9/7/78

Memorandum 78-59

Subject: Schedule for Work--Priorities for Topics

Each fall, in addition to reviewing suggested new topics, the Commission sets priorities for work on its current calendar of topics and schedules its work for the next few years. It should be recognized that any schedule must be tentative since new topics may intervene and since it is difficult to predict the amount of time that will be required to prepare a recommendation on any particular topic. In addition, priorities may require revision in light of requests or suggestions from legislative committees.

The current calendar of topics authorized for Commission study is attached as Exhibit 1 (pink). This memorandum discusses the future prospects for topics on the current calendar and presents the staff recommendations for priorities.

The staff recommends that the Commission's resources during the next year be devoted to finishing up the two major studies presently underway--the guardianship and conservatorship revision and the comprehensive enforcement of judgments statute. Other smaller topics, such as general assignments for the benefit of creditors, selected evidence problems, and quiet title actions, should be worked into the agenda as time is available. A rough schedule for submission of recommendations to future legislative sessions is set out as Exhibit 2 (green).

Child custody, adoption, and related matters. During the coming year, we should finish up work on the guardianship-conservatorship revision, which is our major legislation for the 1979 session. This is the first step in the child custody revision. We have in hand studies prepared by Brigitte Bodenheimer on both child custody and adoption. However, the Legislature is very active in both of these fields and the studies are somewhat obsolete.

Our consultant, Brigitte Bodenheimer, advises that she will be heavily involved in working on an international treaty during 1979 and will not be available to the Commission until sometime in 1980. She believes that recent legislation has taken care of most of the problems identified in the child custody study she prepared for the Commission. She believes that the major need in the adoption area is a complete

redrafting of the existing provisions to provide a well drafted and organized statute. Recent legislation has dealt with some of the problems she identified in her study and other problems are very controversial. If the Commission believes that adoption should be given a priority, the staff will attempt to prepare a draft of a new adoption law before the end of 1979, will submit the draft to Professor Bodenheimer for review and revision during the first six months of 1980, and submit a revised draft to the Commission for consideration toward the end of 1980. This procedure will permit the staff and Professor Bodenheimer to work out the bugs in the draft and identify the policy issues for Commission determination. This procedure would probably permit submission of an adoption recommendation to the 1982 session.

One issue in connection with child custody is whether the rule that an appeal does not stay a custody order should be reversed. See Exhibit 3 (buff). The Commission considered this matter briefly at an earlier meeting, and deferred it until this time. The reaction of those Commissioners who expressed a view was that existing law is satisfactory. Shall we solicit the views of others on this topic, or shall we just drop it? Judge Sims may have views on this problem.

Creditors' remedies. Our major unfinished creditors' remedies project at present is the comprehensive enforcement of judgments statute, which includes redemption. The Commission has already made most of the major policy decisions in this area, and the staff has drafted all the necessary legislation, which is simply awaiting Commission meeting time for review.

The two major unresolved areas are the homestead exemption and liability of community property for debts and exemptions of married persons. We have a study by Chuck Adams on the homestead exemption, which will be scheduled for discussion at the next meeting. And we have retained Susan Prager as a consultant to prepare a study of community property and creditors' remedies problems, which is due March 1, 1979.

The staff recommends that we devote our major resources during the coming year to preparing the comprehensive enforcement of judgments statute for introduction. We should be able to get out a tentative recommendation in April of 1979 that is complete except for the community property problem. We would revise the recommendation in the Fall in light of comments received, and be able to introduce the legislation early in the 1980 legislative session. That would be our major legislation for the session.

The Commission also decided last year to undertake a study of the law relating to general assignments for the benefit of creditors, with a view to introducing a bill in the near future. We have had a student prepare an analysis of the law relating to general assignments, with a comparison of the statutes of major and sample jurisdictions. The staff has available presently a large volume of resource material on this. It shouldn't take much staff or Commission time to prepare any needed legislation on general assignments. The staff recommends we work on this project during the coming year with the view to introduction of legislation in the 1980 session.

The Supreme Court in Isbell v. County of Sonoma, 21 Cal.3d 61 (1978) has held the confession of judgments statute unconstitutional as applied to nonconsumer debts. This might be an opportune time to commence review of the statute. It encompases only a few sections, and could be reviewed and disposed of expeditiously.

Evidence Code. We have in hand Professor Friedenthal's survey of the differences between the Federal Rules of Evidence and the California Evidence Code. The staff suggests that we do not do the whole thing at once as a major study, but that we work on separate independent provisions on a piecemeal basis from time to time for variety. We could devote an evening or a day to this study from time to time and introduce individual recommendations on specific problems over the next couple of legislative sessions.

During the last session, it was suggested that our psychotherapist-patient bill be expanded to include registered nurses. See letters attached as Exhibit 4 (blue). The staff does not believe that it is legislatively feasible to add more professionals to the privilege. If there are persons who feel this is necessary, let them carry their own bill on the subject.

We have prepared a tentative recommendation relating to evidence of market value of property for approval for distribution for comment at the October meeting. We will review the comments during 1979 and submit the recommendation to the 1980 session.

Inverse condemnation. The Commission has available studies prepared by Arvo Van Alstyne on substantive aspects of inverse condemnation, but the Commission's experience in the past has been that it is difficult to prepare rational legislation in this area because of the

tremendous financial impact and because of Constitutional limitations. Our consultants, Gideon Kanner, Tom Dankert, and John McLaurin, have all felt the Commission should give priority to this study nonetheless. Not to be ignored in this connection are the political ramifications of Proposition 13. The Commission has requested the State Bar Committee on Condemnation to suggest areas where it would be fruitful for the Commission to work. The Bar Committee has discussed the matter and apparently feels that procedural aspects of inverse condemnation is the only profitable area. However, the Bar Committee, despite renewed requests by telephone and letter, has never given us any specific suggestions, and has proceeded to draft their own legislation on at least on one matter. In light of this experience, the staff suggests that we do nothing on this topic for the time being and leave this area to the Bar Committee.

Arbitration. There is a committee of the State Bar actively working on the arbitration statute. They have obtained enactment of a provision authorizing mechanics' liens in arbitration, and are investigating attachment and other provisional remedies. The staff believes there is no present need for the Commission to work in this area.

Nonprofit corporations. Assemblyman Knox has obtained enactment of the nonprofit corporation legislation prepared by the Assembly Select Committee. Consequently there is no longer the need to retain this topic on our agenda, and the staff suggests we drop the topic.

Prejudgment interest in civil actions. The Commission has been deferring consideration of prejudgment interest to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. The staff recommends we continue to defer this; the report of the Tort Committee is due during the coming year.

Class actions. There is now a uniform act on class actions, and the State Bar is actively working on the subject. The Commission some time ago decided that Jack Friedenthal should be our consultant on this topic, but he would not be available immediately. The staff suggests we continue to defer work on this topic.

Offers of compromise. The Commission has deferred consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. This is not a large project, and if the Tort Committee fails to deal with the problems, the staff suggests we commence work in this area on a nonpriority basis, with the goal of legislation for the 1981 session.

Discovery in civil cases. Discovery has been on our inactive agenda because the State Bar has been very active in this field. There is considerable controversy as to what revisions, if any, should be made in the law relating to discovery. The State Bar is planning to have a committee make a major study of this area.

Possibilities of reverter and powers of termination. Marketable Title Act. The Commission has retained Jim Blawie to prepare an analysis of the problems in this area with suggestions as to the scope of the Commission's study. The analysis is due June 15, 1979. It would be premature to make any decisions concerning these topics before then.

Quiet title actions. The objective of this study is to give quiet title actions an in rem effect, and to correct other defects that have been pointed out in the literature. This will not involve much staff or Commission time, and we plan to work it into the agenda when time is available, with a view to introducing legislation to the 1980 session.

Community property. The community property study primarily involves correcting problems caused by the equal management statute. The staff believes we must start moving on this study promptly if we are to do any good. If Susan Prager does a good job on the creditors' remedies aspect of community property, we might wish to retain her for the equal management study if she is willing to continue on in the area. We will receive her study in March 1979; and, at that time, we recommend that the Commission move promptly to retain a consultant for the equal management study.

Dismissal for lack of prosecution. The dismissal for lack of prosecution statutes are inconsistent and do not reflect the case law accretion. We should start now to find a procedure expert willing to prepare a study on this area. The project should not consume a lot of Commission time. We would hope to have legislation ready for the 1981 session.

Civil Code Section 1464. This past session, the Legislature directed us to study Civil Code Section 1464 to determine if it should be revised or repealed. This section provides:

> 1464. What covenants run with land when assigns are named. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

This provision has been criticized in the literature, and it should be a fairly simple matter to determine whether it should be revised or repealed. The staff would like to dispose of this one promptly, with legislation in the 1980 session. If it appears there are more problems here than anticipated, we will defer it for consideration in connection with the marketable title study.

Abandonment and vacation of public streets and highways. The Legislature has also directed us to study the law relating to abandonment of streets. The objective is to get rid of the multiplicity of statutes in favor of a single uniform statute. This is mainly staff work, which we will do on a nonpriority basis when time is available. Legislation should be ready for 1981.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

TOPICS CURRENTLY AUTHORIZED FOR STUDY

	Status of Study
A - ARBITRATION (Auth. 1968)	Enacted. State Bar active in this field
B - BUSINESS LAW	
100 - Modification of Contracts (Auth. 1957)	Enacted
200 - Liquidated Damages (Auth. 1969)	Enacted
300 - Parol Evidence Rule (Auth. 1971)	Enacted
400 - Escheat; Unclaimed Property (Auth. 1956)	Enacted
C - CORPORATIONS AND UNINCORPORATED ASSOCIATIONS	
100 - Unincorporated Associations (Auth. 1966)	Enacted
200 - Nonprofit Corporations (Auth. 1970)	Inactive. Legislation (not recommended by Commission) enacted in 1978
D - DEBTOR-CREDITOR RELATIONS (Auth. 1957)	
100 - Repossession of Property (includes Claim and Delivery)	Enacted
200 - Attachment	Enacted
300 - Enforcement of Judgments	Under Active Study
400 - Assignment for Benefit of Creditors	Staff study in progress
500 - Confession of Judgment Procedures	Deferred
600 - Default Judgment Procedures	Deferred
700 - Procedures Under Private Power of Sale	Deferred
800 - Possessory and Nonpossessory Liens	Deferred
E - EMINENT DOMAIN (Auth. 1956)	Enacted
100 - Ad Valorem Taxes	Recommendation - 1979
200 - Assessment Liens	Staff study in progress

	Status of Statute
F - FAMILY AND JUVENILE LAW (Auth. 1956)	
100 - Guardianship	Recommendation - 1979
200 - Appeal of Custody Order	Have study on hand
300 - Custody of Children	Have obsolete study
400 - Adoption	Have obsolete study
500 - Freedom From Parental Custody and Control	Legislation (not recommended by Commission) enacted in 1978
G - GOVERNMENTAL LIABILITY (Auth. 1957)	Enacted
H - REAL ESTATE AND LAND USE	
100 - Lease Law (Auth. 1957)	Enacted
200 - Partition Procedure (Auth. 1956)	Enacted
300 - Possibilities of Reverter and Powers of Termination (Auth. 1975)	Consultant retained
400 - Marketable Title Act (Auth. 1975)	Consultant retained
500 - Quiet Title Actions (Auth. 1978)	
600 - Civil Code Section 1464 (Auth. 1978)	
700 - Abandonment and Vacation of Public Streets and Highways (Auth. 1978)	
I - INVERSE CONDEMNATION (Auth. 1965)	Inactive
J - CIVIL PROCEDURE	
100 - Undertakings for Costs (Govt. Code § 10331)	Possible recommendation - 1979
200 - Prejudgment Interest (Auth. 1971)	Deferred
300 - Class Actions (Auth. 1975)	Deferred
400 - Offers of Compromise (Auth. 1975)	Deferred
500 - Discovery (Auth. 1975)	Deferred. State Bar active in this field
600 - Dismissal for Lack of Prosecution (Auth. 1978)	
K - EVIDENCE (Auth. 1965)	
100 - Evidence of Market Value	Tentative Recommendation drafted

	Status of Statute
200 - Comparison With Federal Rules	Study on hand ready for Commission consideration
L - COMMUNITY PROPERTY (Auth. 1978)	Study re liability of community to creditors due March 1, 1979

Memorandum 78-59

EXHIBIT 2

Proposed Schedule of Recommendations

1979 Legislative Session

Guardianship-Conservatorship revision (two or more bills)
Ad valorem taxes when property acquired for public use
Undertakings for costs

1980 Legislative Session

Evidence of market value
Enforcement of judgments
Assessment liens when property acquired by eminent domain
General assignments for benefit of creditors
Civil Code Section 1464
Quiet title actions
Miscellaneous Evidence Code revisions

1981 Legislative Session

Miscellaneous child custody revisions
Abandoning or vacating public streets and highways
Dismissal for lack of prosecution
Miscellaneous Evidence Code revisions
Offers of compromise

1982 Legislative Session

Adoption

EXHIBIT 3

B. Preserving the Custody Status Quo Pending Accelerated Appeal

1. *The Present Legal Situation*

One of the goals to which the adoption process should be directed is the prevention of repetitive changes in the custody of the child. The familiarity of the child with his daily surroundings is very important, and is worthy of preservation by the adoption law whenever possible.[420]

Unfortunately, the current law does not adequately protect the stability of a child's surroundings while custody orders of trial courts are on appeal. The problems which occur during appeal of a custody determination can be illustrated by two California cases. *C.V.C. v. Superior Court*,[421] discussed earlier in another context,[422] involved a 2-year-old girl who had lived with prospective adoptive parents for some 8 months under an agency placement. After an unverified telephone complaint the agency demanded the return of the child. The trial court ordered the child to be delivered over to the agency. The prospective adopters immediately filed notice of appeal. Their motion for

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with a stable home environment to assure healthy psychological development. Securing early finality of an adoption decree for the benefit of the adoptee is therefore not an important consideration in adult adoptions. It has been pointed out that adoption of adults could more accurately be described as "designation of an heir." *Id.* at 652. *See also* tenBroek, *supra* note 353, at 264-65; Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 Cornell L. Rev. 566, 577-80 (1969), both of which list additional motivations for some adult adoptions.

Many states, including California, permit the adoption of adults with simplified proceedings which do not require the consent of the natural parent. *See, e.g.*, Cal. Civ. Code § 227p (West Supp. 1975). The case of Adoption of Sewall, 242 Cal. App. 2d 208, 51 Cal. Rptr. 367 (1966), illustrates the potential for abuse which exists under such statutes. *Sewall* involved the adoption of a younger woman by a 72-year-old man, which the adopter's relatives sought to set aside after his death on the ground of fraudulent representations by the adoptee. While expressing doubt that the statute of limitations of the adoption law was intended to apply to adult adoptions, the court determined that the time period for attack on an adult adoption on the basis of fraud was tolled until discovery of the fraud. *Id.* at 223, 226, 51 Cal. Rptr. 378-79, 381; *see* Wadlington, *supra*, at 575-76.

Because the proposed 6-month statute of limitations for attack on an adoption is tailored specifically to the needs of children, it is recommended that the result in the *Sewall* case be codified. Attack on adult adoptions should be governed by the general fraud statute of limitations of Cal. Civ. Proc. Code § 338(4) (West Supp. 1975), and by other time bars of general law.

420. *See* text accompanying notes 40-47 *supra*; Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. Colo. L. Rev. 495 (1975).

421. 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973).

422. *See* text accompanying notes 364-76 *supra*.

a stay of enforcement was refused by the trial court. The child was then taken from the adopters and the same day was placed with new prospective adoptive parents. The appellate court, after refusing a writ of supersedeas, ruled that the child's removal from the adopters was improper. Justice Friedman sharply criticized taking the child "from the only home it had ever known."[423] Even so, the court did not restore the child to the original adopters, since further proceedings might have necessitated yet another change.[424]

Similarly, *In re Marriage of Russo*[425] held that the trial court's order changing custody of a child from the mother to the father was improper and reversed the order, but determined that the status quo—the father's custody—should be maintained pending a new hearing in the trial court. Justice Sims expressed some hope that "the injustice done the mother may be righted,"[426] but since 1 year and 8 months had elapsed between the modification order and the decision on appeal, the chances of a return of the child to the mother were probably slim.[427] In this case also the court had refused a writ of supersedeas to stay the change of custody pending appeal.[428]

Both appellate courts were seriously concerned about the children involved. Both courts abhorred the idea of moving the children a second time, with the possibility that upon a new trial a third shift of custody might occur. While they were aware of the dilemma they faced, the choice they made—preservation of the status quo *after* a reversible initial change of custody by the trial court—opened up the distinct prospect that by the time new proceedings were concluded a restoration of the child to his original home or custodian could no longer be expected realistically. Under this approach the child likely is to remain ultimately where he was moved in the first instance by an erroneous trial court decision. The decision in the lower court thus preempts the outcome on appeal.[429]

423. 29 Cal. App. 3d at 920, 105 Cal. Rptr. at 131. *See also id.* at 913 n.1, 106 Cal. Rptr. at 125-26 n.1.

424. *Id.* at 920-21, 105 Cal. Rptr. at 131.

425. 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971).

426. *Id.* at 94, 98 Cal. Rptr. at 517.

427. The court said that "the circumstances which have developed in the interim" must be considered. *Id.*

428. *Id.* at 93 n.7, 98 Cal. Rptr. at 516 n.7.

429. Much the same outcome was achieved in Stack v. Stack, 189 Cal. App. 2d 337, 11 Cal. Rptr. 177 (1961), where the appellate court in virtual despair refrained from even going through the motions of reversing an erroneous custody change that had become the status quo for 16 months. *Id.* at 338-39, 11 Cal. Rptr. at 179-80. The court

This unfortunate predicament faced by appellate courts in the review of custody orders is partially due to calendar delays on appeal which may seem like an eternity in relation to a child's "sense of time."[430] An even more important factor in producing the current problem was the enactment of then-Section 949(a) of the California Code of Civil Procedure in 1955.[431] Before 1955 any custody order made by the trial court was automatically stayed pending an appeal.[432] If there was an immediate need to move the child from a threatening environment, application for relief was made to the appellate court in which the appeal was pending and that court would order removal of the child or other protective measures if necessary.[433] In 1955 the legislature reversed the law: thereafter no custody order was to be automatically stayed pending appeal. The custody order was to be carried out unless the trial judge who made the order in his discretion granted a stay.[434] Appellate courts retained their power to order a stay by writ of supersedeas,[435] but the primary decision on whether to suspend a

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called for a reappraisal and revision of the judicial process in this field. *Id.* at 372-73, 11 Cal. Rptr. at 188.

430. "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." BEST INTERESTS OF THE CHILD, *supra* note 27, at 43 (note).

431. Ch. 170, § 1, [1955] Cal. Stats. 639 (repealed 1968), was in most respects identical with CAL. CIV. PRO. CODE § 917.7 (West Supp. 1974), which replaced it.

432. Ch. 5, [1851] Cal. Stats. 107, *as amended* ch. 1407, § 1, [1955] Cal. Stats. 2525 (formerly CAL. CIV. PRO. CODE § 946) (repealed 1968); *see* ARMSTRONG, *supra* note 43, at 1047-56.

433. *See In re* Burr, 39 Cal. 2d 25, 243 P.2d 787 (1952); note 432 *supra*.

434. Ch. 1407, § 1, [1955] Cal. Stats. 2525 (formerly CAL. CIV. PRO. CODE § 946) (repealed 1968). CAL. CIV. PRO. CODE § 917.7 (West Supp. 1975) currently provides:

> The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding . . . . [P]rovided, the trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods as to it may appear appropriate . . . .

435. Ch. 170, § 1, [1955] Cal. Stats. 639 (repealed 1968) (formerly CAL. CIV. PRO. CODE § 949a), the predecessor to CAL. CIV. PRO. CODE § 917.7 (West Supp. 1975), contained an express provision to this effect. *See* 44 CALIF. L. REV. 141, 145-46 (1956). The sentence in question was removed in 1965, presumably because it included questionable authority to issue injunctions. Ch. 1031, § 1, [1965] Cal. Stats. 2670; *see* ARMSTRONG, *supra* note 43, at 349 (Supp. 1966). However, appellate courts retained their power to issue writs. *See* CAL. CONST. art. VI, §§ 10-11 (West Supp. 1975); 44 CALIF. L. REV. at 145. In 1968, CAL. CIV. PRO. CODE § 923 (West Supp. 1975) was added, providing that the provisions of the chapter containing § 917.7 "shall not limit the power of the reviewing court . . . to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas . . . or to make any order appropriate to preserve the status quo . . . ."

custody order pending appeal was to be a matter for the trial court.[436] Naturally, a trial judge who has satisfied himself that a child should be separated from a former custodian can rarely be persuaded to halt carrying out the order he has just made. Moreover, appellate courts seldom grant writs of supersedeus to preserve the original custody status quo pending the appeal.[437]

The 1955 reversal of the law regarding the fate of custody orders pending appeal can be explained partially by the fact that our present insights concerning a child's basic need for continuity had not yet fully penetrated the consciousness of legislators and the legal profession. The legislative motives for moving from an automatic stay of a custody order to the extreme opposite, however, can only be understood fully by a review of the situation which existed prior to 1955.[438] The Supreme Court of California had taken the position at that time that the custody situation was frozen the moment an appeal was perfected, and that no further order concerning the child could thereafter be entered by the trial judge.[439] If the current custodian abused or mistreated the child, it was for the appellate court to decide whether the child should be moved from the dangerous surroundings.[440] If there was a need

436. *See, e.g.*, Mandini v. Superior Court, 230 Cal. App. 2d 547, 553, 41 Cal. Rptr. 213, 216 (1964):

> Application for a stay should now, other than '. . . in some unusual emergency' [citation omitted], in the first instance be made to the trial court. If the trial court refuses to grant such an application, application is then made to an appellate tribunal. Heretofore such an application was addressed in the first instance to the discretion of an appellate court. Now, in our opinion the question before the appellate court on supersedeas is—did the trial court abuse its discretion in granting or refusing a stay?

437. *See* C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973); *In re* Marriage of Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); note 436 *supra*. One additional reason is that supersedeas may not be issued to stay an order which has already been executed. *See* Superior Court v. District Court of Appeal, 65 Cal. 2d 293, 295-96, 419 P.2d 183, 185, 54 Cal. Rptr. 119, 121 (1966). However, a writ of mandate might be proper, depending on the circumstances. *Id.* at 296, 419 P.2d at 185, 54 Cal. Rptr. at 121. Supersedeas was granted, for example, in Adoption of Cox, 58 Cal. 2d 434, 374 P.2d 832, 24 Cal. Rptr. 864 (1960), holding that the trial court had abused its discretion in moving a child from the interim custody of its prospective adoptive parents after the natural parents had withdrawn their consent to adoption.

438. *See* State Bar Committee on Administration of Justice, *Report*, 29 Cal. St. B.J. 224, 225 (1954).

439. "[J]urisdiction over *all* custody matters is removed on appeal from the trial to the appellate court." ARMSTRONG, *supra* note 43, at 1030; *see* Lamar v. Superior Court, 38 Cal. 2d 676, 680, 242 P.2d 321, 323 (1952).

440. *See In re* Burr, 29 Cal. 2d 25, 28-29, 243 P.2d 787, 789 (1952). "[I]f extraordinary circumstances requiring protection of the child during the appeal arise, application may be made to the appellate court for appropriate relief." Lamar v. Superior Court, 38 Cal. 2d 676, 683, 242 P.2d 321, 324-25 (1952).

to make visiting arrangements, again this was for the appellate court to determine.[441] If a question arose concerning permission for the child to leave the state to attend a certain school, again the appellate court had to be approached.[442] Understandably, however, the appellate courts frequently refused to make interim orders.[443]

It was against this backdrop of appellate cases that the legislature acted in 1955. In view of the adamant position taken by the supreme court, a legislative change was needed to empower the trial judge himself to take needed action to remove a child from a dangerous situation and to order whatever interim measures were needed during the appeal. Relief from the appellate court might come too late or not at all.[444]

It is apparent that the legislature overshot the mark when it provided for immediate custody changes pending the appeal of the change order. It remedied serious shortcomings of prior law by giving the trial judge power to issue temporary and incidental orders for the benefit of the child. But at the same time it created the serious new problem that has been described—the virtual futility of an appeal if the order appealed from has been in effect long before the decision on appeal is rendered. The legislature was not unmindful of the double or triple shifts in custody that might result if a custody order is first carried out under the 1955 legislation and there is a subsequent reversal by the appellate court. It saw that this would cause hardship to the child, but felt that there would be few instances in which the conclusions of the trial court would be reversed.[445] At the time, the legislature could not foresee that appellate courts would feel constrained either not to reverse at all contrary to their better judgment[446] or to reverse without moving the child[447]—in both instances making a deliberate choice to safeguard the child at the expense of frustrating the purposes of an ap-

441. *See* Gardner v. Superior Court, 39 Cal. 2d 688, 690, 242 P.2d 328, 329 (1952).

442. Lerman v. Superior Court, 38 Cal. 2d 676, 681-83, 242 P.2d 321, 323-25 (1952).

443. Cf. Gardner v. Gardner, 38 Cal. 2d 691, 692-93, 242 P.2d 329, 330-31 (1952) (companion case to Gardner v. Superior Court, 39 Cal. 2d 688, 242 P.2d 328 (1952)).

444. *See* 44 Calif. L. Rev. 141, 141-42 (1956).

445. *See id.*

446. *See, e.g.*, Black v. Black, 180 Cal. App. 2d 317, 11 Cal. Rptr. 177 (1961).

447. *See, e.g.*, C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 920-21, 106 Cal. Rptr. 123, 131 (1973); *In re* Marriage of Russo, 21 Cal. App. 3d 72, 93-95, 98 Cal. Rptr. 301, 316-17 (1971).

peals procedure. Further, the 1955 legislature could not foresee that it would soon be the role of appellate courts to mark new paths in adoption and custody law.[447] With hindsight, it is clear that the legislature went too far when it moved from an automatic stay to virtual automatic enforcement of every custody order pending an appeal.

2. *Recommendations*

Fourteen years ago the court declared in *Stack v. Stack* that "the time is ripe" for "the development of new and better techniques"[448] for dealing with custody orders pending an appeal. The time is overdue today. Two basic changes in the law are necessary to eliminate the harmful effects of the 1955 legislation while preserving its benefits. Child custody orders should generally be halted during the appellate process, as under pre-1955 law. However, the trial court should retain the authority to move the child from an environment that endangers his physical or emotional health to an extent that the advantages of stable surroundings are likely to be outweighed by their potential harm.[450] The trial court should have the additional authority to make visitation orders and other incidental temporary orders which may become necessary in the interim.

The second recommended change deals with the serious problem of delay in the appellate process. If the appellate court affirms the custody change ordered in the lower court, that change may have been held in abeyance for so long during the appellate process that there is again a problem of tearing a child away from a familiar surrounding. The advantage over current law is that a reversal on appeal leaves the child where he is, obviating two shifts of residence that are presently required, and an affirmance results in only one move of the child. But

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448. *See, e.g., In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975); *In re* B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 496 P.2d 453, 101 Cal. Rptr. 541 (1972); Cheryl B. v. Superior Court, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); Guardianship of Marino, 30 Cal. App. 3d 952, 106 Cal. Rptr. 855 (1973); C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973); *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967).

449. 159 Cal. App. 2d [illegible], 323 P.2d 177, 178 (1958).

450. This proposal is borrowed from the restrictions on modifications of custody included in the UNIFORM MARRIAGE AND DIVORCE ACT § 409(b)(3). This provision has been enacted in Colorado (COLO. REV. STAT. ANN. § 14-10-131(2)(c) (1973)), Kentucky (KY. REV. STAT. ANN. § 403.340(2)(c) (Supp. 1974)), and Washington (WASH. REV. CODE ANN. § 26.09.260(1)(c) (Supp. 1974)).

this is not a sufficient improvement. The solution must be to limit the duration of the appellate process.

Currently, expedited appellate review is available by regular appeal in juvenile court custody cases[451] or by review by writ of mandate or prohibition. *In re Raya*[452] demonstrates the possibilities for speedy appeal in dependency and neglect cases. Even though the decision on appeal was reached in only 1 month, speed by no means detracted from quality: the decision has become a leader.[453] Similarly, adoption and custody matters can reach the appellate courts by way of an extraordinary writ. Extraordinary relief in such situations is granted because normal appellate procedures are acknowledged to result in intolerable delay.[454] In view of the practical feasibility of expediting custody and adoption cases, whatever the procedural remedy, it is recommended that appeals in all custody and adoption cases be given absolute calendar priority. There will, of course, be *some* time lag between the lower court custody order and the judgment on appeal. If the status quo has been maintained in the meantime, no inordinate harm should result even though the child must be moved once after a speedy appeal. Some changes in custody are unavoidable.

Summarizing the suggestions made above, it is recommended that:

(1) Any custody order[455] should be stayed pending an appeal, except that the trial court or appellate court may order that the child be moved from an environment that seriously endangers his physical or emotional health to an extent that the harm likely to be caused by a change would be outweighed by its advantages to the child.[456] Additionally, the trial court should have the power to make any temporary orders regarding visitation and other incidental matters that may be necessary in the interim.

(2) Appeals in all custody matters should be so set for hearing as to take precedence over all other matters pending in the court to which the appeal is taken and should be disposed of with dispatch.

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451. CAL. WELF. & INST'NS CODE § 800 (West Supp. 1975), provides that the "appeal shall have precedence over all other cases in the court to which the appeal is taken."

452. 255 Cal. App. 2d 260, 63 Cal. Rptr. 232 (1967).

453. The case has been reviewed in PEOPLE, LEVY & SIMMONS, *supra* note 15, at 80 (Supp. 1971), and HOLTZER, WADSWORTH & QUINN, *supra* note 3, at 709.

454. *See, e.g.*, San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 545-47 (1972).

455. "Custody order" and "custody matters" are defined to be all-inclusive, so as to cover guardianship, juvenile dependency, adoption, habeas corpus, and custody disputes involved in marriage dissolution and any other proceedings.

456. *See* note 450 *supra*.

EXHIBIT 4

Copy to Staff for Law Revision Commission Comments from Interested Persons

April 21, 1978

The Honorable Charles Imbrecht
California State Assembly
State Capitol
Sacramento, California 95814

Dear Assemblyman Imbrecht:

I have enclosed a copy of a letter on Assembly Bill 2517 for your review. I believe that Mr. Fulton raises some valid points.

I would be happy to review this with you at your convenience.

Sincerely,

Dennis L. DeWitt
Government Relations

DDW/dd

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JAMES W. CONTE
President

April 11, 1978

TO: Mr. Dennis De Witt

RE: Assembly Bill 2517

I agree with the extension of the privilege for the psychotherapist-patient privilege as outlined in this bill.

The bill does state that the privilege exists between the therapist and the patient as defined, as I go to the definitions I see several specifics that are involved continuously in psychotherapy in psychiatric facilities that are not mentioned.

As an example, there are, in numerous psychiatric facilities in California, Registered Nurses who have a masters degree, as an example, from UCLA School of Nursing, who come out with the title known as "clinical therapist". From a licensing viewpoint, they are still a registered nurse, however, as they get involved in the psychiatric hospital setting, they are continually doing therapy with the patients, they are working with many groups of patients, running group therapies, doing counseling, many times they are the director in charge of, as an example, a day care treatment program.

Even at a lower education level than a masters degree we have registered nurses in many of our facilities who are quite competent who conduct community meetings of patients and their families who constantly are meeting with the patients, maybe not acting in the professional sense as a psychotherapist, however they do hear, they do discuss, they do even record sometimes in medical records, some very confidential information which could be involved in this type of criminal proceedings that the legislation is referring to.

I think that the professional registered nurse, the licensed psychiatric technician, the licensed LVN, should very definitely be involved or considered

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as exempt or exempt as to privilege. I further suggest that we have professionals such as registered occupational therapists who are deeply involved in a quasi-type of psychotherapy, and they also have definite involvement in confidential subject matter of the patient which could be very pertinent in a criminal proceeding.

This bill reminds me of an insurance policy. The more specific things you define, then the more specific things you have excluded. If they are going to start excluding specifics by definition for privilege, then I think they should exclude all those individuals who possibly could be involved in psychotherapy with patients.

Very truly yours,

Jack J. Fulton

JJF/nf