#D-501 7/13/79

Memorandum 79-30

Subject: Study D-501 - Confession of Judgment in Support and Paternity Cases

The attached tentative recommendation is designed to remedy constitutional defects in Section 11476.1 of the Welfare and Institutions Code. That section permits an agreement for entry of judgment determining paternity or for periodic child support payments in a case where the district attorney has undertaken enforcement of support.

Section 11476.1 was held unconstitutional in County of Ventura v. Castro. We attach a copy of the opinion of this case. You should read the opinion with care.

We have attempted to draft a statute that will deal with the problem of enforcing child support payments in welfare cases in a practical way. The staff believes that the statute will be held constitutional. The district attorneys with whom this matter was discussed are of the view that the approach taken will satisfy constitutional requirements.

After the tentative recommendation has been revised to reflect any changes made at the meeting, we would like to distribute it for review and comment by interested persons. We plan to submit a recommendation to the 1980 session of the Legislature.

Sincerely,

John H. DeMoully
Executive Secretary

#D-501 7/13/79

TENTATIVE RECOMMENDATION

relating to

AGREEMENTS FOR ENTRY OF PATERNITY
AND SUPPORT JUDGMENTS

In a case where the district attorney has undertaken enforcement of support, Section 11476.1 of the Welfare and Institutions Code[1] authorizes the district attorney and the noncustodial parent to enter into an agreement for the entry of a judgment determining paternity and for

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1. Section 11476.1 provides:

> 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. The clerk shall file the agreement 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.
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> 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:
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> (a) The standard of living and situation of the parties;
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> (b) The relative wealth and income of the parties;
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> (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.

periodic child support payments based on the noncustodial parent's reasonable ability to pay. Judgment is entered by the court based on the agreement.

In County of Ventura v. Castro,[2] the Court of Appeal held Section 11476.1 unconstitutional on the ground that, on its face, the statute does not ensure that the noncustodial parent makes a valid waiver of his due process rights when executing the agreement for entry of judgment. This decision is consistent with the 1979 decision of the California Supreme Court in the Isbell case,[3] which held the general confession of judgment statute[4] unconstitutional on the ground that the statute did not provide assurance of a valid waiver of due process rights.[5]

In Castro, the court stated:[6]

> In the instant case, the statute under consideration makes no provision for protection of the due process rights of the noncustodial parent, nor does it address the issue of the manner in which defendant shall be permitted to waive those rights. The only provision with respect to information which must be provided to the defendant is the following sentence: "Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement." (Welf. & Inst. Code, § 11476.1.) Glaringly absent from the provisions is any requirement that the defendant be informed that he has a right to trial on the issues of paternity and his obligation to support the minor child.
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> Waiver of constitutional rights is never presumed. (D. H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, 186 [31 L.Ed.2d 124, 134, 92 S.Ct. 775].) Yet, in the instant case, we are called upon to presume that a defendant knowingly, intelligently, and voluntarily waived his right to notice and an opportunity to be heard when the statute contains no requirement that he even be made aware of those rights.

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2. 93 Cal. App.3d 462, ___ Cal. Rptr. ___ (1979).

3. Isbell v. County of Sonoma, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 529 (1979).

4. Code Civ. Proc. §§ 1132-1134.

5. Upon recommendation of the Law Revision Commission, the general statute relating to confession of judgment was revised in 1979 to provide that a confession of judgment is valid only if signed by a debtor on advice of an attorney. 1979 Cal. Stats. ch. __. See Recommendation Relating to Confessions of Judgment, 15 Cal. L. Revision Comm'n Reports __ (March 1979).

6. 93 Cal. App.3d at 469-71, ___ Cal. Rptr. at ___.

> Nor does the document executed by defendant reflect such a knowing and voluntary waiver. The court is instructed to enter judgment based on the agreement. However, the required waiver of due process rights could not be apparent to the court on the face of the document executed herein. No mention is made in the agreement of an understanding on the part of defendant that he has a right to a trial on the issue of paternity and child support and that he is freely giving up that right.
>
> * * * * *
>
> By the same token, the mere fact that the defendant read and executed the agreement does not demonstrate that he knowingly and intelligently waived the rights lost by that execution. Absent an express statement in the agreement setting forth the rights to which defendant is entitled and stating that he understands those rights and knowingly waives them, we must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." (Johnson v. Zerbst (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357].)

The Commission recommends that an agreement for entry of judgment determining paternity or for periodic child support payments be permitted if the agreement includes a statement listing the rights the person is waiving by signing the agreement and the consequences that may follow when the judgment is entered. The content of the statement should be specified in the statute. This addition to the statute will adopt the suggestion of the court in Castro that such a statement is necessary for a valid waiver of due process rights.

Some persons may lack sufficient understanding of the written statement to effectively waive their due process rights. In other cases, the district attorney may wish to foreclose a possible attack on the judgment based on the claimed lack of a valid waiver of due process rights. For these reasons, the statute should also permit an agreement for entry of judgment where an attorney independently representing the person signs a certificate that the attorney has examined the proposed judgment and has advised the person to sign the agreement or where the person signing the agreement has appeared before the court in which the judgment is to be entered and the court determines that the person validly waived his or her due process rights.

The court in Castro mentions another consideration involved in determining whether a waiver of due process rights is voluntary in a

paternity case where the support obligor is dealing with the office of the district attorney:[7]

> In the instant case the agreement was entered into between a lay person and an employee of the office of the district attorney. The declaration of the defendant that at the time of the discussion with Ms. Hickman he believed that he could be sent to jail for refusal to sign the agreement and believed that refusal to sign the agreement would result in "dire consequences," is, of course, uncontradicted in the record and eminently reasonable. It is common knowledge that the district attorney's office prosecutes criminal cases. We would be blinding ourselves to reality if we were to presume that an agreement such as the one in the case at bar were voluntarily executed in the absence of some express evidence of that fact. As stated in Isbell, at page 70, "[A] court presented only with the verified confession of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession."

The usual case where an agreement for entry of judgment determining paternity will be used is one where the man is not married to the mother of the minor child. The voluntariness of an agreement for entry of judgment determining paternity under these circumstances is suspect since a man may fear that, unless he signs the agreement, the district attorney will bring a criminal action[8] against him and he will be adjudged to be the father and criminally punished for his past nonsupport of the child--a child the man may believe is not his own.[9] To minimize

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7. 93 Cal. App.3d at 470-71, ___ Cal. Rptr. at ___.

8. Penal Code Section 270 permits the district attorney to institute a criminal prosecution against a man not married to the mother of a minor child for past failure, without lawful excuse, to support the child.

9. The case of Jeffrey S. II v. Jeffrey S., 76 Cal. App.3d 65, 142 Cal. Rptr. 625 (1977), illustrates this possibility. In that case, the alleged father made support payments only after he received a letter from the district attorney's office stating that a complaint had been filed against him charging him with failure to support the child and such failure was a violation of the Penal Code and carried a penalty of up to one year in jail and/or a $1,000 fine. The district attorney's office further advised the alleged father that if he desired to enter into a voluntary agreement "to avoid further proceedings against" him, he should complete and return the enclosed forms (one of which was an agreement to pay child support). The court noted that the alleged father returned the agreement unsigned, and included a letter stating that:

> [S]ince he did not believe that he was the father of the child he could not "in all conscience sign a statement" that he was.

the threat of criminal prosecution of a man not married to the mother of the child, the Commission recommends that Section 270 of the Penal Code be amended to preclude a criminal action against a father for past nonsupport of a minor child unless the father is also presumed under Section 7004 of the Civil Code to be the natural father of the child.[10]

The letter continued: "Neither do I wish to go to jail and I have been told that I really have no chance to fight this under current laws.; [sic] consequently I will make payments to avoid going to jail."

Id. at 68, 142 Cal. Rptr. at ___.

10. Section 7004 of the Civil Code provides:

7004. (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation in entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 270 of the Penal Code, and to amend Section 11476.1 of, and to add Sections 11476.2 and 11476.3 to, the Welfare and Institutions Code, relating to enforcement of the duty of support.

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

404/396

Penal Code § 270 (amended)

SECTION 1. Section 270 of the Penal Code is amended to read:

270. (a) If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(b) If a court of competent jurisdiction has made a final adjudication in either a civil or criminal action that a person is the parent of a minor child and the person has notice of such adjudication or if a judgment determining that a person is the parent of a minor child has been entered under Section 11476.1 of the Welfare and Institutions Code, and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison not exceeding one year and one day, or by a fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment.

(c) This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission

merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

(d) Proof of abandonment or desertion of a child by such parent, or the omission by such parent to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his or her child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

(e) The court, in determining the ability of the parent to support his or her child, shall consider all income, including social insurance benefits and gifts.

(f) The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child , but subdivision (a) does not apply in the case of a father of a minor child unless the father also is a man presumed under Section 7004 of the Civil Code to be the natural father of the child . A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

(g) The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child for the purpose of this section, if he consented in writing to the artificial insemination.

(h) If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitution "other remedial care", as used in this section.

Comment. Subdivision (b) of Section 270 is amended to recognize the situation where a judgment of paternity under Welfare and Institutions Code Section 11476.1 is entered without a civil or criminal action.

Subdivision (f) is amended to restrict the application of subdivision (a). If the father of a minor child does not fall within the presumption of Civil Code Section 7004, the father can be charged with nonsupport under subdivision (b) only.

404/191

Welfare & Institutions Code § 11476.1 (amended)

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

11476.1. (a) 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.

(b) A judgment based on the agreement shall be entered only if one of the following requirements is satisfied:

(1) 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.

(2) A judge of the court in which the judgment is to be entered makes a finding that the noncustodial parent has appeared before the judge and the judge has determined that under the circumstances of the particular case the noncustodial parent has voluntarily, knowingly, and intelligently waived his or her due process rights in agreeing to use the procedure provided by this section.

(3) The agreement is for the entry of judgment determining paternity and the agreement includes a statement that satisfies the requirements of Section 11476.2.

(4) The agreement is an agreement for the entry of judgment for periodic child support payments and satisfies the requirements of Section 11476.3.

(c) The clerk shall file the agreement , together with any certificate of the attorney or finding of the court, without the payment of any fees or charges. ~~The~~ If the requirements of this section are satisfied, the court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment.

(d) Upon request of the district attorney, the clerk shall set the matter for hearing within 10 days in a case described in paragraph (2) of subdivision (b). The district attorney may require the person who signed the agreement for the entry of judgment to attend the hearing by process of subpoena in the same manner as the attendance of a witness in a civil action may be required.

(e) ~~The~~ Promptly upon entry of the judgment, the district attorney shall ~~be directed to effect service~~ serve upon the obligor ~~of~~ (1) a copy of the judgment and ~~notify the obligor in writing of the~~ (2) a notice of the obligor's right to seek modification of the amount of the child support order upon a showing of ~~changes~~ change 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~~ shall promptly file proof of service thereof.

(f) Upon a showing of a change of circumstances justifying the modification of the child support order, the court shall immediately modify the order and set the amount of the child support payment pursuant to Section 11350.

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

~~(a)~~ (1) The standard of living and situation of the parties ~~;~~ .

~~(b)~~ (2) The relative wealth and income of the parties ~~;~~ .

~~(c)~~ (3) The ability of the noncustodial parent to earn ~~;~~ .

~~(d)~~ (4) The ability of the custodial parent to earn ~~;~~ .

~~(e)~~ (5) The needs of the custodial parent and any other persons dependent on such person for their support ~~;~~ .

~~(f)~~ (6) The age of the parties ~~;~~ .

~~(g)~~ (7) Any previous court order imposing an obligation of support.

Comment. Section 11476.1 is amended to provide procedures for waiver of the noncustodial parent's due process rights in an agreement for entry of judgment of paternity or for periodic child support or both. The procedures, together with provisions added by Sections 11476.2 and 11476.3, are designed to satisfy the constitutional standards announced in Isbell v. County of Sonoma, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and County of Ventura v. Castro, 93 Cal. App.3d 462, ___ Cal. Rptr. ___ (1979). See Recommendation Relating to Agreements for Entry of Paternity and Support Judgments, 15 Cal. L. Revision Comm'n Reports ___ (1979).

404/168

Welfare & Institutions Code § 11476.2 (added)

SEC. 3. Section 11476.2 is added to the Welfare and Institutions Code, to read:

11476.2. A judgment determining paternity based on agreement may be entered under Section 11476.1 if the agreement for entry of the judgment includes a statement signed by the noncustodial parent in substantially the following form:

(a) I understand that I am agreeing to the entry of a judgment that I am the father of (name of child).

(b) I understand that, if I do not sign this agreement, I have the right to a jury trial, or a trial by the court if I waive jury trial, in any court proceeding brought to determine whether I am the father of this child.

(c) I understand that, if a trial is held to determine if I am the father of this child, I will have the right to have the court order the mother, the child, and myself to submit to blood tests. Blood tests sometimes show that a person claimed to be the father of a child could not possibly be the father of that child. I understand that the court decides who pays for the blood tests. The court could order that I pay none, some, or all of the cost of the tests.

(d) I understand that I have the right to be represented in this matter by a lawyer. I understand that, if I cannot afford to hire a lawyer, one will be appointed to represent me in this matter, if I wish one.

(e) I understand that, after entry of the judgment that I am the father of this child, I have the duty to contribute to the support of this child.

(g) I understand that the court may order my employer to withhold the support payments from my wages and pay them to the person named by the court.

(h) I understand that, after entry of the judgment that I am the father of this child, my intentional failure to support the child, without lawful excuse, is a crime. If convicted, I can be punished by either or both of the following:

(1) A fine of not more than $1,000.

(2) Confinement in the county jail for not more than one year or in a state prison for not more than one year and a day.

(i) I understand this statement and my rights and I voluntarily, knowingly, and intelligently waive my rights.

Comment. Section 11476.2 provides for a statement of the noncustodial parent's rights and the effect of the agreement as a part of an agreement for entry of a paternity judgment. The section is intended to ensure that the agreement for entry of paternity judgment, on its face, is a valid waiver of the noncustodial parent's due process rights. This section, together with amended Section 11476.1 and added Section 11476.3, is designed to satisfy the constitutional standards announced in Isbell v. County of Sonoma, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and County of Ventura v. Castro, 93 Cal. App.3d 462, __ Cal. Rptr. ___ (1979). See also Salas v. Cortez, 24 Cal.3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979) (right to appointed counsel).

045/167

Welfare & Institutions Code § 11476.3 (added)

SEC. 4. Section 11476.3 is added to the Welfare and Institutions Code, to read:

11476.3. A judgment for periodic child support payments based on agreement may be entered under Section 11476.1 if the following requirements are met:

(a) It has been determined by adjudication, agreement for entry of a judgment determining paternity, or conclusive presumption as provided in Evidence Code Section 621, that the person agreeing to entry of the

judgment for periodic child support payments is a parent of the child.

(b) The agreement for entry of judgment includes a statement signed by the noncustodial parent in substantially the following form:

(1) I understand that, if I do not sign this agreement, I have the right to have a court determine the amount of child support.

(2) I understand that, by agreeing to entry of the judgment, I waive my right to have a court determine the amount of child support.

(3) I understand that I have the right to be represented in this matter by a lawyer.

(4) I understand that I will be required to support the child by the amount stated in this agreement but that the court has authority to increase or decrease this amount in case of a change of circumstances.

(5) I understand that the court may order my employer to withhold the support payments from my wages and pay them to the person named by the court.

(6) I understand that my intentional failure to support the child, without lawful excuse, is a crime. If convicted, I can be punished by either or both of the following:

(A) A fine of not more than $1,000.

(B) Confinement in the county jail for not more than one year or in a state prison for not more than one year and a day.

(7) I understand this statement and my rights and I voluntarily, knowingly, and intelligently waive my rights except for my right to request the court to change the amount of the child support payments if I can show a change of circumstances.

Comment. Section 11476.3 is added to require that an agreement for entry of a judgment for periodic support payments include a statement of the noncustodial parent's rights and the effect of the agreement. This section is intended to ensure that the agreement, on its face, is a valid waiver of the noncustodial parent's due process rights. This section, together with amended Section 11476.1 and added Section 11476.2, is designed to satisfy the constitutional standards announced in Isbell v. County of Sonoma, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and County of Ventura v. Castro, 93 Cal. App.3d 462, ___ Cal. Rptr. ___ (1979).

[Civ. No. 54214. Second Dist., Div. Four. May 25, 1979.]

COUNTY OF VENTURA, Plaintiff and Respondent, v. RUDY CASTRO, JR., Defendant and Appellant.

SUMMARY

The trial entered judgment against defendant pursuant to Welf. & Inst. Code, § 11476.1, authorizing the entry of a judgment establishing paternity and an obligation to pay child support, in accordance with an agreement between defendant and the district attorney. The trial court denied defendant's motion to set aside the judgment. (Superior Court of Ventura County, No. D88353, Roland N. Purnell, Temporary Judge.*)

The Court of Appeal reversed and remanded with directions to enter an order granting defendant's motion setting aside the agreement for the entry of judgment, and the judgment. The court held that because Welf. & Inst. Code, § 11476.1, made no provision for protection of the due process rights to notice and hearing of the noncustodial parent, nor addressed the issue of the manner in which defendant would be permitted to waive those rights, an agreement for judgment or a judgment entered pursuant to the statute was constitutionally defective. The court pointed out the statute contained no requirement that defendant be informed that he had a right to trial on the issues of paternity and his obligation to support the minor child. The court also held the document executed by defendant did not reflect a knowing and voluntary waiver, and no such waiver could be presumed. The court pointed out the statute made no provision for any prejudgment judicial determination on the issue of waiver. The court rejected the contention the statute violated the doctrine of separation of powers, and held that if an agreement or judgment were executed based on a statute which respected defendant's right to due process of law, a judgment could properly be entered thereon. (Opinion by Alarcon, J., with Kingsley, Acting P. J., and Jefferson (Bernard), J., concurring.)

*Pursuant to Constitution, article VI, section 21.

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Appellate Review § 30—Decisions Appealable—Orders After Judgment—To Vacate Judgment.**—While an order denying a motion to reconsider or vacate a judgment is not ordinarily appealable, an appeal may be taken from the denial of a statutory motion to vacate.

(2a, 2b) **Parent and Child § 17—Rights Respecting Illegitimate Children—Support, Care, and Education—Proof of Legitimacy or Paternity—Civil Liability—Agreement for Judgment—Constitutionality.**—An agreement between defendant and the district attorney, and a judgment entered thereon, establishing paternity and an obligation to pay child support as authorized by Welf. & Inst. Code, § 11476.4, was invalid. The statute was constitutionally defective where it made no provision for protection of the due process rights to notice and hearing of defendant, did not address the issue of the manner in which defendant should be permitted to waive those rights, where it made no provision for any prejudgment judicial determination on the issue of waiver, and where the judgment entered would deprive defendant of personal property and might deprive him of his freedom. Moreover, in view of the circumstances under which the agreement was entered into, it could not be presumed that it was voluntarily executed.

[See **Cal.Jur.3d**, Family Law, § 176; **Am.Jur.2d**, Parent and Child, § 74.]

(3) **Estoppel and Waiver § 20—Waiver—Rights and Privileges Waiverable—Constitutional Rights.**—Waiver of constitutional rights is never presumed.

(4) **Constitutional Law § 37—Distribution of Governmental Powers—Between Branches of Government—Doctrine of Separation of Powers—Violations of Doctrine—Agreement for Judgment—Child Support.**—Welf. & Inst. Code, § 11476.1, authorizing the entry of a judgment establishing paternity and an obligation to pay child support pursuant to stipulation, does not violate the doctrine of separation of powers (Cal. Const., art. III, § 3). The statute does not effectively transfer the power to render a judgment of paternity and child support from the court to the district attorney. The statute comes into play only when there has been an agreement between the

district attorney and the noncustodial parent as to paternity and as to the amount of child support payments based on reasonable ability to pay. The effect of such an agreement is to declare that there is no dispute as to the facts which require resolution by an evidentiary hearing.

COUNSEL

King & Skeels and Paul Lockwood Skeels for Defendant and Appellant.

Stephen P. Wiman, Manuel Jose Covarrubias, Richard A. Weinstock and Robert Guerra as Amici Curiae on behalf of Defendant and Appellant.

George Deukmejian, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Andrew D. Amerson, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

ALARCON, J.— (1) (See fn. 1.) Defendant has appealed from the order denying his motion to set aside judgment for child support.[1] The judgment was entered pursuant to an agreement for the entry of judgment as authorized by Welfare and Institutions Code section 11476.1.[1]

Contentions on Appeal

Appellant asserts that:

(a) Welfare and Institutions Code section 11476.1 is unconstitutional because it authorizes the entry of judgment without notice and opportuni-

[1]Ordinarily, an order denying a motion to reconsider or vacate a judgment is not appealable. However, an appeal may be taken from the denial of a statutory motion to vacate. In the instant case, defendant moved pursuant to Code of Civil Procedure section 473 to set aside the judgment entered on the grounds of mistake, inadvertence, surprise, excusable neglect, duress, and undue influence. The order denying that motion is appealable. (*Winslow* v. *Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 282 [153 P.2d 714].)

ty to be heard, or adequate waiver thereof, and thus deprives defendant of due process of law; and

(b) the agreement for the entry of judgment is a contract between defendant and the District Attorney of the County of Ventura and is void.

Amici curiae contend that the statutory requirement that the court enter judgment pursuant to stipulation is violative of the doctrine of separation of powers.

Summary of the Facts

Prior to August 2, 1977, Viola Gonzales applied for welfare benefits from the County of Ventura. She informed the county employees that she was pregnant and that Rudy Castro, Jr. was the father of her unborn child. The family support division of the office of the District Attorney of Ventura County wrote a letter to Mr. Castro requesting that he come into the Ventura County District Attorney's office to discuss the matter. On August 2, defendant came to the office in response to the letter and spoke to Juanita J. Hickman, a family support officer of the office of the district attorney.

Ms. Hickman asked defendant if he was the father of the child and defendant stated that there were some doubts in his mind but "more than likely I am the father." Ms. Hickman explained to defendant his options. She explained that if he wished to agree to paternity of the unborn child, he could enter into an agreement of paternity with the district attorney's office which would be filed with the court and which would result in a judgment of paternity and an order that he pay child support. She told him that if he was not sure he was the father, the office would file a civil paternity action, serve him with summons and complaint, and he would have thirty days within which to file an answer and have a trial on the issue. She also explained that if he did nothing after the summons and complaint were served upon him, a judgment by default would be entered against him, resulting in an order requiring him to pay child support.

She told him that Ms. Gonzales had nothing to do with bringing the action except that she had accepted welfare assistance and that any money paid by defendant for the support of the child would be used to reimburse the county for the welfare assistance expended for the child. Defendant agreed to sign the agreement for judgment. He read and

signed the agreement prepared by Ms. Hickman and was provided with a copy of the agreement.

The agreement was filed with the Ventura County Superior Court on August 11, 1977. The agreement contains the following provisions:

"It is hereby agreed by plaintiff, through C. STANLEY TROM, District Attorney for the County of Ventura, and Rudy Castro, Jr., defendant, that the following facts are true and that a judgment be entered against the defendant in accordance with this agreement.

"1. Defendant acknowledges that the District Attorney of Ventura County does not represent him and that he understands that he has had an opportunity to have an attorney advise and represent him in this matter.

"2. Defendant understands that a judgment for child support will be entered against him based upon this agreement.

"3. The defendant is the father of: unborn child of Viola Gonzales, due to be born December 1977.

"4. The defendant agrees to pay $125.00 per child per month commencing on Sept. 1, 1977, and on the same date each month thereafter until termination by operation of law or further order of court."

In addition, the agreement provides for payment of a $2.50 processing service charge per month, a mode of payment and address to which payments are to be mailed, a requirement that defendant keep the district attorney's office apprised of his address, and an acknowledgment that if defendant should become two months in arrears in child support payments, his wages shall be assigned.

On August 11, 1977, judgment for child support by agreement was entered by the Ventura County Superior Court. In that judgment, the court decrees that defendant is the father of the unborn child of Viola Gonzales and orders defendant to pay the sum of $125 per month child support "until termination by operation of law or further order of court."

On February 9, 1978, defendant moved to set aside the agreement and the judgment entered thereon pursuant to Code of Civil Procedure

section 473. Defendant's motion was supported by his declaration that at the time he visited the district attorney's office, he had serious doubts that he was the father of the child; that he was aware that the district attorney prosecutes criminal cases and feared that he could be sent to jail for refusal to sign the agreement; that he did not realize that he was giving up his right to trial by jury on the issue of paternity, his right to discovery, and his right to a blood test. He further stated that he was not aware that by signing the agreement he was agreeing to support an unborn child until the child reached the age of 18 years.

Defendant averred that he did not sign the agreement freely and voluntarily but as the result of coercion and duress, nor did he understand the nature and consequences of the document.

Opposition to the motion to set aside the judgment was supported by a declaration executed by Juanita Hickman setting forth the information she had provided to defendant and the explanation she had given him concerning his options. The contents of her declaration are as previously summarized in the summary of the facts. Her declaration concludes:

"At no time was Mr. Castro threatened in any fashion nor were any promises made to him to induce him to enter into this agreement. I made every attempt to explain to him his options to his satisfaction and answer his questions. There was no mention of any criminal action in any respect during our conversation nor was there any mention of the possibility of any jail sentence being imposed."

Defendant's motion to set aside the judgment was denied, and this appeal followed.

Constitutionality of Welfare and Institutions Code Section 11476.1

(2a) Appellant argues that the code section authorizing the entry of a judgment establishing paternity and an obligation to pay child support pursuant to stipulation is violative of due process. Welfare and Institutions Code section 11476.1 provides as follows:

"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. The clerk shall file the agreement 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 payments 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."

Appellant relies on the recent California Supreme Court decision, *Isbell* v. *County of Sonoma* (1978) 21 Cal.3d 61 [145 Cal.Rptr. 368, 577 P.2d 188], in support of his contention that the statute under consideration here is unconstitutional. In *Isbell*, the Supreme Court found unconstitutional the California Confession of Judgment statutes (Code Civ. Proc., §§ 1132-1134). Appellant's analogy between the confession of judgment condemned there and the agreement for judgment procedure utilized here is well drawn. The *Isbell* court first observed that, under the due process clause of the federal Constitution, (p. 64): "[A] court may enter judgment against a defendant only if the record shows that either

(a) the defendant has received notice and an opportunity to be heard, or (b) the defendant has voluntarily, knowingly and intelligently waived his constitutional rights." In *Isbell*, the plaintiffs had allegedly received excess welfare benefit payments from the County of Sonoma. At the behest of a county representative, they executed confessions of judgment for the sums due and authorized the entry of judgment against them in those amounts. The confessions of judgment were filed with the court and judgments were thereupon entered for the confessed sums. The *Isbell* court observed that (p. 66): "The striking feature of the confession of judgment at common law lies in its authorization for entry of final judgment against a debtor without notice, hearing, or opportunity to defend." In this respect, we see no distinction between a confession of judgment and an agreement for judgment. Once the agreement has been executed, it may be filed at any time at the pleasure of the district attorney's office, without prior notice to defendant. Defendant receives notice only after judgment has been entered against him. ". . . all courts agree that a judgment entered pursuant to such a confession is constitutional only if the confession constitutes a *valid waiver* of the debtor's due process rights. [Citations.]" (*Isbell, supra*, at p. 68.)

Respondent argues that the waiver by defendant in this case was knowing and voluntary and makes reference to the declaration of Juanita Hickman concerning her conversation with defendant. We recognize that we must resolve any factual dispute between appellant and respondent in favor of respondent. However, our inquiry here must be not whether this defendant knowingly and intelligently and voluntarily waived his right to notice and hearing, but whether the statute makes provision for such waiver. The *Isbell* court at page 65 summarized its holding as follows: "Because the California statutes provide insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing, and intelligent waiver, . . . we conclude that the confession of judgment procedure established in sections 1132 through 1134 violates the due process clause of the Fourteenth Amendment."

In the instant case, the statute under consideration makes no provision for protection of the due process rights of the noncustodial parent, nor does it address the issue of the manner in which defendant shall be permitted to waive those rights. The only provision with respect to information which must be provided to the defendant is the following sentence: "Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement." (Welf. & Inst. Code, § 11476.1.) Glaringly absent from the

provisions is any requirement that the defendant be informed that he has a right to trial on the issues of paternity and his obligation to support the minor child.

(3) Waiver of constitutional rights is never presumed. (*D. H. Overmyer Co.* v. *Frick Co.* (1972) 405 U.S. 174, 186 [31 L.Ed.2d 124, 134, 92 S.Ct. 775].) Yet, in the instant case, we are called upon to presume that a defendant knowingly, intelligently, and voluntarily waived his right to notice and an opportunity to be heard when the statute contains no requirement that he even be made aware of those rights.

(2b) Nor does the document executed by defendant reflect such a knowing and voluntary waiver. The court is instructed to enter judgment based on the agreement. However, the required waiver of due process rights could not be apparent to the court on the face of the document executed herein. No mention is made in the agreement of an understanding on the part of defendant that he has a right to a trial on the issue of paternity and child support and that he is freely giving up that right.

In *Isbell, supra,* 21 Cal.3d 61, the Supreme Court concluded that the confessions of judgment executed therein demonstrated neither the voluntary character of any waiver of due process rights nor that such waiver was knowing or intelligent. The court observed the disparity of bargaining power between the creditor who prepared the agreement, in that case the County of Sonoma, and the debtor. The court observed that the drastic nature of the document which resulted in the debtor's advance waiver of all possible defenses and of the right to be notified of the existence of the proceeding against him, strongly implied overreaching on the part of the creditor and precluded the indulgence in a presumption that the execution of the document by the debtor was voluntary. (*Isbell* v. *County of Sonoma, supra,* at pp. 69-70.)

In the instant case the agreement was entered into between a lay person and an employee of the office of the district attorney. The declaration of defendant that at the time of the discussion with Ms. Hickman he believed that he could be sent to jail for refusal to sign the agreement and believed that refusal to sign the agreement would result in "dire consequences," is, of course, uncontradicted in the record and eminently reasonable. It is common knowledge that the district attorney's office prosecutes criminal cases. We would be blinding ourselves to reality if we were to presume that an agreement such as the one in the case at bar were voluntarily executed in the absence of some express evidence of

that fact. As stated in *Isbell*, at page 70, "[A] court presented only with the verified confession of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession."

By the same token, the mere fact that the defendant read and executed the agreement does not demonstrate that he knowingly and intelligently waived the rights lost by that execution. Absent an express statement in the agreement setting forth the rights to which defendant is entitled and stating that he understands those rights and knowingly waives them, we must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." (*Johnson* v. *Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357].)

Finally, the statute makes no provision for any prejudgment judicial determination on the issue of waiver. The statute directs that once an agreement for judgment has been filed, "the court shall enter judgment thereon without action." Similar language in the Confession of Judgment statutes was found infirm because it did "not provide for a case by case determination of the validity of the debtor's waiver." (*Isbell, supra,* at p. 71.)

Code of Civil Procedure section 1134 directs the *court clerk* to enter judgment upon the filing of a written confession. Welfare and Institutions Code section 11476.1 directs that the judgment shall be entered by the *court.* However, neither statute requires or provides an opportunity for a judicial determination of the validity of any constitutional waivers. Respondent seeks to persuade us that the analogy drawn between confessions of judgment and agreements for judgment is erroneous. Respondent contends that the fact that defendant is informed that judgment will be entered based on the agreement, that he is informed that he has the right to consult an attorney, and that he is provided with a copy of the agreement, serve to distinguish the two documents. But we believe that the position of the parties in this case, and the direct and collateral consequences of the execution of an agreement for judgment concerning paternity and child support, demand even closer constitutional scrutiny.

Defendant was informed that if he signed the agreement for judgment, he would be obligated to pay $125 per month child support until termination by operation of law or further order of court. He was also advised that the money was to be paid to the county, not to Ms. Gonzales, as reimbursement so long as she was accepting welfare benefits. He was

further advised that if at any time he became two months in arrears in child support payments, his wages could be assigned. However, he was not advised that he could be subject to criminal prosecution for failure to support the child as ordered. On the contrary, Ms. Hickman's declaration states: "There was no mention of any criminal action in any respect during our conversation nor was there any mention of the possibility of any jail sentence being imposed." In fact, Penal Code section 270 provides that the failure to support one's child is a misdemeanor punishable by fine and/or incarceration.

Of additional concern is the fact that the explanation given to the defendant and the agreement which he signed imply that the obligation assumed is only to the County of Ventura so long as the mother of the minor child is receiving welfare aid. However, it is not unlikely that were such aid to terminate, the mother would seek child support payments directly from defendant. The execution of the agreement by defendant, admitting paternity, and the existence of a judgment establishing paternity, would be admissible as evidence on that issue in any subsequent support action. (See *Salas* v. *Cortez* (1979) 24 Cal.3d 22, 29 [—Cal.Rptr. —, — P.2d —]; Pen. Code, § 270e.)

Both the California Legislature and the California courts have in recent years severely limited the use of confessions of judgment or cognitive provisions. (See for example *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 449 [105 Cal.Rptr. 152, 503 P.2d 608]; *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 307 [138 Cal.Rptr. 53, 562 P.2d 1302]; *Brooks* v. *Small Claims Court* (1973) 8 Cal.3d 661 [105 Cal.Rptr. 785, 504 P.2d 1249]; *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 275-276 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206].) An example of legislative concern is the 1975 amendment to Code of Civil Procedure section 1132. That section now provides that in any sale or loan primarily for household, family or personal use, judgment may be entered on a confession only if an attorney who independently represents the defendant certifies that he has advised the defendant concerning his rights and the waiver thereof and his defenses, and that the attorney has recommended the use of the confession of judgment procedure.

What we view as a trend toward providing protection against the entry of judgments without notice, where due process rights may not have been waived, is properly followed in this case. The judgment here will deprive defendant of personal property and may deprive him of his freedom. Any statute authorizing the entry of a judgment under such circumstances

must contain adequate safeguards to assure that defendant's rights to due process are properly waived.

Therefore, an agreement for judgment or a judgment entered pursuant to Welfare and Institutions Code section 11476.1 is constitutionally defective.

Separation of Powers

(4) Amici curiae attack the constitutionality of section 11476.1 of the Welfare and Institutions Code on the ground that it violates the doctrine of separation of powers. Article III, section 3, of the California Constitution provides as follows: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Amici Curiae contend that section 11476.1 "effectively transfers the power to render a judgment of paternity and for child support from the court to the district attorney." Amici argue that the effect of section 11476.1 is to preclude the trial court from holding an evidentiary hearing so as to make an independent determination of the fact of paternity and the amount of support to be awarded based on the parent's reasonable ability to pay. Instead, we are told, the statute gives this fact-finding power to the district attorney.

We disagree. The statute does not come into play unless there has been an agreement between the district attorney and the noncustodial parent as to paternity and as to the amount of child support payments based on his reasonable ability to pay. The effect of such an agreement is to declare that there is no dispute as to the facts which require resolution by an evidentiary hearing. We see no rational purpose which would be served by requiring an evidentiary hearing in all civil child support actions. The court system should not have this additional burden thrust upon its overcrowded docket.

In the field of criminal law where lives and freedom are at stake, our highest courts have recognized the importance to the court system of permitting the prosecutor and the accused to work out plea bargaining agreements which avoid a trial. (*Santobello* v. *New York* (1971) 404 U.S. 257 [30 L.Ed.2d 427, 92 S.Ct. 495]; *People* v. *West* (1970) 3 Cal.3d 595 [91 Cal.Rptr. 385, 477 P.2d 409].) We see no reason to impose a more restrictive concept concerning civil actions.

The statute in question does not violate the doctrine of separation of powers, and if an agreement for judgment were executed based on a statute which respected defendant's right to due process of law, as discussed hereinabove, a judgment could properly be entered thereon.[2]

The Validity of the Agreement

Appellant contends that the agreement for judgment entered into herein was in fact a contract and as such is voidable because: (a) defendant acted under duress and did not freely consent to the terms of the contract; (b) the defendant's consent was obtained by mistake of fact, in that he was misinformed with respect to the anticipated birthdate of the child; (c) the agreement was executed by defendant while he was operating under a mistake of law, in that he did not understand that he was assuming an obligation to support the child until the child reached the age of 18; and (d) the contract was executed without consideration flowing to the defendant.

Whether the agreement herein is interpreted as a contract (see *L. A. City Sch. Dist.* v *Landier Inv. Co.* (1960) 177 Cal.App.2d 744, 750-751 [2 Cal.Rptr. 662]) or a stipulation (see *Harris* v. *Spinali Auto Sales, Inc.* (1966) 240 Cal.App.2d 447, 452-454 [49 Cal.Rptr. 610]), analysis of this issue is unnecessary to the resolution of this case. If the agreement herein were found to be void or voidable, that finding would be based on an examination of the facts in this case. We have determined that the agreement for judgment and judgment entered herein are void, the authorizing statute being unconstitutional. It is therefore unnecessary to determine whether the agreement is also invalid as violative of the rules governing contracts or stipulations.

The order denying defendant's motion to set aside the judgment is reversed and the cause remanded with directions to enter an order granting defendant's motion setting aside the agreement for the entry of judgment, and the judgment. Costs on appeal are awarded to appellant.

Kingsley, Acting P. J., and Jefferson (Bernard), J., concurred.

[2]Amici request that we give retroactive effect to the holding in this case. We decline on these facts to address the issue of retroactivity.