

Admin.

August 30, 1996

**Memorandum 96-58****New Topics and Priorities**

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**BACKGROUND**

It is the Commission's practice annually to review the topics on its calendar, consider suggested new topics, and determine priorities for work during the coming year.

Last year after reviewing topics and priorities, the Commission decided to request authority to study the law of contracts (including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters).

Also at that time the Commission decided to give priority during 1996 to completion of work on unfair competition litigation, judicial review of agency action, obsolete restrictive covenants, the best evidence rule, and corporate governance issues. And the Commission planned to initiate work on a health care decisions act, administrative rulemaking, the Uniform Unincorporated Nonprofit Association Act, and smaller matters such as the mediation privilege.

The contract law study has been authorized by 1996 Cal. Stat. res. ch. 38, along with a major new study — consolidation of the state environmental statutes. The Commission is moving rapidly towards completion of work on the items it decided to give priority to during 1996. And the Commission has initiated consideration of matters it identified for new work, with the exception of the Uniform Unincorporated Nonprofit Association Act (discussed below).

This memorandum reviews the status of items on the Commission's Calendar of Topics that the Commission may wish to give priority to during the coming year, and summarizes suggestions we have received for new topics that should be studied. The memorandum concludes with staff recommendations for allocation of the Commission's resources.

## TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are 26 topics on the Calendar of Topics that have been authorized for study by the Commission, two of which were added during 1996. The Commission has completed work on many of these topics — they are retained in case corrective legislation is needed.

Below is a discussion of the topics on the Commission's Calendar. The discussion indicates the status of each topic and the need for future work. If you believe a particular matter deserves priority, you should raise it at the meeting.

### **1. Creditors' Remedies**

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1982 obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of recommendations to the Legislature.

**Exemptions.** Code of Civil Procedure Section 703.120 requires that the Law Revision Commission by July 1, 1993, and every ten years thereafter, review the exemptions from execution and recommend any changes in the exempt amounts that appear proper. The Commission completed this task during 1994-95 (pursuant to statutes extending time for state reports impacted by budget reductions); legislation was enacted and is operative as 1995 Cal. Stat. ch. 196. The next Commission review is due by July 1, 2003.

As a separate project, the Commission recommended repeal of the declared homestead exemption in the 1996 legislative session. This recommendation was not enacted and the Commission does not plan to resubmit it.

**Attachment.** The Commission submitted to the Legislature its statutorily required report on experience under the statute authorizing attachment where a claim is partially secured. The Senate Judiciary Committee has requested the Commission's recommendation as to the policy of this statute as well; this matter is currently under consideration by the Commission.

**Judicial and nonjudicial foreclosure of real property liens.** This is a matter that the Commission has recognized in the past is in need of work. The staff has had correspondence during 1996 with an under-secured lender who questions the continued need for anti-deficiency legislation in California. A study of judicial and nonjudicial foreclosures would be a major project.

**Enforcement of judgments issued by courts in marital dissolution proceedings.** The Commission has previously recommended legislation, which was not enacted, untangling the interrelation of the general enforcement of judgment statutes with the special statutes on enforcement of judgments issued by courts in marital dissolution proceedings. The problems have not yet been cured; we need to determine whether the time is right to reintroduce this legislation.

## **2. Probate Code**

The Commission drafted the new Probate Code and continues to monitor experience under the code and make occasional recommendations on this subject.

**Health care decisions.** The Commission has activated its study of the durable power of attorney for health care and the Uniform Health-Care Decisions Act.

**Inheritance from or through foster parent or stepparent.** The Commission developed a recommendation to resolve inconsistent appellate decisions, but suspended this matter pending the outcome of the Supreme Court's review of a case presenting the issue. The Supreme Court has not yet ruled in the case.

**Effect of joint tenancy title on marital property.** This issue is still alive and is being monitored by the Commission's staff. There have been new developments during 1996, discussed below under "Proposed New Topics".

**Definition of community property, quasi-community property, and separate property.** The Commission has received communications addressed to problems in the definition of marital property for probate purposes. We understand the State Bar Estate Planning and Family Law Sections have worked on this jointly from time to time.

**Creditors' rights against nonprobate assets.** The staff has identified policy issues. The Uniform Probate Code is developing a statute to address the issues. The staff is monitoring experience under the new trust claims statute to see whether to proceed with this project.

**Application of family protection provisions to nonprobate transfers.** A related issue is whether the various probate family protections, such as the share of an omitted spouse or the probate homestead, should be applied to nonprobate assets. The staff believes this issue is important and becoming critical as more and more estates pass outside probate. We have received phone calls from

several lawyers about it, and the issues are popping up in the advance sheets. The Commission should address this problem at some point.

**Nonprobate transfers of community property.** The legislation enacted on Commission recommendation has received a fair amount of criticism from some quarters, particularly from Professor Halbach. The Commission has deferred action on this.

Professor Kasner's study on this matter raised a number of important issues that the Commission deferred. Many of these issues relate to family law and community property as well as estate planning.

**Alternative beneficiaries for unclaimed distribution.** The concept is that unclaimed property distributed in probate would go to secondary heirs rather than escheat. The Commission decided to wait until the State's finances improve before considering this.

**Filing fees in probate.** The staff has done substantial work trying to make sense out of the filing fee system in probate, supported by the practicing bar. Court clerical staff had problems with this, and negotiations between clerks and lawyers have apparently lapsed. The Judicial Council has proposed legislation on the same issue. We may want to reactivate this worthwhile matter sometime.

**Protective proceedings for federal benefits.** It has been suggested that California could perform a service by clarifying the preemptive effect of federal laws on general state fiduciary principles when federal benefits are involved. We have referred this matter to the State Bar Probate Section for comment, but they have not been forthcoming despite regular prodding from the staff.

**Other matters the Commission has deferred for future study.** In the process of preparing the new Probate Code the Commission identified a number of areas in need of further study. These are all matters of a substantive nature that the Commission felt were important but that could not be addressed quickly in the context of the code rewrite. The Commission has reserved these issues for study on an ongoing basis. Topics on the "back burner" list include:

Statutory 630 affidavit form

Transfer on death designation for real property

Summary guardianship or conservatorship procedure

Uniform Transfers to Minors Act

Interest on lien on estate property (attorney fees)

Tort and contract liability of personal representative

Rule Against Perpetuities and charitable gifts

Jury trial on existence of trust  
Multiple party bank account forms

### **3. Real and Personal Property**

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic. The Commission will be proposing legislation for 1997 on two matters — covenants that run with the land and enforcement of obsolete restrictions.

**Adverse possession of personal property.** The Commission has withdrawn its recommendation on this matter pending consideration of issues that have been raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

### **4. Family Law**

The study of family law was authorized in 1983, consolidating various previously authorized studies into one comprehensive topic.

**Marital agreements made during marriage.** California now has the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights upon death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues. One issue — whether the right to support can be waived — should be addressed in the premarital context as well.

**Mixed community and separate property assets.** We have received a lengthy article from our community property consultant, Professor Bill Reppy, concerning *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 Idaho L. Rev. 965 (1995). The staff intends to solicit comment from other experts on whether the article appears to present a fruitful approach for a legislative solution to this intractable problem.

### **5. Prejudgment Interest**

This topic was added to the Commission's Calendar of Topics by the Legislature in 1971 because some members of the Legislature believed that prejudgment interest should be recoverable in personal injury actions. This topic was never given priority by the Commission. The Commission doubted that a

recommendation by the Commission would carry much weight, given the positions of the Consumer Attorneys of California and the insurance companies and other potential defendants on the issue. **In light of the other major projects the Commission is or will be involved with, the staff suggests that the Commission recommend dropping this matter from its agenda.**

## **6. Class Actions**

This topic was added to the Commission's Calendar of Topics in 1975 on request of the Commission. However, the Commission never gave the topic any priority because the State Bar and the Uniform Law Commissioners were reviewing the Uniform Class Actions Act. Only two states—Iowa and North Dakota—have enacted it, and it has been downgraded to a Model Act. The staff questions whether the Commission could produce a reform statute in this area that would have a reasonable chance for enactment, given the controversial nature of the issues involved. However, it may be a worthwhile endeavor at some point to try simply to codify the existing rules governing class actions.

## **7. Offers of Compromise**

This topic was added to the Commission's Calendar of Topics at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic. The Commission is currently considering the issue of settlement negotiation confidentiality.

## **8. Discovery in Civil Cases**

The Commission requested authority to study this topic in 1974. Although the Commission considered the topic to be an important one, the Commission did not give the study priority because a joint committee of the California State Bar and the Judicial Council produced a new discovery act that was enacted into law.

The Commission in 1995 decided to investigate the question of discovery of computer records; this matter is not under active consideration.

#### **9. Procedure for Removal of Invalid Liens**

This topic was added to the Commission's Calendar of Topics by the Legislature in 1980 because of the problem created by unknown persons filing fraudulent lien documents on property owned by public officials and others to create a cloud on the title of the property. The Commission has never given this topic priority, but it is one that might be considered on a nonpriority basis in the future when staff and Commission time permit. The staff has done a preliminary analysis of this matter that shows a number of remedies are available under existing law. The question is whether these remedies are adequate.

#### **10. Special Assessments for Public Improvements**

There are a great number of statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. (A number of years ago, the Commission examined the improvement acts and recommended the repeal of a number of obsolete ones. That recommendation was enacted.) This legislative assignment would be a worthwhile project but would require a substantial amount of staff time.

#### **11. Injunctions**

This topic was added to the Commission's Calendar of Topics by the Legislature in 1984 because comprehensive legislation was proposed for enactment and it was easier for the Legislature to refer the matter to the Commission than to make a careful study of the legislation. The Commission decided that due to limited funds, it would not give priority to this study, unless there was a legislative directive indicating the need for prompt action on this matter. Due to the Commission's inaction, the 1984 comprehensive legislation was resurrected in 1995 and enacted in amended form. **The staff suggests that the Commission recommend dropping this matter from its agenda.**

## **12. Rights and Disabilities of Minor and Incompetent Persons**

The Commission has submitted a number of recommendations under this topic since its authorization in 1979 and it is anticipated that more will be submitted as the need becomes apparent. The health care decisions study involves issues in this area.

## **13. Child Custody, Adoption, Guardianship, and Related Matters**

The Commission obtained several background studies on child custody and adoption pursuant to this 1972 authority, but never pursued them. **The staff would drop this as an independent study and consolidate it with the family law study.**

## **14. Evidence**

The California Evidence Code was enacted upon recommendation of the Commission, and the study has been continued on the Commission's agenda for ongoing review.

**Federal Rules of Evidence.** Since the 1965 enactment of the Evidence Code, the Federal Rules of Evidence have been adopted. The Commission has available a background study that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. However, the study was prepared many years ago and would need to be updated before it is considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code (enacted 30 years ago) might be useful before the Commission undertakes a review of the Evidence Code.

**Electronic Documents.** The Commission has decided to study selected admissibility issues relating to electronic data. These are being worked into the Commission's agenda as Commission time and staff resources permit. The pending proposal on the best evidence rule is a result of this project.

## **15. Arbitration**

The present California arbitration statute was enacted in 1961 upon Commission recommendation. The topic was retained on the Commission's Calendar so that the Commission has authority to recommend any needed technical or substantive revisions in the statute.



## **16. Inverse Condemnation**

The Commission has made recommendations to deal with specific aspects of this 1971 topic but has never made a study looking toward the enactment of a comprehensive statute, primarily because inverse condemnation liability has a constitutional basis and because it is unlikely that any significant legislation could be enacted. **The staff suggests that the Commission recommend dropping this matter from its agenda.**

## **17. Administrative Law**

This topic was referred to the Commission in 1987 both by legislative initiative and at the request of the Commission. It is under active consideration by the Commission. The administrative adjudication portion of the study was enacted in 1995, and cleanup legislation in 1996. The Commission is currently developing proposals for 1997 on quasi-public entity hearings and administrative law judge ethics. The Commission is also developing a recommendation for 1997 on judicial review of agency action. The Commission has initiated its study of administrative rulemaking. The remaining major subject area — nonjudicial oversight — has not yet been started.

## **18. Payment and Shifting of Attorneys' Fees Between Litigants**

The Commission requested authority to study this matter in 1988 pursuant to a suggestion by the California Judges Association. The staff did a substantial amount of work on this topic in 1990. The Commission has deferred consideration of it pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorneys' fees between litigants. The matter is currently the subject of reform efforts at state and federal levels. This would be a major study requiring significant staff and Commission resources. The staff recommends that the Commission continue to defer work on it.

## **19. Adjudication of Child and Family Civil Proceedings**

This study initially resulted in codification of the Family Code. Authority to study child and family civil proceedings is continued on the Commission's calendar of topics in case Family Code cleanup issues surface or in case non-Family Code issues come up (e.g., district attorney support enforcement; juvenile dependency proceedings). **The staff would drop this as an independent study and consolidate it with the family law study.**

## **20. Uniform Unincorporated Nonprofit Association Act**

This topic was authorized in 1993 on request of the Commission. The Commission retained Professor Michael Hone of University of San Francisco Law School to prepare a background study. The study was not delivered and funds available under the contract have reverted. Professor Hone has indicated his desire to complete the work nonetheless, and has prepared a memorandum with a partial statement of issues.

This is a politically sensitive matter, since the relevant committee of the American Bar Association is negative towards the Uniform Act; Professor Hone has been working with the committee to attempt to resolve their issues. Professor Hone will be visiting at Stanford during the 1996 Fall Semester, and may be able to enlist student assistance to complete the background materials for this project, working with the Commission staff.

## **21. Shareholders' Rights and Corporate Director Responsibilities**

This topic was authorized in 1993 on request of the Commission. The Commission is actively involved in the business judgment rule portion of the study, and has considered the derivative action portion briefly.

## **22. Unfair Competition Litigation**

This topic was authorized in 1993 on request of the Commission. The Commission has circulated a tentative recommendation with the intent to propose legislation for 1997.

## **23. Trial Court Unification**

This topic was assigned by the Legislature in 1993. The Commission delivered its report on the constitutional changes that may be required in January 1994. The Commission's resolution of authority has been revised to provide for a study of statutory changes that may be necessitated by court unification.

SCA 4 has been approved by the 1996 Legislature. It provides for trial court unification by county, on a vote of a majority of the superior court judges and a majority of municipal court judges in the county. The proposed constitutional amendment may be on the November 1996 ballot — we will know for sure by the time of the September meeting. If it is on the ballot, there is a good chance it will be approved by the electors, and it does not have a deferred operative date. This would be a priority item, since the Legislature is looking to the Commission for

guidance on the necessary statutory revisions. The matter is considered separately in Memorandum 96-61.

#### **24. Tolling Statute of Limitations While Defendant Is Out of State**

This topic was authorized in 1994 on request of the Commission. The Commission's recommendation was submitted to the 1996 legislative session but not enacted. The Commission plans to resubmit it on the Assembly side in 1997.

#### **25. Law of Contracts**

The Commission's 1996 resolution authorizes a study of the law of contracts (including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters). The sales, leasing, and licensing articles of the Uniform Commercial Code are currently being revised to take into consideration issues of this type. This may provide useful guidance for the Commission in the contract law study.

#### **26. Consolidation of Environmental Statutes**

The Legislature in 1996 added to the Commission's agenda a study of "Whether the laws within the various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes." It is conceived by the Legislature that this will be a nonsubstantive compilation, that the Commission will be able to exercise a considerable amount of discretion in determining the scope of the study, and that the Commission will give it some priority. This is an immense undertaking, and we will need to devote some attention to the organization and procedure for the study. The staff is talking with knowledgeable people in the field and will present the Commission with suggestions on methodology.

### **PROPOSED NEW TOPICS**

During the past year the Commission has received a number of suggestions for study of new topics. These suggestions are discussed below.

#### **Publication of Legal Notices**

Senator Kopp has written to request that the Commission investigate the laws that require various legal notices to be published in local newspapers. He is the

author of legislation introduced during the past session to repeal the publication requirements for orders to show cause for change of name, fictitious business name statements, and notices of foreclosure sale of real property. The published notices would be replaced by other devices to enable an interested person to obtain the same information.

Senator Kopp notes that, “From discussions and debate about the bill, I have decided that several of these laws are obsolete and an unnecessary burden on the citizens and business of California. I have always been a strong proponent of public notice and open meetings. I question, however, the need for publication of certain legal notices, and I think the Commission is an apt body to investigate the desirability and feasibility of eliminating at least *some* of the historic (but obsolete) publication statutes.” Exhibit p. 1.

The Commission has recommended legislation in the past to eliminate legal notice publication requirements in various contexts, including fictitious business name statements and various probate notices. These proposals have invariably failed, although we managed to reduce the size of one publication and the length of the publication period of another. After a particularly bruising battle with the newspaper publishers over fictitious business name publication in 1969, it became an article of faith with the Commission’s staff that the Legislature will not vote to eliminate a publication requirement over newspaper opposition — legislators cannot afford to alienate their local papers, given the power the papers wield in election campaigns.

Senator Kopp’s proposal — Senate Bill 1684 — had an impressive list of supporters, including the Attorney General, but was opposed by local newspapers and the California Newspaper Publishers Association. The bill made it out of the Senate Judiciary Committee on a divided vote but was defeated on the Senate floor by a 2-1 margin.

Should the Commission decide to study legal publication requirements, the Commission would already have authority in the areas of foreclosure and execution sales, probate notices, and perhaps some others. However, **for a systematic review of notice publication requirements, independent authority to study the matter would need to be obtained.**

### **Criminal Restitution**

In 1982 the Victims’ Bill of Rights was approved by the voters. It included a requirement that restitution be ordered in every case, regardless of the sentence

or disposition imposed, for crime victims who suffer losses, unless compelling and extraordinary reasons exist to the contrary. It mandated the Legislature to enact legislation implementing the right to restitution at the next session. Cal. Const., Art. 1, Section 28(b).

Several bills were enacted in 1983 to require trial courts to order restitution to be paid by convicts placed on probation, require a restitution fine of up to \$10,000 from all convicts payable to a restitution fund, and facilitate rights for civil recovery against convicts. After a 1985 court case found that the Legislature had failed to fully comply with the 1982 initiative, the law was changed to require courts to order restitution to victims for economic loss where probation is denied.

A provision was added in 1988 to require a hearing — or waiver/stipulation — before a restitution order is made. That provision was added to meet constitutional concerns about the enforceability of restitution orders as civil money judgments without a hearing for convicts to contest those orders.

Subsequent changes included the specific right of victims to enforce restitution orders as money judgments; a requirement for a minimum fine in all criminal cases; and additional changes to facilitate the criminal restitution process. Last year a budget trailer bill was enacted to make additional changes, many recommended by the Board of Control, which administers the Victims of Crime Restitution Fund. This year major legislation authored by Senator Kopp would make further changes in the law.

Senator Kopp has written to request that the Commission review the criminal restitution system, noting that “The Legislature intended restitution orders to be enforceable as if they were civil judgments. For many victims, however, the system has not worked as intended.” Exhibit pp. 2-3.

Senator Kopp notes that a large portion of the problem can be blamed on unclear and even contradictory law, citing examples. He notes the rapidly and constantly changing law regarding restitution. “Without careful legislative evaluation, it is no wonder the law has been written in such a confusing and incoherent manner.” He believes a thorough examination and revision of this law is required.

These concerns are echoed by the consultant to the Senate Criminal Procedure Committee, who agrees with Senator Kopp’s assessment. His bill analysis notes that the criminal restitution process continues to evolve; to the extent that restitution orders are made in all criminal cases, additional trial court time and

efforts will undoubtedly need to be expended to ensure that the restitution process is implemented as required by law. To the extent that the statutes continue to be changed on a yearly basis, it may be anticipated that it will take some time for all trial courts to implement the new and changing procedures.

The consultant agrees it would take a thorough study by a group like the Commission to straighten out the law, and that this would be a worthwhile endeavor. He points out that this really involves civil enforcement of judgments, and administrative procedure before the Board of Control, and not criminal law or procedure.

**The staff believes this would be a good project for the Commission to undertake.** There are active and vocal advocates in this area, including defense attorneys and victims rights advocates, but there is no reason why they cannot be brought into the effort to straighten out the statutes.

Although it might be argued the Commission already has authority to work on the matter as part of its creditors' remedies and administrative law studies, the staff believes it will be important to establish this authority clearly. The staff suggests that the Commission request legislative authorization to study the laws governing criminal restitution.

### **Gender-Neutral Statutes**

We have received a suggestion from Sharon B. Morris, a Pacific Palisades attorney, that the statutes should be revised to make them gender-neutral. She notes specifically provisions in the Evidence Code referring to a "reasonable man". See Exhibit pp. 4-5.

The policy of the Legislature has been to gender-neutralize language in a statute whenever the statute is being amended for other reasons. There has not been an effort to amend statutes for the sole purpose of making them gender-neutral. The California codes typically include general provisions to the effect that "words used in the masculine gender include the feminine and neuter." See, e.g., Civ. Code § 14; Code Civ. Proc. § 17; Evid. Code § 9; Pen. Code § 7. The task of reviewing the entire body of California statutes and the costs, including publishing costs, of making the revisions would be monumental.

**Although the staff does not believe a project such as this would be worth the expenditure of resources,** it would have at least one serendipitous benefit, in our opinion. It would enable us to impose consistent and competent drafting conventions throughout the codes. We could eliminate current loose drafting

practice such as, “The petitioner may request that the respondent pay his or her reasonable expenses.” Apart from being linguistically awkward, this amendment is ambiguous (whose expenses?), and seems to imply that the provision is inapplicable where the petitioner is an entity as opposed to a natural person (his, her, or its?). A better drafting technique is to repeat the noun (pay the petitioner’s expenses).

### **Community Property and Joint Tenancy**

The Commission has struggled with the interrelation of community property and joint tenancy for a number of years (but not for as long as California law has struggled with it). The Commission’s latest effort to straighten out the law was its 1993 recommendation to provide a statutory form that would inform married persons of the consequences of taking title as joint tenants, while providing them a clear means to do so if they truly desire it. Although this measure was recommended by the Commission and supported by both the family law and the probate law sections of the State Bar, it was opposed by a coalition of the banking industry, title insurance industry, and real estate industry.

The Commission concluded it would not be possible to obtain enactment of this measure until those industries come to recognize the real problems under existing law. Specifically, it is unclear under current legal principles whether community property held in joint tenancy form is in fact community or joint; the adverse consequences of joint tenancy are substantial. The Commission decided to continue to monitor the situation.

The problems are ongoing. During the past year, for example, the following have appeared:

**(1) Merritt, *Community Property Held in Joint Tenancy Title: Have the Transmutation Statutes and Recent Cases Revived the Concept of Joint Tenancy Only for Convenience?*, 1 California Trusts & Estates Quarterly No. 1 at 36 (Spring 1995).**

Discusses recent case law on conflict between community property presumption and form of title presumption, in context of rights of family of first marriage v. family of second marriage. Suggests that for post-1985 joint tenancy titles, community property presumption will prevail, since mere titling of property fails to satisfy transmutation statute. “Such recharacterization of nominal joint tenancies into community property once again may allow for enhanced tax planning and other benefits, but it also can lead to litigation in

those cases where the disposition of the assets will vary dramatically depending upon the ultimate characterization.”

**(2) Kasner, *Guess What? The IRS Recognizes Survivorship Rights in Community Property*, 1 California Trusts & Estates Quarterly No. 2 at 22 (Summer 1995).**

Discusses recent IRS revenue rulings and private letter suggesting that IRS would recognize concept of community property with right of survivorship. “Score another point for community property (i.e., joint tenancy) with right of survivorship!”

**(3) Johnston, *Transmutation of Property Between Spouses — Another Point of View*, 2 California Trusts & Estates Quarterly No. 1 at 29 (Spring 1996).**

Argues that transmutation statute does not affect characterization of property as community or joint tenancy, since when community property is titled as joint tenancy, the rights of the spouses, though changed, remain equal. “In a 1993 Recommendation, the California Law Revision Commission recommended specific legislation creating a presumption that property with a community property source remains community property, even though held by a married couple in joint tenancy form. If, as some have argued, such a presumption already exists, there would be no reason for such legislation.”

**(4) *Estate of Layton*, 52 Cal. Rptr. 2d 251 (April 1996).**

Community property family residence held in joint tenancy form of title. Marriage dissolved, with jurisdiction reserved to divide residence; wife continued to live in residence. Division had not occurred when husband died nine years later, nor when wife died two years after that. Husband’s will left property to children; wife’s will included children of former marriage. Was family residence community property (each could devise one-half) or joint tenancy (last to die could devise all, first to die could devise nothing)? Court held that status-only dissolution of marriage did not sever or affect title to property, which remained joint tenancy, vesting full title in surviving spouse. “[C]oncerns about divorcing parties’ expectations regarding joint tenancy survivorship fall more suitably within the domain of the Legislature.”

**(5) Bernhardt, *Secretly Severing Joint Tenancies*, 19 CEB Real Property Law Reporter 125 (May 1996).**

Discusses recent case law on severance of joint tenancy to defeat expectancy of survivor. Contrasts community property principles. “So California couples confront the unpleasant fact that, depending on how they choose to hold title,



they can prevent each other either from conveying to outsiders (community property), or from devising their interest by will to outsiders (joint tenancy), but not both.” Proposes a third alternative — marital deed of trust — the couple would take title by a deed that names them as beneficiaries with a third party trustee designated to convey or encumber title on mutual instructions of both spouses.

**(6) Thomson, *Proposal for Statute re Presumption of Community Property Held on Record in Joint Tenancy Form* (May 10, 1996), Exhibit pp. 6-7.**

Russell A. Thompson of Monterey writes to urge the Commission to renew its effort in this area, particularly to enact a statute that property having a community source is presumed to remain community even though held by married persons in joint tenancy form. His analysis indicates that IRS will not necessarily recognize a probate court’s order confirming the community character of property held in joint tenancy form. A community property title presumption, therefore, “should be very helpful in obtaining a fully stepped-up tax basis in the many cases where there is little probative evidence of an agreement between the spouses holding title as joint tenants for convenience [in avoiding probate] without really understanding the distinction between community property and joint tenancy.”

**(7) Comment, 17 CEB Estate Planning Reporter 182 (June 1996)**

Comment on *Estate of Layton*, noting result would have been different if property had been divided on death of first spouse, due to the community property dissolution presumption. “It is, of course, undesirable that a substantive result should depend on the procedure used to determine title.”

**(8) *Jacobs-Zorne v. Superior Court*, 54 Cal. Rptr. 2d 385 (June 1996).**

Late in life marriage; dispute over whether joint tenancy accounts were part of decedent’s estate (and therefore subject to decedent’s will) or passed to surviving spouse by right of survivorship (and therefore not part of decedent’s estate). Petition by surviving spouse, opposed by decedent’s heirs, held not to violate no contest clause in decedent’s will. “Normally, a beneficiary’s attempt to have property characterized in a particular way (i.e., as joint tenancy property, domestic partnership property, community property, or the like) is not considered an attack on the will or on provisions within the will.”

**(9) *Bankruptcy of Mantle*, 96 Daily Journal D.A.R. 8527 (July 18, 1996).**

Wife contributed separate funds to purchase of family residence, taking title in joint tenancy. Dissolution and property division proceedings pending when

husband declared bankruptcy. Does wife get separate contributions back, or are they community property and therefore part of bankruptcy estate? “Where a divorcing couple has, pursuant to court order, sold their residence and placed the proceeds in escrow pending the final order of the state court, the contributing spouse’s separate property interest in the escrowed funds subsists prior to the entry of judgment by the state court. Therefore, the escrowed funds in this case did not fall within the definition of property of the estate contained in Section 541(a)(2).”

While the staff believes the Commission’s existing recommendation on this matter is sound, we do not believe the time is ripe to reintroduce it. Meanwhile, the cases and commentary indicate continuing problems that might be narrowly addressed pending ultimate enactment of the Commission’s grand solution. Specifically, **the staff thinks is worth looking into (1) whether dissolution of marriage should sever a joint tenancy between married persons, and (2) whether the law should recognize a community property presumption at death (with or without a right of survivorship).**

The Commission currently has a very heavy agenda, and the Commission may not necessarily be interested in replotting old fields. But we think the problems are there, and are a continuing source of uncertainty and litigation. If the Commission is interested in pursuing the possibility of narrow legislation, the staff would work it into the agenda as time and resources permit. No new Legislative authority would be needed since the Commission is already authorized under existing studies (family law and probate).

## CONCLUSION

### **Overriding Priority — Trial Court Unification**

If the matter of trial court unification appears on the November ballot, the Commission will need to make this its highest priority during the remainder of 1996 in order to develop stop-gap legislation. If the measure is approved by the electors, the Commission will need to devote substantial resources during 1997 to develop a complete statutory overhaul. This is because the measure does not include a deferred operative date, and the Legislature is looking to the Commission for guidance on statutory implementation of the measure. We will know by the time of the September meeting whether it will be on the November ballot. For further information, see Memorandum 96-61.

## **1997 Legislative Program**

The staff would give next priority during the remainder of 1996 to completing projects currently underway, with a view to introduction in the 1997 legislative session. The staff believes the following are feasible for the Commission's 1997 legislative program:

**Unfair competition.** The Commission's tentative recommendation is currently being circulated for comment. We plan to review comments at the October meeting and should finalize the recommendation for introduction in 1997.

**Administrative adjudication.** The Commission is close to completion of work on two projects — (1) ethical standards for administrative law judges and (2) quasi-public entity hearings. These should both be ready for 1997.

**Judicial review of agency action.** A revised tentative recommendation for a comprehensive judicial review overhaul is being circulated for comment. This is a major piece of legislation. We will review comments in September with a view to finalizing the draft for 1997.

**Real property covenants.** The Commission will have two real property covenant proposals for 1997. The Commission (1) has completed work on the proposal to repeal the First Rule in Spencer's Case, and (2) is nearing completion of work on application of the marketable title act to obsolete restrictive covenants. Senator Calderon's office has expressed an interest in authoring these two matters as a 1997 legislative package.

**Tolling statute of limitation when defendant out of state.** The Commission has decided to resubmit this proposal in the Assembly in 1997.

**Evidentiary matters.** The Commission is close to completion of work on the best evidence rule for 1997. The proposal on mediation confidentiality is currently being circulated for comment; we expect to review the comments in October with the view to 1997 legislation.

**Attachment by unsecured creditors.** We plan to consider this minor matter in October and, at the request of the Senate Judiciary Committee, should be able to report back to the Legislature for the 1997 session. We have already developed drafts for any likely revisions.

## **Work During 1997**

The legislative program for 1997 is large and will consume substantial staff resources. This, combined with the overriding trial court unification priority, will

make it difficult to maintain consistent progress on other projects. However, the staff would try to complete work on the other active projects during 1997, if possible. We need to deal with the following projects:

**Environmental law.** Consolidation of the environmental laws will require a massive effort, and the Legislature would like it to receive a high priority. The staff will prepare a subsequent memorandum suggesting a method of proceeding on this project. It will not be possible to complete work on this project during 1997.

**Business judgment rule and derivative actions.** The Commission is closing in on a tentative recommendation to codify the business judgment rule, and then can turn its attention to demand and excuse in derivative actions. The staff would continue to push this project to completion, and it would be realistic to expect completion during 1997.

**Health care decisions.** We are taking up selected health care decision issues as time permits, en route to building a comprehensive revision. Given other high priority projects, it is probably unrealistic to expect this one can be completed during 1997.

**Administrative rulemaking.** This will not be a comprehensive revision. We can address selected problems, and perhaps even introduce legislation over several years as work progresses. Although this is not a huge project, the issues will generate substantial debate and involve both agencies and regulated industries.

**Local agency hearing procedures.** The concept of this study is a favorable judicial review standard offered as a “carrot” to get local agencies to adopt fair hearing procedures. The scope of the project is fairly narrow and we ought to be able to wrap up work on it during 1997.

**Settlement negotiation confidentiality.** This is an outgrowth of the mediation confidentiality study. It is too early to tell how much time it will take.

**Uniform Unincorporated Nonprofit Association Act.** If Professor Hone completes work on this, we would work individual issues into the agenda on a low priority basis.

**Federal benefits.** When the State Bar Committee delivers its report, we would take it up on a low priority basis.

**Overlapping statutes of limitation in unfair competition litigation.** This issue was held over from the unfair competition study on a divide and conquer

theory. We would take it up only after the unfair competition litigation legislation has been enacted.

### **Down the Road**

The **contract law** study is a substantial undertaking. This is also one where a study by an expert consultant would be helpful, when the Commission is ready to turn to it in a year or two. It should be possible to find a good consultant for this study.

Likewise, it may help expedite the study of **electronic evidence** issues to procure a background study, if we can locate an able and interested consultant for it.

### **Future Topics**

Of the new topics that have been suggested for future Commission consideration, the staff would add the following to the Commission's resolution of authority:

Whether the statutes governing the **criminal restitution** system should be revised, and related matters.

The **joint tenancy and community property** project, the staff believes, is worth doing, but no new legislative authority is necessary for it. We would work it into the Commission's agenda as time and resources permit, understanding the heavy workload the Commission will have.

The matter of **publication of legal notices** would be a meritorious study. However, the staff wonders whether work by the Commission would be efficacious, given our past experience in this area and the likelihood that legislative decisions concerning legal notices will continue to be politically determined.

The staff would not undertake to review the state statutes for the purpose of inserting **gender-neutral language** in them.

### **Topics to be Dropped from Commission Agenda**

The staff thinks the Commission should seek to drop the following topics from its agenda, since it is unlikely the Commission will be doing any work on them:

Study # 5 — Prejudgment Interest  
Study # 11 — Injunctions  
Study # 16 — Inverse Condemnation

In addition, the staff would drop the following projects as independent studies and consolidate them with the family law study:

Study # 13 — Child Custody, Adoption, Guardianship, and  
Related Matters

Study # 19 — Adjudication of Child and Family Civil  
Proceedings

The family law study would thus encompass:

**4. Family Law**

Whether family law (including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code) should be revised.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

SACRAMENTO ADDRESS ☐

STATE CAPITOL  
95814  
(916) 445-0503

DISTRICT OFFICE ☐

363 EL CAMINO REAL, #205  
SO. SAN FRANCISCO, CA 94080  
(415) 952-5666

# California State Senate



STATE SENATOR  
**QUENTIN L. KOPP**

EIGHTH SENATORIAL DISTRICT

REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

Law Revision Commission  
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APR 22 1996

File: \_\_\_\_\_

April 16, 1996

## Admin.

STANDING COMMITTEES:  
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BUDGET AND FISCAL REVIEW  
CRIMINAL PROCEDURE  
HOUSING AND LAND USE  
LOCAL GOVERNMENT  
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SELECT COMMITTEES  
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NORTHRIDGE EARTHQUAKE  
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EXPENDITURE PRACTICES  
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PROCEDURES

SUBCOMMITTEES  
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NO. 2 ON RESOURCES,  
ENVIRONMENTAL  
PROTECTION AND  
JUDICIARY - CHAIRMAN

JOINT COMMITTEES  
JOINT COMMITTEE ON RULES

Colin Wied, Esq.  
Chairman, California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, CA 94303

Dear Colin:

I write to request that the Law Revision Commission include in next year's commission agenda an investigation of laws which require that certain legal notices be published in local newspapers.

This year I have introduced Senate Bill 1684, which repeals the requirement to publish orders to show cause of change of name, fictitious business name statements, and notices of sale of real property. The bill would also establish a separate index at the county recorder, listing all current notices of sale of real property. As expected, the California Newspaper Publishers Association is vociferously opposed.

From discussions and debate about the bill, I have decided that several of these laws are obsolete and an unnecessary burden on the citizens and businesses of California. I have always been a strong proponent of public notice and open meetings. I question, however, the need for publication of certain legal notices, and I think the Commission is an apt body to investigate the desirability and feasibility of eliminating at least *some* of the historic (but obsolete) publication statutes.

I look forward to working with the Commission on the issue next year.

Sincerely yours,

  
QUENTIN L. KOPP

QLK:jch

cc: Senator Bill Lockyer  
The Honorable Dick Ackerman

SACRAMENTO ADDRESS ☐  
STATE CAPITOL  
95814  
(916) 445-0503  
  
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# California State Senate

Law Revision Commission

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MAY 10 1996

File: \_\_\_\_\_

STATE SENATOR  
**QUENTIN L. KOPP**

EIGHTH SENATORIAL DISTRICT  
REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

May 7, 1996

STANDING COMMITTEES:  
TRANSPORTATION - CHAIRMAN  
AGRICULTURE & WATER  
RESOURCES  
BUDGET AND FISCAL REVIEW  
CRIMINAL PROCEDURE  
HOUSING AND LAND USE  
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SELECT COMMITTEES  
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SUBCOMMITTEES  
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NO. 2 ON RESOURCES,  
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PROTECTION AND  
JUDICIARY - CHAIRMAN

JOINT COMMITTEES  
JOINT COMMITTEE ON RULES

Colin Wied, Esq.  
Chairman, California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, CA 94303

Dear Colin:

I write to request that the Law Revision Commission include in next year's commission agenda an investigation of laws regarding the criminal restitution system.

This year I have introduced Senate Bill 1685, which effects a number of changes to the Penal Code regarding restitution. Generally, the bill clarifies the process by which a court orders a criminal defendant to pay restitution to a victim. The Legislature intended restitution orders to be enforceable as if they were civil judgments. For many victims, however, the system has not worked as intended.

A large portion of the problem can be blamed on unclear and even contradictory law. For example, Penal Code Section 1202.4 -- a poorly written, strangely organized statute in its own right -- establishes the court's responsibility to order restitution, and PC 1214 deals with the collection and enforcement of such orders. Various sections of PC 1203 and other code sections, however, affect restitution ordered as a condition of probation, despite the fact that PC 1202.4 applies regardless of the sentence.

The Legislature has approved, and the Governor has signed, several bills in recent years, rapidly and constantly changing the law regarding restitution -- and, should my Senate Bill 1685 be enacted, the law will change again. One particularly startling example is AB 817 (Ch. 313, Stats. 1995), a budget trailer bill. The bill was gutted and amended on July 29, 1995, and chaptered just five days later, without consideration by policy committee or any other opportunity for an exhaustive analysis. Without careful legislative evaluation, it is no wonder the law has been written in such a confusing and incoherent manner.



May 7, 1996  
page 2

I therefore request that the Law Revision Commission thoroughly examine the laws regarding restitution and investigate whether or not a thorough revision of the Penal Code is desirable.

I look forward to working with the Commission on the issue next year.

Sincerely yours,



QUENTIN L. KOPP

QLK:jch

cc: Deputy Legislative Counsel Gwynnae Byrd  
Honorable Larry Stirling, San Diego Municipal Court  
Honorable Milton Marks, Chairman, Senate Criminal Procedure Committee  
Honorable Paula Boland, Chairwoman, Assembly Public Safety Committee  
Mr. Curt Soderlund, State Board of Control

MAY 20 1996

File: \_\_\_\_\_

**TOTARO & SHANAHAN, attorneys at law,**  
P.O. Box 789, Pacific Palisades, CA 90272  
(310) 442 8480

MICHAEL R. TOTARO J.D., LL.M.  
MAUREEN J. SHANAHAN J.D., LL.M.  
SHARON B. MORRIS, J.D.

May 13, 1996

Mr. Nathaniel Sterling  
Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303

Dear Mr. Sterling:

I am attorney with the law firm of Totaro & Shanahan in Los Angeles, California. On or about Thursday, March 21, 1996 I became concerned after reviewing the California Evidence Code for the current year. The Code was not gender neutral; the code sections which I reviewed speak of a "reasonable man" instead of a "reasonable person."

I discussed the situation with my supervisor, Michael R. Totaro, who suggested that I call the Law Revision Commission. I called Information and obtained a number for the Law Revision Commission in San Francisco at (415) 494-1335.

After speaking with a secretary, I was connected to Mr. Nathaniel Sterling. I discussed the status of the California Evidence Code with Mr. Sterling making him aware that as a female attorney in Los Angeles I was disheartened at the fact that the sections are not gender neutral.

Mr. Sterling indicated to me that the California statutes come up for amendment every year, and that changes to the statutes were considered if "substantive" reasons were voiced. Mr. Sterling then paused: I filled the silence by suggesting that the consensus was that the desire for gender neutrality within the Codes was not a "substantive" reason. Mr. Sterling expressed assent.

Mr. Sterling, however, indicated that my concern had been voiced in the past by many others. I feel that the California Codes are antiquated in their ignorance of a full one half of the American population.

Although Mr. Sterling said that my forwarding of a letter to his office regarding this matter would have no direct effect, it seems necessary that Mr. Sterling's office should again be informed of the problem and that other offices which may in fact make a difference should be similarly informed.

Very truly yours,

*Sharon B. Morris*

Sharon B. Morris

SBM/far

cc: Chief Justice Ronald George  
Senator Diane Feinstein  
Senator Barbara Boxer  
The Daily Journal

RUSSELL A. THOMSON  
ATTORNEY AT LAW  
470 CAMINO EL ESTERO  
MONTEREY, CALIFORNIA 93940  
(408) 649-3153

May 10, 1996

Law Revision Commission  
RECEIVED

MAY 13 1996

File: \_\_\_\_\_

Nathaniel Sterling  
California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, CA 94303

Re: Proposal for Statute re Presumption of Community  
Property Held on Record in Joint Tenancy Form

Dear Mr. Sterling:

Thank you for our telephone discussion concerning spousal joint tenancies. As promised, I enclose a copy of my letter to two accountants who inquired about the tax basis issue after the first spouse's death.

I urge the LRC to renew its effort in the area, but for the time being to limit the scope solely to enactment as law of the following presumption:

Property of married persons that has a community property source is presumed to remain community property even though the property is held by the married persons in joint tenancy form.

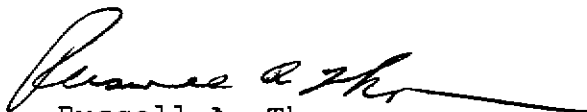
The IRS says it is bound by state law. Therefore, such a presumption should be very helpful in obtaining a fully stepped-up tax basis in the many cases where there is little probative evidence of an agreement between the spouses holding title as joint tenants for convenience [in avoiding probate] without really understanding the distinction between community property and joint tenancy.

Nathaniel Sterling  
California Law Revision Commission  
May 10, 1996  
Page 2

Should the law be in the Family Code or Probate Code? There should be little opposition. It should not, I think, be in the Revenue and Taxation Code because the IRS might argue it applies only to state capital gain transactions.

Thank you for looking into the issue.

Yours very truly,

  
Russell A. Thomson

RAT:klg  
Encl.