

5/1/79

Memorandum 79-25

Subject: Assembly Bill 714 - Confession of Judgment

Attached is a copy of Assembly Bill No. 714, relating to confessions of judgment, which was introduced to effectuate the Commission's recommendation on this subject. This memorandum is a report on the situation with respect to this bill.

We received a letter from Timothy J. Lee (Legal Aid Society of Orange County), set out as Exhibit 1. He suggested an amendment to Section 11476.1 of the Welfare and Institutions Code to add a provision requiring advice of an attorney before a judgment by agreement is entered pursuant to that section. A copy of the amendment is set out as Exhibit 2. The staff suggested to Assemblywoman Waters, the author of the bill, that the amendment was needed; but she apparently has decided not to make the amendment because the legal aid attorneys and poverty lawyers generally take the view that the amendment might jeopardize the passage of the bill. The bill presently is without opposition, but a comparable bill was vetoed by the Governor last session. The staff plans to prepare a draft of a bill for introduction in 1980 to make the necessary conforming amendment to Section 11476.1 and perhaps to require notice of the right to appointed counsel where a paternity case is brought by the district attorney. The California Supreme Court recently held that an indigent defendant is entitled to court appointed counsel in such a case.

Also attached are two other letters we received on the Commission's recommendation. One letter (Exhibit 3) objects to the recommendation if there is any way at all that due process requirements can be met without absolutely requiring the advice of counsel. The other (Exhibit 4) believes that the proposed statute would not withstand constitutional attack. The staff believes the statute will be held constitutional. Exhibit 4 also suggests various revisions in the bill, but considering the situation in Sacramento, I doubt that the author would be willing to make the suggested amendments since they do not appear to be necessary.

Sincerely,

John H. DeMouilly
Executive Secretary



Memo 79-25

Exhibit 1

LEGAL AID SOCIETY OF ORANGE COUNTY

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CRYSTAL C. SIMS
KIYOKO TATSUI
Outreach Program
CHRISTOPHER J. HENNES
ROBERT KLOTZ
EMILY LHAMON
RAYMOND C. MORI
Senior Citizens Program
STUART M. PARKER

March 14, 1979

Howard R. Williams, Chairperson
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Recommendation Relating To Confessions
of Judgment

Dear Mr. Williams:

The Commission has recommended that the advice of attorney requirement presently applicable in consumer cases be extended to all confessions of judgment. Accordingly, the Commission has proposed an amendment of Section 1132 of the Code of Civil Procedure. I am in agreement with this recommendation.

No recommendation, however, was made to similarly amend Section 11476.1 of the Welfare & Institutions Code. The vast majority of confessions of judgment in favor of local agencies are obtained pursuant to that section. Procedural safeguards are equally necessary in such cases, particularly since the district attorney is authorized to obtain the judgments. I urge the Commission to consider amendment of Welfare & Institutions Code Section 11476.1 as well as Code of Civil Procedure Section 1132 in order to satisfy the constitutional standards announced in *Isbell v. County of Sonoma*, 21 Cal.3d 61 (1978).

Thank you for your attention to this matter.

Sincerely,

TIMOTHY J. LEE
Attorney at Law

TJL:ls

EXHIBIT 2

AMENDMENTS TO ASSEMBLY BILL NO. 714

Amendment 1

On page 1 of the printed bill, strike out line 2 of the title, and insert:

Procedure and Section 11476.1 of the Welfare and Institutions Code, relating to entry of judgment by confession or based on agreement.

Amendment 2

On page 2, following line 23, insert:

SEC. 2. Section 11476.1 of the Welfare and Institutions Code is amended to read:

11476.1. In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. A judgment based on the agreement shall be entered only if an attorney independently representing the noncustodial parent signs a certificate that the attorney has examined the proposed judgment and has advised the noncustodial parent with respect to the waiver of rights and defenses under the procedure provided by this section and has advised the noncustodial parent to utilize the procedure provided by this section. The clerk shall file the agreement and certificate without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing

of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to Section 11350, and to promptly file proof of service thereof.

For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

- (a) The standard of living and situation of the parties;
- (b) The relative wealth and income of the parties;
- (c) The ability of the noncustodial parent to earn;
- (d) The ability of the custodial parent to earn;
- (e) The needs of the custodial parent and any other persons dependent on such person for their support;
- (f) The age of the parties;
- (g) Any previous court order imposing an obligation of support.

LAW OFFICES

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March 13, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

RE: RECOMMENDATION RELATING TO CONFESSIONS OF JUDGMENT

Dear CLRC:

If there is any way at all that the due process requirements of Isbell can be met without absolutely requiring as a matter of State law the intervention of an attorney, your recommendation should be rejected. While it is a nice "make-work" bill for lawyers, there is no reason to increase the burden and expense to all parties who are trying to resolve a dispute by confessing a judgment by absolutely requiring in every case the involvement of an attorney. Even in the criminal context where liberty can be lost, a defendant can waive his right to counsel and can waive constitutional rights without counsel. Admittedly, these instances are rare and should not be encouraged. But it would seem to me that a recommendation could always give the court the power to require consultation with or approval by an attorney if the court has some doubt that the party or parties involved are perhaps proceeding "unknowingly" or "involuntarily".

Very truly yours,



STEVEN M. KIPPERMAN

SMK/lbs

Kenneth James Arnold

Attorney at Law

P. O. Box 14218

San Francisco, California 94114

March 17, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re: Recommendations Relating to: (1) Confessions of Judgment
and (2) Effect of New Bankruptcy Law on the Attachment
Law

Gentlemen or Ladies:

Your recommendation re amendment of the attachment law seems to meet the requirements of the new federal law and seems okay to me. With respect to the confession of judgment recommendation, I have some reservations. It should first be noted that the Supreme Court in Isbell did not uphold the validity of existing CCP §1132(b) since that provision was not in issue. Rather, the court merely adverted to the subdivision to show that in the area of consumer liability the Legislature recognized a due process requirement, but the court expressly declined to rule on the constitutionality of the subdivision [see Isbell v County of Sonoma (1978) 21 C3d 61, 74 fn 7].

For my part, I do not believe the certificate requirement of CCP §1132(b) (both as it exists and in the proposed amendment) could withstand constitutional attack. First, as recognized by the subdivision, the advice of independent counsel is required. Secondly, Isbell requires that there be a knowing waiver by the debtor of his/her procedural due process rights - that is, of his/her right to prior notice and opportunity to be heard. In addition, the signing of the confession constitutes a waiver of all defenses the debtor may now have or have in the future. Too, the entry of the judgment has a potential serious impact on the debtor's future property rights (the very situation involved in Isbell). For the attorney simply to state that he/she has advised the defendant with respect to the waiver of rights and defenses is not even a statement of fact (as is normally required for affidavits, declarations, and certificates - as opposed to pleadings which contain ultimate facts); rather, it is a conclusion of fact (i.e., an ultimate fact), and its validity must depend on the assumption that any given lawyer giving such advice himself/herself is aware of what rights and defenses are being waived. I submit this assumption is unwarranted. (To test my belief, I read the certificate requirement to over a dozen attorneys in San Francisco, explaining how the certificate was to be used, and then asked them - each individually - to state what rights were being waived. Only one said procedural due process right to prior notice and opportunity to be heard. Another said the right to due process but when questioned by me wasn't sure whether procedural or substantive due

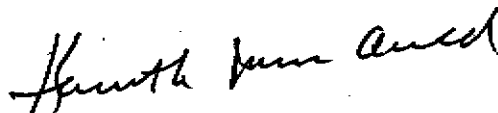
process was involved. The others gave a variety of answers, none of which was relevant. Before asking my question, I first ascertained that the attorney had not read Isbell and had been in practice less than five years.)

In view of this, I would recommend that your proposed amendment be amended as follows:

"(b) A judgment by confession shall be entered only if an attorney signs a certificate, countersigned by the debtor, that the attorney: (1) is independently representing the debtor, (2) has examined the proposed judgment, (3) has advised the defendant debtor with respect to the waiver of rights and defenses under the confession of judgment procedure, and, specifically, that by signing the confession of judgment the debtor waives both the constitutional due process right to prior notice and opportunity to be heard and any and all defenses the debtor may have now or may have in the future to the creditor's claim and of the effect that the enforcement of the judgment may have on property now owned or to be owned in the future by the debtor, and (4) has advised the defendant debtor to utilize the confession of judgment procedure. The certificate shall be filed with the filing of the statement required by Section 1133."

Hope this is helpful.

Very truly yours,



Kenneth James Arnold

ASSEMBLY BILL

No. 714

Introduced by Assemblywoman Maxine Waters

March 1, 1979

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Section 1132 of the Code of Civil Procedure, relating to confessions of judgment.

LEGISLATIVE COUNSEL'S DIGEST

AB 714, as introduced, M. Waters (Jud.). Confession of judgment.

Under existing statutory law, a judgment generally may be entered on the basis of a signed confession without notice and hearing in nonconsumer cases, however, no court may enter a confessed judgment pursuant thereto in view of the case of *Isbell v. County of Sonoma*, 21 Cal. 3d 61. In specified consumer cases, a judgment by confession may be entered only if an attorney independently representing the defendant signs a certificate that he has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure.

This bill would extend such present requirement of independent, private legal counsel in consumer cases to all cases.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1132 of the Code of Civil
2 Procedure is amended to read:
3 1132. (a) A judgment by confession may be entered
4 without action either for money due or to become due,
5 or to secure any person against contingent liability on
6 behalf of the defendant, or both, in the manner
7 prescribed by this chapter. Such judgment may be
8 entered in any court having jurisdiction for like amounts.
9 (b) ~~When the debt or liability arises out of the sale of~~
10 ~~goods or services primarily for personal, family, or~~
11 ~~household use, or a loan or other extension of credit for~~
12 ~~personal, family or household purposes, or a claim~~
13 ~~involves a promissory note which is based upon such a~~
14 ~~sale or loan or other extension of credit, such~~ A judgment
15 by confession shall be entered only if an attorney
16 independently representing the defendant signs a
17 certificate that ~~he~~ *the attorney* has examined the
18 proposed judgment and has advised the defendant with
19 respect to the waiver of rights and defenses under the
20 confession of judgment procedure and has advised the
21 defendant to utilize the confession of judgment
22 procedure. The certificate shall be filed with the filing of
23 the statement required by Section 1133.