10/9/81

Memorandum 81-68

Subject: New Topics

At the time the Commission considers its Annual Report it is the Commission's practice to review the suggestions for new topics that have been received since the last Annual Report was approved for printing. This permits the Commission to include a request for authority to study a new topic if the Commission considers that it is appropriate to request authority to study a new topic.

The new topic suggestions received since the last Annual Report was approved for printing are discussed below. With a number of major studies on our active agenda, the staff recommends that the Commission not request at this time the authorization to study any new topics. However, if the Commission believes that any of the topics outlined below should be given serious consideration for study, the staff will make a careful analysis of the topic and, if necessary, prepare material that could be included in the Annual Report to request authority to study the new topic.

Disposition of psychotherapist's notes relating to patients when psychotherapist dies

Kurt Melchior (Exhibit 1) points out the difficult problem that is created upon the death of a psychotherapist as to the disposition of the psychotherapist's notes relating to his or her patients. The Commission is authorized to study the Evidence Code and the Probate Code. Accordingly, it would not be necessary to obtain legislative authorization to study this difficult problem. However, the problem is difficult and a background study would be required before the Commission could undertake to deal with the problem. In view of the major studies now under active consideration and the lack of staff resources and the limited funds available, the staff recommends that consideration of this suggestion be deferred until new topics are considered next year. If the Commission desires, we will, however, attempt to persuade a law review to give consideration to preparing a student written article on the problem.

Partition procedure

Robert T. Dofflemyer (Exhibit 2) complains about an experience under the partition law. This is a topic the Commission already is authorized to study.

The partition statute (CCP § 873.010) provides that the court "shall" appoint a referee to make a report to the court concerning the division or sale of the property, but the court in the case brought to our attention construed the word "shall" to mean "may." It was intended by the use of the word "shall" that a referee be required to be appointed. However, the judicial decision does not cause the staff concern since the staff would have permitted but not required the appointment of a referee, but the word "shall" be used because of the insistence of our consultant (Mr. Elmore) that the appointment be required.

One possible Commission action would be to propose a provision to make the statute consistent with the court decision that "shall" means "may." This could be accomplished by adding a provision to the statute that nothing in the statute deprives the court from itself performing the duties and exercising the authority given by the statute to the referee. The staff doubts that the matter is important enough (since there is a judicial decision) to merit the staff resources required to obtain the enactment of a bill to clarify the statute. It would not, however, require a great deal of staff resources to obtain enactment of such a bill.

Extend the right of publicity to survivors

John Sommer, a law student at UCLA, suggested a number of matters to Commissioner Berton for possible study by the Law Revision Commission. One suggestion of Mr. Sommer is that the right of publicity be extended to survivors. This suggestion is set out in Exhibit 3 attached. The matter was decided by a 1979 California Supreme Court decision to which Mr. Sommer objects. We would need authority to study this topic if the Commission decided that the matter is in need of a Commission type study.

Add provision to Civil Code and Code of Civil Procedure that division, chapter, article, and section headings do not affect the substance of the statute

Mr. Sommer (Exhibit 4) suggests that a provision be added to the Civil Code and Code of Civil Procedure that the section and similar

leadlines (or captions) do not affect the substance of the statute text. This is a topic that would require authorization for study if it were to be studied and is one that hardly merits a Commission type study.

Uniform Condominium Act

Mr. Sommer (Exhibit 5) suggests that the Uniform Condominium Act should be adopted in California. The staff does not know whether the Uniform Act would be an improvement on existing California law, but we believe that this study would be a major undertaking and that we do not now have the time or resources to undertake this study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

JHD/vvm

enc.

Memo 81-68

Exhibit 1

SEVERSON, WERSON, BERKE & MELCHIOR
ATTORNEYS
TWENTY-FIFTH FLOOR
ONE EMBARCADERO CENTER · SAN FRANCISCO, CALIFORNIA 94111
(415) 398-3344 TLX. RCA 278934

JAMES B. WERSON
ERNEST Y. SEVIER
MAURICE E. HIBBERT
RANSOM S. COOK
ROBERT V. MAGOR
RICHARD B. SCHREIBER
J. MARK MONTOBBIO
JAN T. CHILTON
ROBERT J. CATHCART
JOHN H. FELDMANN III
MICHAEL J. BERTINETTI
GERALD J. BUCHWALD
ROBERT A. SPANNER
JOHN W. BERGHOLT
WILLIAM V. McTAGGART, JR.
ERIC A. BRILL
PHILIP L. ROSS
JOHN N. DAHLBERG
THOMAS B. WALPER
STEPHEN L. GARBER
THOMAS J. DOWDALLS
KURT W. MELCHIOR
CLAIRE D. JOHNSON
EDMUND T. KING II
ROBERT L. LOFTS
DENNIS M. TALBOTT
ROGER S. MERTZ
D. RONALD RYLAND
WILLIAM W. WERTZ
STEVEN W. WALDO
THOMAS G. WOOD
DONALD J. QUERIO
MICHAEL WISCHKAEMPER
CAROL L. WILSON
WILLIAM F. MACK
HOWARD W. ASHCRAFT, JR.
MARK J. KENNEY
PAUL M. STULL
PATRICIA L. McCLARAN
WILLIAM L. STERN
K. SCOTT BOONE

WALTER R. SEVERSON
NATHAN R. BERKE
ALLAN L. FINK
OF COUNSEL

LOS ANGELES OFFICE
SUITE 4500
707 WILSHIRE BOULEVARD
LOS ANGELES
CALIFORNIA 90017
(213) 689-1000

June 1, 1981

Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Ladies and Gentlemen:

Because of your continuing interest in the development of the Evidence Code, and particularly of the psychotherapist-patient privilege (Evidence Code §§1011 et seq.) I am writing to invite your consideration of a difficult problem which has not to my knowledge been resolved or even addressed before.

Twice in the last few months I have been consulted by executors or administrators of the estates of deceased psychotherapists about the disposition of the decedents' patient notes. I have found nothing in statute or case law which appears to offer any guidance. Except in extraordinary circumstances of famous patients these notes would appear to have no monetary value to the estate; and most psychotherapists would think it unethical to profit from these notes if the patients were indeed famous. A psychotherapist's publication of a book on the illness of his famous, deceased patient, the painter Jackson Pollock, has been widely criticized in professional circles.

Such notes are obviously very confidential. Still, although the Evidence Code implies obligations upon the psychotherapist to protect this confidentiality generally, as well, i.e., outside those areas within the Code's reach, and although confidentiality is imposed on therapists by their own professional codes and perhaps by tort law, no such obligations appear to exist with respect to a psychotherapist's estate. It seems a good idea, incidentally, to make the duty to assert the privilege which the Code imposes on the recipient of privileged communications applicable as well to persons holding by derivation from such a recipient such as executors,

administrators, devisees, heirs, trustees in bankruptcy, etc. Such professional practices are sold; and all manner of medical or other provider data, files and similar documents could go through estates, bankruptcy, and so on.

Returning to the question of psychotherapeutic case notes found in therapists' estates, I have not yet found a good practical thing which could be done with them. To destroy them might mean to destroy records of considerable value to a patient or a successor provider. The notes might help a following provider with respect to diagnosis or charting a treatment course; they might be essential to obtain financial reimbursements, damages and the like from third parties. On the other hand, I believe that such notes are the property of the therapist and not the patient although the patient may have access to them under Evidence Code section 1158. There is no law which requires the making of such records or their retention if made. I have long known that therapists are very reluctant to turn over records to their patients because the patient's emotional condition may be very adversely affected by knowledge of the therapist's tentative or less tentative evaluation. In fact, much of the litigation concerning therapists' assertions of privilege, in which I have participated, involves this very question of the therapist's concern that the patient could not cope with a plain statement of his or her emotional condition: that the patient would deteriorate and his or her health suffer if he or she understood these facts.

One simple example, an actual case, will illustrate. A patient was diagnosed as a paranoid schizophrenic but able with substantial supportive psychotherapy to function in her regular environment. The patient thought she was not very ill. In litigation of a type where the privilege was waived by operation of law under Evidence Code section 1016, the psychotherapist would have been forced to testify about his diagnosis; yet he was certain that if the patient were confronted with his evaluation that she had a very seriously stigmatizing illness, she would decompensate and might suffer a complete psychotic break requiring extensive hospitalization and questionable prognosis. After much effort and expense, the matter was negotiated away without such testimony, in circumstances which lost the patient's legal position almost entirely and left her quite bewildered as well about the psychiatrist's apparent reluctance to cooperate with her and the reasons for the poor legal result.

All this is a long way of saying that simply to turn the records of a deceased therapist over to the patient is a poor solution in many cases.

Even turning over the records to a successor therapist is not adequate. The psychotherapist-patient relationship is a very personal and subjective one, and the executor, etc., is hardly in a position to make a choice for the patient. For that matter, the notes may relate to patients currently in treatment. I am told that there are indeed therapists who would not give case notes to successors, or indeed would not want to receive such from those who preceded them. Professionals who have consulted me say that the value of such notes to a successor, or the willingness of a living therapist to pass on notes to a successor, is very subjective; many would not want to receive such notes at all, or would find giving or receiving them to be dangerous to the patient. Thus it is not satisfactory to direct that such material must be passed on.

My partner who specializes in probate practice says that the Probate Code offers no guidance and that the assets are without value. I see nothing in the law of evidence or property which addresses the situation. The problem is of great concern to ethical practitioners, executors and administrators, and any consideration or legislative solution would be very helpful.

Sincerely yours,

Kurt W. Melchior

KWM:fst

cc: Jean E. Hayward, M.D.
President, Northern California Psychiatric Society

Helene Rank Veltfort, Ph.D.
Member, California State Psychological Association
Task Force on Confidentiality

23351 Lomitas Drive
Woodlake, Calif. 93286
March 26, 1981

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen;

The purpose of this letter is to acquaint you and the members of the Law Revision Commission as to the operation of the 1976 revision of the California Code dealing with partitions.

I have collected copies of many of the documents which deal with the purposes in changing and clarifying the Code and would agree that certainly there was a need for revision and modification of many of the code sections.

However, I don't think that any improvement in the operation of the law has resulted, although, that may be attributed to the lack of ability of the judges to read and interpret the code sections rather than the lack of substance in the code sections themselves.

As briefly as I can I would like to relate my experience and let you judge as to where the failure occurred.

In 1976 a partition suit was filed by Janette Richmond, my niece, against me and the other owners to divide a cattle ranch of approximately 4700 acres in which the interest of the parties were:

Janette Richmond	13.33%
Donald Stillwell	13.33%
David Stillwell	13.33%
Robert T. Dofflemyer	19%
Robert T. Dofflemyer Tr.	26%
John C. Dofflemyer	6%
Virginia S. Dofflemyer	6%
William Todd Dofflemyer II	6%

The Richmonds presented a map of partition and the Dofflemyers knowing the complexity of dividing the property equitably requested a sale of the property and division of the proceeds or if this was not feasible also presented a plan of partition. A trust with an interest of 26% was also an owner with Robert T. Dofflemyer and his sister, Frances Stillwell as beneficiaries and the Stillwell children and Dofflemyer children as equal remaindermen. All parties were of legal age.

A three and one half day trial was held in the Tulare County Superior Court (Case #82195) with Judge Marvin Ferguson (Kern County Superior Court) presiding. Following the trial Judge Ferguson awarded certain portions of the Ward Ranch which they requested to Janette Richmond and David and Donald Stillwell, with the final acreage of the Stillwell award to be determined

at a later date by a referee. The balance was ordered sold. The Dofflemyer defendants objected as the code does not allow such a division. Judge Ferguson then changed his judgment and appointed a referee to divide that part of the ranch not already awarded to the Richmonds and Stillwells.

The Dofflemyer defendants appealed the judgment (Case 3854) and in 1980 the judgment was upheld by the Fifth Appellate Court with the opinion written by Judge Conley of the Kern County Superior Court who was sitting on the Appellate Court. Petition for appeal to the Supreme Court was denied because it was not filed timely.

Following this, the referee who was recommended by the Richmonds but neither approved or disapproved by the Dofflemyers made a recommendation for division of the remainder of the property. Once again both parties submitted maps with the Richmonds opting for a division of certain parts of the ranch to the trust and after that division was made the Dofflemyer defendants were to have the balance. The Dofflemyer map showed what areas should be allocated to each of the remaining owners of interest including the trust. The referee, in his recommendation to the court, allocated the area requested by the Richmonds to the trust with the balance to the Dofflemyers. He then undertook to divide the trusts portion into two parts because of a separate action dividing the two trusts.

Now, a second trial is scheduled for July 6, 1981 to determine whether the recommendations of the referee are to be upheld. As it stands, probably a second appeal will have to be made all of which should consume two more years. Probably no final decision can be reached before 1984, eight years after the filing of the complaint.

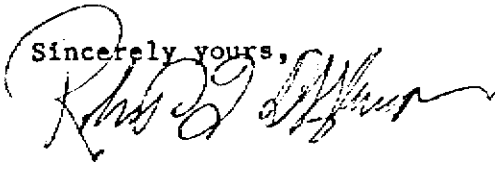
Regardless of the outcome the property will probably be destroyed as a viable cattle ranch which was the highest and best use of the property and had been operated as such for 45 years by the Dofflemyers.

It is my belief that much of this could have been avoided had the law been adhered to, as I believe that the procedure in a partition is quite plain but it is not plain enough. If we are to have a rule of law but not of men no discretion should be granted to the judge and he should not have the authority to make a partition unless the matter is very simple or the amount involved very small. Code section 873.010 which reads "he shall appoint a referee." should be changed to read "he must appoint a referee". The referee should be impartial or should be agreed upon by both parties.

I have purposely tried to make this letter as brief as possible and still cover the essential points. I realize that it is too late to do anything about my problem but would certainly not wish anyone to experience what I have been through. Whatever confidence or faith I may have had in the judicial system has been destroyed.

If the above is of any interest to your commission I would be pleased to furnish any further information that would be helpful and if a personal conference would be fruitful I am planning to attend a Seminar at Stanford on or about May 7 and could be available to anyone who might be interested.

Sincerely yours,



RTD:ed

Robert T. Dofflemyer

II.

EXTEND THE RIGHT OF PUBLICITY TO SURVIVORS

Recently California added Civil Code §3344 which provided a statutory cause of action for commerical use of a person's name or likeness without that person's consent. This is in addition to the common law cause of action. Together, these causes of action are known as the right of publicity, although often confused with the right of privacy for historical reasons. The confusion between the right of publicity (dealing with the misappropriation of intangible property) and the right of privacy (the right of a person not to have his feelings injuried) has caused an unfortunate decision by the California Supreme Court in Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). Under the common law, there can be no invasion of the privacy of a deceased person, therefore, the court in Lugosi reasoned, there can be no invasion of the right of publicity of a deceased person under the common law (Lugosi was not based on §3344). The court thought it was ruling on the right of privacy.

Lugosi is contrary to precedents and the legal literature which hold that the right of publicity does descend to the survivors. E.g. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), Lugosi v. Universal Pictures, 172 U.S.P.Q. 541 (Cal. Super. Ct. 1972)(reversed by Lugosi, supra); Comment, Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild, 22 UCLA L. Rev.

1103 (1975); Comment, Why Not a Relational Right of Privacy? 42 U. Mo. Kan. City L. Rev. 175 (1973). See also, Nimmer, The Right of Publicity, 19 Law & Cont. Prob. 203 (1955); Comment, Community Property Interests in the Right of Publicity: Fame and/or Fortune, 25 UCLA L. Rev. 1095 (1978).

The right of publicity is comparable to copyright which extends for the life of the author plus 50 years. The policies which underlie copyright are the same as the right of publicity. A person creates a valuable commodity and he should profit from it. The person may not be able to recover the full value from his product during his lifetime but his survivors may be able to, and may need to. The heirs have greater moral right to their ancestor's name and likeness than total strangers. If Lugosi had created the value in "Lugosi, as Count Dracula" by his unique appearance, style of acting and personality, then he and his heirs should profit. If Lugosi was not necessary then Universal could have marketed "Joe Smith, as Count Dracula."

The logically solution is found in the statutes of several states which date back at least to 1950, including Virginia, Utah and Oklahoma. Virginia, for example, provides for both civil and penal remedies for unauthorized use of a person's name, portrait or picture for advertising or trade purposes unless the consent of the person, or his surviving widow or widower or next of kin. Va. Code §§18.2-216.1, 8.01-40 (Supp. 1979).

I would suggest that Civil Code §3344 be amended to provided that the spouse, children or grandchildren of a deceased person may enforce his right of publicity for a period of 50 years after the persons death.

III.

ADD DISCLAIMER TO CIVIL CODE THAT HEADINGS DO NOT AFFECT SUBSTANCE

The Civil Code does not have a provision stating that division, chapter, article and section headings do not affect the substance of the statute. Likewise, the Civil Procedure Code is lacking such a provision. One instance where this is important is with Civil Code §3344 which falls under the heading "Penal Damages." Originally the bill that became §3344 provided for penal damages (A.B. 826, March 8, 1971), but was later amended to provide for actual damages (Amended, November 2, 1971, as enacted). See, Comment, Commerical Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians, 3 Pac. L.J. 651, 659 (1972).

To avoid any possible misconstruction, either the heading should be changed, §3344 should be placed elsewhere in the Civil Code, or the equivalent of Evidence Code §5 (cf. Vehicle Code §7) should be added. Evidence Code §5 provides that headings do not affect the scope, meaning or intent of the provision.

IV.

ENACT THE UNIFORM CONDOMINIUM ACT

The condominium statute of California (Civil Code §§1350-1370) has many deficiencies because it was written before America had any experience with the condominium form of ownership. See generally, U.S. Dep't of Housing and Urban Development, HUD Condominium/Cooperative Study (1975). Specially, the question of developer liability for defects, especially in converted condominiums, is totally unanswered. However, as this is the subject of my comment for the UCLA Law Review, I will send you a copy when I complete my revision of it.

At this time, I would suggest that the Uniform Condominium Act would be a valuable improvement over the present statute. The Uniform Act is very complete and deals with every conceivable problem, but is flexible and can be changed by the developer except for certain necessary provisions. The Uniform Act has been recently adopted by two states, and I believe, is under consideration in eight others. The Act is in volume 7 of Uniform Statutes Annotated (West).