Study J-651 August 12, 2002

Memorandum 2002-48

Authority of Court Commissioners (Discussion of Issues)

BACKGROUND

In connection with its work on trial court unification, the Commission has come across several anomalies in the statute governing court commissioners. The statute, with suspect provisions highlighted, provides:

> **Code Civ. Proc. § 259. Court commissioners**
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> 259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:
>
> (a) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.
>
> (b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.
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> (c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.
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> **(d) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.**
>
> (e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose**, or by written consent of an appearing party**. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

(f) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation.

(g) Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

(h) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (e).

(i) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This subdivision does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

(j) Provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which the commissioner resides.

(k) Authenticate with the official seal the commissioner's official acts.

Subdivision (d), (i), (j), and (k) appear to be obsolete because court commissioners no longer act as notaries, do not maintain official seals (whether engraved or otherwise and whether listing the county where they live or otherwise), and do not collect fees for their services (whether transmitted to the county or otherwise). But see Civ. Code § 1181 (listing various officers authorized to take proof or acknowledgment of an instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc.). The Commission plans to circulate these issues to court commissioners, courts, counties, and others for review and possible repeal.

At the same time, we should also address subdivision (e). That provision appears to allow for appointment of a temporary judge on stipulation of one — rather than both — parties, contrary to the constitutional limitation on appointment of a temporary judge. The Commission has previously circulated a tentative recommendation to repeal the provision, but received opposition from the Los Angeles County Superior Court on the ground that the provision is necessary for uncontested and default matters. The Commission asked the staff to give the issue further attention. This memorandum addresses the issue. It is

derived in large part from research performed by our student legal intern, Ellen Nudelman.

TEMPORARY JUDGES

Authority for Temporary Judges

Temporary judges are authorized by the California Constitution. Article VI, Section 21, provides:

> Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

This provision limits appointment of a temporary judge to cases in which there is a "stipulation of the parties litigant."

Although the provision is self executing, there are a few statutes that make reference to the actions of the parties in the appointment of a temporary judge. See Fam. Code § 4251 (child support commissioner acts as temporary judge "unless any party objects"); Prob. Code §§ 2405, 9620 (personal representative and third party disputant may make "an agreement in writing" for a temporary judge); Welf. & Inst. Code § 248 (juvenile court referee may not act in specified cases "unless all of the parties thereto stipulate in writing" that referee may act as temporary judge). These statutes appear to be generally consistent with the constitutional requirement of a stipulation of the parties litigant.

However, Code of Civil Procedure Section 259 is not the only statute that appears facially inconsistent with the Constitution. Code of Civil Procedure Section 116.240 provides that a small claims case may be heard by a temporary judge with only the consent of "the parties who appear at the hearing."

Can Code of Civil Procedure Sections 259 and 116.240 be construed as consistent with the constitutional requirement of the stipulation of the parties litigant? Read on.

"Stipulation of" the "Parties Litigant"

Cases have approved appointment of a temporary judge without any stipulation of any party. This has occurred where both parties are present in court, and a temporary judge acts, and no one objects. In that circumstance there is an "implied" stipulation. There are a number of recent cases on this point. See, e.g., *Walker v. San Francisco Housing Auth.*, 2002 DJDAR 8436 (July 30, 2002); *In re*

Brittany K., 96 Cal. App. 4th 805, 117 Cal. Rptr. 2d 813 (2002). A good discussion of the implied stipulation doctrine appears in *In re Courtney H.*, 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995):

> However, parties may also, by their conduct, impliedly stipulate that a commissioner may act as a temporary judge in a specific proceeding. (*In re Horton* (1991) 54 Cal.3d 82, 91; *In re Mark L., supra*, 34 Cal.3d at pp. 178-179; *Estate of Soforenko* (1968) 260 Cal.App.2d 765, 766.) In fact, it has been held that merely by intending to have the subordinate judicial officer decide the case, the parties may impliedly confer temporary judge status on the officer even without their knowledge that a stipulation is required. (*In re Julio N.* (1992) 3 Cal.App.4th 1120, 1123, citing *In re Horton, supra*, 54 Cal.3d at p. 98.) "Under the 'tantamount stipulation' doctrine, the parties confer judicial power not because they thought in those terms; had they done so, the stipulation presumably would be express. Rather, an *implied* stipulation arises from the parties' common intent that the subordinate judicial officer hearing their case do things which, *in fact*, can only be done by a judge." (*In re Mark L.*, supra, 34 Cal.3d at p. 179, fn. 6, italics in original.) The reasoning in this doctrine is simple: "An attorney may not sit back, fully participate in a trial and then claim that the court was without jurisdiction on receiving a result unfavorable to him." (*Estate of Lacy* (1975) 54 Cal.App.3d 172, 182.)
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> Although a compelling argument could be made that parties never given the opportunity to stipulate cannot do so impliedly, we are bound by the above doctrine as explained by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

But suppose only one party is before the court. Can that party acting alone "stipulate" to a temporary judge in the absence of the other party? Can the absent party, by being absent, be presumed to have impliedly stipulated to a temporary judge?

The issue arose in *Barfield v. Superior Court*, 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (1963). That was a divorce case in which the respondent in the case had defaulted. At the hearing for entry of the interlocutory decree of divorce, the petitioner in the case "stipulated" to a temporary judge. The respondent subsequently brought a mandamus proceeding in the court of appeal to set aside the trial court judgment on the theory that the respondent had not stipulated to a temporary judge. The *Barfield* court denied the writ (216 Cal. App. 2d at 477):

> On the facts of this case, the controlling language is the phrase in article VI, section 5: "Upon stipulation of the parties litigant." It

> was settled in *Estate of Kent* (1936) 6 Cal.2d 154 [57 P.2d 901], that the words "parties litigant" refer only to those persons who have actually appeared in the action and are "litigating" some issue then before the court. Clearly, the present petitioner, whose default had been duly entered in the case, was not a "party litigant." Petitioner urges, however, that the Constitution requires a "stipulation" and that a stipulation is an agreement — i.e. requires the concurrence of at least two persons.
>
> We think this too narrow a construction of the constitutional language. It must be remembered that the "stipulation" required is that "of" and not "between" the litigants. The decision to refer a pending cause to a judge pro tempore, and the selection of the individual member of the bar who is to so act, are, in the end, with the court, which must approve and order the designation, not with the litigant. If "agreement" is here required, it is the agreement between court and litigant which controls.

The *Barfield* doctrine was carried a step further in *Bill Benson Motors v. Macmorris Sales Corp.*, 238 Cal. App. 2d Supp. 937, 48 Cal. Rptr. 123 (1965). In that case the defendant had not defaulted; the defendant had appeared and filed an answer and a cross-complaint and participated in pretrial discovery. At trial an attorney from the law firm representing the defendant requested a continuance because the attorney scheduled to try the case was out of the country. The judge granted a two-hour continuance, at the end of which time the defendant and attorney did not return to the courtroom. The judge transferred the matter to be heard as a default, which was entered by a temporary judge acting on stipulation of the plaintiff.

The *Bill Benson* court argued that a defendant may default not just by failing to appear in the case but also by failing to appear for trial. The constitutional requirement of a stipulation by parties "litigant" does not apply to a party who does not appear for trial and is therefore not a litigant:

> We conclude that the phrase "parties litigant or their attorneys of record" does not include parties or attorneys who wilfully remain away from the trial of a cause as appellants and their counsel did in this case. This being a civil case, they cannot be held in contempt, but there is no injustice in ruling that they waived their rights to object to the appointment of the commissioner as a judge pro tempore in this case by their wilful absence. (Cf. *Unger v. Los Angeles Transit Lines* (1960) 180 Cal.App.2d 172 [4 Cal.Rptr. 370, 5 Cal.Rptr. 71], where *a default judgment* was upheld for failure to answer interrogatories.)

238 Cal. App. 2d Supp. at 944.

It should be noted that there are limits to the *Bill Benson* doctrine. When a defendant who had made an appearance in the case refused to participate in a trial for fear that the participation would be construed as a stipulation to a temporary judge, the defendant was held to be a party litigant notwithstanding his absence from the courtroom. *Yetenekian v. Superior Court*, 140 Cal. App. 3d 361, 189 Cal. Rptr. 458 (1983). And a defaulting, nonappearing defendant who appears in a post judgment proceeding may revoke the implied stipulation to the authority of the temporary judge for the purpose of the post judgment proceeding. *Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (1984).

The question of a defaulting party came before the Supreme Court in *Sarracino v. Superior Court*, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21 (1974). In that case, the respondent in a divorce case failed to answer or to appear for a hearing on temporary child support. The petitioner stipulated to a temporary judge. In a subsequent challenge by the respondent, a sharply-divided court upheld the theory that a party who defaults is not a "party litigant" within the meaning of the constitutional provision, and therefore a temporary judge may act without that party's stipulation.

CODE OF CIVIL PROCEDURE SECTION 259(e)

Is Code of Civil Procedure Section 259(e), providing that a court commissioner may act as a temporary judge "by written consent of an appearing party" consistent with the requirement of Article VI, Section 21, of the Constitution that a temporary judge may be appointed "on stipulation of the parties litigant"? Yes, so long as there is only one appearing party. But if there is more than one appearing party, then the language of Section 259(e) allowing a temporary judge on consent of "an" appearing party is wrong.

The language of the Small Claims Act appears to be more precise. Code of Civil Procedure Section 116.240 provides for a small claims case to be heard by a temporary judge "with the consent of the parties who appear at the hearing."

How did Code of Civil Procedure Section 259(e) get to be the way it is? Until 1989, the section was silent concerning the need for a stipulation in order for a court commissioner to act as a temporary judge. The matter was governed by the

Constitution. In 1989 the provision was amended to provide explicitly that a court commissioner might:

> (5) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of the party appearing at the hearing where the action is either uncontested or the other party or parties are in default. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

As amended, 1998 Cal. Stat. ch. 1105 § 5.

The 1989 language seems to have precisely captured the state of the law at the time. However, it was deemed defective because it was too narrowly drawn. Under the language of statute, a temporary judge could only be authorized where there was a hearing in open court at which a party gave written consent. But what about a case where there is written consent but no open court hearing because the matter is submitted by the parties in writing? By implication, a temporary judge could not act in that case.

The provision was amended the following year to eliminate the court hearing requirement. However, in that amendment the pendulum seems to have swung to the opposite extreme, resulting in an overly broad standard:

> ~~(5)~~ (e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of ~~the party appearing at the hearing where the action is either uncontested or the other party or parties are in default~~ an appearing party. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

As amended, 1990 Cal. Stat. ch. 411 § 5. That is the form in which the provision stands today.

What, if anything, should be done about it? In one sense, the statutory language does not cause a real problem because it is the Constitution that controls. Suppose there are two parties before the court and one gives written consent to a temporary judge and other does not. In that case, the Constitution will require the stipulation of both parties regardless of the statute purporting to authorize a temporary judge on consent of "an" appearing party.

The statutory written consent requirement also appears on its face to restrict the traditional "implied consent" or "tantamount stipulation" doctrine of the

earlier cases. If we are to conform the statute to the law, shouldn't the statute also recognize this doctrine?

Likewise, the statute substitutes a nebulous "appearing party" standard for the more precise language of the earlier version relating to appearance in court. Presumably the new language is intended to refer to a party who has made an appearance in the case by filing a responsive pleading. But whether it picks up prior case law giving a more expansive meaning to the term "party litigant" is unclear.

And shouldn't the section be phrased in the conjunctive rather than disjunctive? The conditions for a commissioner acting as a temporary judge set out in Section 259 should be cumulative, not alternative. A commissioner should not be authorized to act as a temporary judge unless **both** (1) the commissioner is otherwise qualified and appointed for that purpose **and** (2) the appearing parties consent to it.

The staff sees three alternatives. (1) Leave the section alone, on the theory that the Constitution is there to remedy its obvious deficiencies. (2) Fix the statute so it accurately states the law. (3) Repeal the provision because it adds nothing to the Constitution, which is self-executing.

Of these options, the staff believes (3) is preferable to (1) or (2). Now that we have the provision, and its problems, in our sights, why allow it to fester? Problematic provisions ought not to remain on the books. The Commission's principal function is to examine the common law, statutes, and judicial decisions of the state for the purpose of discovering defects in the law and recommending needed reforms.

Although the concept of fixing the section so it accurately states the law is attractive, the staff is wary of such an endeavor. We could revise the section to require consent of all appearing parties (and to allow implied consent, etc.), but the Legislature's experience with trying to provide a precise codification of the rule is cautionary. The issue is constitutional, and the constitutional standard is the stipulation of parties litigant. Why did the Legislature abandon this standard and start speaking in terms of appearing parties? In the end, any statutory language will have to be assessed in terms of the constitutional standard. The only way to ensure that the statutory language is constitutional is to import the language of the Constitution into the statute — a commissioner may act as temporary judge when qualified to do so and on stipulation of the parties litigant. The cases tell us what that means.

But why repeat the Constitution in the statute? Why not just repeal the statutory provision and leave the matter to the Constitution? That will leave Section 259 to what it is intended to be — a statement of the authority of a court commissioner, not of the procedures necessary to satisfy the constitutional requirement of a stipulation of parties litigant:

> (e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose~~, or by written consent of an appearing party~~. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.
>
> **Comment.** Subdivision (e) of Section 259 is amended to delete the provision for appointment of a commissioner as temporary judge on written consent of an appearing party. Written consent is not required in a case of "implied consent" or "tantamount stipulation." See, e.g., *In re* Courtney H., 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Whether consent of a party is required for appointment of a temporary judge is determined by the party's status as a "litigant," not by whether the party is "an appearing party." See, e.g., Sarracino v. Superior Court, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21 (1974); Barfield v. Superior Court, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963). The conditions for appointment of a temporary judge are determined by Article VI, Section 21 of the Constitution. Deletion of the provision for appointment of a temporary judge on consent of an appearing party leaves the matter to interpretation under the Constitution.

The main drawback to this approach, from the staff's perspective, is that we have previously circulated the same proposal for review and received negative reaction from the Los Angeles County Superior Court. It is the negative reaction that prompted our current reinvestigation of the issue. It is possible that when the court reviews the further discussion elicited in this memorandum, it will be satisfied. It is equally if not more likely, though, that court personnel who are concerned about repeal of this provision will remain nervous about losing the apparent authority stated in the provision unless the statute includes adequate replacement language.

If the Commission ultimately decides that something ought to stay in the statute itself, the staff favors option (2) — fix it so it accurately states the law. In that case, we would not struggle to construct a treatise that captures all the nuances laid out in the cases. Instead, we would simply repeat the constitutional language in the statute, and leave elaboration to the courts.

(e) Act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, ~~or by written consent of an appearing party~~ on stipulation of the parties litigant. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

Comment. Subdivision (e) of Section 259 is amended to replace the provision for appointment of a commissioner as temporary judge on written consent of an appearing party with the constitutional standard for appointment of a temporary judge. See Cal. Const. Art. VI, § 21. Under the Constitution, written consent is not required in case of "implied consent" or "tantamount stipulation." See. e.g., *In re* Courtney H., 38 Cal. App. 4th 1221, 1227-28, 45 Cal. Rptr. 2d 560, 564 (1995). Under the Constitution, whether the stipulation of a party is required for designation of a temporary judge is determined by the party's status as a "litigant," not by the whether the party is "an appearing party." See, e.g., Sarracino v. Superior Court, 13 Cal. 3d 1, 529 P. 2d 53, 111 Cal. Rptr. 21 (1974); Barfield v. Superior Court, 216 Cal. App. 2d 476, 477, 31 Cal. Rptr. 30 (1963).

CONCLUSION

The staff will prepare a tentative recommendation proposing the revision of Section 259(e), if any, approved by the Commission. We will combine that with the proposed repeal of Section 259(d) and (i)-(k), and circulate the tentative recommendation to interested persons for review and comment.

Respectfully submitted,

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Executive Secretary