

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

jd10  
11/06/87

Time  
Nov. 20 (Friday) 10:00 a.m. - 4:00 p.m.

Place  
San Francisco  
Airport Hilton  
SF Airport  
(415) 589-0770

**FINAL AGENDA**

for meeting of

**CALIFORNIA LAW REVISION COMMISSION**

San Francisco

November 20, 1987

1. Minutes of October 22-23, 1987, Meeting (sent 10/29/87)

2. Administrative Matters

Annual Report for 1987

Memorandum 87-91 (to be sent)

First Supplement to Memorandum 87-91 (sent 10/28/87)

Second Supplement to Memorandum 87-91 (to be sent)

3. Study L-1024 - Interest and Income Accruing During Administration  
(Review of Comments on Tentative Recommendation)

Memorandum 87-89 (enclosed)

Tentative Recommendation (attached to Memorandum)

4. Study H-408 - Uniform Dormant Mineral Interests Act (Review of  
Comments on Tentative Recommendation)

Memorandum 87-83 (sent 10/28/87)

Tentative Recommendation (attached to Memorandum)

5. Study L-1027 - Accounts (Approval of Recommendation for Printing)

Memorandum 87-92 (sent 10/28/87)

Draft of Recommendation (attached to Memorandum)

6. Study L-1025 - Litigation Involving Decedent (Approval of Recommendation for Printing)

Memorandum 87-93 (to be sent)  
Draft of Recommendation (attached to Memorandum)

7. Study L-1048 - Procedure (Approval of Recommendation for Printing)

Memorandum 87-94 (sent 11/03/87)  
Draft of Recommendation (attached to Memorandum)

8. Study L-1038 - Abatement (Approval of Recommendation for Printing)

Memorandum 87-95 (sent 10/29/87)  
Draft of Recommendation (attached to Memorandum)

9. Study L-1046 - Nondomiciliary Decedent (Approval of Recommendation for Printing)

Memorandum 87-96 (enclosed)  
Draft of Recommendation (attached to Memorandum)

10. Study L-1029 - Distribution and Discharge (Approval of Recommendation for Printing)

Memorandum 87-86 (sent 10/02/87)  
Draft of Recommendation (attached to Memorandum)  
First Supplement to Memorandum 87-86 (sent 10/28/87)

11. Study L-2008 - Cleanup Bill for AB 708

Memorandum 87-97 (sent 11/03/87)  
First Supplement to Memorandum 87-97 (enclosed)  
Second Supplement to Memorandum 87-97 (enclosed)

12. Study L-1040 - Public Administrators (Proposed Change in Recommendation)

Memorandum 87-99 (sent 10/29/87)

13. Study L-940 - Fiduciaries' Wartime Substitution Law (Draft of Tentative Recommendation)

Memorandum 87-78 (sent 10/02/87)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 87-78 (to be sent)

MEETING SCHEDULE

NOVEMBER 1987

20 (Friday)	10:00 a.m. - 4:00 p.m.	SF Airport Hilton San Francisco Airport (415) 589-0770
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Note. The Commission will meet until 2:00 on the following Fridays without a break for lunch if necessary to complete the agenda.

DECEMBER 1987

10 (Thursday)	10:00 a.m. - 6:00 p.m.	Radisson Hotel
11 (Friday)	9:00 a.m. - 2:00 p.m.	1471 North 4th Street San Jose, CA 95112 (408) 298-0100

January 1988

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	

February 1988

18 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
19 (Friday)	9:00 a.m. - 2:00 p.m.	

March 1988

10 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
11 (Friday)	9:00 a.m. - 2:00 p.m.	

April 1988

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
15 (Friday)	9:00 a.m. - 2:00 p.m.	

May 1988

12 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
13 (Friday)	9:00 a.m. - 2:00 p.m.	

June 1988

9 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
10 (Friday)	9:00 a.m. - 2:00 p.m.	

July 1988

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	

August 1988

No meeting

September 1988

8 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
9 (Friday)	9:00 a.m. - 2:00 p.m.	

October 1988

13 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
14 (Friday)	9:00 a.m. - 2:00 p.m.	

November 1988

17 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
18 (Friday)	9:00 a.m. - 2:00 p.m.	

December 1988

8 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
9 (Friday)	9:00 a.m. - 2:00 p.m.	

**STATUS OF COMMISSION STUDIES**  
(as of October 23, 1987)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
H-408	Dormant Mineral Interests	***	***	7/87	[11/87]	
L-636	No Contest Clause	***	[12/87]			
L-655	Inventory & Appraisal	***	***	***	5/87	10/87
L-706	Temporary Guard'n & Cons'r	9/87	10/87	No TR Sent		10/87
L-940	Fiduciary's Wartime Subst'n	***	9/87			
L-1010	Opening Estate Admin.	***	***	***	9/87	10/87
L-1024	Interest & Income	***	***	9/87	[11/87]	
L-1025	Litigation with Decedents	***	***	7/87	10/87	
L-1027	Accounts	***	***	7/87	10/87	
L-1029	Distribution & Discharge	***	***	***	9/87	
L-1036	Probate Attorneys' Fees	8/87	[12/87]			
L-1038	Abatement	***	***	7/87	10/87	
L-1040	Public Guardians & Admins	***	***	***	***	9/87
L-1046	Nondomiciliary Decedents	***	***	***	9/87	
L-1048	Rules of Procedure	***	***	7/87	10/87	
L-1055	Personal Rep's Fees	10/87	[12/87]			
L-1058	Filing Fees in Probate	9/87	9/87	No TR Sent		10/87
L-1060	Multiple Party Accounts	***	[11/87]			
L-2006	Misc Provisions in Div. 3	***	***	No TR Sent		9/87
L-2007	Conforming Changes Div. 3	10/87	[11/87]			
L-2008	Probate Cleanup Bill	***	9/87	No TR Sent		
	Annual Report	9/87	[11/87]			

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
NOVEMBER 20, 1987  
SAN FRANCISCO

A meeting of the California Law Revision Commission was held at the San Francisco Airport on November 20, 1987.

Commission:

Present:	Ann E. Stodden Chairperson Forrest A. Plant Vice Chairperson	Roger Arnebergh Arthur K. Marshall Edwin K. Marzec
Absent:	Elihu M. Harris Assembly Member Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel Tim Paone Vaughn R. Walker

Staff:

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

Consultants:

None

Other Persons:

Phyllis Cardoza, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, West Los Angeles  
James D. Devine, State Bar Estate Planning, Trust and Probate Law Section, Monterey  
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View  
Richard Stack, Los Angeles County Bar Association, Probate, Trust and Estate Planning Section, Los Angeles  
Shirley Yawitz, California Probate Referees' Association, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF OCTOBER 22-23, 1987, MEETING

The Minutes of the October 22-23, 1987, meeting of the California Law Revision Commission were approved subject to the following correction:

On page 12, at the top of the page, the word "nonresident" was changed to "nondomiciliary."

ANNUAL REPORT FOR 1987

The Commission considered Memorandum 87-91 and the First and Second Supplements thereto, relating to the Annual Report for 1987. The Commission approved the annual report for printing without change.

STUDY H-408 — UNIFORM DORMANT MINERAL INTERESTS ACT

The Commission considered Memorandum 87-83, reviewing comments received on the tentative recommendation relating to the Uniform Dormant Mineral Interests Act. The Commission declined to take action on this matter because each Commissioner abstained on the basis of a possible conflict of interest. The staff will hold this proposal for a few years to see whether there is widespread acceptance and adoption of the act in other states, and will bring it back for further Commission review at that time.

STUDY I — PROBATE LAW AND PROCEDURE

ATTORNEY'S FEES

The Commission decided to defer consideration of the matter of attorney's fees in probate to the January 1988 meeting. The State Bar representatives reported that they are circulating a questionnaire to their section membership on this matter, and will report the results to the Commission in advance of the meeting. The staff should seek out the views of all interested persons and groups, including but not limited to the American Association of Retired Persons, on this matter for the January meeting. The staff was also directed to contact the legislative members of the Commission to see if they can attend the

meeting where this is discussed; if necessary to obtain their attendance the location of the meeting may be changed (it is presently scheduled for Los Angeles).

#### COMMENTS TO THE STATUTES

The Commission reviewed a letter from State Bar Study Team 4 (attached as Exhibit 1), concerned about substantive provisions that appear in Comments but not in the statute. The Commission and staff agreed that this matter should be addressed. The State Bar representatives will seek to get specifics for the Commission.

The Commission also discussed the prospects for getting the law publishers to include the Comments in their unannotated Probate Codes, in light of the importance of the Comments.

#### STUDY L-1010 -- OPENING ESTATE ADMINISTRATION

The Commissioner considered Memorandum 87-102, which was handed out at the meeting (attached as Exhibit 2), relating to opening estate administration. Although the Commission has already approved its recommendation on this subject for printing and submission to the Legislature, the Commission agreed to consider the late-arriving comments from the State Bar that were attached to the memorandum, which are primarily of a technical nature. After consideration of the memorandum, the Commission made the changes suggested in the memorandum, with the following exceptions.

#### § 8201. Order for production of will

This section was revised to read:

8201. If, on petition to the superior court of the county in which the estate of the decedent is being or may be administered alleging that a person has possession of a decedent's will, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

#### § 8402. Qualifications

The Commission will address the issue of appointment of a conservator as a ground for disqualification in more depth at a future meeting. Care should be taken that any reference to appointment of a

conservator as a ground for disqualification is limited to a conservator of the estate and is limited to a present, as opposed to a past, conservatorship.

§ 8404. Statement of duties and liabilities

The statement of duties and liabilities should be required to be in the prescribed form, and not in "substantially" the prescribed form. The Comment should note that the lawyer may supplement the prescribed form separately, where appropriate.

STUDY L-1024 — INTEREST AND INCOME ACCRUING DURING ADMINISTRATION

The Commission considered Memorandum 87-89, reviewing comments received on the tentative recommendation relating to interest and income accruing during administration. The Commission made the following changes in the recommendation.

§ 12001. Rate of interest

The interest rate should be one percentage point above the Series EE Savings Bond rate. This formulation was selected because it will be fairly stable, yet will follow market rates; the extra percentage point was added as an inducement to distribution of the estate.

§ 12002. Income and expenses of specific devise

The language of this section should be clarified that first year expenses are to be covered by the estate "whether paid during or after expiration of the one year period to which the expense is attributable."

§ 12004. Annuity; interest on annuity or devise for maintenance

Subdivision (b) should be renumbered as (c) and should be limited to a devise for maintenance. A new subdivision (b) should be added that provides:

(b) If an annuity is not paid at the end of the specified period, it bears interest thereafter, but no interest accrues during the first year after the testator's death.

§ 12006. Reference to former law

This section should be deleted.

§ 12007. Transitional provision

The staff should redraft this section for clarity.

§ 16304. When right to income arises; apportionment of income

The last clause of subdivision (a) was revised to read, "except that income on the property during the period of administration is governed by Chapter 8 (commencing with Section 12000) of Part 10 of Division 7, and becomes subject to the trust as it accrues."

§ 16314. Interest on trust distributions

The section should restate the trust interest standard, rather than incorporating the probate standard by reference. In the case of a distribution to be made from a trust on the death of the settlor, interest should not commence to run until one year after death, similar to the concept in probate administration. The last sentence of the section should be relocated to the provisions on duties of the trustee. Any income on the property should be offset against the interest. The Comment to this section should note that the trust instrument may vary the rules stated in the section.

STUDY L-1025 - LITIGATION INVOLVING DECEDENTS

The Commission considered Memorandum 87-93 and the draft *Recommendation Relating to Litigation Involving Decedents*. The Commission also considered comments of Team 3 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section distributed at the meeting. (See Exhibit 3, attached hereto.) The Commission approved the recommendation to print, subject to the following decisions:

Probate Code § 550. Action authorized

Section 550 should be revised as follows:

550. (a) Subject to the provisions of this chapter, an action to establish the decedent's liability for which the decedent was protected by insurance may, ~~after the decedent's death,~~ be commenced or continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest.

(b) The remedy provided in this chapter is cumulative and may be pursued concurrently with other remedies.

Probate Code § 552. Procedure

A comma should be added following "person" in subdivision (b).

Probate Code § 553. Defenses

In the first sentence of Section 553, "the action" should be revised to read "an action."

§ 9350. Claim prerequisite to bringing action

§ 9351. Claim prerequisite to continuing action

These sections should be revised as indicated to simplify the language and make them consistent with Section 9353.

9350. An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected ~~or is allowed~~ or approved only in whole or in part.

9351. (a) An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless a claim is first filed as provided in this part and the claim is rejected ~~or is allowed or approved only in whole or in part.~~

(b) No recovery shall be allowed in the action against property in the decedent's estate unless proof is made of the filing.

STUDY L-1027 -- ACCOUNTS

The Commission considered Memorandum 87-92, together with letters from State Bar Study Team 4 attached as Exhibits 4 and 5, relating to accounts. The Commission approved the draft recommendation attached to the memorandum for printing and inclusion in the 1988 probate legislation, subject to the following changes.

§ 10900. Contents of account

The staff should consider retabulating this section to eliminate the number of tabulations within the section. The Commission will at some time in the future devote more detailed study to adoption of the Uniform Fiduciary Accounting Standards in California. The section and Comment were revised as follows:

10900. An account shall include all of the following:

- (a) A summary statement, together with supporting schedules, of:
- (1) Property in all inventories.
  - (2) Receipts, excluding property listed in an inventory.
  - (3) Gains on sales.
  - (4) Other acquisitions of property.
  - (5) Disbursements.

- (6) Losses on sales.
- (7) Other dispositions of property.
- (8) Property remaining on hand.
- (b) A report of administration that states all of the following:
  - (1) Liabilities of the estate including creditor claims. The statement of liabilities shall include the following information--~~concerning-creditor-claims~~:
    - (A) Whether notice to creditors was given under Section 9050.
    - (B) Creditor claims filed, including the date of filing the claim, the name of the claimant, the amount of the claim, and the action taken on the claim.
    - (C) Creditor claims not paid, satisfied, or adequately provided for, whether the claim is due and the date due, the date any notice of rejection was given, whether the creditor has brought an action on the claim, and any property that is security for the claim by mortgage, deed of trust, ~~or other~~ lien or other encumbrance.
  - (2) All other matters necessary to show the condition of the estate.

Comment. Section 10900 supersedes former Section 920.3 and the first sentence of former Section 921.

Subdivision (a) is based on concepts developed in Note, California Probate Accounting Procedures, 39 S. Cal. L. Rev. 316 (1966). In the account, each schedule should contain a breakdown of the summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown would vary, depending on the nature of the estate. It would be unnecessary to show in the summary item more than the total amount of each component part making up the total. For illustrative material, see American College of Probate Counsel, National Fiduciary Accounting Standards (1980).

~~The report of administration (subdivision (b)) should include, among other relevant matters,~~ Since the purpose of the report of administration is to provide a complete summary of the estate's administration, additional statements may be necessary in order to clarify certain events or circumstances and to permit interested persons to understand the report. In certain instances, the report of administration may include such matters as that cash was invested in interest-bearing accounts or other proper investments (Section 9652). In the case of a final account, the report of administration must include the amount of fees and commissions paid or payable to the personal representative and to the attorney and must set forth the basis for determining the amount. See Section 10954(c) (waiver of account).

An account must include the information required by this section. This section does not, however, preclude an account from including any other relevant information, such as a separate statement of account as to specific gifts, allocation of principal and income, taxable income and distributable net income, and current values of property in the estate.

§ 10901. Production of supporting documents

The staff should look into the possibility of providing a general provision to the effect that unless a statute calls for personal service on the personal representative, service on a personal representative may be effectuated by service on the personal representative's attorney.

§ 10952. Account after authority terminated

The structure of this section should be reviewed for parallelism.

§ 10953. Account where personal representative dies or becomes incompetent

This section was revised as follows:

§ 10953. Account where personal representative dies, absconds, or becomes incompetent/incapacitated

10953. (a) As used in this section, "legal-;

(1) "Incapacitated" means lacks capacity to serve as personal representative.

(2) "Legal representative" means the personal representative of a deceased personal representative or the conservator of the estate of an ~~incompetent-incapacitated~~ personal representative.

(b) If a personal representative dies or becomes ~~incompetent~~ incapacitated and a legal representative is appointed for the deceased or ~~incompetent~~ incapacitated personal representative, the legal representative shall, unless the court extends the time, not later than 60 days after appointment file an account of the administration of the deceased or ~~incompetent~~ incapacitated personal representative.

(c) If a personal representative dies or becomes ~~incompetent~~ incapacitated and no legal representative is appointed for the deceased or ~~incompetent~~ incapacitated personal representative, or if the personal representative absconds, the court may compel the attorney for the absconding, deceased, or ~~incompetent~~ incapacitated personal representative or attorney of record in the estate proceeding to file an account of the administration of the absconding, deceased, or ~~incompetent~~ incapacitated personal representative.

(d) The legal representative or attorney shall exercise reasonable diligence in preparing an account under this section. Verification of the account shall be made on information and belief. The court shall settle the account as in other cases. The court shall allow a fee reasonable compensation to the legal representative or the attorney for preparing the account; the fee amount allowed shall be a charge against the estate that was being administered by the deceased, ~~incompetent~~ incapacitated, or absconding personal representative.

§ 10954. Waiver of account

The leadline should be changed to "when account is not required." The Comment should refer to specific provisions that are eclipsed by this section.

§ 11001. Contest of account

This section was revised to read:

11001. (a) All matters relating to an account may be contested for cause shown, including but not limited to:

(1) The validity of an allowed or approved claim not reported in a previous account and not established by judgment.

(2) The value of property for purposes of distribution.

(3) Actions taken by the personal representative not previously authorized or approved by the court, subject to Section 10590 (Independent Administration of Estates Act).

(b) ~~If, upon the hearing,~~ the court determines that the contest was made without reasonable cause and good in bad faith, the court may award against the contestant the fees, commissions, and costs of the personal representative and ~~attorney~~ and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded is a charge against any interest of the contestant in the estate and the contestant is personally liable for any amount that remains unsatisfied.

(c) ~~If, upon the hearing,~~ the court determines that the ~~personal representative opposes~~ opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the fees and commission or other interest of the personal representative in the estate and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied.

Subdivisions (b) and (c) should be made into a separate section located between Sections 11002 and 11003.

§ 11002. Hearing on account

Subdivision (a) was revised to read, "The court may conduct such hearing as may be necessary to settle the account, and may cite the personal representative to appear before the court for examination."

§ 11003. Settlement of claim not paid in full

This section was revised to read:

11003. If ~~in an account it appears that~~ the personal representative has settled and paid a claim for less than its full amount, the personal representative shall have receive credit in the account only for the amount actually paid.

§ 11004. Settlement of claim not properly filed

This section was revised as follows:

11004. If ~~in an account it appears that~~ a debt has been paid within the time prescribed in Section 9154 but without a claim having been filed and established in the manner prescribed by statute, ~~the court in settling the account~~ the court shall allow the amount paid if all of the following are proven:

- (a) The debt was justly due.
- (b) The debt was paid in good faith.
- (c) The amount paid was did not exceed the amount reasonably necessary to satisfy the indebtedness.
- (d) The estate is solvent.

STUDY L-1038 — ABATEMENT

The Commission considered Memorandum 87-95 and a letter from State Bar Study Team 4 (Exhibit 6), relating to abatement. The Commission approved the draft of the recommendation attached to the memorandum for printing and inclusion in the Commission's 1988 probate legislation, subject to the following changes.

§ 21400. Abatement subject to transferor's intent

A cross-reference should be added to the Comment noting Section 21101, which applies the abatement provisions to wills, trusts, deeds, and other instruments. The Comment might also refer to case law stating that abatement as between a trust estate and probate estate is determined by the intent of the decedent. See Estate of Clark.

§ 21402. Order of abatement

The reference in subdivision (b) to a person entitled to "take" property from the transferor should be replaced by a reference to a person "to whom property would pass" from the transferor. The section should be limited to persons to whom property would pass under Sections 6401 and 6402.

§ 21403. Abatement within classes

Subdivision (b) was revised to provide that a gift of an annuity or a demonstrative gift is treated as a specific gift to the extent charged against property named in the gift and is treated as a general gift to the extent charged against property not named in the gift. The staff should also check the definition of "demonstrative gift" for conformity.

§ 21405. Contribution in case of abatement

This section was revised to read:

21405. (a) ~~When~~In any case in which there is abatement when a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall reduce the distributee's share by that amount.

(b) If a specific gift ~~is required to abate~~ must be abated, the beneficiary of the specific gift may satisfy the contribution for abatement out of ~~personal assets instead of out of the beneficiary's property other than~~ the property that is the subject of the specific gift.

**STUDY L-1040 — PUBLIC ADMINISTRATORS**

The Commission considered Memorandum 87-99 relating to a proposed change in the public administrator recommendation to require a hospital, convalescent hospital, or board and care facility to notify the public administrator of the death of a person without known next of kin. The Commission adopted the proposal as set out in the recommendation.

**STUDY L-1048 - RULES OF PROCEDURE IN PROBATE**

The Commission considered Memorandum 87-94 and the draft *Recommendation Relating to Rules of Procedure in Probate*. The Commission approved the recommendation to print, subject to the following:

§ 7242. Transitional provision

This section should be revised to read as follows:

7242. Notwithstanding the repeal of former Section 1297, an appeal may be taken from an order or the refusal to make an order:

(a) Determining heirship or the persons to whom distribution should be made, pursuant to former Sections 1190 to 1192, inclusive.

(b) Fixing an inheritance tax or determining that none is due.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

## EXHIBIT 1

## STANTON AND BALLSUN

A LAW CORPORATION

AVCO CENTER, SIXTH FLOOR

10860 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90024-4318

(213) 474-5957

TELEX/FAX (213) 474-1246

PLEASE REFER TO  
FILE NO.

99900103.7L

November 17, 1987

BY FAX

James Quillinan, Esq.  
444 Castro Street, #900  
Mountain View, California 94041

Re: Substantive Provisions Contained in Comments

Dear Jim:

Team 4 felt the issue discussed in this letter to be of sufficient magnitude that it warranted its own letter. As you know, Team 4 is one of the teams appointed by the Estate Planning, Trust and Probate Law Section to review probate legislation proposed by the Law Revision Commission. In reviewing several recent communications from the Law Revision Commission, Team 4 found that the comments contained substantive provisions of the statute; these substantive provisions did not appear in the statute itself. Team 4 is greatly concerned that practitioners will be misled and courts will be unable to administer effectively unless the law is contained solely in the appropriate statute. The Commission should understand that many practitioners use paper-back versions of the Probate Code; the comments do not appear at all in these versions.

The purpose of this letter is not to denigrate the value of the comments. The comments provide invaluable insight into the rationale and history of the sections. Team 4 intends no criticism of this essential function of the comments. On the other hand, if the comments rather than the statute contain the law, then the Law Revision Commission's essential function of clarifying, condensing and reorganizing the law will be defeated.

Team 4, like the Commission, has spent too many hours to permit such a disastrous consequence to occur. Team 4 is more than

James Quillinan, Esq.  
November 17, 1987  
Page 2

willing to assist the Commission in order to ensure that the statutes and not the comments contain the law.

Thank you for your consideration.

Cordially,

*Kathryn A. Ballsun*  
KATHRYN A. BALLSUN  
A Member of  
STANTON AND BALLSUN  
A Law Corporation

KAB/ja

cc: Harley Spittler, Esq.  
Bruce S. Ross, Esq.  
James Willett, Esq.  
Barbara Miller, Esq.  
Charles Collier, Esq.  
James Devine, Esq.  
James Opel, Esq.  
Ted Cranston, Esq.  
Valerie Merritt, Esq.  
Irwin Goldring, Esq.

#L-1010

ns29b  
11/19/87

## Memorandum 87-102

Subject: Study L-1010 - Opening Estate Administration (Suggested Changes)

We have received the letter from the State Bar attached to this memorandum as Exhibit 1, relating to the Commission's recommendation on opening estate administration. Although the Commission has already approved the recommendation to print and submit to the Legislature, it is not too late to incorporate any additional changes the Commission believes are necessary. The State Bar's suggested changes are indicated below.

§ 8000. Petition

Section 8000 provides for the petition to commence estate administration:

8000. At any time after a decedent's death, any interested person may commence proceedings for administration of the estate of the decedent by a petition to the court for an order determining the date and place of the decedent's death and for either or both of the following:

(a) Appointment of a personal representative.

(b) Probate of the decedent's will. A petition for probate of the decedent's will may be made regardless of whether the will is in the petitioner's possession or is lost, destroyed, or beyond the jurisdiction of the state.

The State Bar would make the underscored language into a separate section. "Otherwise practitioners may not note the significance of this sentence."

§ 8001. Failure of person named executor to petition

Section 8001 provides:

8001. Unless good cause for delay is shown, if a person named in a will as executor fails to petition the court for administration of the estate within 30 days after the person has knowledge of the death of the decedent, the person may be held to have waived the right to appointment as personal representative.

Existing law requires that in addition to having knowledge of the death of the decedent, a person must also have knowledge of being named executor before a waiver will be implied. Section 324. The State Bar believes this provision should be restored. "Without the latter requirement, a potential executor must immediately ascertain the contents of the will of any decedent who could have named the person as executor."

The staff agrees with this observation. We do not recall how this omission occurred. In fact, as the Bar points out, the Comment to the section states that there is no change in law. The missing provision should be restored.

#### § 8002. Contents of petition

The State Bar notes mispunctuation in subdivision (a)(2): "The street number, street, and city, or other address, and the county  , of the decedent's residence at the time of death." The staff would add the comma as indicated.

#### § 8005. Hearing

The State Bar would revise subdivision (b)(1), which requires that the petitioner for administration establish the jurisdictional facts, as follows.

(b) The following matters shall be established:

(1) The jurisdictional facts, including:

(A) The date and place of the decedent's death ~~and that~~  ,

(B) That the decedent was domiciled in this state or left property in this state at the time of death.

~~(B)~~ (C) The publication of notice under Article 3 (commencing with Section 8120) of Chapter 2.

The reason for this suggestions is that the court must find that (A) and (C) "occurred" and that (B) is "true", "two very different kinds of findings." The staff has no problem with this revision, though references back in other sections must be adjusted accordingly.

#### § 8100. Form of notice

The State Bar suggests that the provisions in this chapter requiring service of notice should refer back to Section 8100, the form of notice. The staff will add this reference in the cross-references following each section.

§ 8200. Delivery of will

This section requires the custodian of a will to deliver it to the court clerk and mail a copy to the executor or beneficiary. The State Bar would clarify mailing requirement:

(2) Mail a copy of the will to the person named in the will as executor, if the person's whereabouts are known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts are known to the custodian.

The staff agrees with this change.

§ 8201. Order for production of will

The State Bar suggests the following clarification:

8201. If, on petition to the superior court of the county in which the estate of the decedent may be administered alleging that a person has possession of a decedent's will, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

The staff believes this change is sound, although we might want to add or the court in which the estate is being administered to cover that eventuality. Actually, the author of this memorandum likes a general definition of court that would simplify drafting and avoid problems such as this, along the following lines:

"Court" means the superior court of the county in which the decedent's estate may be administered or, if administration of the decedent's estate has commenced, the court in which the estate is being administered.

However, the Commission has previously rejected a staff draft such as this as unnecessary.

§ 8202. Will detained outside California

This section provides that if the original of a will is detained in a court of another jurisdiction and cannot be produced for probate here, a certified photographic copy may be admitted here. The State Bar asks whether the copy can be proved by incorporation in the will of an attestation clause that the witnesses signed. The answer to this question is yes, since Section 8202 provides that, "The same proof shall be required as if the original will were produced." We will expand the comment to refer to proof by incorporation of an attestation clause.

§ 8223. Proof of lost or destroyed will

The State Bar would revise this section:

8223. The petition for probate of a lost or destroyed will shall include ~~or be accompanied by~~ a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate.

The Bar explains that "This wording implies that the wording of the will need not be offered to the court in a verified pleading. These words were included in a previous section that also contained the procedures for proving the will by witnesses. Since new section 8224 and the comment establishes that the contemplated proof by witnesses is permissive, allegation by verified pleading of the terms of the will should be required."

The staff agrees with this suggestion.

§ 8253. Evidence of execution

The State Bar would revise the last sentence of the Comment to read, "The court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will where no witness is available. Section 8221 (proof where no subscribing witness available)." This is fine with the staff.

§ 8270. Petition for revocation

The State Bar would revise the second sentence of the Comment to read, "A will is admitted to probate when it is recorded in the minutes by the clerk pursuant to Section 822. Section 8225 (admission of will to probate)." They note that the date of the entry of the minute order may differ from the entry of the court order—a classic trap for the unwary.

§ 8402. Qualifications

One disqualification of a person from acting as personal representative is that the person is incapable of executing, or is otherwise unfit to execute, the duties of the office. The State Bar raises the issue of whether appointment of a conservator of a person's estate should preclude the person from acting as a personal

representative, or perhaps create a presumption that the person is not qualified to serve as a personal representative. The staff believes appointment of a conservator should preclude a person from acting as personal representative, without further inquiry; a person who cannot manage his or her own affairs should not be entrusted with the affairs of others.

§ 8404. Statement of duties and liabilities

The statement of duties and liabilities received by the personal representative must be "in substantially the form provided" in Section 8404 or, if the Judicial Council prescribes the form of the statement, "in the form prescribed by the Judicial Council." The State Bar is concerned that this could lead a practitioner to conclude that he or she may draw up his or her own form, as the Comment seems to indicate. The staff believes this implication is correct—a practitioner may draw up his or her own form, so long as it is substantially in the form set out in the statute. This would allow the attorney to include additional advice and warnings, or to fine-tune a statement of the law, if so inclined. The staff would alter neither the section nor the Comment.

§ 8465. Nominee of person entitled to appointment

The State Bar points out an incorrect cross-reference in the Comment, which the staff will correct.

§ 8468. Administration by any competent person

The State Bar points out an incorrect cross-reference in the Comment, which the staff will correct.

§ 8520. Vacancy in office

The State Bar notes that if appointment of a conservator of the estate is a disqualification from appointment as a personal representative, appointment of a conservator should also create a vacancy in the office of an existing personal representative.

§ 8544. Special powers, duties, and obligations

The State Bar notes that the powers of a special administrator listed in subdivision (a)(1)-(4) may be exercised without prior court authorization, whereas the powers listed in subdivision (a)(5)-(7) require a court order. The Bar suggests that the section be redrafted to group these two categories separately. The staff has no problem with this suggestion.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**



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November 19, 1987

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RE: LRC Memo 87-93

Dear Jim:

On behalf of Team 3, I have reviewed LRC memo 87-93 dated November 10, 1987. I have the following comments:

1. CCP Section 353(a). The use of the conjunctive "and" in the fourth line creates an ambiguity. It could be interpreted that the filing must be within both the limitation period of the underlying action and the six months referred to in that section. I suggest changing the fourth and fifth lines to read, ". . . representatives, after the expiration of that time, or within six months from the person's death, whichever is later." (or if intended), "whichever is earlier."
2. CCP Section 353(b). Same comment as 353(a).
3. PC Section 550(a). The phrase, "after decedent's death" in line three is redundant and should be deleted. It would be extremely difficult to commence or continue an action against a decedent's estate prior to death.
4. PC Section 552(b). Line 1, insert a comma after the word "person".

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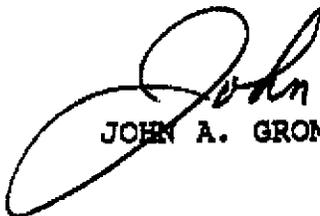
Mr. James Quillinan  
November 19, 1987  
Page Two

5. PC Section 9103(a)(1). Line 1, delete the word "creditor's" which precedes the phrase "attorney representing the creditor".

6. PC Sections 9350, 9351(a), 9353(a), and the Comment to 9351 all deal with the rejection of a claim in whole or in part. In some places the language refers to "rejected or is allowed or approved only in part". In other places, it refers to "rejected in whole or in part". The latter phrase is more precise than the former. I would suggest that the words "rejected in whole or in part" be substituted wherever the words "rejected or is allowed or approved only in part" are found.

7. PC Section 9353(a)(2). I interpret this section to mean that if an obligation does not become due until after death, the creditor has that length of time plus three months to commence an action even though the claim is rejected. Example: a single payment promissory note with principal and all accrued interest due two years after death. Is that what is intended?

Respectfully submitted,



JOHN A. GROMALA

JAG/mdr

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November 13, 1987

James Quillinan, Esq.  
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Re: Study L-1027-Accounts  
(Review of Comments on Tentative Recommendation)

Dear Jim:

On October 21 and 22, 1987, Team 4 (Harley Spitler, William Hoisington, Bruce Ross and I) discussed the Tentative Recommendation Relating to Accounts. Team 4's comments about the above-referenced Tentative Recommendation are as follows:

1. Section 10900. Contents of Account.

1.1 Team 4 suggests that "on hand" be added to Section 10900(a)(8); thus subsection (a)(8) would read:

(8) Property remaining on hand. (Suggested wording is underlined here and throughout the remainder of this letter.)

1.2 Team 4 believes that it would be helpful to add the word "amount" after the word "nature" on the fifth line of subsection (b). The line would read:

". . . creditor claims, including the name of each claimant, the nature, the amount and . . ."

1.3 The word "item" should be added after the word "summary," line 8, paragraph 2 of the comment. The clause would read:

". . . in the summary item . . ."

1.4 Team 4 is greatly concerned that in several instances, substantive sections of a statute have been set forth in the comment rather than in the section itself; the result will be to mislead and confuse practitioners. Team 4 is so concerned about this

issue that a separate letter is being submitted to respectfully draw the Commission's attention to this issue.

Paragraph 3 of the comment to Section 10900 provides a clear illustration of Team 4's concern: Line 1 of Paragraph 3 states that a report of administration "should include among other relevant matters . . ." (emphasis added). "Should" means must. Team 4 strongly believes that all mandatory requirements must be stated in the statute itself. Such mandatory requirements should not be buried in the comments.

1.5 Paragraph 3 of the comment to Section 10900 should be rewritten. Team 4 suggests the following approach:

Since the purpose of the report of administration is to provide a complete summary of the estate's administration, additional statements may be necessary in order to clarify certain events or circumstances and to permit interested persons to understand the report. In certain instances, the report of administration may include such matters as

. . . .

1.6 Team 4 agrees with the staff's response to Howard Serben regarding the attachment of supporting schedules to the summary statement of account. Further, Team 4 believes that it would be helpful to set forth illustrative material concerning supporting schedules in the comment.

1.7 Team 4 believes that the statute should contain an affirmative statement that either a categorized or chronological form of account is permissible. Particularly for smaller estates, a chronological form of account may be more than sufficient; at the minimum, the chronological form of account should be retained as an option. However, for the same reasons expressed previously, Team 4 believes that the forms of permissible accounts should be described in the statute. Team 4 suggests that a statement be made in the statute that the form of an account may be by category (item by item), chronology or employment of any other reasonable method that clearly describes the financial status of the estate.

1.8 Team 4 has reconsidered its position about the use of National Fiduciary Accounting Standards in the preparation of accounts. Team 4 now believes that the National Fiduciary Accounting Standards are an acceptable accounting form for use in California probate proceedings. Further, Team 4 urges the

Commission to commence a formal study project solely concerned with proposing a uniform accounting form for use in California probates.

1.9 Team 4 disapproves the suggestion that a statement of the fair market value of property be required in addition to the statement of property remaining on hand at the time of the accounting (subsection (a)(8)). Team 4 recognizes that some circumstances may warrant furnishing such information; in those cases, the practitioner should voluntarily provide the information.

1.10 Team 4 urges the Commission to accept Mr. Maize's suggestion (page 7) that the personal representative provide a separate statement of receipts and disbursements relating to assets that are the subject of special gifts.

1.11 On the other hand, Team 4 does not believe that the account should be required to indicate the allocation of receipts and disbursements to income and principal (page 7). Again, such a showing should be made voluntarily in appropriate cases.

1.12 As a result of various suggestions, the staff proposed treating creditors' claims in more detail. Team 4 agrees with the proposed suggestions in concept but would suggest the following modifications (new or different language underlined):

The account shall include a statement of liabilities of the estate, including creditors' claims. The statement shall include the following information <words deleted>:

- (1) same as printed.
- (2) A statement of creditor claims filed, including the date of filing the claim, the name of each claimant, the nature and amount of the claim, and the action taken on the claim.
- (3) Any claim not paid or satisfied, the due date of the claim and the reason for nonpayment, and any property that is security for the claim by mortgage, deed of trust, <words deleted>, lien or other encumbrance.

1.13 Team 4 further believes that it would be helpful if the term "liabilities" was defined.

2. Section 10901. Production of Supporting Documents.

Team 4 agrees with the concept of replacing the voucher procedure with the broader and more reasonable standard of supporting documentation.

3. Section 10950. Court Ordered Account.

Team 4 does not think that an account should be required when reporting the reasons for delay in distribution under Section 1025.5. If appropriate, the personal representative could provide such an account voluntarily. If the beneficiaries felt that the report should contain an accounting but it did not, then various methods exist for demanding such an account.

4. A supplemental accounting should not become a mandatory statutory requirement. However, Team 4 does request that the Commission consider a provision that would permit the personal representative to mail a supplemental accounting to a beneficiary, and if no objections were received within thirty (30) days, then further objections would be waived, and the personal representative could be discharged.

5. Section 10952. Account After Authority Terminated.

Team 4 suggests that the first sentence be revised as follows:

A personal representative who resigns, is removed from office; or whose authority is otherwise terminated shall <words deleted> file an account not later than sixty (60) days after termination of authority unless the Court extends the time for filing.

6. Section 10953. Account Where Personal Representative Dies or Becomes Incompetent.

6.1 The title should be amended to read:

Account Where Personal Representative Dies, Becomes Incapacitated or Absconds.

6.2 In view of the relatively recent changes in the conservatorship law, the word "incompetent" should be deleted throughout the statute and the word "incapacitated" substituted therefor.

6.3 Subsection (d) should be revised as follows:

(a) The legal representative, attorney of record, or both, shall exercise reasonable diligence in preparing an account under this section. The court shall settle the account as in other cases. The court shall allow reasonable compensation to the legal representative, or the attorney, or both, for preparing the account . . . .

6.4 Team 4 believes that the statute should include the word "abscond" which means out of the jurisdiction or that his or her whereabouts cannot be located.

7. Section 10954. Waiver of Account.

7.1 The word "any" (subsection (a), line 2) should be deleted and replaced with the word "either."

7.2 The words "this paragraph" (subsection (a)(2), line 2) should be deleted, and "subsection 2" used instead; as written, the reference is ambiguous.

7.3 The word "competent" (subsection (b)(1), line 2) should be deleted and "not incapacitated" substituted therefor.

7.4 Team 4 believes that subsection (a) is confusing as it is presently written. Initially Team 4 suggests that the introductory clause commencing with "notwithstanding . . ." be deleted, and the specific references to other sections be inserted. Further, Team 4 suggests that Section 10954(a) be rewritten as follows:

Notwithstanding Sections (intentionally left blank) of this part, the personal representative is not required to file an account if either of the following exists as to each creditor who has filed a timely creditor's claim or as to each person entitled to distribution:

- 1) such creditor or person has executed and filed a written waiver of account or a written acknowledgement that the person's interest has been satisfied;
- 2) the person's interest has been satisfied in full or adequate provision has been

made for satisfaction in full. This subsection (2) does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

7.5 The title of Section 10954 should be changed to "When Accounting Is Not Required."

7.6 Team 4 again restates its position (and that, apparently, of Luther J. Avery) that an unpaid creditor should not be entitled to receive a copy of the accounting; adequate creditor protection exists.

7.7 We, like the staff, disagree with Mr. Curzon's suggestions concerning waivers by distributees. Consistent with Team 4's position, Team 4 would not require a waiver from persons who have a claim against the estate, whether or not the claim is eventually successful. Team 4 further disagrees with Mr. Curzon when he states that an itemized specification of assets on hand should be filed with the final report of administration.

7.8 Team 4 appreciates the problem raised by Judge Robert R. Willard (page 14). Team 4 suggests that the Commission investigate and respond to the issue raised by Judge Willard. If the Commission requests, Team 4 is willing to provide assistance.

8. Section 11000. Notice of Hearing.

8.1 Team 4 agrees with Judge Henry T. Moore, Jr. that certain situations may require obtaining a waiver of notice from an unpaid creditor. One such situation is when a creditor has filed a claim in an insolvent estate.

9. Section 11001. Contest of Account.

9.1 Team 4 suggests that the following changes be made in Section 11001:

9.1.1 Line 1 of subsection 11001(a) should be changed as follows:

All matters relating to an account may be contested for cause shown . . . .

9.1.2 Subsection 11001(b) should be reworded as follows:

(b) If, after the hearing in accordance with Section 11002, the court determines that the contest was <word deleted> without reasonable cause and good faith, the court may award against the contestant the fees, commissions and costs of the personal representative and attorney incurred to defend the account. The amount awarded <words deleted> is a charge against any interest of the contestant in the estate.

9.2 Team 4 supports Nancy L. Powers' suggestion that litigation expenses should be awarded against the personal representative where the personal representative unreasonably resists the contest of account. Team 4 believes that the reciprocal doctrine of attorneys' fees would be fairer to all parties and might be a persuasive deterrent to litigation. The Executive Committee as a whole disagrees with Team 4's position.

10. Section 11002. Hearing on Account.

10.1 Team 4 suggests that Section 11002 be completely rewritten as follows:

The court may conduct such hearing as may be necessary to settle the account, including the appointment of one or more referees to examine and make a report on the account. The court may allow a reasonable compensation determined in accordance with the standards set forth in Section 11001 to the referee to be paid out of the estate.

10.2 Team 4 agrees with the suggestion of Judge Willard (page 19) but strongly suggests that the provisions dealing with the burden of proof be set forth in the statute.

11. Section 11003. Settlement of Claim Not Paid In Full.

11.1 Team 4 suggests the following changes be made in Section 11003:

If <words deleted> the personal representative has settled and paid a claim for less than its full amount, the personal representative shall receive credit in the account only for the amount actually paid.

James Quillinan, Esq.  
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Page 8

12. Section 11004.

12.1 Team 4 suggests the following changes be made in Section 11004:

<words deleted> If a debt has been paid within the time prescribed in Section 9154 but without a claim having been filed and established in the manner prescribed by statute, <words deleted> in setting the account, the court shall allow the amount paid if all the following are proven: . . .

(c) The amount paid did not exceed the amount of the indebtedness over and above all payments and set-offs.

12.2 Team 4 agrees with Judge Moore that an informally paid debt should be allowed even if payment is not made within the creditor claim period as required by this section.

Thank you for your consideration.

Cordially,

*Kathryn A. Ballsun*

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November 17, 1987

BY FAX

James Quillinan, Esq.  
 444 Castro Street, #900  
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Re: LRC Memo: 87-92-Accounts

Dear Jim:

On November 16, 1987, Team 4 (Harley Spitler, James Willett, Barbara Miller and I) discussed the Tentative Recommendation Relating to Accounts. Team 4's comments about the above-referenced Tentative Recommendation are as follows:

1. Sections 10950; 10952; 10953; Court-Ordered Account; Account After Authority Terminated; Account Where Personal Representative Does or Becomes Incompetent

It appears to Team 4 that the trend of proposed Sections 10950, 10952, 10953 is to increase the involvement of the court over that required by present law. Team 4 believes that increased court involvement is contrary to much of what the Law Revision Commission has attempted to accomplish in its rewriting of the Probate Code.

Section 10950(b) should give the court discretion to order an account if more than one year has elapsed since the last account was filed. This discretion will enable the court to deal with circumstances where an individual demands an account merely as a means of harassing the estate. One other item concerns the term "interested person." Since that term is not defined, a person only remotely concerned with the estate might be entitled to demand an account. If the court were given discretion about ordering an account, then it could adequately respond to an unwarranted demand. Finally, if the Commission agrees that the court should have this discretion, then subsection (b) should be eliminated because such discretion is already given to the court in subsection (a).

Although Team 4 has made this point several times before, Team 4 believes that the court should have discretion to order an account in the situations described in Sections 10952 and 10953. Team 4 does not believe that the rationale for making these sections mandatory is justified. For example, Team 4 is aware of one situation where the personal representative died two days after appointment. Even if the attorney knew what had occurred, is an

James Quillinan, Esq.  
November 17, 1987  
Page 2

account warranted? Moreover, the sixty (60) day time limit is unrealistic. A horrendous task would confront an attorney if an account had to be rendered for a personal representative who became incapacitated over several years and maintained inadequate records during the period. Sixty (60) days to prepare an account would be insufficient. In conclusion, the court should have discretion both with respect to ordering the preparation of an account and the number of days during which to prepare it.

2. Section 11001. Contest of Court.

In the Staff Recommendation (page 3), the Staff states that a reciprocal attorneys' fees provision has been incorporated into Section 11001 and that litigation expenses can be awarded to either the personal representative or to the contestant. As an aside, although not expressly stated, Team 4 assumes that litigation expenses include attorneys' fees.

Notwithstanding the Staff comments, subsections (b) and (c) of Section 11001 seem to contain different attorneys' fees provisions. The major difference is that subsection (c) does not authorize the award of attorneys' fees. Team 4 strongly recommends that the essential provisions and, to the extent possible, the language of subsections (b) and (c) be identical. Both subsections should expressly authorize the award of attorneys' fees.

Thank you for your consideration.

Cordially,

*Kathryn A. Ballsun*  
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November 13, 1987

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Re: Memorandum 87-82; Study L-1038-Abatements

Dear Jim:

On October 27, 1987, Team 4 (Harley Spitler, William Hoisington, Bruce Ross and I) discussed the Tentative Recommendation Relating to Accounts. Team 4's comments about the above-referenced Tentative Recommendation are as follows:

1. Throughout the statute the terms "gift" and "beneficiary" are used. In view of the recent changes in the Probate Code, Team 4 respectfully inquires whether the word "gift" should be changed to "devise" and whether "beneficiary" should be changed to "devisee." In view of the language used throughout, Team 4 is uncertain whether and how the sections apply to trusts.

2. Section 21400. Abatement Subject to Transferor's Intent.

2.1 The word "if" should be added after the word "or" on line 2, Section 21400 as follows:

". . . instrument provides for abatement, or  
if the transferor's plan, or if the . . ."

2.2 Team 4 is uncertain about the manner in which the section applies to trustees, particularly if some of the beneficiaries are relatives and some are not or if the trustee is a devisee. Since Team 4 believes that these issues deserve attention and is willing to assist the Commission in any manner requested.

3. Section 21402. Order of Abatement.

3.1 Team 4 suggests that the word "take" be deleted from subsection (b) and that the word "succeed" be substituted therefore.

3.2 Team 4 believes that there is an inconsistency between subsection (b) and the comment. The specific issue concerns the meaning of "blood relatives" set forth in the comment. Does blood relative encompass heir-at-law and mean anyone who might be entitled to inherit?

3.3 Team 4 disagrees with the suggestions of Jeffrey A. Dennis-Strathmeyer (page 6). The abatement area is complex; not even a detailed statute can anticipate every situation that might arise. Public policy prescribes that simplicity be the goal and that the basic rules not be varied except where substantial justification exists. Finally, Team 4 fails to see any compelling reason to make the suggested distinction, especially since the result would only be increased complexity.

#### 4. Section 21403. Abatement Within Classes.

4.1 A major structural problem exists in subsection (b). Does subsection (b) have priority over, and therefore disrupt, Section 21402. Team 4 believes that the statute fails to accomplish the objective set forth in the comment and is inconsistent with the comment. Team 4 is somewhat uncertain how to resolve the issue, but, to provide a starting point for discussion, makes the following alternative suggestions: 1) convert the comment into a new subsection of Section 21402 (William Hoisington's suggestion); or 2) create a new section to deal with annuities and demonstrative gifts.

#### 5. Section 21405. Contribution in Case of Abatement.

5.1 Team 4 suggests that Section 21405 be reworded as follows:

(a) In any case in which there is an abatement, when a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall reduce the distributee's share by that amount.

(b) If a specific gift must be abated, the beneficiary of the specific gift may satisfy the contribution for abatement out of the beneficiary's property other than the property that is the subject of the specific gift.

James Quillinan, Esq.  
November 13, 1987  
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6. Section 21406. Transitional Provision.

6.1 Team 4 is concerned that this section is really a substantive provision. As of the current date, the abatement rules generally do not apply to an inter vivos trust. If the term "devise" is used, then the section should only apply to wills. If the term "gift" is used, the section may apply to other gifts.

Thank you for your consideration.

Cordially,

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