Admin. September 8, 2004

Memorandum 2004-34

New Topics and Priorities

BACKGROUND

It is the Commission's practice to annually review the Calendar of Topics that it is authorized to study.

This memorandum summarizes the status of studies assigned to the Commission and discusses suggestions it has received for new topics to study. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

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

As in the past couple of years, **the staff is generally negative towards the concept of the Commission taking on new projects or activating new priorities**. The Commission remains overwhelmed with work, with far too many major projects underway simultaneously, and more in the pipeline. This is at a time when the Commission's resources remain severely reduced due to the state budget crisis.

Last Year's Decisions

At its last annual review of new topics and priorities, the Commission made the following decisions:

Mechanic's Liens. The Commission decided to reactivate its general study of mechanic's liens.

Uniform Electronic Transactions Act. The Commission directed the staff to investigate the situation with respect to California's adoption of the Uniform Electronic Transactions Act (UETA) and possible federal preemption for lack of uniformity.

Action on Last Year's Decisions

During 2004, the Commission took the following action in response to last year's decisions:

Mechanic's Liens. The Commission decided to take a "moderate" approach in overhauling the mechanic's lien law, clarifying and simplifying existing law rather than proposing more radical revisions. The staff has done considerable work in preparing a draft along those lines for the Commission to review.

Uniform Electronic Transactions Act. With some provisos, the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. § 7001 *et seq*., preempts all inconsistent state legislation other than state enactments of UETA in the form promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). 15 U.S.C. § 7002. California's version of UETA, Civ. Code §§ 1633.1-1633.17, differs from the final version approved by NCCUSL. It is thus clear that at least parts of the California enactment are preempted by E-SIGN. As yet, there do not seem to be any published decisions addressing the exact scope of California preemption.

In 2001, Senator Byron Sher introduced a bill (SB 97) to conform California's version of UETA to the final version approved by NCCUSL. His bill passed the Senate but was amended in the Assembly to address another subject with a different author. We are attempting to learn more about the situation and the practical politics of becoming involved in this area.

TOPICS LISTED IN THE COMMISSION'S CALENDAR OF TOPICS

The Commission's enabling statute recognizes two types of study topics — those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and those that the Legislature assigns to the Commission directly. Gov't Code § 8293. However, the Commission may not address those that it has identified for study until the Legislature, by concurrent resolution, approves them for study by the Commission.

The bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Direct legislative assignments have been relatively rare in the past but have become more common in recent years. Some of the major topics currently occupying the Commission (including financial privacy and repeal of statutes made obsolete by trial court restructuring) are the result of direct legislative assignments, not requested by the Commission.

This section of the memorandum reviews the status of matters currently listed in the Commission's Calendar of Topics. The next section discusses matters assigned by the Legislature directly.

The Commission currently lists 21 topics in its Calendar of Topics. These topics have all been previously approved by the Legislature. The most recent concurrent resolution is SCR 4 (Morrow), enacted as 2003 Cal. Stat. res. ch. 92. A precise description of each topic is appended at Exhibit pp. 1-3. The Commission has completed work on a number of the topics listed in the calendar — the authority is retained in case corrective legislation is needed.

Below is a discussion of each topic in the calendar. The discussion indicates the status of the topic and the need for future work. A Commission member who believes a particular matter deserves priority should plan to raise the matter 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.

Enforcement of Judgments and Exemptions. There are specific statutes directing the Commission to study enforcement and exemptions. The directives are discussed below under "Topics Referred by the Legislature."

Judicial and nonjudicial foreclosure of real property liens. Foreclosure 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 that area of law. The National Conference of Commissioners on Uniform State Laws has completed work on a Uniform Non-Judicial Foreclosure Act (2002). That may be a useful product for Commission consideration.

Pursuant to a Commission directive, the staff is monitoring development of problems concerning the bad faith waste exception to the antideficiency laws. See *Nipon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001).

Mechanic's lien law. The Commission has had mechanic's lien law under active consideration. The Commission has issued three reports:

(1) *The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001). The core concept recommended by the Commission was embodied in AB 286 (Dutra). The bill died in the Senate Judiciary Committee without a hearing, due to substantial opposition. The Commission needs to decide whether to take further steps to obtain enactment of its proposal.

(2) *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 31 Cal. L. Revision Comm'n Reports 333 (2001). Enacted as SB 113 (Ackerman), 2003 Cal. Stat. ch. 22.

(3) *Mechanic's Lien Law Reform*, 31 Cal. L. Revision Comm'n Reports 343 (2001). The Commission has reactivated its work on a general overhaul of the mechanic's lien law. The Commission is undertaking this work on a priority basis due to the level of legislative interest in this project.

Assignments for the benefit of creditors. Should California law 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. Mr. Gould has completed a substantial amount of work, including review of statutes of other jurisdictions, and has delivered an outline of the study. He has also circulated a detailed questionnaire to obtain empirical data from persons active in the field. Last year, we reported that he was compiling the

questionnaire results. He has since expanded his survey to include the members of the State Bar Bankruptcy Committee. We do not know when he plans to submit his background study and survey results to the Commission. If we obtain a projected completion date from him, we will share that information orally at the Commission meeting.

2. Probate Code

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

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.

A recent court of appeal decision provides an example of the types of problems involved. That case addressed an ambiguity in the Probate Code regarding whether the trustee of a revocable living trust has a duty, following the settlor's death, to preserve trust assets for the benefit of creditors with claims pending against the deceased settlor's probate estate. *Arluk Medical Center Industrial Group, Inc. v. Dobler*, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004). By a 2-1 vote, the court decided that "the trustee's only duty to such creditors is to refrain from affirmative misconduct that defeats the creditors' reasonable expectation for a recovery from trust assets." *Id.* at 1328. Probate attorney Marshal Oldman considers this result harsh on a creditor with a pending claim against an estate. Oldman, *Creditor Can Get Short End of Stick When Settlor Dies*, S.F. Daily J. 5 (May 26, 2004) (attached as Exhibit p. 19). The matter should be examined from a legislative perspective, with the objective of ensuring that it is governed by a clear rule that properly balances the competing policy interests.

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 these issues at some point. The Uniform Probate Code deals with nonprobate 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 requested comment on this matter from the State Bar Estate Trusts and Estates

Section some time ago. Despite repeated inquiries, we have not received a response, suggesting a lack of interest in this matter.

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, as well as other sources. 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. (David 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 Commission canceled its contract with Prof. English due to budget cuts, but the State Bar Trusts and Estates Section agreed to fund the research. Prof. English has not yet completed the report.

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.

Multiple Party Accounts: Ownership of Amounts on Deposit. In June, the Commission approved a recommendation on *Ownership of Amounts Withdrawn from Joint Account*. This proposal is ready for introduction in the Legislature in 2005.

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.

Inverse condemnation. The Commission has dropped inverse condemnation 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 deferred pending resolution of several cases currently in the courts. The Commission's contract with Prof. Kanner has expired and funding has lapsed, but Prof. Kanner has indicated his intention to perform nonetheless.

Adverse possession of personal property. The Commission has withdrawn its recommendation on adverse possession of personal property 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. Another 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 a real property joint tenancy.

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 Family Code was drafted by the Commission and the general topic of family law has been continued on the Commission's agenda for ongoing review.

Marital agreements made during marriage. California has enacted the Uniform Premarital Agreements Act as well as 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

Offers of compromise 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 ambiguities in the language of Section 998 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 discovery 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. Former San Francisco discovery commissioner Richard Best has suggested that the Commission examine issues in this area. See "Suggested New Topics" below.

Last year, the Commission approved a recommendation to reorganize the civil discovery statute. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003). The proposal has been enacted. 2004 Cal. Stat. ch. 182. The new legislation will become operative on July 1, 2005. Some of the conforming revisions in the proposal were chaptered out; cleanup legislation will be necessary in 2005. In addition, the Commission has found a number of statutory cross-references that were never conformed to reflect enactment of the Civil Discovery Act of 1986. The Commission circulated a tentative recommendation proposing to correct these obsolete cross-references. The comment period has closed; the Commission should be able to finalize that proposal for introduction in 2005. See Memorandum 2004-36.

The Commission has initiated a project to review **developments in other jurisdictions** to improve discovery. This matter is under active consideration by the Commission. In June, the Commission approved a final recommendation addressing a number of minor issues. *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports ___ (2004). Many other issues, both minor and substantial, remain to be considered.

7. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for public improvements of different 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. The Commission has decided to prioritize this matter somewhat, subject to current overriding priorities such as mechanic's liens.

8. Rights and Disabilities of Minor and Incompetent Persons

The Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons since authorization of this study 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 comprehensively revised. The Commission has engaged Professor Miguel Méndez of Stanford Law School to prepare a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. Prof. Méndez has delivered Parts 1-4 of the eight part study. The Commission is engaged in active consideration of the matter. See Memorandum 2004-44 and Memorandum 2004-45, scheduled for consideration in September 2004.

Waiver of Privilege By Disclosure. The Commission has been studying Evidence Code Section 912, which governs waiver of specified evidentiary privileges by disclosure. A draft of a final recommendation has been circulated for comment. The Commission is scheduled to consider the comments in September 2004. See Memorandum 2004-43.

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. Professor Alford recently completed his report and it has been published. *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2004). We plan to circulate the report to interested persons for review and comment before commencing active work on this study. Prof. Alford will become available to participate in the study in January 2005; it would be advisable to start active work on the study at that time if possible.

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 both administrative adjudication and administrative rulemaking has been enacted.

In June, the Commission approved a recommendation on *Emergency Rulemaking Under the Administrative Procedure Act*. This proposal is ready for introduction in the Legislature in 2005.

12. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988 pursuant to a suggestion of the California Judges Association. The staff did a substantial amount of preliminary work on the topic in 1990.

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. We have put the matter on the back burner due to its complexity and other demands on staff and Commission time.

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 somewhat different standards. An effort would be made to provide some uniformity in the law, with a comprehensive statute and uniform definitions. If it proves to be too difficult to conform existing statutes, an effort would be made to create a statutory scheme and definitions that future legislation could incorporate.

13. Uniform Unincorporated Nonprofit Association Act

The study of the Uniform Unincorporated Nonprofit Association Act was authorized in 1993 on request of the Commission. The Commission approved a final recommendation last year. *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003). The proposal has been enacted. 2004 Cal. Stat. ch. 178.

The Commission has also circulated a tentative recommendation on *Unincorporated Association Governance* (Nov. 2003). The Commission is scheduled to consider the comments on this tentative recommendation at the September meeting. See Memorandum 2004-41. In addition, the Commission is studying issues relating to the liability of directors, officers, and members of an unincorporated association. See First Supplement to Memorandum 2004-41.

14. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have been enacted.

Two related projects have been assigned by the Legislature. They are discussed below under "Topics Referred by the Legislature".

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.

As previously discussed, it is unclear to what extent E-SIGN preempts California's version of UETA. 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

CID law 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. Last year, the Commission approved a recommendation on fair rulemaking and decisionmaking procedures. *Common Interest Developments: Procedural Fairness in Association Rulemaking and Decisionmaking*, 33 Cal. L. Revision Comm'n Reports 81 (2003). The portion of the recommendation relating to rulemaking was enacted, with revisions. 2003 Cal. Stat. ch. 557. The portion of the recommendation relating to decisionmaking was not enacted. The Commission later approved another recommendation on that topic. *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm'n Reports ___ (2004). That proposal was enacted. 2004 Cal. Stat. ch. 346. The Commission also issued a recommendation on the use of alternative dispute resolution in disputes relating to common interest developments. *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003). The proposal was passed by the Legislature and is pending before the Governor as AB 1836 (Harman). The Commission is now examining the possibility of creating a state agency responsible for oversight of common interest developments. See Memorandum 2004-39.

Uniform Common Interest Ownership Act. In late 2003, the Commission considered whether the Uniform Common Interest Ownership Act ("UCIOA") should be adopted in California in place of the Davis-Stirling Common Interest Development Act. The Commission decided to recommend against adoption of UCIOA at that time. The Commission is using UCIOA as a source of ideas as it studies issues relating to common interest developments. The Commission may at some point reevaluate whether to recommend adoption of UCIOA. Minutes (Nov. 2003), p. 8.

General revision of common interest development law. Numerous issues with existing California law have been brought to the Commission's attention. The staff is compiling and cataloging the issues. As a preliminary step, the Commission recommended a nonsubstantive reform to make the Davis-Stirling act more user-friendly. *Organization of Davis-Stirling Common Interest Development*

Act, 33 Cal. L. Revision Comm'n Reports 1 (2003). The proposal was enacted. 2003 Cal. Stat. ch. 557. The Commission has begun studying whether to provide statutory guidance for resolving a conflict between a local regulation and the CC&Rs applicable to a common interest development. See Memorandum 2004-38.

17. Legal Malpractice Statutes of Limitation

The statute of limitations for legal malpractice was added to the Commission's calendar in 1999 at the request of the Commission. The Commission has been examining a number of issues, including the limitations period for estate planning malpractice. In April 2004, the Commission put its work on the limitations period for estate planning malpractice on hold, referring that aspect of this study to the State Bar for further consideration. The Commission recently received a new suggestion from attorney Terence Nunan relating to the limitations period for estate planning malpractice. We will present that idea to the Commission when time permits.

18. Coordination of Public Records Statutes

A study of the laws governing public records 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.

While this is an important and topical study, we have not given it priority. The staff will work it into the Commission's agenda as staff and Commission resources permit.

19. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's calendar in 1999 at the request of the Commission. The Commission has discontinued work on this matter, due to negative input on its efforts to reorganize and clarify the law relating to weapon and injury enhancements. In 2002, the scope of the Commission's authority with regard to criminal sentencing was narrowed to that area. **The staff believes this topic could be dropped from the Commission's calendar without loss.**

20. Subdivision Map Act and Mitigation Fee Act

Study of the Subdivision Map Act and Mitigation Fee Act 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. The Commission has not commenced work on this study.

21. Uniform Statute and Rule Construction Act

Study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's calendar in 2003 at the request of the Commission. The Commission has indicated its intention to give this study a low priority.

TOPICS REFERRED BY THE LEGISLATURE

Apart from the Commission's Calendar of Topics, there are statutes and resolutions that authorize or direct the Law Revision Commission to make studies and recommendations on a number of other matters.

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature. Gov't Code § 8298. The Commission exercises this authority from time to time. A recent example is the Commission's recommendation on *Authority of Court Commissioner*, 33 Cal. L. Revision Comm'n Reports 673 (2003). That proposal was enacted by 2004 Cal. Stat. ch. 49. Another recent example is the Commission's recommendation to delete obsolete state agency reporting requirements from the codes. *Obsolete Reporting Requirements*, 33 Cal. L. Revision Comm'n Reports 267 (2003). That proposal was enacted by 2004 Cal. Stat. ch. 193.

Several years ago, the Commission recommended a number of technical corrections relating to civil procedure, which were enacted by 2001 Cal. Stat. ch. 44. We have since learned of a few other technical issues relating to civil procedure. These should be addressed at some point, but they are not urgent.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held by the Supreme Court of California or the United States to be unconstitutional. Gov't Code § 8290. The Commission

obeys this directive annually in its Annual Report. However, the Commission does not ordinarily sponsor legislation to effectuate the recommendation, for a number of reasons. The Commission has requested staff research on the subsequent history of statutes held unconstitutional or repealed by implication. The staff is gathering the requested information on a low priority basis.

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the Law Revision Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority. Debtor-creditor technical revisions were enacted on Commission recommendation in 2002.

Exemptions from Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(a) 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 its second decennial review last year. Legislation recommended by the Commission was enacted by 2003 Cal. Stat. ch. 379.

Trial Court Unification Procedural Reform

Government Code Section 70219 directs the Commission to study issues in judicial administration growing out of trial court unification. The Commission is actively engaged in this endeavor, and has obtained enactment of a number of recommendations on these issues.

The major project remaining under Section 70219 is a review of basic court procedures under unification to determine what, if any, changes should be made. The Commission has been studying four different matters:

(1) **Appellate and writ review under trial court unification.** The Commission circulated a tentative recommendation to create a limited jurisdiction division within each court of appeal district, replacing the individual superior court appellate divisions. The Commission has discontinued further work on this project due to state budgetary constraints on court operations. The Commission may reactivate this study in the future, as circumstances warrant.

(2) **Criminal procedure under trial court unification.** Prof. Gerald Uelmen prepared a background study for the Commission. After considering the background study, the Commission issued a

tentative recommendation proposing changes to the procedure for conducting a preliminary examination in a felony case. Public reaction to the proposal was negative and the Commission decided against making a final recommendation on the subject.

(3) **Jurisdictional limits of small claims cases and limited civil cases.** This is a joint study with the Judicial Council. In February, the Commission put this study on hold until the state budget situation improves or other developments suggest that further work would be productive. We are monitoring the progress of the Judicial Council on matters relevant to this study. See Memorandum 2004-40.

(4) **Equitable relief in a limited civil case.** The Commission is actively engaged in this study, working towards a tentative recommendation.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform). See Gov't Code § 71674. This work is ongoing. Two substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 874; 2003 Cal. Stat. ch. 149; see also 2002 Cal. Stat. res. ch. 88. Last year, the Commission decided that this should no longer be a priority matter. Rather, the Commission would do further work on a nonpriority basis as problems come to its attention and issues become ripe for statutory cleanup.

Financial Privacy

Assembly Member Papan's ACR 125, enacted as 2002 Cal. Stat. res. ch. 167, directs the Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to or arising out of financial transactions. The Commission is actively engaged in this study. See Memorandum 2004-37. The due date for the Commission's report is January 1, 2005.

SUGGESTED NEW TOPICS

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

Availability of Oral Argument

The Chair and the Vice-Chair of the Senate Judiciary Committee have jointly requested that the Commission "undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument." Exhibit p. 6. This request stems from a bill authored by the Vice-Chair, Senator Bill Morrow, who is the Senate member of the Commission. His bill, SB 1249, would have amended Code of Civil Procedure Section 17 to add a definition of "hearing." Under the proposed definition, the word "hearing," when applied to any demurrer, motion, or order to show cause, would "signif[y] oral argument by moving and opposing parties on a record amenable to written transcription which shall be had unless affirmatively waived by the parties." This proposed definition was intended to address concerns that some Southern California judges improperly denied litigants the opportunity to present oral argument in certain matters.

In analyzing the bill, Senate Judiciary Committee staff determined that approximately 263 sections of the Code of Civil Procedure contain the word "hearing." Exhibit p. 7. "Given time and resource constraints, it was not possible for the committee staff analyzing SB 1249 to conduct an occurrence-by-occurrence review of each section of the code containing the word 'hearing' to ensure that the bill's proposed definition was neither overbroad, resulting in the extension of the right to oral argument in a matter to which it currently is not applicable, nor underinclusive, unintentionally eliminating the right to oral argument in matters concerning which the applicable statute does not contain the word 'hearing.'" *Id*. Thus, Senator Morrow agreed not to pursue SB 1249, on the understanding that he and the committee chair (Senator Martha Escutia) would request the Commission's assistance in studying the matter.

Despite the Commission's full workload, we recommend that it **commence work on this topic and give it priority.** The project is important to the Legislature and well-suited to the Commission's abilities and method of operation. The topic was also the subject of a recent article written for California practitioners. Thomas, *The Rites and Rights of Oral Arguments*, Cal. Lawyer 40 (Sept. 2004).

It is a close call whether such a study would fall within the Commission's authority to correct technical and minor substantive statutory defects pursuant to Government Code Section 8298. As we understand it, however, the concept of the study is simply to clarify when litigants are entitled to oral argument under

existing law, not to change the circumstances in which they are entitled to oral argument. Because the project would amount to nonsubstantive clarification of existing law, we believe that it would be within the scope of Section 8298.

Nonetheless, it might be helpful to **seek specific legislative authorization for this study, adding it to the Commission's Calendar of Topics.** That would remove any doubt about the Commission's authority, and would also make it easier for interested persons to check what studies the Commission is conducting. Because the Commission already appears to have authority to conduct the study under Section 8298, we would commence work on the study without waiting until specific legislative authorization is obtained.

Family Code

We have received two suggestions relating to the Family Code.

Enforceability and Renewal of a Money Judgment Awarded Pursuant to the Family Code

Richard Wilcox has raised an issue regarding enforcement and renewal of a money judgment awarded pursuant to the Family Code. Exhibit pp. 14-15. The Code of Civil Procedure includes a chapter governing the period for enforcement and renewal of judgments, but "[e]xcept as otherwise provided in the Family Code, this chapter does not apply to a judgment or order made or entered pursuant to the Family Code." Code Civ. Proc. § 683.310. The Family Code includes a provision specifying that a judgment for child, family, or spousal support is enforceable until fully paid and need not be renewed. Fam. Code § 4502. The Family Code also includes a provision specifying that a judgment or order for possession or sale of property made pursuant to the Family Code is subject to the rules in the Code of Civil Procedure governing the period for enforcement and renewal of judgments. Fam. Code § 291. But the Family Code does not specify what rules govern enforcement and renewal of a money judgment made pursuant to the Family Code that is *not* a judgment for support (e.g., a judgment for the payment of money as part of a property division in a dissolution proceeding). The proper treatment of such a judgment is thus unclear. Mr. Wilcox suggests that the Commission undertake a study to clarify this point. Stan Ulrich, former Assistant Executive Secretary of the Commission, also requests that the Commission study the topic; he even offers to provide assistance. Exhibit pp. 16-18.

It would be appropriate for the Commission to look into this matter. The Enforcement of Judgments Law in the Code of Civil Procedure was enacted on Commission recommendation in 1982. The Family Code, a nonsubstantive reorganization of scattered statutes pertaining to family law, was enacted on Commission recommendation in 1992. Family Code Section 291, the provision on enforcement of a judgment or order for possession or sale of property made pursuant to the Family Code, was enacted on Commission recommendation in 2000, in response to a concern that the proper treatment of such a judgment was unclear. Historically, when a practical problem has arisen in an area in which the Commission has recommended legislation, it generally has taken responsibility to deal with the issue.

Here, the issue is narrow but appears to be significant. We understand that in Mr. Wilcox's situation the point was important enough for an appeal to be taken. We do not know the status of the appeal nor whether it is likely to result in a published decision.

Although the Commission's resources are strained, **we would try to work this project in on a low priority basis.** Any legislative reform requires substantial effort, but in this instance much of the research has already been done by Stan Ulrich. See Exhibit pp. 16-18. We are grateful to Stan for this assistance.

Enforceability of a Premarital Agreement

In a letter to Senator Sheila Kuehl that was copied to the Commission, family law specialist Robert Fulton suggests a need for reform of the requirements for enforceability of a premarital agreement. Exhibit pp. 8-12. In particular, he focuses on provisions that were added to Family Code Section 1615 in a 2001 bill authored by Senator Kuehl. He proposes specific language to correct what he views as practical problems in the statute. *Id*. at 10.

Despite Mr. Fulton's detailed suggestions, which he made well before the 2004 bill introduction deadline, Senator Kuehl did not introduce legislation to amend Section 1615, perhaps because she considers the provision properly protective of the pertinent policy interests in its present form. The issue may be controversial and time-consuming. **It does not seem advisable for the Commission to spread its resources even more thinly by getting involved in this matter.**

Discovery of Computer Records

Former San Francisco Discovery Commissioner Richard Best suggests that the definitions of "document" in Code of Civil Procedure Section 2016 and "writing" in Evidence Code Section 250 be updated to better address electronic data. He acknowledges that "the definitions from the 60's should be adequate to get by," but recommends that they be improved to explicitly address matters such as metadata (hidden information that would not show up on a printout of an electronic document). Exhibit pp. 4-5.

This would be an appropriate issue for the Commission to explore, if it had the resources. Ideally, however, the Commission would hire a computer expert to assist in such a study. *Id.* at 5. It does not have funding available for that purpose. Further, the Judicial Conference of the United States has done extensive work on electronic discovery; proposed amendments to the Federal Rules of Civil Procedure are under discussion. The American Bar Association Litigation Section has also done extensive work in this area. At the state level, the Judicial Council is monitoring these developments. The background study that Judge Joseph Harvey prepared for the Commission in 2000 disclosed no pressing problems with the definition of a "writing" in the Evidence Code, which is incorporated by reference into the definition of "document" in the Code of Civil Procedure. Harvey, *The Need for Evidence Code Revisions to Accommodate Electronic Communication and Storage* 2-3 (2000) (available at www.clrc.ca.gov). Given the Commission's limited resources, we would **not actively pursue this matter at this time, but would continue to follow developments in the area.**

Obsolete Reporting Requirements

While the bill to implement the Commission's recommendation on *Obsolete Reporting Requirements* — SB 111 (Knight) — was pending earlier this summer, the author's office received suggestions from the Air Resources Board regarding additional obsolete reporting provisions to add to the bill. Because it was already late in the legislative process, these additional provisions were not incorporated into the bill. This would be an appropriate matter for the Commission to pursue at some point.

In addition, we might request that Legislative Counsel's office notify the Commission each time it receives a one-time report from an agency. That would facilitate preparation of a bill to delete the corresponding statutory language. The

provisions could be compiled and such legislation could be prepared on an annual basis, at least when the Commission has adequate resources.

Under present circumstances, in which the Commission is struggling to complete many pressing and important projects, it may be better just to collect the information from Legislative Counsel's office, hang onto the suggestions of the Air Resources Board, and **wait a year or two before undertaking to prepare another proposal on obsolete reporting requirements.**

Litigation Expenses in Eminent Domain

Prof. Kanner has brought to our attention recent Colorado legislation intended to encourage condemning entities to make fair and reasonable offers to property owners. Under the new Colorado statute, if a court or jury determines that the fair market value of a condemned property is more than $10,000 and at least 30% higher than the condemning entity's last offer, the condemning entity is liable for the property owner's costs and attorneys fees, in addition to compensation for the property. In his characteristically entertaining style, Prof. Kanner writes: "As the rooster said to the hens (as he was showing them an ostrich egg), 'I'm not complaining, I'm not finding fault, I'm merely calling attention to what is being done elsewhere." Memorandum from G. Kanner to N. Sterling (Feb. 28, 2004).

The Commission recently explored the topic of litigation expenses in eminent domain, but ultimately decided not to issue a tentative recommendation on it. Minutes (Feb. 10-11, 2000), p. 5. **It probably is not a good idea to revisit that decision at this time,** when the Commission is overloaded with other work.

Procedure for Revocation of a Revocable Living Trust

Real estate broker Richard Strickland requests that the Commission "consider making it a legal requirement for the Trustor in a Revocable Living Trust to revoke the trust in order to cancel it, instead of filing an unverified Probate Code Sec. 17200 petition for trust account violations against the Trustee." Exhibit p. 13. Mr. Strickland describes an unusual situation in which he "was sued for trust account violations in [his] mentally impaired mother's name after she was kidnapped from her treatment for dementia in a locked facility by an ex felon with a false promise to take her home." *Id.* We found his description of the situation confusing and are not convinced that there is a need to study this matter. The Commission **should not pursue this topic at this time.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during the remainder of 2004 and for 2005. 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 projects for which a consultant has delivered a background study — it is desirable to take up the matter before the research goes stale and while the consultant is still 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 2005

Topics under active consideration by the Commission on which work potentially could be completed for the 2005 legislative session include the following:

Administrative Law

Emergency Rulemaking Under the Administrative Procedure Act

Discovery

Correction of Obsolete Cross-References

Statutory Clarification and Minor Substantive Improvements

Evidence Code

Waiver of Privilege by Disclosure

Financial Privacy

Probate Code

Ownership of Amounts Withdrawn from Joint Account

Uniform Unincorporated Nonprofit Association Act

Unincorporated Association Governance

The Legislature's Priorities

The Legislature has indicated several priority matters for the Commission:

Protection of Personal Information. The Commission's report on financial privacy is due by January 1, 2005. The Commission is on schedule to meet this deadline.

Mechanic's lien law. The Assembly Judiciary Committee requested in 1999 that the Commission give priority to the study of mechanic's lien law. Most of the Commission's work following that request focused on the double liability problem, because that area was of greatest concern to stakeholders and other interested persons. Although the Commission made extensive efforts to draft a fair proposal, its recommendation on the double liability problem has not yet been enacted. The recent defeat of Assemblymember Dutra's closely similar proposal and substantial opposition to that proposal **suggest that it would be futile to spend further effort attempting to obtain enactment of the Commission's double liability proposal.** This is disappointing, because we continue to receive occasional calls from distressed homeowners who are victims of the double liability problem.

Instead of spending further resources on the double liability problem, the Commission should focus on its general study of the mechanic's lien law. The staff expects to have a draft of a comprehensive cleanup of the mechanic's lien law ready for the Commission to review at its November meeting. The Commission **should plan to devote substantial resources to this topic in the coming year.**

Consultant Studies

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

Discovery Improvements from Other Jurisdictions. The Commission's consultant is Professor Gregory Weber of McGeorge Law School. Prof. Weber's background study for the Commission is published as Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001). Two years ago, the Commission reviewed the background study and identified a number of areas to pursue. Minutes (May 2002), pp. 10-11. Since then, the Commission has received some suggestions for other issues to examine. The Commission is actively working on this study.

Conforming the Evidence Code to the Federal Rules of Evidence. Prof. Méndez has delivered the following parts of his background study:

(1) Hearsay and Its Exceptions.
(2) Expert Testimony and the Opinion Rule.
(3) The Role of Judge and Jury.

(4) Presumptions and Burdens of Proof.

The Commission is working towards a tentative recommendation on the hearsay issues. It is also working towards a tentative recommendation on the role of judge and jury. The Commission has not yet commenced consideration of expert testimony and the opinion rule, or presumptions and burdens of proof. The Commission should move forward on these matters as soon as possible. Prof. Méndez is still working on four additional parts of his background study.

Arbitration improvements from other jurisdictions. Prof. Alford's background study has just been published and is ready to circulate to interested persons for comment. Ideally, the Commission would commence active consideration of this study in January 2005, when Prof. Alford will first be available to present it to the Commission.

Uniform Trust Code. Because of the Commission's full workload, we have not pressured Prof. English to complete his background study. When he delivers the study, the staff would circulate it to interested persons and organizations (including the State Bar Trusts and Estates Section and the California Bankers Association) for review and comment before scheduling it for Commission consideration.

General assignments for the benefit of creditors. Because of the Commission's full workload, we have not pressured David Gould to complete his background study. The funds available for the project have been exhausted, and no further funds will be made available. It is clear that Mr. Gould is making progress. There is no reason to hurry his work.

Ripeness and exhaustion of remedies in inverse condemnation. This study was postponed pending key litigation in both state and federal courts on the issue. Given this posture, Prof. Kanner has not set a completion date for his background study.

Other Active Topics

Apart from matters to be wrapped up for the 2005 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 try to give a reasonably high priority to these matters, so that, once activated, they do not become stale. However, the Commission's workload and resources are such that it is unlikely that steady progress can be made on all topics.

Common interest development law. This is a very large project. The Commission has made substantial progress on nonjudicial dispute resolution procedures and is now examining the possibility of state oversight. The Commission's work on UCIOA is essentially complete, at least for the time being. The Commission has barely begun to tackle the hundreds of problems that have been identified with the Davis-Stirling Act.

Equitable relief in a limited civil case. The Commission made preliminary decisions in June. Minutes (June 2004), pp. 5-6. The next step is to prepare a draft of a tentative recommendation.

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

Attorney's fees. This complex and difficult project is on the back burner.

Uniform Unincorporated Nonprofit Association Act. The Commission is ready to introduce legislation on governance issues. That should wrap up its work in this area.

CONCLUSION

The Commission's agenda continues to be as full as it has ever been, or fuller. 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, and beyond.

Nonetheless, the staff recommends that **the Commission undertake two new projects:**

- The legislatively-requested study clarifying the availability of oral argument in hearings under the Code of Civil Procedure.
- The narrow issue of clarifying the rules governing enforcement and renewal of a money judgment, other than a support judgment, made pursuant to the Family Code.

Other than that, we would not depart 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.

A new resolution regarding the Commission's Calendar of Topics would not technically be necessary to implement the above recommendations. The first new topic — clarifying the availability of oral argument — appears to fall within the Commission's authority to correct technical and minor substantive statutory defects pursuant to Government Code Section 8298. The second new topic — clarifying the rules governing enforcement and renewal of a Family Code money judgment that is not for support — is clearly within the Commission's existing authority to study Creditors' Remedies and Family Law. Pursuant to Government Code Section 8293, as amended by 2004 Cal. Stat. ch. 193, § 33 (effective Jan. 1, 2005), it is not necessary for the Commission to seek reauthorization of studies previously authorized.

Still, we would follow the Commission's traditional practice of finding an author to introduce a resolution on the Commission's Calendar of Topics. The resolution should drop the criminal sentencing topic, include all of the other topics previously authorized, and add the study on the availability of oral argument in hearings under the Code of Civil Procedure.

Next year at this time we would reassess whether we are in a position to schedule startup of any 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,

Barbara Gaal
Staff Counsel

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 SCR 4 (Morrow), enacted as 2003 Cal. Stat. res. ch. 92.

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 restriction 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 litigant 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 sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

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.

21. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or part, and related matters.

COMMENTS OF RICHARD BEST

Date: Jan. 23, 2004
To: Barbara Gaal
From: Richard Best
Re: Discovery/evidence clean up

A noncontroversial update of the Evidence code should consider revising the definition of "writings" to include "electronic or digital data and information in any form" or some such language to cover modern and future technology. Alternatively, the update might occur in the Discovery Act definition of documents [CCP 2016] which now refers to writings as defined in the Evid. Code. Of course, production per CCP 2031 is not limited to "documents" under the Discovery Act but that is the mindset at the heart of discovery. If any modification to the FRCP occurs with regard to e-discovery it is likely to be an update of their definition along this line. As examples of recent legislation in related areas see CCP 1985.6(a)(1) and 1985.3(a)(1) which refer to "electronic data". Although the current definition seems to be designed to be as broad and inclusive as possible, it may be worth a second look and worth running by an IT person. You may be aware of the ABA litigation committee survey a few years ago that found roughly 70% of clients or lawyers did not think electronic data was discoverable, did not look for it and took no efforts to preserve it because they did not think it was a document.

Perhaps more difficult and possibly controversial would be the definition of "original". Tech savvy lawyers do not want printouts since they do not include all the data contained in the true original. Lawyers are sometimes interested in metadata or hidden information that would not show up on a printout of an electronic "document" and a knowledgeable lawyer would not want a printout. I'm told that a printout of a spreadsheet or data base is often useless and at best incomplete.

☞ **Note.** The staff forwarded Mr. Best's 1/23/04 message to Prof. Miguel Méndez, the Commission's consultant for its study on conforming the Evidence Code to the Federal Rules of Evidence. Prof. Méndez responded by saying that the definitions of "writing" and "original" in Evidence Code Sections 250 and 255 appear to be broad enough to encompass data stored in a computer, including embedded data. He warned that he had not researched the issues. He also suggested consulting someone with technical expertise regarding the problems raised by Mr. Best. In response to this input from Prof. Méndez, Mr. Best provided the following additional comments.

ADDITIONAL COMMENTS OF RICHARD BEST

Date: March 1, 2004
To: Barbara Gaal
From: Richard Best

I agree the issue should be raised in a serious manner with people who have expertise in computer forensics and information technology. Their suggestions as to language could be helpful.

Is it clear that when someone requests a "document" they are entitled to obtain the electronic version in native format including all meta data and any hidden comments, revisions etc contained in the electronic file? Not only is such information the complete version but it may aid in authentication issues.

I agree that the definitions from the 60's should be adequate to get by but was suggesting it might be improved and updated. As I noted some other CCP sections provide updated language and it might be good to seek consistency. The Federal civil rules committee has been considering such updating amendments to their definitions for some time. Many lawyers think they deal with their desire for electronic versions and meta data by providing their own definitions of documents in their requests. But if the statute says they can only get a document aka a writing as defined, can they expand the scope of the statute by themselves? Some lawyers take the position that a document is limited to the text that is printed out to hard copy and excludes any hidden comments.

Authentication raises other issues. It is easier to alter or fabricate electronic documents [see your message to me below wherein you acknowledge your financial debt to me]. In Creative Cotton vs. RS Creative the whole case was based on a fabricated contract. Exam by a computer forensic expert could reveal the possible fabrication. I have had cases before me where evidence was fabricated but simply knowing the creation date contained in the meta data and revealed by clicking "Properties" revealed the fabrication. Having the complete document including the meta data will aid in authenticating or refuting the authenticity. Note the information in the email header that includes a unique Message ID number for each email from the ISP.

As I mentioned this subject might be better addressed by a revised and expanded definition of "document" in the Discovery Act.

California Legislature

Senate Committee on Judiciary

Martha M. Escutia
Chair

STATE CAPITOL
ROOM 2187
SACRAMENTO, CA 95814
(916) 445-5957

August 27, 2004

California Law Revision Commission
Mr. Frank Kaplan, Chair
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Kaplan:

We are writing to request that the California Law Revision Commission undertake a comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument.

SB 1249 (Morrow) was introduced this session in response to concerns about several superior court judges in two Southern California counties who refused to allow for oral argument as part of the tentative ruling process prescribed by Rule 324 of the California Rules of Court. The bill would have amended Code of Civil Procedure section 17 to add a definition of "hearing" as follows: "The word 'hearing,' when applied to any demurrer, motion, or order to show cause, signifies oral argument by moving and opposing parties on a record amenable to written transcription which shall be had unless affirmatively waived by the parties."

The Judicial Council of California opposed SB 1249, asserting that the judges who were not complying with Rule 324 have corrected their practices, and that current case law adequately protects the right to oral argument in connection with the tentative ruling process.

The Senate Judiciary Committee's analysis of SB 1249 noted that current case law does not support an entitlement to oral argument for every type of motion or matter:

> Where a statute provides for a "hearing," it does not necessarily demand the parties be given an opportunity to orally argue the case. As our Supreme Court recently noted, the terms "hear" and "hearing" "when used in a legal sense . . . do not necessarily encompass oral presentations." (Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1247.) A statute referring to a "'hearing' does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent." (Id., at p. 1247.) Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 113-114.

The analysis also noted that other cases have held that parties may be entitled to oral argument even with respect to motions or matters for which the statute does not contain the word "hearing":

> In the absence of a clear legislative directive for or against oral hearings, we examine the applicable statutory language and consider the context. In particular, we look to the following factors: (1) Does the statutory scheme, read as a whole, encompass an oral hearing? (2) Do the proceedings involve critical pretrial matters of considerable significance to the parties? and (3) Does the motion or other pretrial proceeding involve a real and genuine dispute? (See discussion in TJX, [ ] 87 Cal.App.4th at pp. 750-751.) Titmas v. Superior Court (2001) 87 Cal.App.4th 738, 742.

An electronic search of the Code of Civil Procedure indicates that there are approximately 263 sections of the Code of Civil Procedure that contain the word "hearing." Given time and resource constraints, it was not possible for the committee staff analyzing SB 1249 to conduct an occurrence-by-occurrence review of each section of the code containing the word "hearing" to ensure that the bill's proposed definition was neither overbroad, resulting in the extension of the right to oral argument in a matter to which it currently is not applicable, nor underinclusive, unintentionally eliminating the right to oral argument in matters concerning which the applicable statute does not contain the word "hearing."

In light of the above concerns, Senator Morrow decided not to pursue SB 1249 this session, and instead we jointly agreed that a thorough review of the statutes and case law governing hearings would significantly improve the administration of justice by clarifying the circumstances in which litigants are entitled to oral argument.

Thank you for your consideration of this request.

Very truly yours,

Martha Escutia
Chair, Senate Judiciary Committee

Bill Morrow
Vice Chair, Senate Judiciary Committee

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October 24, 2003

Sheila Kuehl, Senator
State of California
Attention: Syrus Devers, Esq.
State Capitol, Room 4032
Sacramento, CA 95814

Re: Family Code section 1615

Dear Senator Kuehl:

Family Code section 1615 in its present form began as Senate Bill 78. A copy of the statute is attached for quick reference. These comments are directed primarily to subsections (a) and (c)(2).

Let me frame the problem thus (though there are many other versions that would create a similar problem):

Hypothetical Facts

> A premarital couple having agreed that a premarital agreement was mutually important to them each obtained independent legal representation. Two to six months of negotiations follow, four drafts are exchanged and each party, independent of the other party but together with his/her respective attorney, review each draft and make suggestions for change and correction which are made. Substantial agreement is reached. One party's lawyer promptly prepares an original premarital agreement and provides a copy to the other lawyer/party. Arrangements are made for the agreement to be executed by the parties at a joint meeting to occur two weeks later at the office of one of the attorney's. All appear at the appointed hour. Upon final review with the parties present, one of the lawyers notices that a key provision, discussed but not finally negotiated, had been omitted. With all present and in agreement that the provision needed to be added, the previously prepared premarital agreement was revised, whereupon each party signed the agreement, signatures acknowledged.

The foregoing is a quite possible circumstance. Marriage arrangements often entail somewhat inflexible schedules related to agreement negotiations. Though negotiations begin months, if not a year or more before, it is not unusual for the day the parties will marry to be close at the time the agreement is signed (a month, a week, or even one or two days). I have been preparing premarital agreements for a number of years and by policy will only represent a party to a premarital agreement if the other party is represented. I have discussed Family Code section 1615 with a number of other lawyers each of whom has opined that the purpose of SB 78 flowed from the *In re Marriage of Bonds* (2000) 24 Cal.4th 1 and *In re Marriage of Pendleton and Fireman* (2000) 24 Cal.4th 39 cases. The object appears to be to protect persons lacking in English skills and those who attempt self-representation, especially where spousal support is concerned, in these serious and consequential contract negotiations. Where the parties are represented there is little need to be concerned about either of those protections.

Family Code section 1615 subsection (c), though spacially removed from subsection (a) defines subsection (a)(1). The latter subsection in pertinent part states "A premarital agreement is not enforceable if the party against whom enforcement is sought **proves either of the following:** (1) That party **did not execute the agreement voluntarily.**" (Emphasis added.) Subsection (c) states, again in pertinent part, "For the purposes of subdivision (a), it shall be **deemed** that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record **all of the following** : "(1) The party against whom enforcement is sought **was represented by independent legal counsel at the time of signing the agreement....** (2) The party against whom enforcement is sought had **not less than seven calendar days** between the time that party was **first presented with the agreement ... and the time the agreement was signed.**" For purposes here the balance of the statute is irrelevant.

The Problem

The problems which may reasonably be expected to result in substantial future litigation are: Does the word "deemed" in subsection (c) mean "presumed" or "conclusively determined?" Concerning subsection (c)(2), when is the time "the time that party was first presented with the agreement?" In the hypothetical, notice that if "the time that party was first presented with the agreement" means the time the agreement was actually signed, neither person had the mandated seven days, and that the seven day problem is virtually irreparable, even if recognized soon after the marriage takes place. And, if that is the case, what of the many, many effected transactions that may take place between the marital parties; for instance, estate

planning, real property transfers, retirement plan elections and many, many more.

A Solution

These problems can be remedied, without prejudice to anyone, by making the following changes retroactive to January 1, 2001. Change subjection (c) to read "For the purposes of subdivision (a), unless both parties were represented by legal counsel at the time the agreement was signed, it shall be presumed...." (c)(1) "The party against whom enforcement is sought had not, expressly waived, in a separate writing, representation by independent legal counsel." Then change (c)(2) to read "The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with a draft agreement and the time the agreement was signed."

An alternative could be to provide for a seven day (or some period) "cooling-off" period after signing a premarital agreement. During that time the agreement would be subject to revocation by either party.

Though not a subject of this correspondence, I will observe that subsection (c)(3) creates a substantial conflict of interest for the attorney attempting to deal with a self-represented person in a premarital agreement negotiation setting. To create this substantial duty for a non-client is rife with problems (malpractice?). Subsections (4) and (5) do not require comment at this point.

Urgency

There is an urgency attendant to taking action in this matter. Premarital agreements are popular and becoming more so due to greater public awareness of their value, today's level of gender economic level, and the more and more widely known complexity and expense of family law litigation. The availability of a wide range of information quality via the Media/Internet exacerbates the self-represented persons potential for problems. It is increasingly important that each person before entering into a premarital contract obtain independent legal representation and know that by doing so each has enhanced the level of enforceability of the agreement they have negotiated. Premarital agreements today are viewed far more as partnership agreements by which the marriage will be successfully operated then adversarial encounters the focus of which is on the breakdown of the marital partnership.

The reason for the wide distribution of this letter is because I contacted each of these people or their offices to obtain their views on this subject. To the extent any or all of them have comments to make, best those comments are made by them directly to you or to your office.

Respectfully, I request your attention be directed to this issue and I make myself available to discuss the matter with you or your office, and to each of the persons to whom copies have been provided, as may seem desirable.

Very truly yours,

Robert J. Fulton, Certified Family Law Specialist

RJF:1615ltr.wpd
Enclosure

cc: Sheila Kuehl, Senator
District Office
10951 W. Pico Boulevard, #202
Los Angeles, CA 90064

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Leroy C. Humpal, Esq., ACFLS Legislative Coordinator 2002-2003
Joseph J. Bell, Esq., ACFLS Legislative Coordinator 2003-2004
Dawn Gray, Esq., President Elect, Association of Certified Family Law Specialists (ACFLS)
Judicial Council, Center for Families, Children and The Courts
Attention: Corby Sturges, Esq.
✓ Law Revision Commission

§ 1615 Fam.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

(Amended by Stats. 2001, c. 286, § 2.)

COMMENTS OF RICHARD STRICKLAND

Dear CA Law Revision Commission:

The people respectfully request you consider making it a legal requirement for the Trustor in a Revocable Living Trust to revoke the trust in order to cancel it, instead of filing an unverified Probate Code Sec. 17200 petition for trust account violations against the Trustee. I have been a licensed real estate broker since 1964 and never had a complaint filed against me. As you may know trust account violations are the number one reason brokers lose their licenses.

I was sued for trust account violations in my mentally impaired mother's name after she was kidnapped from her treatment for dementia in a locked facility by an ex felon with a false promise to take her home? CA law says persons admitted for Sec. 5150 observation and treatment are returned to the person admitting them for the Sec. 5150? These are Penal Code 182 and State Bar Act 6152 violations. But, getting the law enforced seems next to impossible.

The CA Superior Court DENIED the trust account violations and canceled the trust but only after I had to spend money I planned for retirement to defend against the unverified petition. Now after she is no longer competent enough to revoke the trust with a letter, the court canceled plans made when she was competent for me to take care of her when the time came. And, the ex felon and her attorney who violated the law, and me, are allowed to go unpunished.

Respectfully,

Richard H. Strickland

COMMENTS OF RICHARD WILCOX

Date: Sat, 29 Nov 2003
To: commission@clrc.ca.gov
From: Richard Wilcox <wilcox@rain.org>
Subject: A Question Regarding One of Your Recommendations #F-1300

Dear Sirs:

In 1999 and 2000 your organization addressed and made recommendations (Study #F-1300) to Assembly Bill 1358 (Enforcement of Judgments Under the Family Code).

There seemingly, in my reading of the two codes, was a large hole left open or not addressed when the changes were made to the Code of Civil Procedure and the Family Code relating to the enforceability and renewal of judgments under the Family Code, and I was hoping that you may show me where I am wrong.

This has to do with "money judgments" awarded pursuant to the Family Code that have nothing to do with child, family, or spousal support but rather a "money judgment" awarded in the division of community property, and how they are treated as far as expiration.

The Code of Civil Procedure - Section 683.130 says in part that "lump-sum money judgments" that are not renewed before the expiration of ten years become unenforceable.

The Code of Civil Procedure - Section 683.310 then says: "Except as otherwise provided in the Family Code, this chapter does not apply to a judgment or order made or entered pursuant to the Family Code."

Now we go to the Family Code - Section 4502. This code then addresses judgments that are made solely for child, family, or spousal support. (It does not address "money judgments" that have nothing to do with child, family, or spousal support.) It states that these type of judgments are enforceable until paid and are exempt from any requirement that judgments be renewed.

> 4502. (a) Notwithstanding any other provision of law, a judgment for child, family, or spousal support, including a judgment for reimbursement that includes, but is not limited to, reimbursement arising under Section 17402 or other arrearages, including all lawful interest and penalties computed thereon, is enforceable until paid in full and is exempt from any requirement that judgments be renewed.

Family Code - Section 291 addresses judgments for "possession or sale of property", and makes them subject to the period of enforceability provisions as stated in the Civil Code. It does not address "money judgments" that have nothing to do with child, family, or spousal support.

> 291. A judgment or order for possession or sale of property made or entered pursuant to this code is subject to the period of enforceability and the procedure for renewal provided by Chapter 3 (commencing with

Section 683.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure

So my question comes down to where in the Civil Code or Family Code does it directly address the subject of “money judgments” made pursuant to the Family Code that are NOT judgments made for child, family, or spousal support but rather judgments made in the division of property, and how they are treated as far as the 10 year renewal clause in the Civil Code.

Do these type of judgments expire after ten years if not renewed?

Family Code Section 291 does not address “money judgments”, but only “judgments for possessions or sale of property”.

I can not believe that in your exhaustive study (#F-1300) in 1999 and 2000 of Assembly Bill 1358 that “money judgments” not for support were overlooked.

I would sincerely appreciate an answer to my questions.

Thank you very much.

Richard Wilcox
6135 N. Rose Ave
Oxnard, CA 93036

July 13, 2004

To: California Law Revision Commission
Nat Sterling, Executive Secretary

From: Stan Ulrich <su@ix.netcom.com>

Re: Renewal of money judgment in property division under Family Code

I am writing to urge the Commission to add a relatively small renewal of judgments clean-up to its calendar of topics for next year. Clarifying the applicable law should not consume much staff or Commission time, although there is always the possibility that some groups may prefer one solution over another, thus bogging things down in the Legislature. If the Commission decides to pursue the matter, I can provide a list of relevant materials in the form of Commission staff memorandums, and am willing to provide additional technical assistance if needed.

The Problem

The issue is how to characterize a judgment for the payment of money that is entered as part of a property division in dissolution proceedings and whether such a judgment is renewable or otherwise subject to the judgment renewal provisions in the Enforcement of Judgments Law (EJL) (Code Civ. Proc. § 680.010 *et seq*.).

This is not simply an abstract matter, but has arisen in real life. Mr. Richard Wilcox originally contacted the Commission staff and Nat put Mr. Wilcox in touch with me, since I was the former staff member most directly involved in the relevant Commission recommendations. In practical terms, the issue is whether a large money judgment entered as part of property division remains enforceable or is barred by failure to comply with renewal procedures in the EJL.

The difficulty arises out of the relation between the Family Code and the EJL, which historically have provided separate regimes for enforcement of judgments. The Commission has made significant progress toward developing a rational scheme, culminating in some technical revisions made in 2000, but some gaps and inconsistencies remain. The specific issue of how to treat a money judgment made as part of a property division was never considered by the Commission, if memory serves.

Background

The Enforcement of Judgments Law sets out a comprehensive scheme for enforcement of three types of judgments, along with a general default procedure for all other judgments. The three types are (1) money judgments, (2) judgments for the sale of property, and (3) judgments for possession of property. The default rule is set out in Code of Civil Procedure Section 717.010. Subject to exceptional rules provided elsewhere, the EJL provides a universal scheme of enforcement rules, the bulk of which apply to money judgments, rather than "nonmoney judgments" (sale, posses-

sion, and anything else except money judgments). In other words, some rule is provided for enforcement of every class of judgment.

As outlined in the Commission's Recommendation on *Enforcement of Judgments Under the Family Code: Technical Revisions*, 29 Cal. L. Revision Comm'n Reports 695 (1999), the EJL has never attempted to displace the inherent and traditional discretionary authority of courts enforcing family law judgments (including "decrees" and "orders"). The discretionary authority is recognized in Family Code Section 290 (drawn from former Civ. Code § 4380 in the former Family Law Act, superseded by the Family Code). Put differently, the EJL provides a detailed framework, subject to some elaboration and limitation by family court judges.

The Legislature has severely limited judicial discretion concerning enforcement of support orders, but not otherwise, to my knowledge. In the last 15 or 20 years, the greatest ongoing issue has been collection of child and family support, with spousal support trailing behind a bit. Now, the three types of support are generally treated in the same breath as to enforceability.

As to renewal and enforceability rules, the relationship is clearer. The EJL makes clear in Code of Civil Procedure Section 683.310 that the enforceability limitations and renewal of judgment rules apply to family law judgments only to the extent the Family Code says so. The Family Code adopts the renewal procedure as an *optional* scheme in Section 4502(b). (Note that later legislation has added a misplaced subdivision (c) to make clear that the equitable doctrine of laches cannot be used to defeat enforcement of support liabilities, except for reimbursement owing the state.)

And finally, since 2000, the application of the EJL's enforceability and renewal rules to judgments for sale or possession of property under the Family Code has been made certain.

I will not burden you with a full history of the development of the relevant rules in this memo, but I can provide fuller detail is you wish.

Issues and Options

1. The law on enforceability and renewal has never been clear as to the treatment of family law judgments ordering the payment of money as part of a property division, i.e., not part of support payments. It is also arguable that it isn't clear as to orders assigning liability or assets, if they are not judgments for possession.

2. The renewal provisions of the EJL were drafted on the explicit assumption that courts have *discretion* as to the enforceability of all judgments, though most discussions of family law enforcement issues tended to focus on support judgments. The EJL renewal scheme was never fully applicable to family law judgments either because some of them were specifically excluded (support) or fell within the general rule prevailing when the EJL was drafted, that judicial discretion would make any mechanical application of the renewal rules ineffective in the family law field.

3. Discussions in CLRC materials generally, if not universally, contrast support judgments with "nonmoney" judgments, leaving in limbo the possibility of money judgments that are not support judgments. (See, e.g., 29 Cal. L. Revision Comm'n

Reports 707.) One resolution of this apparent gap is to treat property division money judgments as a subclass of judgments enforceable by contempt — i.e., not money judgments, or judgments for sale or possession, even though this is inconsistent with the separate treatment of judgments for sale or possession under Section 291.

4. In fashioning remedial legislation, the line may be drawn between support on one hand, and all orders implementing property division on the other. Another way of looking at it is to treat the "money" judgment as in lieu of an order for possession that would have been used to divide property. This helps avoid anomalies that would result from certain orders (sale, possession) implementing property division becoming unenforceable under Section 291, while others (payment of money) did not.

5. The strong policy against limitations on enforcement of support liabilities is clear in the statutes as amended in the last 15 years. However, this policy has not been legislatively applied to property divisions under the Family Code. Judicial discretion under Family Code Sections 290 and 2553 by analogy should follow the treatment of orders for sale or possession and the EJL, rather than the extraordinary policies applicable to support.

6. While the ministerial renewal procedure may optionally be applied to support judgments that are not required to be renewed (to account for payments and accruals and to compound interest), compliance with the renewal procedure is required for judgments for sale or possession under Family Code Section 291. Section 290 preserves judicial discretion as to enforcement in all other cases, and Section 2553 preserves discretion to "carry out" property division. Both provisions appear applicable to property division "money judgments." Thus, the scheme existing in 1982 when the EJL became operative, continues to apply to this class of judgments, as well as any judgment enforceable only by contempt. Judicial discretion under Section 290 arguably is subject to the due diligence standards applicable under prior law, although diligence and laches no longer apply to enforcement of support.

7. There does not appear to be an optional renewal procedure under the Family Code for money judgments other than support judgments, although a court might read Section 290 broadly to include some type of renewal, notwithstanding the section's omission of any reference to renewal.

Conclusion

In the interest in applying rational and consistent rules to all types of judgments enforceable under the Family Code, I would treat money judgments (other than support judgments) in the same matter as judgments for possession or sale under the Family Code, which also has the benefit of being consistent with the rules generally applicable under the Enforcement of Judgments Law.

In any event, however, some type of clarification needs to be made, even if it is to treat money judgments in property division the same as support, or to institute some type of judicial discretion. Although I would not favor that approach, the law should be revised to fill the gap that currently exists.

Creditor Can Get Short End Of Stick When Settlor Dies

By Marshal A. Oldman

In the matter of *Arluk Medical Center Industrial Group Inc. v. Dobler*, 116 Cal.App. 4th 1324, the 2nd District Court of Appeal determined that a trustee had no duty to preserve the assets of a trust on the possibility that a creditor of a decedent might wish to enforce a judgment against the assets of a trust over which the decedent maintained a right to revoke before his death.

Physician Theodore Hylwa joined and was employed by Arluk Medical Center Industrial Group Inc. As a part of Hylwa's contract, he promised to maintain life insurance in favor of the corporation and turn over all income earned from his practice to the medical group. Hylwa failed to maintain his life insurance, so none was payable to the practice when he died.

Additionally, Hylwa did not turn over all of his income to his employer. Hylwa had assets in his estate amounting to $2,182,593.98 and further assets in his trust consisting of $4,864,572.00. The employer filed a timely creditors' claim against the decedent estate for $750,318.28. After 30 days, the creditor treated the claim as rejected and filed suit against the estate for the amount of the claim.

The litigation resulted in a judgment for $800,000 with interest and attorney fees.

Before the rendering of a judgment, the trustee made a series of distributions to the beneficiaries of the trust estate amounting to $509,173.31. The last distribution was made on March 27, 1999, before any judgment was rendered against the decedent estate.

Thereafter, the probate estate was closed, and after payment of statutorily senior creditors, such as the personal representative and his attorneys, the net estate payable to the employer amounted to $136,707.00. The creditor attempted to collect from the assets of the trust estate under Section 18201 of the Probate Code. Because of the costs of administration, the trust was insolvent, and no portion of the creditor's claim could be paid from the trust assets. The employer attempted to enforce its judgment by a surcharge against the trustee.

However, the trial court found that the trustee had not acted improperly and declined to make the trustee personally liable for any portion of the judgment against the decedent.

The appeal brought to the court's attention a complex series of statutes that interplay in the area of a creditor's right to pursue assets in a trust over which the decedent held a power to revoke. Beginning with common law, the court determined that no authority allowed a creditor to enforce his or her judgment against a decedent against the assets of a trust over which the decedent held a power to revoke.

In 1986, the Legislature enacted Section 18201 of the Probate Code and gave creditors the right to pursue trust assets once the assets of the debtor's estate were exhausted. However, the Legislature became concerned that trustees would need to hold assets pending the expiration of statutes of limitation before distributing assets of the trust estate.

This would defeat the primary purpose of a living trust, which was to allow the prompt distribution of assets on the death of the settlor.

In 1991, the Legislature enacted a more comprehensive scheme, which re-enacted Section 18201 of the Probate Code with an entirely new chapter that allowed trustees the option to open a creditor proceeding under Sections 19000 et seq. of the Probate Code. Under these new sections, the trustee was given the option of filing a proceeding for the purpose of requiring creditors to file claims on the receipt of notice in a manner similar to decedent estates.

This option was available to the trustee if no probate estate was opened; otherwise, only the probate estate would handle claims. If neither a trust proceeding was commenced and nor a probate was opened, the trustee was not obliged to preserve any portion of the estate in the absence of a judgment obtained by a creditor.

The court focused on Section 16002 of the Probate Code, which requires the trustee to administer the trust solely for the benefit of the beneficiaries. No conflicting obligation was enacted by the Legislature that required the trustee to consider the interests of a creditor of the decedent.

The sections at 19000 et seq. of the Probate Code do not apply unless the trustee chooses to use them to require claimants in the absence of a probate estate to file timely claims. Only if the trustee has notice of a judgment against the probate estate do the statutes require that the estate be used to pay the judgment.

In the absence of a judgment, the trustee is free to make distributions to the beneficiaries without incurring personal liability. At that point, the beneficiaries are liable for the claims of the judgment creditor to the extent that judgment cannot be satisfied from the estate of the decedent.

The only exception to the rule that a trustee is not liable for the judgment debts of the decedent was the possibility that the trustee might engage in wrongful or tortious conduct that was designed to defeat a creditor. In the opinion, the court suggested that distribution of the trust estate to beneficiaries who might expend the distribution after an order is made by a trial court but before its actual judgment might be such wrongful conduct.

Some form of fraudulent conveyance or tortious interference with prospective economic advantage also might constitute wrongful conduct. In the absence of such conduct, the business decisions of the trustee to make distribution to the beneficiaries will not become a source of personal liability for the trustee even if the economic interests of third parties who might later obtain a judgment are thereby damaged.

The dissent by Justice Earl Johnson Jr. indicates that the court's opinion was not necessarily easy. Even the dissent finds that the majority's interpretation of the statutory interplay was plausible. However, Johnson formulated the public policy to require the trustee to withhold distribution once the trustee has notice of claim or lawsuit similarly to the notice of pending action filed in probate estates.

On balance, the majority's approach is closer to the public's expectations. When a settlor died, beneficiaries are dependent on a trustee acting in their best interests and not being conflicted by interests of third parties who may be able to enforce claims against a decedent.

The duties of the trustee are properly focused on the rapid distribution of the trust estate, the payment of taxes on account of the death of the decedent, and the management of the assets for the benefit of the beneficiaries, not for the interests of third parties.

Trust administration is difficult enough without requiring a trustee to open a creditors proceeding in every instance that a probate is not opened and withhold distribution until every conceivable statute of limitation has expired.

While the opinion leaves open liability for wrongful conduct, the opinion also ignores other avenues that a creditor might pursue if he or she is concerned about likelihood of payment, should he or she be successful in obtaining a judgment. In particular, injunctive relief might be available to prevent the trustee from distributing assets to beneficiaries.

Additionally, if the beneficiaries have received distribution and the estate may be insolvent, injunctive relief to preserve the assets also might be available against them. Of course, any such relief would be subject to the balancing of interests, the probability of success, and the imposition of an undertaking to protect the enjoined parties.

Once again, the opinion illustrates the difficult problems faced by creditors once a debtor dies. The rights of various parties often come ahead of creditors who are able to prove a claim against a decedent. Surviving spouses and minor children have family allowance and homestead rights in probate.

The trustee is able to administer and distribute a trust long before a creditor is able to prosecute his or her claim. Even with the legislation of recent years, the term "creditors rights" as applied to decedents may be something of an oxymoron.

EX 19