simplify the form. The Section also was concerned that it will be too simple to designate a person to make health care decisions using the form and a person will not understand what he or she is doing.

The Commission decided to delete the portion of the form set out in the staff draft that permitted the person to choose whether or not life-prolonging procedures should be used. The statute sections that spell out the specific authority given if one or the other of the choices is checked should be eliminated.

In place of the deleted material, the substance of the following language, taken from the First Supplement to Memorandum 83-61 and slightly revised, should be included in the form:

In exercising this authority, the attorney-in-fact shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to the attorney-in-fact, including but not limited to my desires concerning obtaining or refusing or withdrawing life-prolonging treatment, services, and procedures. If my desires are unknown or unclear, the attorney-in-fact shall make health care decisions for me that in the judgment of the attorney-in-fact are in my best interests.

The form should include a statement concerning the right to examine and consent to disclosure of medical records. This addition was suggested because health care providers may be more willing to give up medical records if there is an express provision in the statutory form. The substance of the statement set out on page 2 of the First Supplement to Memorandum 83-61 was approved.

The Recommendation was approved to print after the above revisions have been made and other technical and clarifying revisions have been made.

#### Living Will Statute

The living will statute should be amended to conform to the seven-year provision of the durable power of attorney for health care, including the provision extending the period if the principal is incapacitated when the seven-year period ends, so that both documents can be renewed at the same time.

#### Durable Power of Attorney for Property Transactions

The Commission considered Memorandum 83-78 and the attached draft statute. It was noted that, with minor modifications, the draft statute is the same as a New York statute that was originally enacted in 1948 and subsequently recodified in 1963.

The Commission approved the recommendation and draft statute to print. However, before printing the recommendation, the staff is to revise draft statute to modernize the language in light of the Commercial Code, to make any revisions needed because California is a community property state, and to make other technical changes. Also, there was a feeling that the phrasing of the New York statute could be improved.

STUDY L-810 - INDEPENDENT ADMINISTRATION OF DECEDENT'S ESTATE

The Commission considered Memorandum 83-59, the attached Tentative Recommendation Relating to Independent Administration of Decedent's Estate, and the First Supplement to Memorandum 83-59. The Commission made the following decisions:

(1) The Commission reaffirmed its decision to recommend taking real property transactions out of the matters of which mandatory court supervision is required, but decided not to recommend the elimination of mandatory court supervision of the other matters set forth in Probate Code Section 591.2 (allowance of executor's and administrator's commissions, attorney's fees, settlement of accountings, preliminary and final distributions, and discharge).

(2) The Commission asked the staff to draft a proposed statute for waiver of the accounting. This may be drawn from existing court rules. Such a statute might be applicable under the Independent Administration of Estates Act, or might be a general statute applicable to probate proceedings generally.

(3) The Commission disapproved the suggestion to reduce the number of people to whom advice of proposed action must be given by limiting such advice to those who have requested special notice. The Commission reaffirmed that the advice of proposed action should be given to all those now entitled to it under Section 591.3.

(4) The Commission disapproved the suggestion that the advice of proposed action set forth the names of "all parties" to the proposed transaction.

(5) The Commission reaffirmed its view that although the advice of proposed action is to be binding on those who have actual notice and fail to object, the court should retain the equitable power to review actions of the executor or administrator on its own motion or on motion of an interested person who did not receive advice of the proposed action.

(6) The Commission approved the proposal to amend the second and third sentences of Section 591.4 to read:

The advice of proposed action shall state the name ~~and~~, mailing address, and telephone number of the executor or administrator and the action proposed to be taken, with a reasonably specific description of such action, and the date on or after which the proposed action is to be taken. Such date shall not be less than 15 days after the personal delivery, or not less than 20 days after the mailing, of the advice.

(7) In the case of an advice of proposed action for the sale of real property, the advice should include the sale price and material terms of sale.

(8) The Commission approved the proposal to amend paragraph (1) of subdivision (a) of Section 591.5 to read:

(1) The person may apply to the court having jurisdiction over the proceeding for an order restraining the executor or administrator from taking the proposed action without court supervision under the provisions of this code dealing with the court supervision of such action, which order the court shall grant without requiring notice to the executor or administrator and without cause being shown therefor. . . .

(9) The Commission decided to amend paragraph (2) of subdivision (a) of Section 591.5 to read:

(2) The person may deliver or mail a written objection ~~directly to the executor or administrator, or to the attorney for the executor or administrator,~~ at the address stated in the advice of proposed action, so that the objection is received before the date specified on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is later.

(10) The Commission approved the proposal to amend subdivision (d) of Section 591.5 to read:

(d) All persons described in Section 591.3 who have been given an advice of proposed action as provided in Section 591.4 may object only in the manner provided in this section ~~and the .~~ The failure to so object is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired. The court may, however, review actions of the executor or administrator on its own motion or on motion of an interested person who was not given an advice of proposed action.

(11) The Commission asked the staff to develop a form for the advice of proposed action, with a place for the person given the advice to object or to indicate a waiver of objection. Possibly the form should also include proof of service or acknowledgment of service (see Notice and Acknowledgment of Receipt of Service, Code Civ. Proc. § 415.30).

The Commission approved the recommendation for printing with the inclusion of the revisions made in paragraphs (6) through (10) above. The staff should report back to the Commission on the proposals made in paragraphs (2) and (11) above for possible amendment into the Commission's proposal on the Independent Administration of Estates Act.

STUDY L-826 - DISTRIBUTION OF DECEDENT'S ESTATE  
WITHOUT ADMINISTRATION

The Commission considered Memorandum 83-58, the attached Tentative Recommendation Relating to Disposition of Estates Without Administration, and the First Supplement to Memorandum 83-58 with attached comments on the tentative recommendation. The Commission made the following decisions:

(1) The Commission decided to increase to \$100,000 the maximum estate value for use of the procedure for collection of personal property by affidavit (Prob. Code §§ 630-632). (The amount under existing law is \$30,000, and under the tentative recommendation as considered by the Commission was \$50,000.)

(2) It should be made clear that the \$100,000 estate value for use of the affidavit procedure means gross value, less those specific exclusions now set forth in Probate Code Section 630.

(3) The Commission decided to add the decedent's grandparents to the list of the decedent's relatives who may use the affidavit procedure.

(4) The Commission decided that the affidavit procedure should be usable notwithstanding the presence in the estate of a real property interest having a gross value of \$10,000 or less.

(5) The Commission decided to drop the proposal to permit the decedent's surviving spouse to use the affidavit procedure without regard to the value of the estate and without regard to the presence of real property in the estate, and instead to apply the same maximum limit on estate value and on the value of real property in the estate as is applied to other claimants.

(6) The Commission decided to drop the proposal to increase the surviving spouse's intestate share of the decedent's separate property, and instead to keep the scheme of newly-enacted AB 25 (see new Section 6401).

(7) The Commission approved the proposal to expand Section 650 of the Probate Code to permit the surviving spouse to take the decedent's separate property by summary proceeding when the surviving spouse is entitled to the property under the decedent's will or by intestate succession.

(8) The Commission asked the staff to investigate the statutes of other states which permit the passage of title to real property by

affidavit and without probate, and to develop legislation which could be considered for adoption in California.

Decisions 1 through 4 above may be implemented by amending Section 630 of the Probate Code as follows:

630. ~~When a decedent leaves no real property, nor interest therein nor lien thereon, in this state, (a) Subject to Section 632, subdivision (b) applies only if the gross value of the decedent's real property in this state does not exceed ten thousand dollars (\$10,000) and the ~~total~~ gross value of the decedent's real and personal property in this state, (excluding any motor vehicle, or mobilehome or commercial coach registered under the provisions of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, of which the decedent is the owner or legal owner,) over and above any amounts due to the decedent for services in the armed forces of the United States, and over and above the amount of salary not exceeding five thousand dollars (\$5,000), including compensation for unused vacation, owing to decedent for services from any employment, does not exceed ~~thirty thousand dollars (\$30,000)~~, one hundred thousand dollars (\$100,000).~~

~~(b) The~~ The surviving spouse, the children, ~~lawful~~ the issue of deceased children, a grandparent, parent, brothers or sisters of the decedent, the ~~lawful~~ issue of a deceased brother or sister, or the guardian or conservator of the estate of any person bearing such relationship to the decedent, or the trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear such relationship to the decedent, if such person or persons has or have a right to succeed to the property of the decedent, or the sole beneficiary, or all of the beneficiaries under the last will and testament of the decedent, regardless of whether or not any beneficiary is related to the decedent, may, without procuring letters of administration, or awaiting probate of the will, collect any money due the decedent (including money of the decedent on deposit in a financial institution as defined in Section 40), receive the tangible personal property of the decedent, and have any evidences of a debt, obligation, interest, ~~indebtedness or~~ right, stock, or chose in action transferred to such person or persons upon furnishing the person, representative, corporation, officer or body owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of debt, obligation, interest, ~~indebtedness or~~ right, stock, or chose in action, with an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive such money or property, or to have such evidences transferred.

(c) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subdivision (b) and is discharged from liability in so doing as provided in Section 631.

Comment. Section 630 is amended to do the following:

(1) To increase the maximum estate value for use of the affidavit procedure from \$30,000 to \$100,000.

(2) To make clear that the \$100,000 maximum estate value refers to gross value, less the specific exclusions set forth in Section 630. Prior law was not clear.

(3) To permit use of the affidavit procedure notwithstanding the presence in the estate of a real property interest of a gross value of \$10,000 or less.

(4) To add the decedent's grandparent or grandparents to the list of the decedent's relatives who may use the affidavit procedure.

(5) To add subdivision (c), which is drawn from Uniform Probate Code Section 3-1201. The provision in subdivision (c) protecting the transfer agent from liability is consistent with Section 631.

The reference to "tangible" personal property and evidences of an "obligation," "stock," or "chase in action" in subdivision (b) is drawn from Section 3-1201 of the Uniform Probate Code and is clarifying. The word "issue" has been substituted for "lawful issue" in subdivision (b) to conform to the provisions relating to intestate succession. See Sections 6408 and 6408.5.

#### STUDY M-100 - STATUTE OF LIMITATIONS FOR FELONIES

The Commission considered Memorandum 83-44 and the attached tentative recommendation relating to the statutes of limitation for felonies. The Commission approved the tentative recommendation for printing and submission to the 1984 Legislature, with the following changes:

##### § 799. Limitation period for capital crimes

There should be no limitation period for crimes punishable by life imprisonment with or without parole, as well as for crimes punishable by death. This rule is consistent with existing treatment given to all degrees of murder and to kidnapping for ransom. It recognizes that crimes punishable by life imprisonment are considered the most serious crimes. And it helps avoid overcharging by the prosecution, since many of the crimes punishable by life imprisonment are lesser included offenses of crimes punishable by death. The Comment to Section 799 should point out that punishment by life imprisonment of an habitual offender does not amount to a separate crime within the meaning of Section 799 for purposes of application of the statute of limitation.

##### § 800. Six-year limitation period for felonies

The recommendation should point out the other jurisdictions that apply a five-, six-, or seven-year criminal limitation period.

##### § 802. Tolling of limitation period

The recommendation should make clear that the concept of no tolling of the limitation period is integral to the extension of the limitation period to six years, and that if tolling is kept, the limitation period should not be extended. The extended limitation period has already

built into it an allowance for tolling. The Commission will not pursue legislation to extend the limitation period to six years if the legislation is amended to include tolling.

§ 803. Commencement of prosecution

Section 803 should be revised for clarity and consistency. The reference to an "accusatory pleading" should be replaced by a reference to an "information or indictment." The information or indictment should be required to state either the true name of the defendant or the name by which the defendant is known. The comment should point out that this codifies existing case law as to "Doe" defendants named in an indictment. The staff should also check to make sure the language adequately covers misdemeanor prosecutions. The staff should check the revised language with knowledgeable attorneys to make sure it's right.

§ 804. Classification of offenses

The Comment should make clear that existing law is preserved to the effect that the statute of limitation for a lesser included offense is that applicable to the lesser, and not the greater, offense.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

**LIVINGSTON & MATTHEWSON**

ATTORNEYS AT LAW

September 22, 1983

Mr. David Rosenberg  
Chairman, California Law Revision  
Commission  
Members of the California Law  
Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94306

Dear Mr. Chairman and Members:

I represent Brandenburger and Davis, a Sacramento Probate Research firm which is vitally interested in the Commission's study of the California Probate Code. Brandenburger and Davis was founded in 1932. It has since that time provided worldwide probate research and investigative services to courts, attorneys, banks, executors, public and private administrators. Brandenburger and Davis is one of two major California firms providing such services; the other being an equally prominent and venerable company, The American Research Bureau of Los Angeles.

Admittedly, Brandenburger and Davis has a self-interest in participating in your deliberations. However, Brandenburger and Davis also have a great deal of experience in assisting their clients with Probate Code §229 cases and seeing first-hand the benefits which flow from the "ancestral property doctrine." Specifically, Brandenburger and Davis is involved in researching thousands of probate cases each year. In approximately 80 of those cases, the ancestral property doctrine is applicable. The average size of those estates is \$80,000 to \$100,000. Some exceed \$400,000.

As your staff is aware, Brandenburger and Davis urged the Legislature not to eliminate §229 of the Probate Code and with it, the ancestral property doctrine.

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September 22, 1983  
Page Two

Our participation before the Legislature ultimately resulted in a compromise, the adoption of Probate Code §6402.5.

Unfortunately, Brandenburger and Davis was not aware of the Commission's 1982 study of the Probate Code, nor the introduction of Assemblyman McAllister's AB 25 until that bill was well along in the legislative process. We did not, therefore, have an opportunity to meet and discuss with you these probate issues when you considered them last year. We are grateful for that opportunity now.

Your staff has proposed three alternatives regarding this issue: (1) abolish the ancestral property doctrine in total; (2) allow the compromise reached in AB 25 to stand; or (3) expand that compromise to include some personal as well as real property. We think there is a fourth alternative. As we have previously told your staff, we believe the elimination of the ancestral property doctrine provisions contained in Probate Code §229 to be the wrong public policy for California. We believe so for two reasons.

First, in the name of simplicity and ease, the Legislature, in enacting AB 25, is ending an almost 80 year old practice of fairness in the laws of intestacy. Since 1905, the California Legislature has, in some fashion, recognized that the heirs of a predeceased spouse should, as a matter of equity, receive the portion of an intestate's estate which can be attributed to the predeceased spouses separate property or his/her efforts in creating community property.

The California Supreme Court as early as 1939 in *In Re Rattray's Estate*, 13 Cal.2d 702, 91 P.2d 1024, acknowledged the wisdom and fairness of such a system:

It is apparent from the history of these code provisions and the various changes therein that ever since the amendment in 1905, wherein the origin or source of the property was

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first set up as one of the determining factors in the descent and distribution of the estate of a decedent dying intestate without issue, that there has been a consistent attempt to work out a reasonable, consistent scheme of distribution wherein upon the death of a decedent intestate without issue, instead of the whole property going to the relatives of the spouse from which title was derived. The scheme in general, as was fair and reasonable, provided that the separate property of a predeceased spouse, and that the community property of the spouses should be shared equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition. ...It will be noted that the provisions relative to the separate property of the predeceased spouse and relative to the community property of the spouses were contained in one subdivision of one section of the code (subd. 8 of sec. 1386, Civ. Code) and were intended to furnish one general plan of distribution based upon the same underlying fundamental principle, that the origin or source of the property should determine its distribution. (91 P.2d at 1048-9)

As originally proposed, AB 25 would have eliminated this long-standing system of judicial determination of rightful heirs based upon the source of the property. Instead, the Legislature has substituted a new,

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mechanistic system, based upon a presumption of what "most intestates would want." While that proposal was compromised through the enactment of Probate Code §6402.5, we do not believe that this compromise sufficiently answers the question of fairness to the heirs of the predeceased spouse.

The fairness of the existing law is made apparent from the happenstance of which spouse dies first. Brandenburger and Davis has often experienced the situation where a surviving spouse lives only a few months longer than the predeceased spouse. In many such cases the personal property is community property having been derived from the effort of both spouses over a long period of years. In some cases, inherited separate personal property, family heirlooms, jewelry, stocks, bonds and cash are left by the first to die spouse to the intestate. In one recent case, the intestate survived her spouse by only 11 months and the community personal property amounted to \$167,000. Fairness, we believe, requires that such property not pass solely to the blood relatives of the spouse who happens to be the survivor.

Secondly, to the extent that the Commission's proposal is intended to represent the "probable" desires of the intestate, we believe it doubtful that the majority of intestates without surviving spouse or issue would want to deprive the relatives of a predeceased spouse of some share of the personal property in which a spouse had an interest. Brandenburger and Davis bases that belief upon the many years of experience it has had in Probate Code §229 cases where the predeceased spouse's relatives were often well known to, sometimes living with, and even caring for the intestate, and the intestate's own heirs were unknown, distant but "blood" relatives.

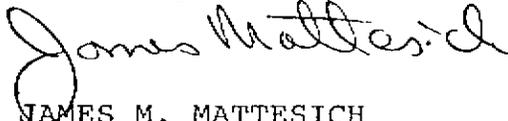
We are well aware of the Commission's concerns about expense and complexities in the probate process, and do not take them lightly. Nevertheless, we do not believe that the hoped-for reduction of those factors in this instance warrants the elimination of a long-standing doctrine of basic fairness. As this Commission well knows, due process, fairness, and justice are notions which often must be purchased with court-time, and some expense. The difficult question, obviously, is balancing those competing interests. Given that

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the Legislature and the courts have seen fit prior to this time to continually expand the principals of the ancestral property doctrine, we do not believe that the substantial history of mediating toward fairness should be summarily reversed.

Brandenburger and Davis believe the better public policy is contained not in the presumptions of simplicity and testators intent contained in AB 25 but in the present provisions of Probate Code §229. We would therefore urge the Commission to propose the restoration of the ancestral property doctrine and Probate Code §229 to the Legislature next session.

Sincerely,

A handwritten signature in cursive script that reads "James Mattesich". The signature is written in dark ink and is positioned above the typed name.

JAMES M. MATTESICH

JMM:mb



## THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW  
OFFICE OF THE DEAN

September 20, 1983

John H. DeMouilly, Esq.  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94306

Dear John:

I have reviewed the proposed statutory short form durable power of attorney although I primarily focused on the form for health care decisions. The statutory short forms would be a further improvement in the durable power of attorney legislation.

The following substantive and technical changes seem to me worth considering:

(1) Substantive change regarding expression of desire with respect to refusal of life-prolonging procedures:

This desire should be phrased to provide an objective standard, perhaps based on reasonable medical expectations, for determining when the principal desires the refusal of life-prolonging procedures. The standard must be worded so that most people will agree on its interpretation. I don't think the section should be removed even if it is not the central concern of the drafters. (Your memo #L-704). It is important to some of the people who will use the statutory form.

(2) Substantive change - health care:

Because of the broad and sweeping nature, the powers listed in Sections 2511 and 2512 should be included in the statutory short form itself. The powers could be listed directly after the respective desire concerning life-prolonging procedures. The principal could strike out any which do not express his/her intent.

(3) Technical change - health care:

An additional section should be added to subparagraph (A) of paragraph 4 of the statutory short form. This section could be titled "other desires with respect to life-prolonging procedures." This will indicate clearly

that a principal may write in his/her own desire and standard. (Subparagraph B appears to be designed for other or additional desires with respect to health care decisions in general).

(4) Substantive change - health care and property:

An optional section should be added to both the health care and property statutory short forms to provide for the nomination of a conservator of the person or estate, respectively, if protective proceedings are thereafter commenced.

(5) Technical change - health care:

The word "senile" in the second sentence of Section 1512 (b) should be struck; it is too vague and pejorative. The phrase "or otherwise unreachable by means of such communication" will cover any situation in which senility would prevent an attorney-in-fact from communicating with the principal.

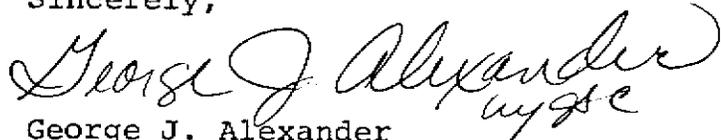
(6) Substantive change - property:

The statutory short form for property should provide the optional clause "This power of attorney shall become effective upon my incapacity."

I'm curious as to why the new code will provide that the statutory short form power of attorney is the only printed form of a durable power of attorney that may be sold in the state for use by a person who does not have legal counsel. Will the durable health care power also be restricted?

I look forward to hearing the results of the Commission's September 22-24, 1983 meeting.

Sincerely,



George J. Alexander  
Dean

Exhibit 3  
EDWARD HOWARD BORDIN, M.D., J.D.  
ATTORNEY AT LAW  
19830 LAKE CHABOT ROAD  
CASTRO VALLEY, CALIFORNIA 94546  
(415) 538-6696

September 16, 1983

John H. DeKouly  
Calif. Law Revision Commission  
4000 Middlefield Road - Rm. D-2  
Palo Alto, CA 94306

Dear John:

Enclosed please find a copy of the letter I have just sent to Governor Deukemejian, regarding SB762. Also enclosed is a copy of a recent Supreme Court of Washington case regarding discontinuance of life support, and an Appellate case from Southern California rejecting the Attorney General's opinion in 1982 regarding this matter.

I have reviewed the material sent me, and agree that some type of statutory form is an imperative, if SB762 is to work. My general reaction to the forms proposed is very affirmative. Enclosed are two suggested changes - I find the statement of desires on page 3 to be awkward and confusing. I am not sure if my suggestions are any better, but I do feel that the public will interpret a box as something to check if an affirmative choice is to be made, not a negative one. Also, I have suggested changes in the strictly medical terminology in § 2512, on page 12 of the draft. I will check further into what additional procedures or treatment modalities might be listed, and contact you further.

Unfortunately I will not be able to attend the September 22-24 meeting, but would like very much to assist the Commission in this matter if I can.

Yours truly,



Edward Howard Bordin

EHB:kr  
enc.

4. STATEMENT OF DESIRES.

(A) Desires with respect to life-prolonging procedures. In...:

(1) Prolong my life ... ( )

OR

(2) Refuse life-prolonging procedures ... ( )

(If one of the paragraphs above indicates your desires, check the box along side it and then cross out the paragraph which does not indicate your desires. Do not check both boxes or strike out both paragraphs. If neither paragraph indicates your desires, do not check either box or strike out either paragraph.)

§ 2512. Refuse life-prolonging procedures if the attorney-in-fact believes that I myself would do so under the circumstances.

2512. (a) In ....

(1) To request that aggressive medical or surgical therapy not be instituted or discontinued, including (but not limited to) cardiopulmonary resuscitation (CPR); the implantation or use of a cardiac pacemaker; renal or peritoneal dialysis; the use of a respirator or ventilator; blood or blood product administration; intravenous infusion; hyperalimentation; the use of a nasogastric or gastrostomy tube for feeding; the use of an endotracheal, nasotracheal or tracheostomy tube for ventilation; chemotherapy; antibiotics; and organ transplants.

(6) To consent to and arrange for pain relief therapy which might be considered unconventional, including (but not limited to) biofeedback, guided imagery, relaxation therapy, acupuncture, cutaneous stimulation, and other therapies which the principal or the attorney-in-fact believe may be helpful to the principal.