

First Supplement to Memorandum 92-19

Subject: Study F-1000 - Family Code (Additional Letters on AB 2650)

Attached to this supplement are additional letters concerning AB 2650.

The letter from Dorothy Jonas and Bonnie K. Sloane, Co-Chairs of the Los Angeles Women's Leadership Network (Exhibit 1), provides a more detailed discussion of the concerns they expressed in their earlier letter attached as Exhibit 7 to Memorandum 92-19.

Janis K. Stocks forwards a letter from Kate Yavenditti concerning the domestic violence provisions in the Family Code bill.

We will consider these letters in the same manner as the letters attached to Memorandum 92-19.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

RECEIVED

Los Angeles Women's Leadership Network

MAR 06 1992

American Association of University Women, L.A. * Asian-Pacific Women's Network, L.A. * Business and Professional Women (CA) * Comision Femenil Mexicana Nacional * Comision Femenil de Los Angeles * Fund for the Feminist Majority * League of Women Voters (CA) * National Council of Jewish Women, L.A. * National Women's Political Caucus, L.A. * National Organization for Women of L.A. * Older Women's League of L.A. * Women For: * Women Lawyers of Los Angeles * YWCA - L.A. Metro

2447 Century Hill, Los Angeles, CA 90067 / (310) 557-9000 ext. 460

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road #D-2
Palo Alto, CA 94303

March 3, 1992

Dear Mr. Sterling:

Following a telephone conversation with Mr. Edwin Marzec after he received a copy of our February 6 letter to Assemblyman Terry Friedman, we are forwarding our revision to the proposed Family Code. It is our understanding from Mr. Marzec that the Leadership Network's concerns over these proposed Sections can be resolved.

Our revision is a simple one. It involves removing Sections 721, 751, 1110-1118 and 1150-1153, and substituting current Sections 5103, 5125 and 5125.1 precisely as worded (with the obvious exception of code references within the statutes). The original sections will be renumbered to conform with the rest of the Family Code, but their intact nature and sequence will be preserved. In addition, Civil Code 5127 will be restored as currently written.

These substitutions will solve many problems posed by the Law Revision Commission's fragmentation and rewriting of current marital property management statutes, creation of new law, and rearrangements of section sequences proposed by the Family Code. Some of these problems include:

I. Family Code Section 1111, covering remedies for breach of fiduciary duty, is out of order and contradicts the legislative intent of Civil Code Section 5125.1. Remedies for breach of fiduciary duty were designed to apply not only to the general responsibilities of spousal fiduciary duty (current Section 5103, Family Code Section 721) but also to the specific management duties outlined in Civil Code Sections 5125 and

5127. Returning to the original format will eliminate this problem and restore the intent of the legislature.

2. The "books and records" reference in Family Code Section 721(c) is out of place. This sentence, lifted by the Family Code from its context in Civil Code 5103(b)(2) and incorrectly placed as a single sentence in (c) of 721, clarifies that no detailed books or records are required to be kept in order for a spouse to be able to comply with the other spouse's request for true information concerning community property transactions. The clarification applies to 5103(b)(2) only, not to previously stated nor remaining provisions. Returning to the original wording will correct this misplacement.

3. While we understand the Law Revision Commission has a legislative mandate to consolidate and clarify family law codes, the arrangement of Sections 1110 - 1118 and 1150-1153 interferes with this mandate. There is no apparent justification for splitting up two sections of the Civil Code (5125 and 5125.1) and creating *thirteen* sections to take their place, particularly when the original two sections were worded and structured purposely to increase clarity of understanding on the part of lay readers and family law practitioners alike. Again, returning to the original format of 5125 and 5125.1 will solve this problem.

4. Restoring the wording of 5125.1(a) precisely as written will resolve the dilemma posed by Family Code Section 1111 which, in referencing another portion of the Family Code (Section 751), contradicts a third portion of the same Code (Section 1110) on the question of whether only community property during marriage or community property during marriage and through dissolution is to be subject to the breach of fiduciary duty remedy. Senator Roberti's SB 716 clarified that a fiduciary relationship exists between spouses over the management and control of their community property during the intact marriage and through a dissolution process.

The integrity of the fiduciary duty can tolerate no ambiguity concerning the duration of its existence. Statutory references which ignore this principle and create confusion must not be introduced.

5. Civil Code 5127, describing the rights and limitations of spouses in management of community real property, should be restored. This is a statute containing clear, necessary guidelines and spousal protections, and has withstood the test of time. CC 5127 requires joinder for transfers of real estate, while at the same time granting equal management authority to each spouse. By contrast, Family Code sections 1200, 1201, and 1202, substitutes for Civil Code 5127, leave the reader bewildered. Section 1200 says: "Except as provided by statute ..." then gives no statutory references! (The draft Comment does provide the references, but Comments are not included in the proposed new Family Code.)

As with Sections 5125 and 5125.1, there is no apparent justification for splitting up a straightforward Section of the Civil Code and creating three new ones to take its place. Again, the obvious solution is to put back in Civil Code 5127, without changing its format.

6. Family Code Section 1118, an attempt to broaden the circumstances under which a spouse may delegate his or her management decisions to an agent (including the other spouse acting as agent.) must be eliminated.

Current Civil Code 5127 permits a spouse to appoint a "duly authorized agent" to act only in specified circumstances involving community real property transactions which are explicitly enumerated and require the signature of both spouses. Without providing any justification, nor establishing any need, the Law Revision Commission has expanded this specific provision to create Family Code Section 1118, which extends the concept of agency to all transactions involving all jointly-owned property, whether real or personal.

There can be no question that Section 1118 creates new and potentially dangerous law.

As experts in the field of marital property laws and their impact on women in marriage and divorce, we have long been aware of the economic problems suffered by wives who have lost the ability to share in the management of their own community property. Section 1118 not only fails to address this problem, it creates new hazards for nonmanaging

spouses by encouraging more unilateral management without providing corresponding safeguards. Even though spouses now enjoy the protection of a fiduciary relationship, it makes no sense to propose a law which opens the door to a new scenario of bad faith management.

We agree with Senate President Pro Tem David Roberti, author of Senate Bill 716, who stated: "If spouses clearly understand their duties and responsibilities to one another, the result will be less painful and debilitating marital settlements and a strengthening of the equal partnership marriage." The sponsors of Senate Bill 716 are committed to ensuring that judicial interpretation of spousal rights and duties will be as unambiguous and straightforward as the statutory reforms enumerated in Senate Bill 716, and that spouses and their lawyers who reference relevant sections will do so in a spirit of confidence rather than confusion.

Effecting the restoration of Civil Code Sections 5103, 5125, 5125.1 and 5127 by incorporating the above revisions to Family Code sections 721, 751, 1110-1118 and 1150-1153 will ensure preservation of legislative intent directing recent reforms to marital property law.

Sincerely,



Dorothy Jonas, Co-Chair



Bonnie K. Sloane, Co-Chair

CC: **Senator David Roberti**
Senator William Lockyer
Assemblywoman Jackie Speler
Assemblywoman Marguerite Archie-Hudson
Assemblyman Terry Friedman

Edwin Marzec, Chair, California Law Revision Commission

Marilyn Kizziah, Coalition for Family Equity; Sheila Kuehl, CMLC; Joanne Schulman, SFWLA; Barbara McCallum, WFW Coalition; Susan Rose, SB WPC; Anita Miller, CWL; Fran Teller, NCJW; Billie Heller, NWPC; Joyce Morrissey, BPW; Barbara James, WLLA

MAR 09 1992

JANIS K. STOCKS
ATTORNEY AT LAW
CERTIFIED FAMILY LAW SPECIALIST

File: _____

Key: _____

1450 FRAZEE ROAD, SUITE 409
SAN DIEGO, CA 92108
(619) 296-6251

March 5, 1992

Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middle Field Road, Suite D-2
Palo Alto, CA 94303

RE: FAMILY LAW CODE - DOMESTIC VIOLENCE PROVISION

Dear Mr. Ulrich:

Enclosed you will find comments on Domestic Violence Section of the new Family Code which have been prepared by Kate Yavenditti of the San Diego Volunteer Lawyer Program. Ms. Yavenditti is a certified family law specialist and is the supervising attorney at this San Diego County low or no income pro bono program.

Ms. Yavenditti works extensively with domestic violence matters and I think that her comments should be considered.

If you have questions or comments, you can contact me or Ms. Yavenditti at (619) 238-8100.

Very truly yours,



JANIS K. STOCKS

lct
Enclosure
cc: Kate Yavenditti

COMMENTS ON DOMESTIC VIOLENCE, SECTION (Division 10)
OF THE LAW REVISION COMMISSIONS PROPOSED FAMILY CODE

Section 5505: The word person should be changed to persons since Section 70 may include more than just the Petitioner. In addition, it would be better to say "persons protected by the order" rather than "persons described in Section 70" since it is more understandable and does not require a referral back to Section 70.

Section 5513: In the first draft that I received, there was a referral back to Section 3020, which contained the provisions of former Civil Code Section 4600. That has now been changed to Section 215. I assume this means that Section 3022 has been changed to Section 215. If not, this should be looked at.

Section 5518 (e): The word section should be changed to division, since the policy does not apply only to Section 5518 but to the entire division. In addition, in that sentence, the words "set" should be changed to "sit". It may also be important to clarify that this support person policy does apply to all domestic violence orders which are now incorporated in the Family Code which were formally obtained under various sections such as the DVPA, Family Law Act, or Uniform Parentage Act.

Section 5531 (b): What, if any, is the effect of this section if there is a petition for legal separation, nullity or dissolution already filed in this county? In San Diego County, the court requires that any restraining orders be filed in the current

case, rather than accepting a separate domestic violence filing.

Section 5550 (a) (1): I support retaining the words "other named family and household members" rather than changing it to "other named persons described in subdivision (a) of Section 70." I also have concerns about the language in the comment stating that the restraining order concerning transferring, etc., of property has been omitted because "the order does not relate to abuse or domestic violence." I strongly disagree with the omission of this provision because, in many cases, transfer and destruction of property accompanies domestic violence situations and I feel that this protection is necessary.

Section 5551: It appears that there is a different showing set out for an exclusion order in this section as opposed to Section 5550 (a) (2). This section requires a showing that "Petitioner has a right under color of law to possession of the premises"; however, Section 5550 (a) (2) states that an exclusion order can be made "regardless of which party holds legal or equitable title or is the lessee of the building." The difference in language between the two sections is confusing and may need to be reconciled in some way. In addition, Section 5551 refers to Section 2035. In the prior draft that I had it referred to Section 753. I don't know if this means that section numbers have been re-numbered but this should be checked.

Section 5755: This provides for payment of attorneys' fees and costs of the "prevailing party." However, in domestic violence cases, it is often difficult to determine who is the prevailing party. There is some concern that the Respondent may request

mutual restraining orders which may be granted on minimal evidence and therefore can argue that there is no prevailing party. In addition, since these orders can also contain orders for custody, visitation and support, the idea of "prevailing party" is hard to define. I would suggest that this provision conform to the other attorneys' fees provision concerning need and ability to pay or that the term prevailing party be more explicitly defined.