

Admin.

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Memorandum 2001-60

New Topics and Priorities

BACKGROUND

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

This memorandum reviews the status of items on the Commission's calendar to which the Commission may wish to give priority 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 during the coming year.

The following letters and other materials are attached to and discussed in this memorandum:

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1. Calendar of Topics	1
2. Maurice D. Meyers	4
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LAST YEAR'S DECISIONS

At its last annual review of topics and priorities, the Commission decided that in 2001 it would give priority to the legislatively directed studies of (1) mechanic's lien law and (2) statutes made obsolete by trial court restructuring. This has been done.

The Commission also decided that in 2001 it would request the Legislature to make the following changes in the Commission's study authority:

(1) Add a study of the Subdivision Map Act and Mitigation Fee Act, pursuant to a previous Commission decision.

(2) Expand probate authority to include “related matters” that may happen to fall outside the Probate Code, such as in the Civil or Family Code.

(3) Broaden the arbitration study to include other forms of alternative dispute resolution. (The Commission also decided to engage an expert consultant to prepare a review of arbitration statutes in other jurisdictions, including the Uniform Arbitration Act, and suggest areas for improvement of California law. This has been done. See discussion under “Consultant Studies” below.)

(4) Delete environmental law from the Calendar of Topics, along with the specific studies of civil arrest, possibilities of reverter, Civil Code Section 1464, and powers of appointment.

The Legislature has implemented the requested changes in 2001 Cal. Stat. res. ch. 78.

The Commission also decided that suggested studies of covenants that run with the land, standardization of attorney’s fee statutes, and the Uniform Custodial Trust Act, appear meritorious and fall within existing study areas. However, the staff was directed not to schedule them until the Commission finds some breathing room on its agenda.

TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are now 20 topics on the Commission’s Calendar of Topics that have been authorized by the Legislature for study. A precise description of each topic is appended at Exhibit pp. 1-3. The Commission has completed work on a number of the topics on the calendar — they are retained in case corrective legislation is needed.

Below is a discussion of each topic on the calendar. The discussion indicates the status of the 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 narrower recommendations to the Legislature.

Exemptions. Code of Civil Procedure Section 703.120 requires the Law Revision Commission, decennially, to review the exemptions from execution and

recommend any changes in exempt amounts that appear proper. The Commission completed this task during 1994-95 (pursuant to statutes extending time for state reports affected by budget reductions); legislation was enacted. The next Commission review is due in 2003.

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, but has always deferred due to the magnitude, complexity, and controversy involved in this area of law. The National Conference of Commissioners on Uniform State Laws has commenced work on a Uniform Non-Judicial Foreclosure Act, and may have a useful product for Commission consideration in a year.

Mechanic's lien law. The Commission has this matter under active consideration. The Commission has retained three experts in this field to provide advice — Gordon Hunt, James Acret, and Keith Honda.

Municipal bankruptcy. The Commission is well along on this study. We hope to be able to circulate a tentative recommendation this fall for possible enactment in 2001. The Commission's consultant is Professor Fred Tung of University of San Francisco Law School.

Assignments for the benefit of creditors. The issues here are whether California law should be revised to codify, clarify, or change the law governing general assignments for the benefit of creditors, including but not limited to changes that might make general assignments useful for purposes of reorganization as well as liquidation. The Commission's consultant is David Gould of McDermott, Will & Emery, Los Angeles; his background study is overdue.

Creditors' remedies technical revisions. The Commission has approved a recommendation to make technical revisions in a number of creditors' remedies statutes. We expect to introduce implementing legislation in 2002.

2. Probate Code

The Commission drafted the Probate Code and continues to monitor experience under it and make occasional recommendations on it.

Rules of construction for trusts. The Commission is actively engaged in this topic. We plan to review comments on the tentative recommendation this fall with the objective of 2002 legislation.

Creditors' rights against nonprobate assets. The staff has identified policy issues. The Uniform Probate Code now has a procedure for dealing with this

matter. This is an important issue that the Commission should take up when resources permit.

Application of family protection provisions to nonprobate transfers. Should the various probate family protections, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? The Commission needs to address this problem at some point. The Uniform Probate Code deals with statutory allowances to the decedent's spouse and children.

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 referred this matter to the State Bar Estate Planning, Trust and Probate Law Section for comment some time ago.

Uniform Trust Code. The National Conference of Commissioners on Uniform State Laws has promulgated a Uniform Trust Code (2000). The code is derived from the California Trust Law, which the Commission drafted. The Commission has engaged Professor David English of the University of Missouri Law School to prepare a comparison of the Uniform Code with California law. (He is the Reporter for the Uniform Code.) The concept is to determine whether any of the provisions of the Uniform Code that differ from California law should be adopted in California. The report is due by the end of this year.

Uniform Custodial Trust Act. The Commission has decided, on a low priority basis, to study the Uniform Custodial Trust Act. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act.

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.

Eminent domain law. The California Eminent Domain Law was enacted on Commission recommendation in 1975. The Commission is currently engaged in an update project focusing on specific issues in eminent domain law. At this point, we have been through all identified issues.

Inverse condemnation. The Commission has dropped this as a separate study topic. However, the Commission has agreed to consider the impact of

exhaustion of administrative remedies on inverse condemnation, as part of the administrative procedure study. Professor Emeritus Gideon Kanner of Loyola Law School is preparing a report for the Commission on this matter. The study has been delayed pending resolution of several cases currently in the courts.

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.

Severance of personal property joint tenancy. A low priority project is statutory authorization of unilateral severance of a personal property joint tenancy (e.g., securities). This would parallel the authorization for unilateral severance of real property joint tenancies.

Environmental covenants and restrictions. The Commission has decided, as a low priority matter, to study an issue relating to environmental covenants and restrictions. Public agencies often settle concerns over contaminated property, environmental, and land use matters by requiring that certain covenants and restrictions on land use be placed in an agreement and recorded, assuming that because recorded they will be binding on successors in interest in the property. However, there is nothing in the case law or statutes that permits enforcement of these covenants against successive owners of the land because they do not fall under the language of Civil Code Section 1468 (governing covenants that run with the land), nor are they enforceable as equitable servitudes.

4. Family Law

The California Family Code was drafted by the Commission.

Marital agreements made during marriage. California has enacted the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights on 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; there are recent cases on this point. The Commission has indicated its interest in pursuing this topic.

5. Offers of Compromise

This topic was added to the Commission's calendar 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.

6. 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 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.

The Commission has also decided to review developments in other jurisdictions to improve discovery. Prof. Gregory Weber of McGeorge Law School is the Commission's consultant. He has delivered his report to the Commission, and we are circulating it to interested persons for their reactions before taking up the matter. The comment deadline is the end of 2001.

7. Special Assessments for Public Improvements

There are a great many 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 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.

8. 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.

9. Evidence

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

Federal Rules of Evidence and Uniform Rules of Evidence. Since the 1965 enactment of the Evidence Code, the Federal Rules of Evidence have been adopted and the Uniform Rules of Evidence have been promulgated and comprehensively revised. The Commission many years ago had a background study prepared that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules; that study was never considered by the Commission and is now dated. The Commission has engaged Professor Miguel Mendez of Stanford Law School to prepare a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. The study is due at the end of 2002.

Electronic communications. The Commission is actively engaged in the study of Evidence Code changes to accommodate electronic communications.

10. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961 on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

Contractual arbitration improvements from other jurisdictions. The Commission has engaged Professor Roger Alford of Pepperdine Law School to prepare a background study on contractual arbitration statutes in other jurisdictions that may be appropriate for importation into California law. The study is due at the end of 2002.

11. Administrative Law

This topic was authorized for Commission study in 1987 both by legislative initiative and at the request of the Commission. Legislation dealing with administrative adjudication and administrative rulemaking has been enacted.

There are technical and minor substantive cleanup issues the Commission has decided to defer until now.

12. Attorney's Fees

The Commission requested authority to study this topic 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 further consideration of it pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorney's fees between litigants.

Award of costs and contractual attorney's fees to prevailing party. The Commission has commenced work on one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission has considered a number of issues and drafts, but has not yet approved a tentative recommendation on the matter.

Standardization of attorney's fee statutes. The Commission has decided, on a low priority basis, to study the possibility of standardizing language in attorney's fee statutes. For example, many provisions allowing recovery of a "reasonable attorney's fee," are qualified by a somewhat different standards. The effort would be to provide some uniformity in the law, with a comprehensive statute and uniform definitions. If it is too difficult to conform existing statutes, an effort could be made to create a statutory scheme and definitions that future legislation could incorporate.

13. Uniform Unincorporated Nonprofit Association Act

This topic was authorized in 1993 on request of the Commission. The Commission has commenced work on this study, with the assistance of Professor Michael Hone of the University of San Francisco Law School.

14. Trial Court Unification

This topic was assigned by the Legislature in 1993. The Commission delivered its report on constitutional changes for unification in January 1994. Proposition 220, implementing the report, was approved by the voters on the June 1998 ballot.

The Commission submitted its report on statutory revisions to implement unification in July 1998. The proposed legislation was enacted in 1998, and cleanup legislation recommended by the Commission was enacted in 1999.

Trial court unification procedural reform. Government Code Section 70219 directs the Commission to study the additional issues in judicial administration identified in the Commission's report on statutory revisions. The Commission is actively engaged in this endeavor, and has approved a number of tentative recommendations on these issues.

The major project under Section 70219 is a review of basic court procedures under unification to determine what, if any changes should be made. With respect to **criminal procedures**, the Commission has retained Professor Gerald Uelmen of Santa Clara University Law School to prepare a background study. The study is due December 31, 2001. With respect to **civil procedures**, the statute contemplates a joint project of the Commission and Judicial Council. The Commission and Judicial Council staffs have met, convened a panel of civil procedure experts to suggest appropriate areas of inquiry, and are in the process of attempting to narrow the focus of this project and initiate background research.

Trial court restructuring — obsolete statutes. The Legislature has also directed the Commission to recommend revision of obsolete statutes resulting from trial court restructuring (unification, funding, and employment). See Gov't Code § 71674 The recommendation is due January 1, 2002. The Commission is actively engaged in this project.

15. Contract Law

The Commission's calendar includes 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 National Conference of Commissioners on Uniform State Laws has promulgated a Uniform Electronic Transactions Act, which has been adopted in California, effective January 1, 2000. See Civ. Code § 1633.1 *et seq.* The staff has not yet had an opportunity to explore whether this act addresses all the problems in the area. Federal legislation has also been enacted to validate electronic signatures.

The staff suggests that the Commission maintain authority in this area and monitor experience under the new enactments for the time being.

16. Common Interest Developments

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The Commission is actively engaged in this study, and has divided it into three phases:

Nonjudicial dispute resolution. The effort here is to provide some simple and expeditious means of avoiding or resolving disputes within common interest communities, before they escalate into full-blown litigation. This is a high priority phase of the project. The Commission has not yet made any tentative recommendations on the matter.

Uniform Common Interest Ownership Act. The Commission will consider whether the Uniform Common Interest Ownership Act should be adopted in California in place of the Davis-Stirling Common Interest Development Act.

General revision of common interest development law. Numerous issues with existing California law have been identified. The staff is compiling and cataloging the issues. After the Commission has completed work on the two topics listed above, it will address these issues.

17. Legal Malpractice Statutes of Limitation

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The Commission has this matter under active consideration.

18. Coordination of Public Records Statutes

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The objective is to review the public records law in light of electronic communications and databases to make sure the laws are appropriate in this regard, and to make sure the public records law is adequately coordinated with laws protecting personal privacy.

The staff will work this matter into the Commission's agenda as staff and Commission resources permit.

19. Criminal Sentencing

This topic was added to the Commission's calendar in 1999 at the request of the Commission. The objective of the study is to propose a reorganization and clarification of the sentencing procedure statutes in order to make them more logical and understandable. The Commission is actively engaged in this topic.

20. Subdivision Map Act and Mitigation Fee Act

This topic was added to the Commission's calendar in 2001 at the request of the Commission. The objective of the study is a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

SUGGESTED NEW TOPICS

During the past year the Commission has received several suggestions for new topics and priorities. These are analyzed below.

Probate Law

There are several matters in the probate area that possibly need reform.

Intestate Succession

The existing California law of intestate succession was enacted on recommendation of the Commission. One of the more complex issues in the law is inheritance from a child born out of wedlock.

A recent California Supreme Court case applies the statute to a troubling fact situation. In *Estate of Griswold*, 108 Cal. Rptr. 2d 165 (2001), a person born out of wedlock died intestate, leaving a surviving spouse. The decedent and his natural father had never met or communicated with each other during their lives. When the surviving spouse sought an order in probate for distribution of the decedent's modest estate, the father's children from a later marriage — the decedent's half siblings — intervened and sought a share of the estate. The half siblings only learned of the decedent's existence after the decedent had died (through the solicitation of an heir tracer).

Existing California law provides that a natural parent does not inherit from an out-of-wedlock child unless the parent acknowledged the child and contributed to its support or care. In *Griswold*, the father had admitted paternity and had paid \$5 weekly child support until his son's majority. Under these facts, the court reluctantly held that the statute applies and the half siblings are entitled to a share of the estate. The statute cannot be read to require that a father must have personal contact with his out-of-wedlock child, such as making purchases for the child, receiving the child into the family, or treating the child as he does his other children.

We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by the parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

Griswold, 108 Cal. Rptr. 2d at 181.

A concurring opinion by Justice Brown urges the Legislature to revise this statute. She believes that in order to avoid such a dubious outcome in the future, the intestate succession laws should allow a parent to inherit from an out-of-wedlock child only if the parent has some sort of parental connection to the child.

I believe our holding today contravenes the overarching purpose behind our laws of intestate succession — to carry out “the intent a decedent without a will is most likely to have had.” (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a “father” who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a “forensic genealogist.”

Griswold, 108 Cal. Rptr. 2d at 181.

The staff believes the Commission ought to take a look at this issue. We maintain continuing authority in areas where we have obtained enactment of legislation for the very purpose of monitoring and fine-tuning if revisions appear called for. The main issue, in the staff's opinion, is one of timing and resources. We are completely swamped by other high priority issues at present and will be for the next year or two. This is arguably a small enough project it could somehow be worked into the Commission's agenda at some time in the future. **Perhaps a useful way to proceed would be to seek assistance from the Institute for Legislative Practice, the Public Law Research Institute, or some other student research source to develop the pros and cons of a change in the statute.** This could make a nice (and perhaps publishable) research article for someone.

Application of Family Law Presumptions in Estate Planning

One of the more troublesome issues in both family law and probate law is the characterization of marital property as community or separate. The Commission has done substantial work in this area.

A recent article reviews cases dealing with the issue. Oldman & Cooley, *Weak Will*, S.F. Daily J. 5 (May 16, 2001). The article notes that family law presumptions are designed to control the allocation of marital property primarily in the event of dissolution, and the application of these concepts to estate planning and probate has produced cases with strange and unintended results. Legislation to straighten this out (enacted on Commission recommendation) has to date not worked in the case law.

Further thought needs to be given to separating family law from the decedent-estate context. Study should be given to the creation of a specific set of presumptions, applicable only under the Probate Code, for the passage of property at death. Reference to the Family Code presumptions should be limited to circumstances in which the marriage was in the process of dissolution or separation at the time of death. In the vast majority of cases, a statutory scheme in the Probate Code will be more likely to achieve the results the married parties intended, and less likely to produce the result in such cases as *Bibb*, *Powell*, *Barneson* and *MacDonald*.

This is an important area, and one that the Commission has been involved with on an on-going basis. It is also a fact-oriented area in which it is apparent that courts seek to achieve a just or equitable result, regardless of the precise dictates of the statute. **The staff is inclined to give it a rest and let this area continue to evolve for a while before revisiting it.**

Conservatorships as Administered in the 21st Century

Maurice D. Meyers writes with the concern that there is little protection of the rights of the elderly under California conservatorship law. His experience is that the law has created a court system that assumes total control over the lives and property of the elderly, and a tiny group of favored attorneys who wield absolute power over their rights. "In short, once a Petition is filed, there is no practical way to oppose imposition of a conservatorship in California." Exhibit p. 4. Mr. Meyers attributes this situation to the work of the Commission in the 1970's when we recommended substitution of conservatorship for guardianship of adults. "The system described surely exists, cries out for review, and I believe is

directly related to the efforts of your Commission some decades past.” Exhibit p. 5.

From the staff’s perspective, there is nothing wrong with the law on its face, although it is certainly conceivable that in practice the protections built into the law are not adhered to. The Commission did indeed recommend replacement of guardianship for adults with conservatorship. However, the standards for imposing a conservatorship were not changed. A conservator of the person may be appointed for a person “unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter”; a conservator of the estate may be appointed for a person “unable to manage his or her own financial resources or resist fraud or undue influence.” The standard of proof in either case is clear and convincing evidence. Prob. Code § 1801.

The inquiry Mr. Meyers suggests is an empirical one, far beyond the practical limitations of the Commission’s resources. It is possible we could enlist student resources in such an inquiry, if the Commission is interested in pursuing it.

Child Support and Custody

We have received two communications relating to child support and custody issues. This would fall within the Commission’s existing Family Code authority. The question is whether the Commission is interested in taking up either of these issues.

Parental Custody Rights

We have received a proposal from Dwain Barefield that the laws governing child custody be revised to (1) deny a parent custody only where a violation of law has been proved, (2) remove financial incentives for divorce, (3) limit the ability of either parent to eject the other from the family home, (4) educate parents about the consequences of divorce for their children, and (5) limit the ability of a custodial parent to marginalize a noncustodial parent. See Exhibit pp. 6-16.

There have been plenty of studies and plenty written on the social, economic, cultural, racial, political, and other ramifications of child custody. **The staff doubts that a Law Revision Commission recommendation on the matter would have much impact on the Legislature or Governor.**

Determination of Disposable Income for Purposes of Child Support Calculations

Family Code Section 4059 defines “annual net disposable income” of a parent for the purpose of making support calculations. Under this provision, a number of deductions from gross income are allowed. One of the deductions is the amount “attributed to the employee’s contribution or the self-employed worker’s contribution pursuant to the Federal Insurance Contributions Act (FICA), or an amount not to exceed that allowed under FICA for persons not subject to FICA, provided that the deducted amount is used to secure retirement or disability benefits for the parent.” Fam. Code § 4059(b).

We have received a communication from Richard L. Haeussler of Costa Mesa noting problems with this determination in the case of a parent not subject to FICA. See Exhibit p. 17. The parent is granted the right to deduct some amount, but the amount is not clear. Is it the 15.2% that a self-employed person could deduct or the 7.51% that an employee could deduct? The deduction used by some courts is the amount of the mandatory retirement plan of the employer; this does not necessarily equal the FICA-deductible amount. Also for a self-employed person, a more appropriate deduction might be the amount put into a SEP-IRA or similar plan. This is approximately 13% — less than the amount paid in FICA taxes.

The Commission has never been involved in the details of support calculations. **This is a highly political area; the staff thinks the Commission would be well-advised to stay out of it.** Mr. Haeussler argues that his suggestion is only for clarification of the law, not substantive reform:

I can understand why CLRC does not get involved in this issue, since it is VERY POLITICAL. However, I would think that would be something that the LRC may want to seek comment on, since it appears that the law is unclear, and would be something that needs a clear statement. With more and more people just using a computer program and not understanding the law behind it, it should be a clear statement.

Digital Signature Laws and Notarization

The National Notary Association has sent us *A Position on Digital Signature Laws and Notarization* (September 2000). The Association is concerned that, as new technology develops, there is a movement in a direction that would allow electronic notarizations to take place outside the presence of a notary. The position paper is intended “as a guide and a warning to the states that crucial

consumer protections need to remain in place, even as the tools of notarization change.” Exhibit p. 18. The Association is also revising its Model Notary Act, which will include a new section setting guidelines for electronic notarization.

A study of this matter is arguably within the Commission’s general property law and Evidence Code authority. However, it appears to the staff that it would be premature to jump into this fray, particularly as digital signature technology continues rapidly to evolve. **We recommend that the Commission not get involved in this matter at present.**

Redevelopment

We have received correspondence from our eminent domain consultant, Gideon Kanner, concerning abusive use of eminent domain for redevelopment under California law. Materials we have received on this matter from Prof. Kanner and other sources include the following items (all of which will be available for inspection at the Commission meeting):

- McGreevy & Miller, *Heady Plans, Hard Reality*, L.A. Times A1, 26 (Jan. 30, 2000). This feature article on the failure of the North Hollywood redevelopment project chronicles the acquisition of homes and businesses by the Community Redevelopment Agency without delivery of the promised benefits. “Two decades and \$117 million in public money later, efforts by the city of Los Angeles to rescue suburban North Hollywood from creeping blight have largely struck out ... The meager results logged so far in North Hollywood offer a cautionary tale to hundreds of other California communities that are investing more than \$1.5 billion annually in hopes of reviving fading areas. ... Only a fraction of the new homes and businesses the CRA pledged to build have been erected, and plywood boards still protect shutdown storefronts.”
- Municipal Officials for Redevelopment Reform, *Redevelopment: The Unknown Government* (April 2000). This is a broad-based indictment of current California redevelopment law and practice. It includes a section titled, “Eminent Domain for Private Gain” and argues that controls must be placed on the widespread abuse of eminent domain. The report notes that, “Legislative attempts to protect small property owners have all been derailed by pro-redevelopment forces in Sacramento.”
- Kanner & Berger, *There Is a CRA Scandal, but Not the One Tuttle Thinks*, L.A. Times M6 (Dec. 10, 2000). This article notes that there is no scandal in private property owners receiving full market value for their land and fair compensation for their destroyed

goodwill when their property is taken by eminent domain. The real scandal is in the frequency with which eminent domain is used to enrich private developers in the name of redevelopment. “In recent years, the process of redevelopment, particularly its freewheeling use of eminent domain to take property from one person and give it to another for the latter’s private profit, has reach grotesque proportions. High-rise building, shopping and automobile malls, professional sports stadiums and even race tracks and gambling casinos are being built on land forcibly taken from citizens who are abused and undercompensated in the process. This is no ‘public use,’ but private enrichment of well-connected insiders who are able to build their own businesses using tax-free municipal bond financing and thus enrich themselves at public expense.”

- Kanner, *The World Trade Center Deal Shows the Hypocrisy of “Public Use” Law*, 45 *Just Comp.* 11 (No. 3, March 2001). Criticizes judges who fail to enforce the public use doctrine and allow condemnation for private profit — in this case redevelopment for construction of the World Trade Center. “The World Trade Center is and always has been nothing more than a major urban real estate development undertaken to make money for the developer which in this case happened to be the government. The only difference is that the Port Authority wielded the power of eminent domain and thus was able to make the displaced property owners the proverbial offer they could not refuse.”
- Kanner, *The New Robber Barons*, Nat’l L.J. p. A19 (May 21, 2001). The article cites examples of inappropriate condemnations for redevelopment purposes. It argues that judges have abdicated their responsibility to enforce the “public use” clause of the Constitution. “So here is another example of a disgraceful process that is going on in America, whereby the power of eminent domain — which according to the Fifth Amendment is supposed to be employed for ‘public use’ — is being unblushingly abused to line the pockets of private, profit-making enterprises, at the expense of the municipal fisc and of the constitutional rights of the indigenous inhabitants of areas coveted by well-connected business pursuing private profit.”
- Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 *Hast. L.J.* 991 (2001). This article favors liberalized use of redevelopment in California. Prof. Lefcoe notes that the courts have not found public use problems with redevelopment, even though it involves condemnation of private property for sale or lease to another private owner. Government programs to achieve health and safety goals such as slum clearance and blight removal

qualify as a public use; condemnation incidental to these programs is therefore constitutional. “The use of eminent domain for redevelopment has always been controversial... But local governments should be prepared to pay a premium for properties acquired without the threat of eminent domain.”

This is a major public policy and planning issue. As with parental custody rights (above), there have been plenty of studies and plenty written on the social, economic, cultural, racial, political, and other ramifications of redevelopment. **The staff doubts that a Law Revision Commission recommendation on the matter would have much impact on the Legislature or Governor.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during the remainder of 2001 and for 2002. Completion of prospective recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters the Legislature has indicated should receive a priority and other matters the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to studies for which a consultant has delivered a background study — it is desirable to take advantage of the consultant’s expertise while the matter is still fresh and the consultant is available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

Legislative Program for 2002

The Commission has completed work on the following matters which could be part of the Commission’s 2002 legislative program:

- Prejudgment Deposit Appraisal in Eminent Domain
- Debtor-Creditor Law Technical Revisions

Matters under active consideration by the Commission on which work could be completed for the 2002 legislative session include the following:

- Rules of Construction for Trusts
- Criminal Sentencing Statutes
- Cases in Which Court Reporter is Required
- Stay of Mechanics Lien Enforcement Pending Arbitration
- Electronic Communications and Evidentiary Privileges

- Municipal Bankruptcy
- Mechanic's Lien Law
- Statutes Made Obsolete by Trial Court Restructuring

All of these matters will be scheduled for consideration by the Commission during the fall.

Legislature's Priorities

The Legislature has indicated two current priority matters for the Commission:

Mechanics lien law. The Assembly Judiciary Committee has requested that the Commission prioritize the study of mechanics lien law. The Commission has been giving it highest priority during the past year, and should continue to do so until the project is complete. We have received further correspondence from the Assembly Judiciary Committee indicating a need for the Commission's report no later than the first of the year. The Committee's letter, and Executive Secretary's response, are attached as Exhibit pp. 19-21.

Obsolete provisions resulting from trial court restructuring. The Legislature has directed that the Commission deliver a recommendation on this matter by January 1, 2002. This massive project is consuming and will continue to consume the lion's share of the Commission's resources. It is unlikely that the entire review can be accomplished by the statutory deadline. The Commission may wish to recommend an extension of the deadline to enable completion of the project. See Memorandum 2001-68.

Consultant Studies

To the extent delivery of a background study by a consultant affects Commission priorities, it is useful to review studies delivered, and to be delivered, during 2001 (and beyond).

To date during 2001 we have received a background study on the following subject:

Discovery improvements from other jurisdictions. The Commission has received from Professor Greg Weber of McGeorge Law School the background study on discovery innovations in other jurisdictions that may be appropriate for adoption in California. We are currently circulating the study for comment, with a due date of December 31, 2001. Meanwhile, Prof. Weber is arranging for law review publication of the study.

We expect to receive two additional consultant studies by the end of the year:

Review of criminal procedures under trial court unification. The Commission has contracted with Professor Gerald Uelmen of University of Santa Clara Law School to analyze California criminal procedures in light of trial court unification. Prof. Uelmen is currently working on the project, and has met with the Commission staff on a several occasions to go over issues. The expected delivery date is **December 31, 2001**.

Uniform Trust Code. The Commission has contracted with Professor David English, reporter for the Uniform Trust Code, to prepare a comparison of the Uniform Code with the California Trust Law. The contract calls for delivery of the study by the **December 31, 2001**.

The Commission also has consultants engaged to prepare material for it on several other subjects. These include:

Federal Rules of Evidence and Uniform Rules of Evidence. The Commission has contracted with Professor Miguel Mendez of Stanford Law School to prepare a comparison of the Federal Rules of Evidence and the revised Uniform Rules of Evidence with the California Evidence Code. The contract calls for delivery of the study by **December 31, 2002**.

Arbitration improvements from other jurisdictions. The Commission has contracted with Professor Roger Alford of Pepperdine Law School for a background study on contractual arbitration provisions from other jurisdictions that may be appropriate for adoption in California. The study is due **December 31, 2002**.

General assignments for the benefit of creditors. The Commission has contracted with David Gould of Los Angeles to prepare a background study on possible statutory clarification of the law governing general assignments for the benefit of creditors. The study is overdue. Mr. Gould has completed a substantial amount of work and has delivered an outline of the study, for which he has been compensated. He has not set a completion date.

Ripeness and exhaustion of remedies in inverse condemnation. The Commission has contracted with Professor Emeritus Gideon Kanner of Loyola Law School to prepare a study of the ripeness and exhaustion of remedies issue in inverse condemnation procedure. The study has been postponed pending key litigation on the issue. The contract has expired and funding has lapsed, but Prof. Kanner has indicated his intention to perform nonetheless. He has not set a completion date.

Other Active Topics

Apart from matters to be wrapped up for the 2001 legislative session, legislatively set priorities, and projects on which we have received consultant studies, the Commission has also commenced work on the following topics. We would continue to give a reasonably high priority to these matters, so that, once activated, they do not become stale.

Common interest development law. This is a very large project. The Commission has decided to give priority to nonjudicial dispute resolution procedures under CID law. Later in the study we will review the Uniform Common Interest Ownership Act, and analyze the hundreds of problems that have been identified with the Davis-Stirling Act.

Statute of limitations for legal malpractice. We have not yet reached the point of a tentative recommendation on this matter.

Attorney's fees. This is a complex and difficult project concerning the interrelation of the general attorney's fee statutes with those governing contractual attorney's fee provisions.

Uniform Unincorporated Nonprofit Association Act. The Commission has commenced work on this topic, and can expect it to occupy some Commission time during the coming year.

Issues in administrative rulemaking. The Commission has started on cleanup legislation for administrative rulemaking, with a technical bill enacted in 2001. The Commission deferred until this fall consideration of somewhat more substantive cleanup issues.

CONCLUSION

The Commission's agenda continues to be as full as it has ever been. If we just stick with already activated projects, and projects on which background studies are to be delivered, we will have more than enough to keep us busy for the next year.

The staff recommends no departure from the traditional scheme of Commission priorities — (1) matters to be completed for next legislative session, (2) matters directed by the Legislature, (3) matters for which the Commission has engaged an expert consultant, and (4) other matters that have been previously activated but not completed. Projects falling within each of these categories are identified above.

The staff recommends that no new topics be added to the Commission's calendar, and recommends no new priorities for other topics already calendared. Next year at this time we may be in a position to schedule the startup of some of the other backed-up topics such as covenants that run with the land, standardization of attorney's fee statutes, the Uniform Custodial Trust Act, and the Subdivision Map Act.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

NEW TOPICS AND PRIORITIES

Calendar of Topics Authorized for Study

The Commission's calendar of topics authorized for study includes the subjects listed below. Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see 2001 Cal. Stat. res. ch. 78.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and personal property. Whether the law should be revised that relates to real and personal property including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restrictions on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon assignment, subletting, termination, or abandonment of a lease and related matters.

4. Family law. Whether the law should be revised that relates to 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.

5. Offers of compromise. Whether the law relating to offers of compromise should be revised.

6. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

7. Special assessments for public improvements. Whether the acts governing special assessments for public improvement should be simplified and unified.

8. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

9. Evidence. Whether the Evidence Code should be revised.

10. Alternative dispute resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

11. Administrative law. Whether there should be changes to administrative law.

12. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigants should be revised.

13. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

14. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

15. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

16. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real

property interests located within them, and to determine to what extent they should be subject to regulation.

17. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

18. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

19. Criminal sentencing. Whether the law governing criminal sentencing should be revised, nonsubstantively, to reorganize and clarify the sentencing procedure statutes in order to make them more logical and understandable.

20. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000) Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

MAURICE D. MEYERS
Attorney at Law
Post Office Box 5123
Beverly Hills, CA 90209-5123

Law Revision Commission
RECEIVED

OCT 18 2000

(310) 273-6300 / FAX (310) 274-0892

File: _____

October 13, 2000

Mr. Stan Ulrich, Esq.
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303

Re: CONSERVATORSHIPS
AS ADMINISTERED IN THE 21ST CENTURY

Dear Mr. Ulrich:

Thank you for our nice conversation of today. I apologize for phoning so late on a Friday afternoon with such a sticky problem. Some decades ago, your commission addressed the problem of the "Stigma of Incompetency" in Guardianship cases for the elderly. The commission solved the problem through the creation of "Conservatorship", leaving the Petitioner with virtually no burden of proof other than age. This has created a court system which assumes total control over the lives and property of the elderly, and a tiny group of favored attorneys who seem to wield absolute power over the rights of the "beneficiaries". The following paragraphs attempt to illustrate the current trend in Conservatorship Law, from the *beneficiary's* point of view. I am *not* a certified practitioner in Probate Law, and had never been in Conservatorship Court before.

About two years ago, I was *implored* to defend against a Conservatorship Petition. I discovered a court system which exists without checks and balances, but which assumes enormous power over the lives and property of a huge and growing population in the state; and litigants without the right to independent counsel or the right of appeal. To make the problem even more complicated, it seems that the Judges in this area honestly believe they're doing the right and fair thing for those who appear before them, so I can't even suggest that there's an improper motive by bench or counsel (well, maybe counsel). But the harm done is enormous; the expense is unlimited; and the impact on both lives and property of those affected is pure torture, as their rights and desires are ignored and methodically stripped away, with no way to stop it.

Once an elderly person is served with a Summons and Petition for Conservatorship, he/she attempts to seek counsel to "defend" the matter. No attorney will take such a case other than an attorney specializing and certified in Probate Matters. After paying a substantial Retainer, "defense" counsel, who is known by both the court and other practitioners in this *secret* society, presumes that a conservatorship will indeed be imposed. He therefore assumes the responsibility, not of defending, but merely to make it as easy as possible for the "beneficiary" to work within the system, ignoring entirely the beneficiary's own intention. In short, once a Petition is filed, there is no practical way to oppose imposition of a conservatorship in California.

The Petitioner has virtually no burden of proof. The defense has no opportunity to be heard at all. And if the objector insists on presenting a defense, the court imposes terrible fines, threats of imprisonment, breakup of the family and life style, and simply overwhelms the objector until the

Mr. Stan Ulrich, Esq.
California Law Revision Commission
CONSERVATORSHIP COURT

October 13, 2000
page two

objections are withdrawn or the beneficiary dies. Finally all parties conform to the court's will. Clearly, the court's will is dominant over the will of any individual beneficiaries or objectors.

A former California Senator stated that the most precious elements of American life are the "Three F's: Family, Faith and Freedom" The system to which I refer impacts all three of these, by stripping the Freedom of decision from the "beneficiaries"; by destroying Faith in the justice system; and often by breaking apart Families, for the (well intended) cause of judicial expediency. And, the only attorneys free to practice in this system are attorneys who are dedicated to the principals of the system rather than the rights of their clientele. To paraphrase Chief Justice Ronald George (State Bar Journal, November 2000, "Opinion"), "Access and fairness in the courts are not abstract philosophical principals - they are basic to preserving the rule of law."

Since Conservatorship has replaced Guardianship to avoid the "Stigma of Incompetency," this cloistered system has evolved into a private club, in which only Probate Volunteer Panel counsel are heard; the rules of pleading and practice have been altered; and due to the age, infirmities and energy-levels of the elderly; once a protracted battle is pursued in Probate Court, there's little inclination (or money left) to appeal anything. The "beneficiaries" tend to run out of money or simply expire before any rulings can be reviewed by higher authority.

A *compassionate* system must be established which recognizes the inclination, and limitations of the elderly. Litigation is simply too costly and too exhausting for the elderly to deal with. And, most troublesome, in a majority of the matters heard, the issues giving rise to huge legal fees, and protracted litigation are simply matters of lifestyle and personal preference. Golden Years in the Golden State? Not if one is embraced by the Conservatorship Court.

The system described surely exists, cries out for review, and I believe is directly related to the efforts of your Commission, some decades past. I don't pretend to have the answers, nor even a clear view of most of the problems. What I do have is experience in ONE matter which has caused terrible trouble to a lovely family of very elderly citizens (siblings, all in their 90's). This litigation has cost the family their freedom, their health, over \$130,000 in fees and costs.

All this occurred during a time when all the elderly siblings wish to do is live the remainder of their lives together in peace and harmony. Perhaps worse, my discussions with both court and counsel indicate that this one case is really quite normal in the operation of Conservatorship Court cases. Have the elderly really outgrown their constitutional rights and freedom? It seems so, if this is what we have to look forward to.

If the Commission has an interest in reviewing this problem, I'd be delighted to share in such inquiry. I can't believe the State actually wants to treat its elderly citizens this way.

Sincerely,



MAURICE D. MEYERS

MDM:cl

Date: Thu, 11 Jan 2001 16:15:28 -0500 (EST)
To: feedback@clrc.ca.gov
From: vcellos@mail.concentric.net (Dwain Barefield)
Subject: Feedback Form

This is the Feedback form submitted by
Dwain Barefield (vcellos@mail.concentric.net) on Thursday, January 11, 2001
at 16:15:28

Message:

I respectfully request that you recommend the adoption of the following Joint Resolution:

BE IT RESOLVED THAT:

The current state of the law regarding divorce and custody of minor children is in fact implemented in a fashion that leads to constitutionally-prohibited violations of the rights of both children and parents within the United States in the aggregate, as the current code:

Removes children from parent's direct care and control.

Impermissibly denies children the right to the direct care, custody, and love of their natural parents in most cases without a finding of predicate harm.

Impermissibly denies parents the right to make decisions about expenditures that further the interests of their children and transfers that control to another through the enactment and enforcement of the current "child support" laws within the several states.

Operates in a manner that is biased against men as a gender in violation of the Constitutional requirement for equal protection under the law.

Impermissibly violates a citizen's right to due process by assuming that allegations of criminal conduct such as physical and sexual abuse are proven prior to trial, and exacts punishment for alleged offenses which have not been proven.

Impermissibly violates citizen's rights to due process of law by assigning increased obligations and oversight to divorced parties which do not exist for married parties, or those who adopt children in an unmarried state, in the care and raising of this nation's children.

Current research documents that children are less likely to do well in single-parent, mother-headed homes. Such children are more likely to have serious

psychological problems, drop out of school, become involved in serious felonies before the age of 18, give birth out of wedlock, run away from home and quit school prior to graduation. All of these problems have been directly tied to the incidence of family breakup. Further, it is documented fact that women initiate nearly 75% of divorces, and that as many as 7 out of 10 are initiated against the expressed desires of their husbands.

As such it is the duty of the several state legislatures and Congress to discourage the destruction of families in the first place, and where such a result cannot be avoided, attempt to mitigate the damage to our children to the fullest extent possible.

To meet our duty of responsibility under the law for all parties with regards to the children of this nation we therefore must:

Recognize that the current custody decisions handed down by the legal system do not grant custody - they remove custody from one or both parents. Since this results in the denial of one or both parent's civil rights and the civil rights of the children involved, such an adjudication is only permissible where criminal standards of proof can be cited. It is legally impermissible under the Constitution to remove an individual's civil rights without prior adjudication that a violation of the law has first taken place.

Remove the financial incentives that currently exist for initiation of divorce.

Remove the ability of either parent to be ejected from their home and their children's lives for any period of time without clear and convincing proof that this removal of a parent's rights is necessary to protect the children involved.

Require couples contemplating marriage to have a full understanding of the consequences of divorce, including the consequences for any children they may produce.

Seek to reduce conflict post-divorce by requiring divorcing couples to truly act in the best interest of their children. In short, this means removing the ability of one parent to effectively render the other a "visitor" or "uncle" to their children for either personal or financial reasons.

THE FOLLOWING LEGISLATION IS HEREBY PROPOSED IN ANY SUIT AT LAW WHERE DIVORCE, CUSTODY OR CHILD SUPPORT IS AT ISSUE:

SECTION A - CUSTODY

All biological parents are presumed equal under the law and shall have the right to be treated equally at the bar. It is hereby declared that children have the fundamental right to direct care and interaction of both biological or adoptive parents, and that parents have the fundamental right to equal parenting time, parental oversight, and direct care of their children. Such rights are declared and understood to be a fundamental liberty interest which governments may not intrude upon without first showing a compelling interest and/or predicate harm to the specific children involved.

In recognition of the fundamental rights set forth in Section A.1, joint legal and residential custody shall be presumptive, with an approximately 50/50 parenting time division. The court shall direct the parents to develop a parenting plan implementing this provision prior to trial, and shall impose such a plan should the parents be unable to agree between themselves.

Any court ordering a deviation from the above presumption must document those deviations in the judgment or order(s) establishing the deviation under one of the following permitted exceptions:

The parents have privately agreed in a valid prenuptial, postnuptial, or other contractual document to a different custody arrangement under the provisions of Section A.4, and such agreement has been found to be in the best interests of the children.

One or both parents has been found guilty, under criminal standards of proof, of a violation of the law which bears directly on the care and custody of the child or children involved, and for which the appropriate criminal penalty and rehabilitation proscribed at law have not been completed.

Interim orders may proceed on the basis of an allegation of criminal conduct material to custody provided that an arraignment on the predicate charge or charges has taken place and with the provision that should the predicate charge be dismissed, or the defendant found not guilty, that this exception shall be immediately extinguished and the interim order shall be immediately re-heard as an emergency matter.

A parent is found to be unfit for joint custody due to a current condition of mental illness, substance or alcohol abuse, mental disorder or physical incapacity.

One or both parents have abandoned the children and their domicile, or have announced their intention, in a verified pleading or personal court appearance, to do so following the entry of the judgment contemplated by the court.

The courts shall recognize and give full faith and credit to all private agreements between the parties concerning child custody, support, and related matters, regardless of when said agreements are made (prenuptial, postnuptial, pre or post-conception) unless it finds that (1) the agreement is unconscionable, (2) that implementation would likely lead to the neglect of the child or children involved, or (3) is contrary to the public interest as expressed in Section A or B of this legislation. All such claimed agreements must be in written form. Should the court find such an agreement invalid it may impose the standard shared parenting time division as defined herein, but may not impose sole custody unless a deviation is permitted under Section A.3.

The word "visitation" shall be replaced with "parenting time" in all related and relevant sections of law.

No parent may violate the civil rights of the other to be an involved parent, or of the child to a full, continuing, custodial relationship with either parent by removing, or attempting to remove, the child or children from the metropolitan area where they reside at the time the parents separated or, in the case of unmarried couples, when the child or children were born. No parent may remove the child or children from the school district in which they are currently attending school, or the district where the child or children have attended school within the previous 180 days, without the written consent of the other parent. Any attempt to do so shall be treated as a willful abandonment of joint parenting under Section A.3 by the parent attempting removal and sole custody shall be awarded on a permanent basis to the other parent.

A parent who constructively interferes with a custody order such that the other parent is substantially deprived of their parenting time more than once in a calendar year, or more than three times in three years, shall be presumed to have abandoned joint parenting under Section A.3 and sole custody shall be awarded on a permanent basis to the other parent.

All existing custody and support orders may be re-litigated on an expedited basis under this section, provided that the parties reside in the same metropolitan area. All existing custody agreements with a differential in parenting time shall be presumptively invalid if entered into prior to the effective date of this legislation. A parent seeking to modify sole custody to joint residential custody under the presumptions of this section, and who does not reside in the same locale as the other parent and child, shall be required to first establish domicile in the locale where the other parent and child reside. An injunction shall issue upon the filing of a petition for modification enjoining the custodial parent from relocating during the pendency of the case in these circumstances.

All attorneys of record shall be required to inform their clients prior to retention of the provisions of this section, including the penalties for interference with custody or attempted removal of the children from the metropolitan area or school district. Pro-se litigants shall file a notarized statement with their initial petition or response denoting their understanding of same, or shall be sworn in and enter into the record their recognition and understanding of these provisions upon initial appearance.

SECTION B - CHILD SUPPORT:

All joint residential custody arrangements adjudicated under Section A shall not contain a child support award for ordinary, customary, and routine living expenses, as both parents are presumed to be sharing said expenses in an equitable manner via their shared parenting agreement.

The Court may order support to be paid in the form of a qualified medical support order for the specific purpose of maintaining health insurance and providing for the payment of uninsured medical costs of the child or children. The actual cost of necessary health care shall be allocated equally to the parents.

A private support agreement, entered into by the parents as part of a variance of the presumptive nature of shared custody, shall be ratified and enforced by the Court unless the trial court finds that it is unconscionable, is likely to lead to the neglect of the child or children involved, or is in violation of the terms of this section of the law. Should the Court so find both custody and child support shall be set aside and remanded for renegotiation by the parties.

All private support agreements shall terminate automatically by statute upon emancipation of the child or children involved, except that a private agreement allocating the cost of post-secondary education beyond the age of majority is permitted.

All private support agreements shall include the terms and conditions upon which they may be re-negotiated or modified. No agreement may be accepted by the court which attempts to deny re-negotiation or modification upon a substantive change in the custody of the children or the earnings of either parent.

A private support agreement is inextricably tied to the residential status of the child or children involved. Should such an agreement's re-negotiation fail under Section B.5, the parties may re-litigate the full custody and support matter under the presumptions of both Section A and B of this legislation

and both sections of the previous agreement (bearing on custody and support) shall be void.

In the event that support is ordered by the Court due to a Section A.3 exception to joint residential custody in a nonconsensual format (due to abandonment, incapacity, or conviction for a related criminal offense) the Court shall assess support against any absent parent (either or both) in an amount not to exceed the following percentages of net income for the number of children covered: (1) - 20%, (2) - 25%, (3) - 32%, (4) - 40%, (5) - 45%, (6 or more) - 50%. "Net income" is defined as the income from all sources less Federal, FICA and State income tax, mandatory retirement contributions, union dues, health insurance premiums, prior obligations of support or maintenance (including alimony in the instant case) and expenditures for repayment of debts or expenses that represent reasonable and necessary expenses for the production of income, preservation of life or health and reasonable direct expenditures for the child or other parent. The amount of support shall be stated in all such cases in dollars.

A rebuttable presumption exists that parents who are assessed support will comply with said orders. Only upon conviction for civil or criminal contempt of court in regards to compliance with such orders of support shall the court be authorized to attach, seize, or otherwise encumber any parent's assets (such as through wage garnishment, seizure of income tax refunds, or other process usually reserved for the enforcement of orders in contempt).

The state shall petition the Federal Government to permit and enforce the split of the dependent income tax deduction for all parents, and request that all parents who have and obtain joint custody under Section A be qualified for this tax relief. Until such relief is granted, all existing and new divorce decrees shall specify that the deduction shall be taken on alternative years by each parent, and that both parents will cooperate in signing the appropriate IRS forms to effect this deduction transfer.

No parent may be forced to pay child support beyond the point at which their children achieve the age of majority or emancipate themselves, including but not limited to post-secondary educational expenses.

If support is assessed under section B.7 both parents shall have a right of audit which may be exercised not more than once per calendar year. In such an audit the trustee for the child shall produce documentation sufficient to substantiate that the support ordered and paid was actually used only for the benefit of the child. The following determinations shall apply to said audits:

Support shall be deemed "paid" if evidence of either (1) withholding from wages, or (2) encashment of privately delivered funds (ie: cancelled checks or bank statements documenting same) is produced.

A portion of rent, mortgage, and utility costs shall be permitted only if the parent receiving the support has sole legal and physical custody of the child or children involved, with the other parent having the child or children in his or her care less than 20% of the time. If this inclusion is allowed it shall be determined as the incremental expense for the child or children in the household, measured by the actual incremental expense. For example, if two children share a bedroom, then the increment for rent shall be the incremental rent required over a comparable home (house or apartment) with one fewer bedroom. Real estate agents may be employed by the auditor as an expert witness to document reasonable incremental mortgage or rent payments in the area in which the child or children reside. Incremental utility use, exclusive of telephone, shall be rated at 15% per child with a cap at 50% of the utilities consumed. Telephone costs beyond basic line expense (ie: usage charges, long-distance, cellular or pager service, etc.) are disallowed.

Food and other direct consumables shall be ratably apportioned over the number of persons in the household.

The recipient of support is required to produce documentary evidence of the expenses claimed to be for the benefit of the child where such expenses are variable (ie: grocery register tapes, clothing, etc)

Other direct expenses made only on behalf of the child for reasonable, ordinary and customary needs, exclusive of gifts, shall be permitted in the computation of actual expenses.

Excluded from consideration shall be luxury or "designer" items of any kind, private or parochial school tuition, fees, or expenses, charitable contributions made on behalf of the child, elective transportation expenses (ie: automobile insurance, costs or payments for a vehicle driven by the child), voluntary expenses (eg: daycare expenses where the parent is not actually working, or is employed at a wage less than the cost of said daycare during the hours the child is in daycare) elective medical procedures and any expense otherwise separately paid (eg: health insurance, where a qualified medical child support order is in effect)

The audit shall be performed in the offices of a certified public accountant (CPA), appointed under court direction, who shall render a written opinion to the court under this section as to the actual amount of money spent on the child or children under the definitions of this section. Included in this report shall be the amount and percentage of total expenditures for each major category of expense (ie; housing, food, clothing, school supplies, etc.) The CPA shall also render an opinion on the cooperation of the parties with the process and quality of documentation produced.

The court shall then determine the reasonableness of the support award and any required adjustments as follows:

Willful failure to cooperate with the CPA or audit procedure shall be conclusive evidence of malfeasance on the part of the non-cooperative party and shall be an act of criminal contempt.

The court shall order the disclosure of both party's net income. Except for good cause shown, copies of the party's federal and state tax returns shall be determinative of net income. Either party shall have their income imputed by the court should it determine that a party is attempting to "hide" income or voluntarily evade their financial obligations.

The recipient of support is required to document that they are "matching" the received child support in ratable proportion to their income. This shall be determined by increasing the amount of support paid by the percentage of net income that the recipient has in comparison to the payor of support. For example, if the recipient has 50% of the net income of the payor, then the paid support amount shall be increased by 50%. If the recipient has 100% of the net income of the payor then the paid support amount shall be increased by 100% (twice the base value). This value shall be called "ANC", or "amount necessary for the children".

Should the court find that the amount spend on the child or children, per the audit opinion, falls within the range of 80% to 120% of the ANC, it shall take no action on the results of the audit and the costs of same shall be split equally between the parties.

Should the audit find that the amount spend on the child or children was less than 80% of the ANC the court shall order the amount of child support to be reduced for a period of 12 months by an amount such that that the paid-but-not-spent amount is recovered by the non-custodial parent over that 12 month period. Should this modification result in an order for less than zero dollars said time period shall be extended until the overpayment is fully refunded. At the end of this time period the order for support shall be issued to self-modify to an amount that shall prevent overpayment in the future. The court shall also order the recipient of support to pay all costs of the audit and court proceedings incident to the audit.

Should the audit find that the amount spent on the child was more than 120% of the ANC the court shall order an increase up to but not beyond the guideline amounts in this section sufficient to recover the underpayment within 12 months. If the modification would exceed statutory guidelines then the amount of time said increase shall remain valid may be extended beyond 12 months as necessary. The court shall also order the payor of

support to pay all costs of the audit and court proceedings incident to the audit.

All existing support orders shall be brought into compliance with these guidelines and rules upon petition to the court, or within two calendar years, whichever first occurs. An existing order or agreement made prior to the effective date of this legislation is presumptively void upon petition to the court by the payor of said agreement or order.

SECTION C - ABUSE AND NEGLECT ALLEGATIONS

No allegation of abuse in a divorce or custody case shall be given judicial notice except as provided for in Section A.3, and no order of protection may issue that impairs either parent's custody of the child or children involved unless the standards indicated in Section A.3 are met.

The issuance of an "ex-parte" order shall be denied unless it is accompanied by the filing of a criminal complaint and arrest of the suspect contemporary with the requested "ex-parte" order of protection. Dismissal or acquittal of the predicate charge(s) involved shall operate to immediately extinguish the order of protection and any temporary or permanent sole custody award as provided for in Section A.3.

A person bringing a false petition before a court, or making a false statement under oath, for the purpose of obtaining such a protective order shall be tried in accordance with the laws of the state in question for Perjury, and upon conviction shall suffer the penalties prescribed at law. Indictment, prosecution and conviction for such an offense shall be deemed a criminal offense relevant to the care and custody of the child or children at issue, and shall operate as constructive and permanent abandonment of joint custody under Section A.3.

A person bringing a petition for an ex-parte protective order before the court which is found to be insufficient, that is withdrawn, or where the defendant is acquitted or the charges are dismissed, shall be subject to civil suit at law for damages suffered by the defendant, including intentional infliction of emotional distress, false arrest and punitive damages if the respondent has been denied access to his or her children during the interim period. The accused parent may also bring an action for damages, including both emotional distress and punitive damages, on behalf of the minor child or children involved, and shall be deemed the custodian of any funds recovered under such an action for the benefit of the minor children so harmed.

Attorneys at bar for litigants in custody, divorce and support matters are required to inform their clients of the consequences of false or unsubstantiated pleadings under this section, including possible criminal and civil penalties along with the permanent loss of custody. All litigants shall provide their signature acknowledging this legislation as part of their retention agreements. Pro-se litigants shall be required to submit a notarized statement containing this section verbatim and their knowledge, acceptance and understanding of same.

SECTION D - FEE REQUESTS

No such request may be heard or granted (even on an interim basis) on a non-evidentiary basis, as doing so violates the respondent's right to due process of law and is contrary to settlement interests thereafter; thereby being presumptively in violation of the civil rights of the litigants and/or children involved.

Sufficient defenses to an attempted fee recovery petition shall include any of the following, individually or in combination. Should the court find that any of the below defenses apply it shall deny the fee petition:

That the fees were incurred to pursue non-responsive or inappropriate avenues of litigation, including but not limited to "fishing expeditions" during discovery.

That the fees were incurred in an attempt to violate the presumptive nature of custody in a divorce or custody proceeding as defined in this legislation, except where a valid exception under Section A.3 is proven at trial or by agreement of the parties. Should such an allegation be raised an interim order may be assessed. If the person bringing the fee petition does not prevail in the Section A.3 exception for any reason (including settlement) the fees assessed shall be remitted back to the payer along with interest from the date of payment at a rate three percentage points above the published prime lending rate in the locale where the action was heard.

That the petitioner had, under their control or ownership, sufficient assets or money to fund the litigation they pursued at or prior to the litigation's inception, and disposed of those assets or funds for other than necessary living expenses.

That the petitioner took any other action to prejudice their own earnings capacity and/or financial position that had a material impact upon their ability to afford said fees, including but not limited to charitable contributions,

voluntarily leaving employment, being terminated from their employment for cause or transferring assets under their control to others.

Discovery shall be permitted prior to the hearing for any such petition to the extent necessary to prove or disprove any of the above sufficient defenses in D.2 above.

A person bringing a fee recovery petition that is denied under these provisions for any of the defenses in D.2 above shall pay the litigation costs incurred by both parties in pursuit and defense of the fee petition, including all discovery related costs.

Sincerely,

Dwain S. Barefield

From: "Richard L. Haeussler" <haeu@ix.netcom.com>
To: <comment@clrc.ca.gov>
Subject: Family Law Support Deductions
Date: Sun, 15 Apr 2001 09:20:44 -0700

The Family Code Section 4059 sets forth the deductions which are allowed in setting support.

There are some conflicts between 4059(b) in the calculations.

First if the the parent is employed, his FICA deductions would be 7.51 % of income of which 6.0 % is for the Retirement system and 1.51 is for the Medicare system.

If the Parent is self employed, and subject to selfemployment tax the FICA Deduction would be 15.2 %

If the spouse is not subject to the FICA plan [a government plan] the spouse is granted the right to deduct some amount. Howmuch ? 7.51 % or 15.2 [less some offsets]

I think that the statute should be more specific. Further the deductions which many courts use is the MANDATORY RETIRMENT PLAN of the employer deduction. The amount deducted does not necessarily equal 7.51 %

Why should not a self employed person get the amount that can be put into a SEP-IRA or similar plan. since if the self employed person has some w-2 Income, the amount which is authorized to be deducted [approximately 13.0% is less the amount that is paid in FICA Taxes]

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September 11, 2000

Nathaniel Sterling
California Law Revision Comm.
4000 Middlefield Rd. #D-1
Palo Alto, CA 94303

Dear Mr. Sterling:

The National Notary Association has released a position paper on electronic notarization, "A Position on Digital Signature Laws and Notarization." I have enclosed a copy of this paper for your reference.

Utilizing new technology, a number of states are developing procedures for electronic notarization. While the National Notary Association has supported the development of new technology to simplify document transactions, several states are using this technology to move in a troubling direction that would allow electronic notarizations to take place outside the presence of a Notary. The NNA prepared its position paper as a guide and a warning to the states that crucial consumer protections need to remain in place, even as the tools of notarization change.

The NNA is also revising its *Model Notary Act*, which will include a new section setting guidelines for electronic notarization. We will distribute the revision to you as soon as possible.

Please let me know if you have any questions or comments about the paper.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tiffanie Heben".

Tiffanie Heben
Legislative & Outreach Program Manager

Enclosure

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Nat Sterling
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4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
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JUL - 2 2001

File: _____

Re: *Mechanic's Lien Report to the Legislature*

Dear Mr. Sterling:

As you know, at the request of this Committee, the Commission agreed in 1999 to undertake a comprehensive review of the state's mechanic's lien law on a priority basis, and to provide the Legislature with suggestions for possible areas of needed reform. The Judiciary Committee was prompted to request your expedited review of this complicated area of the law as a result of the many bills it inevitably faces every year which seek to reform various aspects of this controversial law.

As the Commission has acknowledged in recent staff memoranda, new proposals to revise the mechanic's lien laws continue to be referred to the Committee. In expectation of the Commission's report to the Legislature, we have deferred action on these bills this year. While we do not wish to impede the Commission's ongoing research efforts on this subject, it is imperative we receive the Commission's report in time for the Legislature's consideration of currently pending reform bills on this subject no later than the first of the year.

Thank you for your assistance and attention to this matter. If you have any questions, please contact our Committee Counsel, Kevin Baker, at (916) 319-2334, or Minority Counsel Mark Redmond at (916) 319-2739.

Sincerely,

Darrell Steinberg, Chair
Assembly Judiciary Committee

Robert Pacheco, Vice Chair
Assembly Judiciary Committee

- cc: Hon. Martha Escutia
- Hon. Dick Ackerman
- Hon. John Dutra
- Hon. Juan Vargas
- Hon. Bob Margett



CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
650-494-1335



July 2, 2001

Hon. Darrell Steinberg, Chair
Assembly Judiciary Committee
State Capitol, Room 5136
Sacramento, CA 94814

Hon. Robert Pacheco, Vice Chair
Assembly Judiciary Committee
State Capitol, Room 4177
Sacramento, CA 94814

Re: Mechanic's Lien Report to the Legislature

Dear Assembly Members Steinberg and Pacheco:

Thank you for your letter indicating the need for timely completion and delivery of the Commission's report on the subject of mechanic's lien law.

The Commission's schedule on this study calls for delivery of three separate reports to the Legislature:

- **Report on Double Payment Problem.** The Commission will report in detail on the problem under the mechanic's lien law of the potential for double payment by the property owner. The report will review alternative solutions and their pros and cons. The purpose of the report is to assist the Legislature in evaluating bills addressed to this subject that come before it.
- **Double Payment Recommendation.** The Commission plans to submit its recommended solution of the double payment problem. The recommendation will take the form of a discussion of the merits of the proposed solution and a statutory draft to implement it.
- **Comprehensive Revision.** The Commission will prepare and recommend to the Legislature a comprehensive redraft of the mechanic's lien law, scaled to the time available for completion. The recommendation will propose elimination of obsolete and duplicative provisions, modernization of language, and improvement of organization. The recommendation will also address issues raised by SB 938 and other bills, as well as issues identified by the Commission in the course of this study.

The Commission's schedule calls for completion of this work by mid-January, 2002. However, I note that your letter requests the Commission's report by the first

of the year. Please let me know if the Commission's schedule presents a problem in this respect.

The person in charge of this project is the Commission's assistant director, Stan Ulrich. Stan can be reached at 650-494-1335.

Sincerely,

Nathaniel Sterling
Executive Secretary

File: Study H-820
cc: Hon. Martha Escutia
Hon. Dick Ackerman
Hon. John Dutra
Hon. Juan Vargas
Hon. Bob Margett
Kevin Baker, Committee Counsel
Mark Redmond, Minority Counsel