

Memorandum 2005-29

**New Topics and Priorities**

BACKGROUND

Each fall, the Commission reviews its Calendar of Topics and determines (1) whether to request authority to add or delete any topic, and (2) what its priorities will be for the next year.

To that end, this memorandum summarizes the status of the studies that the Legislature has authorized the Commission to undertake. The memorandum also presents and analyzes suggestions made throughout the past year regarding new topics for the Commission to study. The memorandum concludes with staff recommendations for allocation of the Commission’s resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many ongoing and suggested new topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting.

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

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2. Craig Anderson, <i>Executive Fights Faxes, One at a Time</i> , Los Angeles Daily J. (June 6, 2005) .....	4
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As this exhibit list reflects, the Commission received an abundance of suggestions for new projects. The Commission already has a considerable backlog of projects, however, due largely to staff reductions necessitated by budget cuts during the state budget crisis. In addition, it appears likely that the Legislature will assign several new projects to the Commission. As in other recent years, the Commission must be careful not to spread its resources too thin. Although the Commission now has sufficient funding to hire a new attorney and a half-time administrative assistant, it will take time to bring these new employees up to speed. **The staff remains generally negative about undertaking any new projects; the Commission should be highly selective in deciding how to spend its resources.**

### **Review of Last Year’s Decisions**

At its last annual review of new topics and priorities, the Commission decided to undertake two of the suggested new projects:

- (1) A study to clarify the rules governing enforcement and renewal of a money judgment made pursuant to the Family Code, other than a support judgment.
- (2) A study requested by the Chair and the Vice-Chair of the Senate Judiciary Committee, clarifying the availability of oral argument in hearings under the Code of Civil Procedure.

The Commission also decided that the next legislative resolution concerning the Commission’s Calendar of Topics should delete the criminal sentencing study, include all the other topics previously authorized, and add the study of oral argument in hearings under the Code of Civil Procedure (the other new project

was within the Commission's existing authority to study creditor's remedies and family law). The Commission further decided that apart from undertaking the two new projects, it would adhere to the traditional scheme of Commission priorities: (1) matters to be completed for the 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.

### **Action on Last Year's Decisions**

During 2005, the Commission took the following action in response to last year's decisions:

#### *Enforcement of a Money Judgment Made Pursuant to the Family Code, Other Than a Support Judgment*

After exploring more narrow approaches, the Commission issued a tentative recommendation proposing that the rule governing the period of enforcement of a support judgment be generalized to apply to all judgments arising under the Family Code. For discussion of the comments on the tentative recommendation, see Memorandum 2005-37.

#### *Oral Argument in Hearings Under the Code of Civil Procedure*

The Commission began studying this topic pursuant to its authority to correct technical and minor substantive statutory defects (Gov't Code § 8298). A pending resolution authored by Senators Morrow, Dunn, and Escutia — SCR 15 — would add the topic to the Commission's Calendar of Topics. In mid-2005, the Commission approved a tentative recommendation and circulated it for comment. For discussion of the comments, see Memorandum 2005-34.

#### *Criminal Sentencing*

Due to political circumstances, SCR 15 would still include the criminal sentencing study on the Commission's Calendar of Topics. The Commission is not actively working on that study and has no plans to do so.

### TOPICS LISTED IN THE COMMISSION'S CALENDAR OF TOPICS

The Commission's enabling statute recognizes two types of study topics: (1) those that the Commission identifies for study and lists in the Calendar of Topics

that it reports to the Legislature, and (2) those that the Legislature assigns to the Commission directly. Gov't Code § 8293.

The bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. If the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments used to be relatively rare but have become more common in recent years. Some of the major topics the Commission recently addressed (including financial privacy and repeal of statutes made obsolete by trial court restructuring) were directly assigned by the Legislature, 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 that the Legislature assigned to the Commission directly.

The Commission's Calendar of Topics currently includes 21 topics. These topics have all been previously approved by the Legislature. See 2003 Cal. Stat. res. ch. 92. The Calendar of Topics pending in SCR 15 includes the same 21 topics. A precise description of each topic is appended as 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.

## **1. Creditor's 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*

Specific statutes direct the Commission to study enforcement and exemptions. These 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 (“NCCUSL”) completed work on a Uniform Non-Judicial Foreclosure Act in 2002. That may be a useful product for Commission consideration, although it has not yet been enacted in any jurisdiction.

Pursuant to a Commission directive, the staff is monitoring developments relating to the bad faith waste exception to the antideficiency laws. See Minutes (Nov. 7-8, 2002), pp. 3-4; *Nippon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001); see also Miller, Starr & Regalia, California Real Estate *Deeds of Trust* § 10:217, at 720-22 (2003 update). There do not appear to have been any significant new developments in this area in the past year.

### *Assignments for the Benefit of Creditors*

In late 1996, the Commission decided to study whether 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 later hired David Gould of McDermott, Will & Emery in Los Angeles to prepare a background study on this topic. Mr. Gould has done extensive work on this project, but has not yet submitted a final report to the Commission.

## **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. See Hartog & Schenone, *Alice in Tulsa-land: The Dobler Effect on Creditors of Revocable Trusts*, Cal. Trusts & Estates Q. 4 (Summer 2004); Memorandum 2004-35, p. 5.

### *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? These are important issues that the Commission is well-suited to study. As discussed later in this memorandum, one of this year's suggestions underscores the need for such work, although the suggestion is framed in different terms. If the Commission undertakes a study of these issues, the Uniform Probate Code may be a useful reference, because it deals with nonprobate statutory allowances to a decedent's spouse and children.

### *Uniform Trust Code*

NCCUSL promulgated a Uniform Trust Code in 2000. The Reporter for the Uniform Trust Code, Prof. David English of the University of Missouri Law School, is preparing a report on how California law compares with the Uniform Trust Code. The Commission originally funded his work, but had to cancel the contract due to budget cuts. Fortunately, the State Bar Trusts and Estates Section agreed to fund the research instead. Prof. English has not yet completed his report.

### *Uniform Custodial Trust Act*

In late 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. 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. The Commission has not had sufficient resources to take any action on this matter.

### *Multiple Party Accounts: Ownership of Amounts on Deposit*

AB 69 (Harman) would implement the Commission's recommendation on *Ownership of Amounts Withdrawn from Joint Account*, 34 Cal. L. Revision Comm'n Reports 199 (2004). The bill is pending in the Senate Judiciary Committee as a two-year bill.

## **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.

### *Mechanics Lien Law*

The Commission is actively working on a general overhaul of mechanics lien law. The Commission is undertaking this work on a priority basis due to the level of legislative interest in this project. The Commission has done extensive work on a tentative recommendation to circulate for comment. The Commission expects to finalize a proposal for introduction in the Legislature in 2007. For further information on the status of this project, see Memoranda 2005-31 & 2005-38.

### *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. Prof. 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.

##### *Enforcement of a Money Judgment Made Pursuant to the Family Code, Other Than a Support Judgment*

See discussion on pp. 2, 3.

#### **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 Code of Civil Procedure Section 998, which calls for adjustment of costs following rejection of a compromise offer. 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 is actively studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. The Commission's nonsubstantive reorganization of the civil discovery provisions became operative on July 1st. A technical cleanup bill, which would also make some minor substantive improvements relating to civil discovery, is pending before the Governor (AB 333 (Harman)). The Commission is currently studying a number of other discovery issues. See Memorandum 2005-33.

Other issues, both minor and substantial, remain to be studied. The Commission has received numerous suggestions from interested persons. The staff is collecting these and will present them to the Commission for consideration as time permits.

The Commission in 1995 decided to investigate discovery of computer records. This matter is not under active consideration, but the staff is following developments in this area. The topic is being extensively studied in the federal court system and by national organizations such as the American Bar Association. NCCUSL is undertaking to form a Drafting Committee "to draft an Act relating to the discovery, in civil litigation in state courts, of potential evidence maintained in electronic form." Blackburn, *Final Report of Study Committee on Electronic Discovery* (June 17, 2005). We will continue to monitor developments in this area.

## **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 mechanics 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 in 1965 on recommendation of the Commission, and the study has been continued on the Commission's agenda for ongoing review.

### *Review of the California Evidence Code*

Since the 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 engaged Prof. 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 1-5 of an eight part study. The Commission began active consideration of the hearsay issues and role of judge and jury, but suspended its work earlier this year due to political resistance.

### *Waiver of Privilege By Disclosure*

In 2004, the Commission issued a recommendation on *Waiver of Privilege By Disclosure*. A bill to implement that recommendation passed the Assembly but is pending in the Senate as a two-year bill (AB 1133 (Harman)). The bill is controversial and the Commission will need to decide how to proceed in light of the concerns raised.

## **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*

Prof. Roger Alford of Pepperdine Law School prepared a background study for the Commission on contractual arbitration statutes in other jurisdictions. Earlier this year, the Commission considered comments on the background study and directed the staff to convene a half-day stakeholder meeting to assess whether there are issues relating to contractual arbitration that the Commission can productively study. We plan to schedule this meeting during the upcoming legislative recess, when the outcome of 2005 legislation is clear.

## **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 2004, the Commission approved a recommendation on *Emergency Rulemaking Under the Administrative Procedure Act*. For political reasons, the Commission refrained from introducing this proposal in the Legislature in 2005. It is ready for introduction in 2006; we plan to seek an author if it appears possible to pursue this technical proposal without getting caught up in political battles over use of emergency rulemaking.

## **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 Commission's recommendations on *Unincorporated Associations*, *Nonprofit Association Tort Liability*, and *Unincorporated Association Governance* have been enacted. Although the Commission has no plans to do further work in this area,

it should retain authority to study the area in case issues arise relating to the provisions enacted on its recommendation.

#### **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. In this regard, we have been monitoring developments relating to the Uniform Electronic Transactions Act (“UETA”). California enacted a version of UETA in 1999 (Civ. Code §§ 1633.1-1633.17), but that version differs from the final version approved by NCCUSL. As a result, the California version appears to be preempted to some extent by the Electronic Signatures in Global and National Commerce Act (“E-SIGN”). As yet, the courts have not determined the scope of preemption. We will continue to monitor this situation.

#### **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.

The Commission made this a high priority matter and issued several recommendations. Three of these were enacted with some revisions — (1) *Common Interest Developments: Procedural Fairness in Association Rulemaking and Decisionmaking*; (2) *Common Interest Development Law: Architectural Review and Decisionmaking*; and (3) *Alternative Dispute Resolution in Common Interest Developments*.

In 2005, the Commission issued a recommendation on *Common Interest Development Ombudsperson Pilot Project*. Two bills to implement that recommendation are pending in the Legislature — AB 770 (Mullin) and SB 551 (Lowenthal). These will require extensive work in 2006 .

#### *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 has compiled and cataloged the issues. See Memorandum 2005-3. New suggestions continue to arrive. Two proposals have been enacted on Commission recommendation: *Organization of Davis-Stirling Common Interest Development Act* and *Preemption of CID Architectural Restrictions*. The Commission is now working on reorganization and simplification of CID law. See Memorandum 2005-32.

### **17. Legal Malpractice Statutes of Limitations**

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 is actively working on other issues relating to the limitations period for legal malpractice. The Commission might be able to finalize a proposal in time for introduction in the Legislature in 2006.

### **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. Last year, the Commission decided to entirely drop criminal sentencing from the Commission's Calendar of Topics. We cannot implement that decision in SCR 15, but will do so in the next resolution regarding the Commission's Calendar of Topics.

### **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

### **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.

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 number of other technical issues relating to civil procedure, which should be addressed at some point. These include an inquiry regarding how to appeal from an anti-SLAPP order in a limited civil case. *Compare* Code Civ. Proc. §§ 904.1(a)(13), 425.16(j) & 425.17(e) *with* Code Civ. Proc. § 904.2. The staff has taken steps to obtain some free research assistance on this issue.

We are also aware of what appear to be two erroneous cross-references in the Uniform Partnership Act. Corporations Code Sections 16701(c) and 16701.5(b)(2) both refer to “Damages for wrongful dissociation under subdivision (b) of Section 16602.” It is not subdivision (b) but subdivision (c) of Section 16602 that prescribes damages for wrongful dissociation. Some time ago, we brought this apparent error to the attention of the State Bar Committee on Partnerships and LLCs. asking whether that group was in a position to propose corrective legislation. We never received a response.

Although the Commission’s resources are limited, it may make sense to pursue some of these technical issues on a low priority basis in the next year. Such a project might be a good learning opportunity for our new attorney, as well as a chance to prevent confusion and improve the law for the benefit of the public.

### **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 in 2003. 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. The Commission put the study on hold in 2004 because the state budget crisis made it impractical to propose the type of improvements in small claims procedures that appeared necessary to achieve consensus on increasing the small claims limit. Two bills to increase the small claims limit are now pending — AB 1459 (Canciamilla) and SB 422 (Simitian). We are monitoring those bills and will update the Commission for further consideration when the fate of the bills is clear.

- (4) **Equitable relief in a limited civil case.** The Commission is actively engaged in this study and has issued a tentative recommendation. For discussion of comments on the tentative recommendation, see Memorandum 2005-35. The Commission might be able to finalize a recommendation on this topic in time for introduction in the Legislature in 2006.

### **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. In response to this directive, two substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149. More work remains to be done. The Commission decided to deprioritize this work in 2003, because many issues were still unripe for statutory reform and the Commission's resources were depleted due to budget cuts.

Recent developments suggest that the topic should be reactivated as a priority matter. For instance, we recently received an inquiry from Santa Barbara Superior Court asking whether it is still necessary to retain Government Code Section 74640.2, a provision that refers to court facilities for each division of the North Santa Barbara County Municipal Court. Despite the elimination of the municipal courts, that provision could not previously be amended or repealed, because issues relating to court facilities were unsettled. Now that court facilities legislation has been enacted and implementation is well underway, the provision may no longer be needed, at least in its present form. Numerous other court facilities provisions may also be obsolete.

Similarly, a recent case raises the possibility of revising the judicial disqualification statutes to reflect trial court unification. See *Housing Authority of County of Monterey v. Jones*, 130 Cal. App. 4th 1029, 30 Cal. Rptr. 3d 676, 685-86 (June 29, 2005). While those provisions are workable as presently drafted, the case suggests that revisions may help to provide better guidance in the future.

The staff has a long list of other trial court restructuring issues that may also be ripe for attention. The Legislature is relying on the Commission for this cleanup. It was appropriate to table this project while matters such as court facilities were being resolved, but the Commission should turn back to it now that further cleanup would be both feasible and useful.

## **Financial Privacy**

Assembly Member Papan's ACR 125, enacted as 2002 Cal. Stat. res. ch. 167, directed the Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to or arising out of financial transactions. In response to this directive, the Commission issued a recommendation on *Financial Privacy*, 34 Cal. L. Revision Comm'n Reports 401 (2004). A bill to implement this recommendation was introduced in the Legislature in 2005 and is pending in the Senate as a two-year bill — SB 1104 (Committee on Banking, Finance & Insurance).

### NEW STUDIES THAT MAY BE ASSIGNED TO THE COMMISSION BY THE LEGISLATURE

## **Probate Code**

Two measures introduced in 2005 call for the Commission to study a probate issue:

### *No Contest Clause*

SCR 42 (Campbell) has been adopted. It directs the Commission, in consultation with the Senate and Assembly Judiciary Committees, to conduct a comprehensive study and prepare a report concerning the advantages and disadvantages of the provisions of the Probate Code relating to no contest clauses. The measure also requires the Commission to "[r]eview the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law." The measure does not set a deadline for completion of the Commission's report.

### *Real Property "Transfer on Death" Deed*

AB 12 (De Vore) would direct the Commission to study real property "transfer on death" deeds. This would be a short-fuse study, with the Commission's report due January 1, 2007. The bill is pending before the Governor; its fate should be clear by the time the Commission meets.

## **Statutes Relating to Control of Deadly Weapons**

ACR 73 (McCarthy) would direct the Commission to study the statutes relating to control of deadly weapons with the objective to propose legislation that would clean up and clarify the statutes nonsubstantively. The Commission's report would be due by July 1, 2008. The measure passed the Assembly and is pending in the Senate Public Safety Committee, which will not consider the measure until 2006.

### SUGGESTED NEW TOPICS

During the past year, the Commission received a wide variety of suggestions for new topics and priorities. These are analyzed below.

#### **Creditors' Remedies**

The Commission received two suggestions relating to creditors' remedies:

##### *Inclusion of Social Security Number on Abstract of Judgment*

Code of Civil Procedure Section 674(a)(6) requires an abstract of judgment or decree requiring the payment of money to include the "social security number and driver's license number of the judgment debtor if they are known to the judgment creditor." The Commission received an email message from Sidney Tinberg raising concerns about this requirement. Exhibit p. 83.

We forwarded this message to Patrick O'Donnell at the Administrative Office of the Courts ("AOC"), to find out whether the Judicial Council is taking any action on the matter. *See id.* According to Mr. O'Donnell, the AOC receives inquiries about the SSN and driver's license disclosure requirement several times a year. He is not aware of any Judicial Council study reexamining that requirement. Exhibit p. 84. However, he says that a representative of the California Association of Collectors suggested revising the statute to require only the last four digits of the judgment debtor's social security number. That approach may be sufficient to ensure that the lien is placed on the right person, while protecting the person's financial identity. Mr. O'Donnell asks whether this is a reform the Commission might be able to explore. *Id.*

This is an important issue affecting many people. Section 674 was substantially amended in 1982 on Commission recommendation as part of the Enforcement of Judgments law. The SSN and driver's license disclosure requirement predates that amendment. Because the Commission drafted the

Enforcement of Judgments law, it would be appropriate for the Commission to reconsider the SSN and driver's license disclosure requirement in light of modern concerns for financial privacy. This would be a fairly narrow project that the Commission might be able to squeeze in as a low priority matter. It is likely, however, that some other person or group might be interested in pursuing the matter. There have been a number of recent bills on similar subjects. Unless the Commission otherwise directs, **the staff will try to bring this issue to the attention of legislative contacts active in this area.**

#### *Foreclosure of a Deed of Trust*

Attorney Michael Hertz offers a suggestion regarding foreclosure of a deed of trust in California. Exhibit pp. 56-58. He recommends "that there be established a statewide foreclosure website and that it be a legal requirement that any foreclosure be posted there." *Id.* at 57. He further recommends that "there should be a mechanism for bidding over the Internet, with appropriate safeguards to make certain that the actual bidders are able to perform." *Id.* He predicts that "by having a truly open auction system coupled with the protected opportunity to sell property during foreclosure period, the number of actual properties going back to the lenders would be more limited and — overall — more value would go to the owners and lenders." *Id.* at 58. He also predicts that "the number of bankruptcies would drop, which would also be cost saving as well as a saving in emotional distress and hardship for the owners." *Id.*

These are interesting, innovative ideas. If the Commission had more resources and fewer ongoing projects, they would be worth investigating. Under current circumstances, **the staff recommends against undertaking this work at the present time.** We would hold Mr. Hertz's suggestions for consideration if the Commission studies foreclosure law in the future.

#### **Probate Code**

The Commission received several suggestions relating to the Probate Code:

##### *Duties Where Settlor of Revocable Trust is Incompetent*

John Beauclair identifies two issues that arise when the settlor of a revocable trust allegedly becomes incompetent:

- (1) Is the trust still revocable or does it become irrevocable?

- (2) Is a judicial determination of the settlor's competency necessary when the trust specifies another method of determining the settlor's competency?

Exhibit pp. 6-9. Mr. Beauclair believes that the law on these points should be clarified.

As Mr. Beauclair mentions in his comments, the Commission previously investigated these issues to some extent. The Commission tabled its work in June 2000, however, in view of an "ongoing project to address these issues by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee." Minutes (June 2000), p. 12.

We recently referred Mr. Beauclair's comments to the Trusts and Estates Section for consideration. We simultaneously inquired as to the status of the Trusts and Estates Section's work in this area. We have not yet received an answer. We will update the Commission with any further information we obtain. **If the Trusts and Estates Section is still active in this area, the Commission should not duplicate that group's efforts.**

*Treatment of Domestic Partners Under the Probate Code*

Prof. Grayson McCouch of the University of San Diego School of Law asks why some provisions of the Probate Code have been amended to specifically refer to a domestic partner (e.g., Prob. Code § 6401(c)) while others have not (e.g., Prob. Code § 6401(a), (b)). Exhibit p. 62. He points out that "the amendments to the domestic partner provisions of the Family Code that took effect in January provide broadly that domestic partners have the same rights and obligations as married couples." *Id.* He comments that "[i]f this was intended as a back-door way of redefining 'spouse' to include 'domestic partner,' it seems odd that the legislature bothered to add parallel references to domestic partners to selected provisions of the Probate Code while leaving others unchanged." *Id.*

The staff investigated this apparent anomaly upon receiving Prof. McCouch's inquiry. It looks as though there is a historical explanation for the anomaly: The inheritance rights of domestic partners were narrowly addressed in 2002, while the broader legal rights of domestic partners were added in 2003, using a general provision to define the rights of domestic partners rather than amending each of the many statutes that refer to spouses. See Exhibit p. 63.

At some point, cleanup to address this situation may be warranted. The area is still in flux, however, with same-sex marriage being debated through the

political process (see, e.g., AB 849 (Leno)) and the courts. It seems premature to start a technical cleanup project while the policy issues are still being resolved. The Commission should **revisit this matter in the future but refrain from addressing it now.**

*Probate Code Section 6103*

The State Bar Trusts and Estates Section has brought to the Commission's attention an apparent problem with a cross-reference in Probate Code Section 6103, which was enacted and recently amended on Commission recommendation. See Exhibit pp. 67-68. The staff has looked into this matter to some extent and determined that it is more complex than it initially appears. The issue interrelates with some work that the State Bar did in the area. In the staff's opinion, **it would be more appropriate for the Trusts and Estates Section to deal with this issue than for the Commission to work on it.**

*Interest on a Pecuniary Gift in a Trust*

Probate Code Section 16340 was enacted on Commission recommendation as part of the Uniform Principal and Income Act. According to the Commission's Comment, it continues the substance of former Probate Code Section 16314. Probate Commissioner Don Green points out, however, that unlike its predecessor statute, Section 16340 does not expressly provide for interest on a pecuniary gift in a trust. Mr. Green suggests eliminating this ambiguity and clarifying that a pecuniary gift in a trust earns interest. Exhibit pp. 37-41. **This is a narrow issue that might be appropriate for the Commission to investigate on a low priority basis because it drafted the provision in question.** Alternatively, the Commission might consider referring the issue to the Trusts and Estates Section to study.

*Probate Code Section 13655*

Attorney Bob Showen has raised a concern regarding Probate Code Section 13655. Exhibit p. 82. The staff has explored this issue and related issues to some extent with Probate Commissioner Don Green, who offered to bring the full range of issues to the attention of the State Bar Trusts & Estates Section. The staff informed Mr. Green that the Trusts & Estates Section might be better-situated than the Commission to look into the issues in the near term. Because the Trusts & Estates Section may become involved in the area, **the Commission need not get into it at this time.**

### *Forced Heirship*

Sam Shabot urges the Commission “to pursue *forced heirship* legislation in California, to protect against parental disinheritance of children ....” Exhibit p. 79 (emphasis in original). He has provided a list of law review articles on the subject (*id.* at 80-81), as well as some other materials that we have not reproduced but can provide upon request.

At its most extreme, the doctrine of forced heirship precludes a parent from disinheriting a child, even if the child has reached adulthood and is self-sufficient. The doctrine enjoys support in many countries, but has been largely rejected in the United States.

California does, however, have protections in place for a minor child when a parent dies. Under Probate Code Section 6540, a minor child of a decedent, or an incapacitated child, is entitled to payment of a reasonable family allowance from the decedent’s estate. The allowance must terminate no later than upon entry of an order for final distribution of the estate. Prob. Code § 6543. A court may, however, delay the closing of an estate if it finds that (1) a family allowance is needed by the recipient to pay for necessities of life, and (2) the recipient’s need for a continued allowance outweighs the needs of those whose interests would be adversely affected by continuing the estate for this purpose. Prob. Code § 12203.

In a case decided almost a decade ago, a party argued that the Probate Code authorizes payment of a family allowance from the assets of a revocable trust, not just from the assets of a decedent’s estate. The court of appeal held, however, that “Section 6540 authorizes the award of a family allowance only in connection with the administration of an estate.” *Parson v. Parson*, 49 Cal. App. 4th 537, 542, 56 Cal. Rptr. 2d 686 (1996).

This is an example of a probate protection that is not available in the context of a nonprobate transfer. As discussed earlier in this memorandum (see p. 6), the Commission is well-suited to study whether such protections should be applied to nonprobate transfers. In the staff’s opinion, however, the Commission lacks sufficient resources to undertake such a study in 2006. **The Commission should keep this topic in mind for possible activation in 2007.**

### *Imbalance of Trustee’s Power and Beneficiaries’ Rights*

Patricia Nolan Mackenzie urges the Commission to revise trust law such that “a trust attorney and trust accountant are responsible to ALL in a trust, not just

the trustee and that ‘no attorney client privilege’ should be permitted when, in effect, all vested beneficiaries are paying the attorney bills charged the trust’s principal.” Exhibit p. 60 (emphasis in original). In her experience, the “imbalance of a trustee’s protected power vs. a beneficiary’s unprotected entitlement is alarming.” *Id.* She has supplied the staff with a copy of a book she wrote detailing her frustrations regarding the execution of her father’s trust — Mackenzie, Without Legal Conscience (1999). The book is interesting and easy-to-read. The approach she proposes, however, is unworkable because it would put a trust attorney or trust accountant in a conflict-of-interest situation. **The Commission should not pursue this idea.**

### **Real and Personal Property**

Eminent domain attorney Michael Montgomery raises concerns regarding Code of Civil Procedure Section 1260.040, which provides:

1260.040. (a) If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.

(b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an eminent domain proceeding, the court may postpone those dates for a period sufficient to enable the parties to engage in further proceedings before trial in response to its ruling on the motion.

(c) This section supplements, and does not replace any other pretrial or trial procedure otherwise available to resolve an evidentiary or other legal issue affecting the determination of compensation.

This provision was enacted in 2001 on recommendation of the Commission.

Mr. Montgomery reports that the State of California is using the provision to dismiss inverse condemnation actions by filing a motion supported by sworn affidavits of experts. Exhibit p. 65. He points out that although the condemnor “may take several months amassing its evidence for the purpose of the motion, formulating declarations and exhibits thereto, .. [u]nder the provisions of Code of Civil Procedure § 1005, the property owner in an inverse condemnation case has only seven court days to respond with competent evidence sufficient to defeat the motion.” *Id.* He regards this as inherently unfair. When the situation arose in

one of his cases, the court alleviated the problem by granting his client a continuance. He seeks a more global solution, however, asking the Commission to either (1) limit Section 1260.040 to evidentiary disputes and preclude it from being “used as a ‘death-penalty’ to cause the action to be dismissed,” or (2) “[p]rovide as much time to respond to such a motion as that which applies to summary judgment proceedings.” *Id.* at 66.

**This situation may be worth investigating.** The procedure established by Section 1260.040 is new and might require some refinement to ensure that it is fair to all parties.

### **Family Law**

The Commission received a number of suggestions relating to family law:

#### *Premarital Agreements*

Family law specialist Robert Fulton is concerned about ambiguities in a recently enacted statute governing premarital agreements (Fam. Code § 1615). He voiced his concerns last year (see Exhibit pp. 21-25), but the Commission decided not to pursue them due to its limited resources. Shortly after the Commission made that decision, he renewed his request that the Commission consider the matter. Exhibit pp. 26-36. He also tried to interest others in pursuing the matter, such as the Association of Certified Family Law Specialists (“ACFLS”). See *id.* at 27-30. Mr. Fulton cautions that the problems “are serious and without doubt will have heavy future consequences for premarital agreement drafters and their clients.” *Id.* at 27.

The staff is in the process of checking whether ACFLS has taken any action on this matter or is aware of any steps taken by anyone else. If it turns out that no action has been taken, our recommendation would be to **add Mr. Fulton’s concerns to the collection of issues that the Commission plans to consider when it takes up marital agreements made during marriage** (see p. 8). Regrettably, we do not think the Commission should undertake that study this year. The Commission is still too overloaded with other projects to begin work in this substantial new area.

#### *Paternity Determination for Child Without Presumed Father*

Dan Hemenway of Renton, Washington, urges the Commission to examine Family Code Section 7630(c), which provides:

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

Mr. Hemenway reports that some courts “force the petitioner to claim there is a father-child relationship, that the alleged father is in fact the natural, biological, or presumed father before they will adjudicate whether or not he really is the father.” Exhibit p. 42; see also Exhibit p. 43. He asks the Commission to imagine “forcing the mother or Child Support Services to argue in the affirmative to challenge a pedophile’s false claim of paternity to attain child custody or unsupervised visitation rights” or “forcing a petitioner to plead in the affirmative to challenge a false claim of rape or incest to gain standing to present evidence showing the claim is false.” Exhibit p. 42. Mr. Hemenway says this approach “stands in stark contrast to establishing the mother-child relationship under Section 7650(a), which is bias-free and does not require any such presumption of outcome.” *Id.*

The staff finds these comments confusing. The reference to Section 7650(a) is incorrect; that provision applies not to establishment of a mother-child relationship but to an action to determine paternity where paternity is presumed under Family Code Section 7611. The hypotheticals seem strained. If a pedophile were to claim paternity, the pedophile would be the petitioner in the action, not the mother or Child Support Services. If a person were charged with rape, the person clearly would have standing to present a defense and would not need to bring a paternity action.

We are not certain there is a problem here that needs to be addressed. **Absent more specific and concrete evidence of a problem, the Commission should not devote resources to this matter.**

#### *Standing of Grandparents in Adoption*

Marilynn Mc Laughlin “would like to see a law passed that gives Grandparents legal standing when their grandchildren are involved in CPS/Social Services/State Adoptions.” Exhibit p. 64. She explains:

Currently the law does not provided that “Notice” to be given to the biological Grandparents regarding any court hearings. When Grandparents do attempt to attend court, they have “no standing” even when the parents have abandoned the children or when reunification services have been terminated. Once a child is placed in “complete care, custody, and control” of State Adoptions Grandparents participation in their grandchildren lives is completely severed.

*Id.* She refers to a recent report on foster care, which emphasizes the importance of providing each child with a safe, permanent family. Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* (2004). Among other things, the report notes that sometimes guardianship with a relative might be the best permanence option for a child. *Id.* at 21-22.

The law already provides protections for grandparents in a dependency case. See Welf. & Inst. Code §§ 361.3 (preferential consideration of relative’s request for placement of child with relative), 366.26(c)(1)(D) (restriction on termination of parental rights where child is living with relative under specified conditions), 366.26(k) (adoptive placement preference for relative who has cared for child under specified conditions); see also *In re Aaron R.*, 130 Cal. App. 4th 697, 29 Cal. Rptr. 3d 921 (2005); *Cesar v. Superior Court*, 91 Cal. App. 4th 1023, 111 Cal. Rptr. 2d 243 (2001). Further protection may not be needed. **The Commission should devote its resources to other matters.**

*Child Support Payments By a Non-Custodial, Biological Parent Who Also Supports a Child in the Home*

A Roseville resident identified only as “CE” has described in detail a number of concerns relating to payment of child support by “non-custodial, biological parents who support 1 or more children in the home and upon whom child support has been ordered for 1 or more children detained out of the home....” Exhibit pp. 11-18. The thrust of CE’s comments is that imposing an obligation to support a child who is a ward of the court can be detrimental to another child who is being supported at home by the same parent.

Issues relating to child support tend to be contentious and are often ill-suited to the Commission’s deliberative, consensus-building process. **It is generally better to leave child support issues to others to handle; the Commission should follow that approach here.**

### *Reinstatement of Driver's License Upon Reaching Agreement to Pay Child Support*

Richard Besse reports that his driver's license was not promptly reinstated after he entered into an agreement to pay child support. Consequently, he was unable to pay the agreed child support because he could not work without a driver's license. Exhibit p. 10. He proposes that "there should be a mandatory delay of license suspension of a period of three(3) to six (6) months after child support is ordered, and a notice to the non-custodial parent sent by certified letter informing them of the impending suspension." *Id.*

Again, **it seems best to leave this issue to others to handle.** The proposed project probably would not be a good use of the Commission's study process and expertise.

### **Evidence**

The Commission received two suggestions concerning evidentiary rules:

#### *Marital Privilege*

Under Family Code Section 297.5(a), "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, ... as are granted to and imposed upon spouses." Kevin Norte, a research attorney for Los Angeles County Superior Court, is interested in application of this provision to the portion of the Evidence Code relating to evidentiary privileges.

In particular, Mr. Norte suggests revising the title of the statute establishing the marital communications privilege to reflect the recent enactment of Section 297.5. Exhibit p. 69. He speculates that revising the title might be easier than revising the statutory text, which he recognizes could "take years." *Id.*

The title (technically, "headline") of a statutory provision is not law; it is prepared by the publisher of a code and thus can vary from code to code. Consequently, the Commission could not seek to change a headline through the legislative process.

The Commission could propose to amend the statute governing the privilege for confidential marital communications (Evid. Code § 980) to reflect the enactment of Section 297.5. As discussed previously, however, issues relating to same-sex marriage are still being resolved. The time may not yet be ripe for cleaning up this provision, which refers to a "marital relationship" and "husband

and wife.” Instead of undertaking this cleanup now, **the Commission should revisit the issue when the area is more stable.**

#### *Post-Death Status of Attorney-Client Privilege*

Estate planning attorney Terence Nunan urges the Commission to review the law pertaining to the post-death status of the attorney-client privilege. Exhibit p. 70. With a co-author, he has written a well-researched article contrasting the federal and California approaches to this topic. Burford & Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, Calif. Trusts & Estates Q. 17 (Summer 2005). The article identifies problems with Evidence Code Sections 953 and 954, as recently interpreted by the California Supreme Court in *HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005).

This might be an interesting and significant topic for the Commission to examine. The Commission drafted the provisions in question, so it would be appropriate for the Commission to consider issues relating to their operation.

But experience with the Commission’s proposal on *Waiver of Privilege By Disclosure* (pending as AB 1133 (Harman)) has made it painfully clear that issues relating to evidentiary privileges are controversial and difficult to resolve. **The Commission would be ill-advised to undertake such a study without clear legislative support for that effort.** There may not be a need for Commission involvement in any event; Mr. Nunan has informed the staff that State Bar groups are looking into the issues.

#### **Venue Statutes**

Mike Kelly, Principal Deputy Legislative Counsel, has alerted the Commission to a recent unpublished decision concerning venue issues, in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394 (a venue statute) is a “mass of cumbersome phraseology” and there is a “need for revision and clarification of the venue statutes.” Exhibit p. 59. The Court of Appeal was sufficiently concerned about this matter to direct its clerk to send a copy of the decision to Legislative Counsel. *Id.* Mr. Kelly reports that Legislative Counsel defers to the Commission’s expertise “in determining whether a broader review of venue statutes is in order; however, a review of the present case and the prior reported cases does seem to indicate that Section 394 of the Code of Civil Procedure needs to be restructured.” *Id.*

The staff has had occasion to review the venue statutes in the past. The Court of Appeal is correct in characterizing them as cumbersome and confusing. Attempting to clean them up would be difficult but potentially worthwhile, because the statutes are so widely used. The Commission would need to seek authority from the Legislature to undertake such a study. In light of the Commission's ongoing and backlogged projects, the staff does not recommend seeking such authority at this time. **But the Commission should revisit this topic again next year, when it might be closer to having resources available for the suggested study.**

### **Vehicle Code Section 5200**

Tony DeRego of the Sacramento County Sheriff's Department asks the Commission to review Vehicle Code Section 5200. He "believe[s] this code section is contradictory." Exhibit p. 19. In a phone conversation with the staff, he explained that subdivision (a) seems to require two license plates, while subdivision (b) seems to require only one license plate.

Section 5200 provides:

5200. (a) When two license plates are issued by the department for use upon a vehicle, they shall be attached to the vehicle for which they were issued, one in the front and the other in the rear.

(b) When only one license plate is issued for use upon a vehicle, it shall be attached to the rear thereof, unless the license plate is issued for use upon a truck tractor, in which case the license plate shall be displayed in accordance with Section 4850.5.

We do not see a conflict between subdivisions (a) and (b). Subdivision (a) specifies the rule applicable when the Department of Motor Vehicles ("DMV") issues two license plates for a vehicle; subdivision (b) specifies a different rule applicable when DMV issues only one license plate for a vehicle. Other provisions specify when DMV is to issue two license plates and when it is to issue only one license plate. See Veh. Code §§ 4850(a), 4850.5. **There does not appear to be a need to revise Section 5200**, which was amended as recently as 2003.

### **Junk Faxes and Small Claims Jurisdiction**

Through a number of phonecalls and written communications, Howard Herships has requested that the Commission consider an issue relating to junk faxes.

Under federal law, it is illegal to send a junk fax (i.e., unsolicited advertising facsimile). 47 U.S.C. § 227. A private person can enforce this law through an action to recover either “actual monetary loss from such a violation, or to recover \$500 in damages for each such violation, whichever is greater.” 47 U.S.C. § 227(b)(3). Greater damages are potentially recoverable for a willful or knowing violation. *Id.*

The federal law was recently amended to create an exception when the sender has an “established business relationship” with the recipient. 47 U.S.C. § 227(b)(1)(C)(i). States are free, however, to impose more restrictive requirements. 47 U.S.C. § 227(e). A bill along those lines just passed the Legislature and is on its way to the Governor (AB 833 (Bowen)). The bill would essentially make the new federal exception inapplicable in California. The same damages would be available under it as under the federal law.

Mr. Herships’ issue concerns use of small claims court to sue for a junk fax. The jurisdictional limit of small claims court is currently \$5,000. Code Civ. Proc. § 116.220. A person may file no more than two small claims actions per year in which the demand exceeds \$2,500. Code Civ. Proc. § 116.231. Suppose a person brings a number of claims against an entity, one for each junk fax received. Must the claims be aggregated in determining whether the small claims limits are met, or should each junk fax claim be considered separately?

Mr. Herships believes that the claims should be aggregated. He is troubled by situations such as a recent incident in which a person “won over \$40K for 16 faxes in one 10 minute court appearance, in small claims.” See <[www.junkfax.org](http://www.junkfax.org)>. Mr. Herships considers this abusive, inconsistent with the small claims limits, and a violation of due process. Exhibit pp. 44-55. A recent news article reports, however, that thus far courts have rejected those arguments. Anderson, *Executive Fights Faxes, One at a Time*, Los Angeles Daily J. (June 6, 2005) (reproduced at Exhibit pp. 4-5).

Mr. Herships would like the Commission to look into this situation. Based on the information we have thus far, however, the staff **is not convinced that there is a need for the Commission to get involved**. Both the Legislature and Congress have recently worked on junk fax legislation. We have not seen enough evidence to be confident that the current approach is problematic from a policy standpoint. Assuming there is a problem, it could be addressed by those who are already active in the area.

## Statutory Drafting Technique

Attorney James Eschen suggests that the Commission “propose to the Legislature a statute under which the Commission gets its pay docked every time that it proposes a law containing the passive voice.” Exhibit p. 20. As an example of poor drafting, he points to Code of Civil Procedure Section 418.11, explaining how it could be made more clear by using the active voice. *Id.*

Fortunately, the Commission was not involved in drafting Section 418.11. Mr. Eschen has informed the staff that he is not that interested in Section 418.11 itself; dealing with the statute just prompted his correspondence. What he is interested in is “the frequency with which statutes (as well as contracts and opinions) use the passive voice, sacrificing clarity for wordiness.” Email from J. Eschen to B. Gaal (April 8, 2005).

The Commission should **bear this concern regarding use of the passive voice in mind as it engages in statutory drafting.** We would also **add Section 418.11 to the list of technical issues that may be appropriate for the Commission to examine pursuant to Government Code Section 8298.**

## SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during the remainder of 2005 and for 2006. Completion of prospective recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters that the Legislature has indicated should receive a priority and other matters that 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, because 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 2006

The following proposals are already pending in the Legislature and will require staff attention during 2006:

- Ownership of Amounts Withdrawn From Joint Account (AB 69 (Harman))
- Waiver of Privilege By Disclosure (AB 1133 (Harman))

- CID Ombudsperson Pilot Project (AB 770 (Mullin); SB 551 (Lowenthal))
- Financial Privacy (SB 1104 (Committee on Banking, Finance & Insurance))

The Commission has also finalized a recommendation on *Emergency Rulemaking Under the Administrative Procedure Act*. The staff will investigate whether 2006 would be an opportune time to introduce that proposal.

Active topics on which the Commission might be able to finalize a recommendation in time for introduction in 2006 include:

- Civil Discovery
- Enforcement of Judgments Under the Family Code
- Equitable Relief in a Limited Civil Case
- Oral Argument in Civil Procedure
- Statute of Limitations for Legal Malpractice

### **The Legislature's Priorities**

The Legislature has indicated several priority matters for the Commission:

#### *Mechanics Lien Law*

The Assembly Judiciary Committee requested in 1999 that the Commission give priority to the study of mechanics lien law. The Commission has devoted considerable resources to that topic since then, but much of its work was on the double liability problem, which ultimately proved politically intractable. The Commission's work on an overhaul of the mechanics lien law is now well underway and should continue to receive high priority.

#### *No Contest Clause*

Although SCR 42 (Campbell) does not set a statutory deadline for the Commission's work on no contest clauses, it is safe to presume that the Legislature expects the Commission to promptly begin work on the matter. The Commission should activate this study right away; the staff has already done some background work on the issues.

#### *Real Property "Transfer on Death" Deed*

If the Governor signs AB 12 (De Vore), the Commission's report on real property "transfer on death" deeds would be due by January 1, 2007. Obviously, the Commission would have to make this a high priority matter to meet that

deadline. If the Governor vetoes the bill, the Commission will need to discuss the situation.

#### *Trial Court Restructuring*

The original deadline for the Commission's report on trial court restructuring was January 1, 2002. That deadline was removed after the Commission submitted a major legislative proposal on the topic and requested authority to continue to do cleanup work in the area. Although the statute directing the Commission's study no longer includes a deadline, we can infer from the original deadline that the Legislature expects the Commission to promptly address issues relating to trial court restructuring once they are ripe for action. The Commission should reactivate this study as a priority matter.

#### **Consultant Studies**

For three of its currently active studies, the Commission has the benefit of a background study prepared by a consultant (the Commission also has Prof. Méndez's background study on the Evidence Code, but that project is on hold):

#### *Common Interest Development Law*

This is a very large project. Prof. Susan French of UCLA Law School prepared a background study for the Commission. The Commission has barely begun to tackle the hundreds of problems that have been identified with the Davis-Stirling Act.

#### *Discovery Improvements From Other Jurisdictions*

The Commission has made progress on civil discovery, but it has gotten many suggestions from interested persons that it has not yet considered. Prof. Weber's background study covers numerous issues. Although the Commission made preliminary decisions regarding which issues to pursue, it has not yet addressed most of the ones it selected.

#### *Arbitration Improvements From Other Jurisdictions*

It is not yet clear how substantial this project will be. We should know better after the staff convenes the requested half-day stakeholder meeting and reports back to the Commission.

## Other Activated Topics

Apart from the 2006 legislative program, legislatively set priorities, and active projects on which the Commission has received consultant studies, the Commission has also commenced work on attorney's fees, which it had to interrupt when other projects became more pressing. The Commission should turn back to that work if time permits.

## CONCLUSION

The Commission's agenda continues to be very full. If it just sticks with already activated projects and legislative priorities, it will have more than enough to do in the coming year.

The only other projects the staff recommends for this year are:

- The narrow procedural concern relating to Code of Civil Procedure Section 1260.040, the relatively new eminent domain provision drafted by the Commission.
- As a low priority matter, the technical issues identified by the staff that the Commission could investigate pursuant to its statutory authority to correct technical and minor substantive defects (Gov't Code § 8298). This might be a good project for our new attorney.
- Perhaps also the narrow issue relating to Probate Code Section 16340, which was drafted by the Commission. It might make sense to look into this issue on a low priority basis while the Commission is actively working on the legislatively mandated study of no contest clauses (and possibly also the study of real property "transfer on death" deeds). Alternatively, the State Bar Trusts and Estates Section might have some interest in the issue.

Besides these projects, the staff simply recommends following the traditional scheme of Commission priorities: (1) matters for the 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. If the Commission decides to take this approach, no changes in the currently pending resolution regarding the Commission's Calendar of Topics (SCR 15 (Morrow)) would be necessary.

Respectfully submitted,

Barbara Gaal  
Staff Counsel

Exhibit

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## 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. See also SCR 15 (Morrow), which is pending in the Assembly.

**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.

## Executive Fights Faxes, One at a Time

By Craig Anderson  
Daily Journal Staff Writer

SAN JOSE — Silicon Valley entrepreneur Steve Kirsch got angry four years ago when he kept getting unsolicited faxes. He's been trying to get even ever since.

Kirsch, the chief executive officer of a technology company, took on the biggest fish in the mass-faxing industry when he filed a \$2.2 trillion — with a T — class action two years ago against Fax.com.

Although Fax.com is now defunct following a series of fines and sanctions by state and federal authorities, Kirsch continues to pursue his suit in U.S. District Court.

In fact, Kirsch and another employee of his company, Propel Software, have expanded their battle against "junk faxes" to another front, suing companies in small-claims court for each single unsolicited fax they send. And the successful strategy has defendants' attorneys crying foul.

"I think there will be a judge who agrees this is unlawful splitting of causes of action," said Costa Mesa attorney Terri Breer, who has represented several companies sued for sending commercial faxes. "We don't need these vigilantes taking advantage of a consumer law."

Kirsch and his allies are suing under the Telephone Consumer Protection Act, a 1991 federal law that makes it illegal to send faxes to people without their consent. The law is routinely ignored, a fact that galls Kirsch.

"It was something that bothered me, and nobody was doing anything about it," he said.

Kirsch started a Web site, junkfax.org, which explains the law and how to sue senders of junk faxes for as much as \$2,500 per fax in California.

Taking the lead, Kirsch and his Propel Software employee, Jimmy Sutton, have filed a hundred cases in Santa Clara small-claims court during the last two years, alleging Telephone Consumer Protection Act violations and winning big awards.

The jurisdictional limit in small-claims court is \$5,000, but Kirsch has gotten around that limitation by persuading judges and commissioners to allow him to file claims based on each fax received.

Last fall, Kirsch won a \$42,260 award from the Bay Area company First Chartered Investments Inc., which had sent 16 faxes pitching mortgage broker-

On his Web site, Kirsch reports that the judgment followed a 10-minute hearing. The company's representative, Katrina Hartwell, appealed the award all the way to the U.S. Supreme Court, but the high court refused to hear it.

More recently, Propel Software won \$35,000 from Global QA, an Oxnard-based consulting firm that sent 11 unsolicited faxes.

San Jose attorney Paul Avilla of McPharlin Sprinkles & Thomas is appealing the small-claims judgment, asking Santa Clara Superior Court Judge James Kleinberg to order Propel and its agent, Sutton, to sue in Superior Court — where the defendant can be represented by an attorney and is entitled to discovery — or waive all but \$5,000 of Propel's claim.

A hearing on the matter is set for June 22. *Propel Software v. Global QA Corp.*, 2-04-SC-001397 (Santa Clara Super. Ct.).

"When you get up to this dollar amount, I think the defendants are entitled to have discovery and even the playing field," Avilla said.

If a plaintiff files cases in small-claims court, with its "abbreviated, informal procedures, you have to take with it the limitations on the amount you can recover," he said.

Thus far, Kirsch and Sutton are winning the legal argument. Courts that have considered the small-claims cases have agreed that, under the law, plaintiffs are allowed to win judgments in the tens of thousands of dollars.

In the appeal of Sutton's case against First Financial, Santa Clara Superior Court Judge Robert A. Baines ruled in October that each violation of the Telephone Consumer Protection Act "constitutes a separate and distinct statutory violation, and that an aggrieved consumer can sue separately ... for each such alleged violation."

As such, plaintiff Sutton may file each of his statutory actions separately [as he already has done], and he may have each heard separately without violating the prohibition on splitting claims in Small Claims Court," he ruled.

Baines added, "Nothing in this ruling, however, prevents the Small Claims Court from scheduling more than one of plaintiff's cases for hearing on the same calendar." *Sutton v. First Chartered Financial*, 4-03-SC-003174 (Santa Clara Super. Ct., October 2004).

In court papers supporting his appeal for Global QA, Avilla cites the 1982 case of

*Lekse v. Municipal Court*, 138 Cal.App.3d 188 (1982), in which the 2nd District Court of Appeal considered how much money landlords could collect from tenants whom they had sued for four months of back rent.

The landlords tried to get around the jurisdictional limit in small-claims court, then \$750, by filing separate claims for \$750 each.

The court ruled against the landlords, saying "small claims court processes cannot be used to enable certain plaintiffs to bring multiple lawsuits where only one cause of action is stated within the jurisdictional limits of the court."

Avilla argues that the situation is the same in the case of junk faxes and that plaintiffs must abide by the same jurisdictional limit when filing multiple, identical claims against the same defendant.

Sutton said the *Lekse* case is not applicable.

The landlords' case "was held to be single cause of action," he said.

"These [fax] cases were held to be multiple causes of action," Sutton said.

Kirsch argues that suing in small-claims court makes sense because it allows nonattorneys to take direct action against a junk fax company without having to hire a lawyer and fight an expensive legal battle.

Further, Kirsch argues, defendants who lose in small-claims court can appeal their cases to Superior Court for a court trial.

Kirsch said that gives the defendants an advantage because they have two chances to win.

But attorneys for the companies that send faxes contend the tactic is unfair because Kirsch and others may be "senior professional plaintiffs" who have an unfair advantage against fax company employees who do not know the law.

Kirsch is unsympathetic. He said that he doesn't abuse his knowledge of the system and that getting rich is not the idea.

The point, Kirsch said, is that when companies send junk faxes, those companies steal from their recipients, costing them toner, ink and wear on equipment. He said he focuses his action against repeat offenders.

"I try not to waste my time on dentists," he said.

continued →

Attorneys for junk fax companies “are looking to the court system to protect evil doers, and the court system doesn’t protect evildoers,” Kirsch said.

Breer said she believes the courts eventually will decide to crack down on what she considers an abuse of the small-claims system.

“It’s making an absurdity out of the regulation,” she said.

But Breer admitted that she has not been successful raising the argument in court. She said the law itself is flawed because it exposes the commercial fax industry to liability while ignoring equally annoying practices such as junk mail.

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California Law Review Commission:

In a prior publication of the Commission (Memorandum 2000-7: Duties Where Settlor of Revocable Trust is Incompetent), the Law Review Commission commented on the rights of beneficiaries in revocable trust situations. To my knowledge, the Commission did not end up making any tentative recommendations subsequently on this topic. This circumstance is unique, since only one situation can lead to beneficiaries of revocable trusts having any rights at all, namely the incapacity of the trustor, without a conservator in place or a suitably enabled attorney-in-fact in place. Most family trusts provide that the trust becomes irrevocable on the death of the trustor. Also, many trusts have incompetency provisions: the trustor has chosen to be subject to being declared incompetent and to be replaced as trustee without his or her consent, judged by two doctors (typically) declaring trustor unable to act.

It is clear by §15800 (and §16064), that upon incompetence of the trustor, the trustee would have reporting duties to the beneficiaries. The only California case dealing with this is the Kotyck case. It held that since a conservator was in place, and was capable (with a court) of revoking the trust, there was no reporting duty of trustee to beneficiaries. Rather the trustee's reporting duty was to the conservator.

A further analysis of Kotyck v. Johnson reveals that the plaintiff made the incorrect argument that the trust became irrevocable upon the incompetence of the trustor. The court rightly observed that had the conservator not been in place, this argument also had its problems for the court, since the trust specifically held that it was to become irrevocable upon the death of trustor. That argument was never explored further in the opinion, since a conservator was in place able to revoke. Had the court explored further, the court would have found further difficulty in trying to apply the duties prescribed under §16061.7, the code dealing with duties of trustees in irrevocable trust situations. Trying to apply these in the incompetency situation quickly leads one to conclude that the wording in §16061.7 presumes the normal situation, that the trustor is deceased, and that it is not meant to cover while the trustor is still alive, even if incompetent. So because the trust provisions normally define irrevocability as occurring at death, and because the code provisions for irrevocable trusts are incompatible with duties in an incompetency situation, it would appear initially that the duty clearly created by §§15800 and 16064 cannot be implemented (as the Kotyck court seemed to imply had there been no conservator).

In fact, what the plaintiff in the Kotyck case, and the Kotyck court itself did not seem to see, was that when a trustor becomes incompetent, the trust does not become irrevocable.

It remains revocable, but without any person in place able to revoke. If a conservator is later appointed, or if the trustor regains competence, the trust could be revoked. The mere absence of the trustor or any surrogate to the trustor does not render the trust itself irrevocable. This is not, as it might first appear, a distinction without a difference. This scheme thereby uses different code provisions (§16060) to implement the duty of §15800, and can have no reference to §16061.7. The fact that §16060 must apply is not obvious in the code, partly because §16060 gives no specific duties for revocable trusts as does §16061.7 for irrevocable trusts. In fact though §16060 has to apply, else the code would be internally inconsistent by establishing a duty to beneficiaries via §15800 with no method of effecting that result. The lack of specifics in §16060 is probably because the situation arose infrequently in the past, but the code provision is sufficiently broad to be able to enforce the reporting duty of §§15800 and 16064. Its lack of specificity is also probably the reason that plaintiffs and the courts would instinctively gravitate to §16061.7, with its specificity as to duty, only to find problems with having to make the trust irrevocable in order to use its provisions. One can also appreciate the logic, mistaken though it may be, that since no one is in place able to revoke, it is tempting to label the trust itself “irrevocable”, or “temporarily irrevocable”.

Although the code as it stands supports the conclusion that upon incompetence of trustor, a duty of reporting is owed to the beneficiary, the code is certainly not explicit enough in stating that the trust is still revocable while the trustor is incompetent, and thereby must use §16060 as the code section implementing the incompetency provisions of §15800. The confusion on this point in the Kotyck case is instructive. (Indeed there are only two references found that overtly state that the trust is revocable during trustor's incompetence. One is the Commission's above-mentioned memorandum 2000-7, whose very title is “Duties where settlor of revocable trust is incompetent.” So what the commission readily understands as a basic, the courts are missing. The other reference is mentioned obliquely in the Uniform Trust Code, in a sentence juxtaposing the two facts: “When the trust is revocable and the trustor is incompetent,.....” There is to my knowledge no such overt reference in California code or case law.

The other issue is the effect of Part 17 of the Probate code. (§§810-813), defining legal mental competence. This Part by operation of §811(e) is only to be applied to judicial proceedings to determine incompetence, typically proceedings with a view to appointing a conservator. Yet typically a trust has its own incompetency provision (authored of course by the trustor), in which the trustor sets up a non-judicial method for having himself declared incompetent. This method is utilized precisely to avoid the expense of a judicial determination, and the expense of a conservator. This is typically two doctors declaring the person unable to act. The doctors are not just making the diagnosis, as they would in a judicial determination, but also the actual conclusion of incompetence based on those diagnoses, as authorized by the trust provisions. Although there is a legal presumption that trustor is competent, does the trustor's chosen trust method, if utilized, defeat that presumption. One would think so, for two reasons: first, Part 17 is precluded by operation of §811(e) from application to this trust (non-judicial) method of declaring incompetence, and secondly, since the trustor's trust provisions, unless unlawful, should be given full effect, trustor's method of having himself declared incompetent should be

honored by the courts. In any event, the presumption is for the protection of the trustor, and if the trustor while competent is the author of the method of declaring himself incompetent, the courts should not frustrate trustor's clear intent.

I am acquainted with these issues, because I was the plaintiff in a case where I was a beneficiary, the trustor was declared incompetent by operation of the trust provisions, no conservator was appointed, and the trustee, now having a reporting duty to me, did not do so. There were essential facts I needed to know from the trustee which I did not find out in a timely manner because there was no reporting, and I suffered financial damages. This was the situation the Kotyck court mentioned, but did not have to resolve because of the presence of a conservator. Both the trial and the appellate court in my case agreed with Kotyck that the trust could not become irrevocable when the trustor became incompetent, because of the terms of the trust. They did not however reach the necessary corollary conclusion that to enforce the clear duty of §15800, they would have to identify the code provision that would implement the §15800 duty when the trust remained revocable, that code provision being §16060.

But they essentially went on to decide the case by applying Part 17 provisions to this non-judicial trust determination of incompetence, provided for by the trustor herself, contrary of course to the provisions of §811(e). In effect, the appellate court held that a judicial determination would always be necessary to apply §15800 duties to a beneficiary in an incompetency situation. The majority of family trusts put in an incompetency provision, seeking to substitute a trust process to effect the same result as the more expensive judicial process, and avoiding the expense of conservatorship. The court's logic in my case would invalidate this process, and produce a trustee who for years or possibly even decades, would not actually be responsible to anyone, not the courts, not the trustor, and not even the beneficiaries, since the courts logic would negate any duty to the beneficiaries. This is the very result I believe was trying to be avoided by the incompetency provision of §15800. It would seem the legislature felt that any privacy considerations of the trustor were clearly outweighed by the unacceptable situation of a trustee having control over trust assets without any accountability or oversight for an indeterminate period of time. There is of course no published case on this issue, but certainly some direction in the code should be available to the courts.

The author of Memorandum 2000-7 was surprised by the paucity of cases on an issue such as this. I would submit that when the law is somewhat opaque, there may be many cases like the one in which I was involved. The court may be vaguely uncomfortable with its legal reasoning, and the case is deemed not for publication and scrutiny. The case I was party to, for instance, was not published. Chances of the California Supreme Court taking these cases would seem to be remote, so I suspect cases are being decided incorrectly, or at least these issues are being incorrectly viewed, in many more instances than the recorded appellate decisions would indicate.

The code needs clarification, as two things appear not at all clear to the courts:

:

1. The trust of an incompetent trustor, without a surrogate present, is revocable at all times until trustor's death (or whenever the trust specifies irrevocability occurs), and §16060, not §16061.7 implements the duties of §15800. The Kotyck Court, and the trial and appellate court I dealt with, both assumed the trust needed to become irrevocable in order to define trustee's duty under §16061.7, but both had a problem with doing that because of the terms of the trust. Neither recognized that the trust was in fact still revocable, nor did they recognize the necessary applicability of §16060 to implement the duty, since no appellate case has made that clear. Certainly §16060 would be helped if it specifically mentioned that it applies to revocable trusts in an incompetency situation, or §15800 could specifically refer to §16060 as applying when trustor was incompetent. A third possibility would be to actually specify the duties of trustee under §16060 in a revocable trust situation, just as §16061.7 does for irrevocable trusts.
2. A trust determination of incompetence of trustor is to be honored since it was approved by the trustor, and Part 17 (§§810-813) provisions do not apply to these determinations, as provided by §811 (e), which limits Part 17's purview to judicial determinations of incompetence only.

In summary, California surprisingly has yet to have a published appellate decision affirming the duty of trustee to beneficiaries in an incompetency situation. That duty itself could not be more clear, by operation of §15800. Yet litigants may not press their rights, and if they do, courts may not interpret the code correctly, because the code itself does not make clear the revocability status of the trust, nor the correct code provisions that implement the duty defined in §15800. Changes recommended here are not substantive changes, but rather clarification of existing law. As regards incompetency provisions of revocable trusts, there is no provision in the code, nor case law that speaks to whether these are to be respected by the courts, and whether indeed a Part 17 judicial determination is the only one a court can accept to determine trustor's competence. But by the exposition above regarding this issue, that conclusion is poorly reasoned, and frustrates both the intent of §15800, and the intent of the trustor.

I would appreciate knowing whether there is currently any work being conducted presently by the commission on these issues.

Sincerely,

John P. Beauclair

## COMMENTS OF RICHARD BESSE

Feedback form submitted by Richard D. Besse on the CLRC website:

Date: August 25, 2005

Subject: suspension of drivers licenses (child support).

emailaddress: <mreatherright@yahoo.com>

Message: California family court code clearly states that:

Once an agreement has been made regarding child support, any and all state licenses are to be released.

I am sure that I am not the only person who has run into this same problem, but after I agreed to pay child support, my driver's license was not released in a timely manner.

It took a lot of phone calls to the family court in Los Angeles, and seven (7) months to get my driver's license reinstated. However, in that seven (7) month period I lost my career, so I was unable to pay the child support that I had agreed to.

When I did get my driver's license reinstated, it was suspended again for failure to pay child support. After two (2) months.

I am currently unable to work in either of my previously chosen professions, as they all require a driver's license.

So what I am proposing, is that there should be a mandatory delay of license suspension of a period of three (3) to six (6) months after child support is ordered, and a notice to the non-custodial parent sent by certified letter informing them of the impending suspension.

This will in no way detract from the amount of which is owed, nor will it negate the support ordered for the aforementioned three (3) to six (6) months.

Also the courts should be (required) to release any and all state licenses once an agreement of support has been reached.

These provisions will give those of us who do care for our children a chance to pay our fair share and not wrongfully punished.

AUG 15 2005

File: \_\_\_\_\_  
I am writing to express concerns regarding the application and jurisdiction of the family courts of child support guidelines and to encourage restructuring of current procedures and codes as they are causing unjust hardships that have a huge impact on a specific group, or class, of California's families and the exploitation of the children in them. What I need is your assistance and advise regarding the best way to get the attention this matter deserves from the entities empowered and responsible for making, changing, and abolishing the laws, rulings, procedure, codes, and other enactments, as their consideration of this matter is needed to prevent further denigration of families and the subtle persecution of children.

At some point it was determined that the jurisdictional scope of the family law courts would be expanded to include the non-custodial, biological parents of children placed in foster care and guardianship when ruling over child support cases. This first came to my attention beginning in the year 2000. I believe this was part of a pilot program in Placer County, under the guise of Children Welfare Reform.

The children for whom these child support matters are brought are not benefiting from the child support- the main reason behind the establishment of procedures for obtaining said child support was to ensure that any children in a family would be provided for financially so they would have the necessities of food, clothing, and housing but also have a resource available for providing quality living standards.

By including non-custodial, biological parents, when there are children in foster care and guardianship as well as in the home with the parent, to be within the jurisdiction of the courts for the purpose of ordering payment of child support is a dis-service to this group of family households. It is hard to comprehend how rules and codes established for the benefit and protection of children accomplishes the exact opposite and are arbitrary in upholding justice, while no one seems to care or is aware of the impact. A procedure that is assumed to benefit children should somehow be able to show this 'benefit' to children and not provide additional funding for inter-agency programs especially when it is to the detriment of a child. The current procedures are exploiting children, using them as an excuse to continue funding programs claiming welfare reform and state debt as being the motivating force. Consequently circumstances are being re-created that may result in a parent's inability to provide properly for children who remain in the home; if this results in agency intervention, then on the grounds of the family having a previous involvement, commonly referred to as a 'History', the result is permanent placement out of the home for these other children- guilt is automatic. In addition, less effort is made in catching absent parents who have just decided they had better things to do

than take care of a child because the parent who still has an interest and lives to see their children are easy prey-they aren't going to run and hide.

Below are enumerated concerns that the current child support codes and procedures pertaining to non-custodial, biological parents who support 1 or more children in the home and upon whom child support has been ordered for 1 or more children detained out of the home have raised. This list is by no means exhaustive and does not intend to include situations of voluntary placement of children out of home.

**Issue #1 – How is it that parents whom the courts have determined unable to be responsible for their children in one court find themselves suddenly financially responsible in another court?** By what rule has it been determined that non-custodial biological parents of children detained by the state are responsible for the support of these children. Prior to 2000 this was not a procedure that was implemented. When one parent asked this of the District Atty Dept of Child Support their response was to refer client to FC 3900 which states, 'the father and mother of a minor child have an equal responsibility for the support of their child', as being the source of their authority.

What about FC 17000 (i), "'Parent'" means the natural or adoptive father or mother of dependent child, and includes any person who has an enforceable obligation to support a dependent child.' And FC 4050, "'Child support obligee' ..means either the parent, guardian, or other persons..'; and, WIC 11400 (k), "Placement and care" refers to the responsibility for the welfare of a child vested in an agency or organization by virtue of the agency or organization having (1) been delegated care, custody, and control of a child by the juvenile court, ...(3) taken the responsibility of supervising a child detained by the juvenile court pursuant to Section 319 or 636, or (4) signed a voluntary placement agreement for the child's placement; or to the responsibility designated to an individual by virtue of his or her being appointed the child's legal guardian.'

These codes can be interpreted to mean that when the child is removed from the care of their biological parents then responsibility for said child is assumed by outside entities, the guardians or the state through CPS. You cannot even locate any codes nor guidelines for child protective services cases. All the codes and guidelines and self-help available are dependent upon certain variables being present (separation or divorce proceedings, absent parent, etc.) these variables which may be relevant to those family law cases and child support guidelines are not however relevant in matters involving foster care and guardianship families. **There is a gradual persecution of at least one subgroup in the larger group of families and that is the single-parent households of previously dysfunctional families who are trying to**

**provide a good-lifestyle for their children who remain in the home while paying child support for children in foster care or guardianship.** This brings us to the next issue...

**Issue #2- unfair advantage to a single parent who completely changes the course their life was on; learning new skills and ways of living while also providing all the things necessary for her children in the home is given the added burden of paying child support, throw into the pot an economy where the rising costs of living are not equal to the average wages offered and you have a recipe for disaster.** FC 4053 states that in implementing the guideline (d) Each parent should pay for the support of the children according to his or her ability. (a) states a parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life. Yet the calculations used to determine child support amount take none of the above into consideration. What constitutes "ability to pay" and "according to the parent's circumstances in life" when the party involved is recovering from a previously dysfunctional lifestyle and possesses limited skills and resources. And how is FC 4071 a (2) factored in? This code states the hardship includes inability to meet the minimum basic living expenses of children in the home. Too many single parents are being forced to take in roommates in order to provide shelter, yet, having roommates in a home with children is not inductive to protecting a child, a parent might as well tell the children it is ok to talk to and take a ride with strangers, for it amounts to the same thing the introduction of an unknown entity that affects the safety of the children and causes CPS to raise their figurative eyebrows. This brings us to the next issue.

**Issue #3 FC 4053 (e) the guideline seeks to place the interests of children as the state's top priority.** Does this mean all children or just a select few? Who determines "the best interests of the children"? How does the child in foster care and/or guardianship for whom support is paid by a non-custodial parent benefit by this payment? How are they deprived if parent pays nothing? How does the child support payment made affect the children still in the home...or is their 'best interests' of no immediate concern? *The foster parents and guardians will receive their monthly amount plus services for the children in their care whether child support is paid or not, therefore, payments affect the children in placement not at all.* **It does however greatly affect the quality of life of the children still in the home.**

By having to pay child support one parent is unable to petition the courts to bring home at least one of her children in guardianship because she can't afford a place with adequate bedroom space. Another parent shares a room with a 7 and 8 year old because the 2<sup>nd</sup> bedroom belongs

to a roommate. This parent can't even afford a place big enough for immediate family needs. A comparison of the quality of life for children in placement vs children remaining in the home here is a prime example of a misallocation of monies and 'best interest's of the children'.

How is "in the best interests of the children" being met here?

**Issue #4 – Current guidelines use percentage of visitation to offset the total amount of child support.** What benefit is there in applying the amount of time spent with children, as in visitation, in the calculation to lower the amount of child support when visitation is arbitrary, out of the control of and without any consideration of the wants of the child and parent? The courts do not even have any influence to enforce court ordered visitation over foster parents who have blatantly disregarded the court's directives.

How is using the amount of visitation guideline to offset child support amount in the interest of the child, the parent, or of justice?

**Issue #5 – Medical coverage, parents are being forced to provide medical via the guidelines yet under the regulations of the agency responsible for the removal of the children makes the state responsible for the support and well being of child(ren), including the provision of medical.**

Low-income parents cannot even provide low-cost medical for children because the children retain the Medi-Cal required by the state to provide.

One parent went into debt when employer medical benefits were assigned for her out of home children only to discover after the financial ruin that one of the children already had coverage through his guardians (don't these people ever communicate). A parent provided medical for her children in the home through Healthy Families, established for low-income households, however, her application to add other children was denied because they had Medi-Cal, which the state is required to carry for the children who have been made its dependents; hence, Medi-Cal cannot be discontinued for these children by means of their current status. While the court later determined that this particular parent did not have to provide medical at this time, financial hardship of almost \$9,000 in debt for non-custodial parent had been already accrued. You can envision the impact of this on the quality of life for the in-home children.

**Issue #6 While taking the focus OFF the collection of child support from absent parents the scales of justice have been tilted in favor of the system. If the DA's office put similar effort into locating absent fathers enforcing them to become employed in order to pay, then there would be less need to persecute a minority group that are easy pray simply because these parents want to or hope to have some contact with their child(ren) who are out of the home thus making the enforcement of child support payments from these non-custodial parents an effortless task.**

One such instance is in a single parent of 5 children of which there are 4 fathers all of who are not involved in children's lives. She had been receiving welfare for 18+ years cooperating with the child support department in an effort to enforce payment of child support from the fathers, even informing welfare of a large inheritance one parent was to receive; yet, it took the children becoming dependants of the court, hence wards of the state, before any enforcement which resulted in the collection of monies occurred. And, not only did 3 out 4 fathers suddenly get found and miraculously began paying; but also, right along with them, the previous custodial parent is also charged child support. All this is fine and dandy except, 2 of these 5 children are still in the care of the single parent and are any efforts being made to encourage that father to pay child support?

Of course not, there is no reason to, since the fathers of the children who are detained are paying. Three out of four is not bad, plus the mom is paying. Besides, there is nothing to gain by enforcing payment from this dad, any money actually collected would go to the other parent anyway. Seems that as long as some quota has been achieved all is good.

Interestingly, now that child support is being paid, there is still no benefit regarding the children for whom support is collected, their status has not improved but there is a substantial affect on the children who remained in the one parent's home. This may be the answer to the previous question of whether the 'best interests of the all the children' or just some are being met.

**Issue #7 How can one court rule that a parent is unable to be responsible for the child(ren) and find it is justified in removing the child(ren) with this responsibility out of home and yet another court operating on a different set of guidelines rule that parents are responsible and on this basis they must be accountable and made to provide for child.** The court have taken away the parent's rights (maybe not completely as in adoption but show me what rights these parents can exercise successfully) and the state becomes responsible for the care of the child(ren) while another court steps in and says well you

have conditional responsibility? As if the state were leasing the child(ren) for an amount payable each month.

**Issue #8 Being granted the right of guardian over dependents of the state; one of the sweetest deals around.** When agreeing to take on the role as guardian of a child, the person(s) are claiming to be able and willing to take on all the responsibilities that birth parents have towards a child, to provide for the welfare and care of the child, including financial responsibility. Prospective guardians are declaring that they have the necessary resources available for providing for the child(ren) and are willing to use these resources for the benefit of the child(ren) and, most importantly, that they do not require county assistance. Thus, the court can end child(dren)'s dependency and social service's involvement goes to a minimum of 1 or 2 visits annually. Here is the frosting on the cake, the guardians know this is just red tape and they will still receive money and services, the only difference being that now they have more control over the child and do not need to worry about adhering to any rules or requirements of social services or the court.

This is also where the visitation clause in child support calculation is not in the interests of justice much less that of the child. Some guardians want all ties to a biological family severed and proceed to do just that.

Why the hypocritical pledge to gain guardianship? And per the codes cited previously in Issue #1 are these then NOT the same as the "guardians" mentioned by them? If not, then there must be codes specifically relating to some set of conditional responsibility towards a child by the guardian referred to here.. Where can these be found, because I'd really like clarification on the difference between being responsible for raising a child and being responsible for raising a child.

#### **Need for Further Consideration:**

Is the state in such financial debt that we are willing to sacrifice our young—suffer the children? How could a ruling or decision to make biological non-custodial parents with children both in and out of state dependency be implemented without establishing appropriate guidelines geared towards this particular group? The guidelines that are being used to determine child support in these cases is grossly unfair and do not show any interest in the true welfare of the children they are providing for. The benefits do not go towards enhancing the children or their quality of life. In fact they reek of injustice. The inclusion of this select group of families in the enforcement of child support is providing a dis-service to all families and children and to the community. It is an

abusive use of power. What about guidelines that will protect and have the best interests of all the children as the focus?

*Why has the protection of children become a money making venture? Children are not commodities.*

The conditions resulting in the use of the current child support guidelines and procedures create genuine hardship in a child's home making a mockery of the principles behind having established all the provisions and agencies for the purposeful intention of protecting and assisting the rights of children.

If continued, the status will not improve for these families; and, no matter how well the parents are functioning as contributing members of the community the scales are already significantly tipped against this group of families.

It makes more sense to leave them alone to let them raise and provide for their remaining children. "What" gainful purpose is there in placing more obstacles into their path? If you wanted them to fail then you should have just left them alone in the first place.

How do the current codes and procedures justify keeping these families in a perpetual "at risk " state, ensuring a continued quality of living in a sub-standard, near poverty, level life-style. How are either the children in or out of the home be benefiting? Foster homes will get their money as will guardians, so, whether child support is paid or not, these children are not affected. However, the children remaining in the home have less, struggle day to day, and have an increase potential for wrong doing or becoming victims of evil-doers. So, who is benefiting?

Let's be realistic here: If there are grounds for county involvement there are generally some issue within the family that required intervention in order to assist the family members in learning new ways of functioning within the structures of society. The families are parented by persons who have had poor role models, bad experiences, possess less chance for earning an income that will allow them to afford an appropriate life style than the more general populace. If they can pull themselves out of their dysfunction, is it really in the interest of justice to keep kicking them down by making life harder. In an economy that offers so many challenges it makes little sense to continue on in this manner.

How long do you think the rewards will last before prior life-styles start looking good again?

In conclusion, assistance in amending or revoking the procedures of placing biological non-custodial parents of children who are in foster care and guardianship, primarily when there are children both in and out of the home is greatly appreciated. I look forward to hearing from you soon.

\* \* \*

The terminology used in this letter may not be that which persons familiar with the subject would use, however, the meaning and intent is clear. My use of the word "agency" refers to the collaborative efforts of the multi-departmental offices of the Health & Human Welfare Services including Children's Protective Service, the Office of the District Attorney for Child Support, and their entire sub-sectors and partner agencies.

This letter and the issue presented are not about child support cases involving absent parents or divorcing parents.

I do not know why the inclusion of non-custodial biological parents of children who are wards of the state was implemented, what the benefits were to be, how the proposal was presented, nor do I know what the arguments for or against were. What I do know is, and I am reasonably sure **this** was not in any manner presented as part of the proposal, how this already handicapped group of families is having to struggle that much harder.

Regards,

CE ([cemery@firstam.com](mailto:cemery@firstam.com) ; 156 Nevada Ave; Roseville Ca 95678)

Cc:

Ombudsman Office  
Governor Schwarzenegger  
Representative John Doolittle  
Cal. Law Revision Commission  
Senator Dave Cox  
Assemblyman Tim Leslie  
ACLU Northern Cal

## **COMMENTS OF TONY DEREGO**

From: tderego@sacsheriff.com

Date: August 18, 2005

To: bgaal@clrc.ca.gov

Per our conversation. When available, please review vehicle code section 5200 a & b. I believe this code section is contradictory.

Thank you,

Tony DeRego

### **VEHICLE CODE SECTION 5200**

5200. (a) When two license plates are issued by the department for use upon a vehicle, they shall be attached to the vehicle for which they were issued, one in the front and the other in the rear.

(b) When only one license plate is issued for use upon a vehicle, it shall be attached to the rear thereof, unless the license plate is issued for use upon a truck tractor, in which case the license plate shall be displayed in accordance with Section 4850.5.

## COMMENTS OF JAMES ESCHEN

From: James C. Eschen <eschenlaw@cruzio.com>  
Subject: Proposal for review  
Date: March 23, 2005  
To: Barbara Gaal <bgaal@clrc.ca.gov>

I would like to suggest that the Law Revision Commission propose to the Legislature a statute under which the Commission gets its pay docked every time that it proposes a law containing the passive voice.

For example, Code of Civil Procedure section 418.11 states:

An appearance at a hearing at which ex parte relief is sought, or an appearance at a hearing for which an ex parte application for a provisional remedy is made, is not a general appearance and does not constitute a waiver of the right to make a motion [to quash service of process or to stay pending action in a more convenient forum].

This statute does not make clear whether the identity of the party seeking ex parte relief makes a difference about whether the appearance constitutes a general appearance. Does a party seeking to shorten time on a motion to quash thereby make a general appearance by seeking relief? (I am not sure if the Commission itself bears responsibility for this statute). The statute would be clearer if it said, "An appearance at a hearing at which a plaintiff or a cross-complainant seeks ex parte relief. . ." or, "An appearance at a hearing at which any party seeks ex parte relief . . ." or, "An appearance at a hearing at which any other party seeks ex parte relief . . ."

James Eschen  
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Santa Cruz, CA 95060  
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October 24, 2003

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

COPY  
Law Revision Commission  
RECEIVED

OCT 27 2003

Re: Family Code section 1615

Dear Senator Kuehl:

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

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

Sheila Kuehl, Senator  
October 24, 2003  
Page 3

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 subsection (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 than adversarial encounters the focus of which is on the breakdown of the marital partnership.

Sheila Kuehl, Senator  
October 24, 2003  
Page 4

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

Garrett C. Dailey, Esq., President, Attorney's Briefcase, Inc.  
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

California Code  
CALIFORNIA FAMILY CODE  
DIVISION 4. RIGHTS AND OBLIGATIONS DURING MARRIAGE  
PART 5. MARITAL AGREEMENTS  
Chapter 2. Uniform Premarital Agreement Act  
Article 2. Premarital Agreements

§ 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.)

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September 29, 2004

Law Revision Commission  
RECEIVED

SEP 30 2004

File: 2-3-1

Barbara S. Gaal, Staff Counsel  
State of California  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: (1) Family Code Section 1516  
(2) California Law Revision Memorandum 2004-34

Dear Ms. Gaal:

Thanks for the copy of Memorandum 2004-34 which summarized the status of the Commission's assigned studies and, among other things, reported a staff recommendation (Memorandum page 19) concerning a matter brought to the Commission's attention by copy of my letter to State Senator Sheila Kuehl dated October 24, 2003. (Memorandum Exhibits 8-12) The recommendation was that the Commission not spread its resources "even more thinly" by getting involved in the problem presented.

Anyway, when I read the Memorandum in its entirety, I learned on page 7 that marital agreements were a subject the Commission had indicated as being a topic of interest. And, premarital agreements were expressly mentioned there. Would not the problem I alluded to in my letter to Senator Kuehl be a subset of the marital agreements in which the Commission has an interest? If so, would not the solution of the premarital agreement statute problem be within the interest of the Commission also? I enclose language which might be considered if the Commission agreed it was, to reduce the amount of Commission resources necessarily used to affect a revision recommendation.

One real situation already on life's stage can be found in the FindLaw article also enclosed. Ms. Spears and her husband likely will confront this issue in Court should their marriage be found valid, but later the subject of a dissolution of marriage proceeding. The financial consequences in that case would be more than substantial. This is but one example of the nest of legal difficulties that can be found in the vagueness of the statute as written.

Regards,

  
Robert J. Fulton, CFLS

RJF:sm  
Enclosures

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September 29, 2004

Law Revision Commission

SEP 30 2004

Dawn Gray, ACFLS President  
PMB 195 - 12036 Nevada City Highway  
Grass Valley, CA 95945

File

Re: Family Code section 1615

Dear Dawn:

My letter to you of December 17, 2003 asked that clarification of Family Code section 1615 language be a 2004 legislative change goal of ACFLS. I outlined at least one perceived problem and suggested revised language in letters to others; copies of some of which accompany this letter. The problems cited are serious and without doubt will have heavy future consequences for premarital agreement drafters and their clients. Prompt corrective action can avoid them entirely. In her reply to my letter to her of October 24, 2003 State Senator Sheila Kuehl clearly demonstrated her non-perjorative ignorance of the vagueness and ambiguity patent in the legislation she sponsored.

Despite a flurry of ACFLS activity concerning this matter April past, to my knowledge no ACFLS action was taken. Similarly, though I brought the situation to the attention of each of them, AAML, the State Bar, Judicial Council, Attorneys Briefcase (Garrett Daily), and the California Law Revision Commission have taken no action.

Two items caused me to think it was time to "stoke the fire".

First, California Law Revision Commission, Memorandum 2004-34, p 19, states the following:

"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

Dawn Gray, Esq.  
September 29, 2004  
Page 2

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.**" (Emphasis in original)

A copy of pertinent parts of that memorandum is included should a reader wish to see my cited letter to Senator Kuehl.

Second, FindLaw's, Monday, September 27, 2004, Joanna Grossman "Commentary" pointed out celebrity Britney Spears' real time entanglement with this statute. A copy of that article is also enclosed. Would you like to be Ms. Spears' or her PMA lawyer should this marriage be valid but later be dissolved with reliance on the agreement the subject of the article?

Enough. I have done what I know to do. My offer to Senator Kuehl to work with her staff to revise the statute was ignored. Can we get someone interested? Does anyone care?

Regards,



Robert J. Fulton

RJF:sm  
Enclosures

cc: John Staley, Esq. (AAML)  
California Law Revision Commission (Barbara Gaal, Esq.)  
Joseph J. Bell, Esq. (ACFLS Legislative Coordinator 2004)  
Garrett C. Dailey, Esq. (President, Attorneys Briefcase, Inc.)  
Nancy Perkovich, Esq., ( State Bar of California Chair, FLEXCOM)  
Edward F. Mills, Esq. ( State Bar of California , FLEXCOM)  
Jennifer Wald, Esq. ( State Bar of California, FLEXCOM)  
Kathleen Robertson, Esq, ( State Bar of California, FLEXCOM)  
Rita Patterson, Esq. ( State Bar of California, FLEXCOM)  
Joanna L. Grossman, Esq. (Professor of Law, Hofstra Law School)

9-29-2014

PROPOSED

California Code

Fam Code § 1615

CHANGES

§ 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), *unless both parties are represented by legal counsel*, it shall be ~~deemed presumed~~ 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, had not 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 *draft* agreement and advised to seek independent legal counsel and the time the agreement was signed.

(3) The party against whom enforcement is sought <sup>was</sup> ~~has not been~~ advised in writing ~~not less than seven calendar days before the agreement is signed of his or her right to rescind the agreement for up to seven calendar~~

*at least*

PROPOSED  
Fin. Code § 1615 *Case 13*

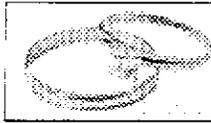
days after the date the agreement is signed but not later than the day preceding the marriage.

(4) ~~(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 his or her right to seek independent legal counsel having had adequate opportunity to do so, 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 advisement explanation of the right to independent legal counsel and the right to rescind the agreement for up to seven calendar days after the date the agreement is signed but no later than one day preceding the marriage ceremony rights and obligations relinquished shall be memorialized in writing and delivered to the party seeking enforcement prior to signing the agreement, no later than the presentation of a draft agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a ~~document~~ separate declaration that he or she timely received the advisement declaring that he or she received the information required by this paragraph and indicating who provided that information.

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

(6) ~~(5)~~ Any other factors the court deems relevant.

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



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Is Britney Spears Legally Married? And If So, Is Her Prenup Enforceable? By JOANNA GROSSMAN lawjlg@hofstra.edu

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Monday, Sep. 27, 2004

Last January, Britney Spears made headlines when, on a whim, she married her childhood friend Jason Alexander in Las Vegas. Fifty-five hours later, the two had the union annulled. Afterward, Britney told a New York Times reporter, "I do believe in the sanctity of marriage, I totally do. But I was in Vegas and it took over me."

Eight months later, Spears invited friends and family to her second wedding, to back-up dancer Kevin Federline. Prior to the ceremony, the couple apparently negotiated a prenuptial agreement. In addition, they claim they obtained, but did not file, a marriage license.

The ceremony was planned for October 16. But in the end, the couple actually took their vows on September 18. (The couple suggested the reason for the date change was that they'd been hounded mercilessly by the press.)

Later, a website - The Smoking Gun - posted what the site claimed was a contract between Britney and

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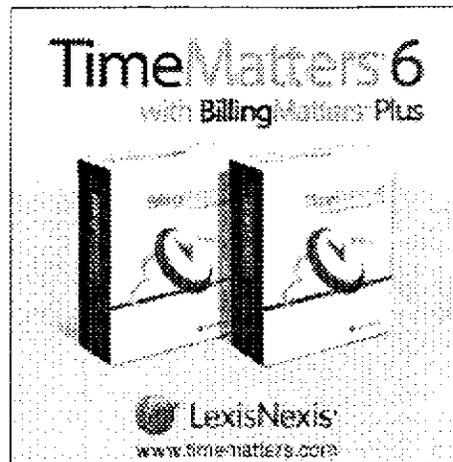
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Kevin notarized September 16, two days before the ceremony. (I will assume, for purposes of this column, that the document is genuine.) In the contract, the couple agreed they would participate in a "faux" wedding on September 18, but would not take vows as husband and wife. It also stated that they "do not intend to and shall not validly marry one another on said date."



So what, exactly, is Britney and Kevin's legal status now? Are they legally married? If so, does the prenuptial agreement apply? What difference, if any, does this "faux marriage" contract make?

### **Are Britney and Kevin Legally Married?**

To begin, let's put the "faux marriage" contract aside for a moment. Otherwise, are Britney and Kevin married? Or is it a problem if, as they claim, they had a license, but failed to file it?

The answer is that it's not a problem: In California, couples need not have previously filed their marriage license to be legally wed.

To be valid under California law, a marriage requires the consent of the parties, the issuance of a license, and - within 90 days after the license's issuance -- solemnization by an authorized official. (California does not recognize common-law marriages, which are formed in some jurisdictions when a couple declares their intent to be married but does not have their union solemnized or licensed.)

Here, the parties consented when they said "I do." They claim that a license was issued. And the ceremony to solemnize the marriage occurred. Thus, if we believe Britney and Kevin, all the requisite California steps were taken, and they are legally married.

According to the statute, after the solemnizing ceremony, the celebrant (clergy person or governmental official) is supposed to return a "Certificate of Marriage" to the state. There has been no report, here, that this was ever done. But the statute makes clear that if a "nonparty" to the marriage - such as the celebrant -- fails to satisfy the statute's requirements, the marriage will still be valid.

For all these reasons, it seems that - putting the "faux marriage

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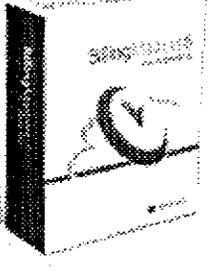
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agreement" aside - Britney and Kevin are legally married.

### **If Britney and Kevin Are Legally Married, Is Their Prenup Valid?**

If Britney and Kevin are legally married, however, their prenup may not be valid.

Ideally, a prenup must be signed before a marriage occurs - hence, the name. To be valid, every contract requires what the law calls "consideration": a thing of value, given in exchange. In a prenup, the consideration is marriage: Here, for instance, the idea would be that Britney would marry Kevin in exchange for his signing the prenup. He would sign; she would say "I do"; and the contract would be effective.

But under California law, a party cannot validly sign a prenup until seven days after he is "first presented" with it, and advised to seek independent legal advice. And it appears that here, the seven-day waiting period never occurred

Circumstantial evidence from the "faux marriage" agreement suggests Kevin probably wasn't first presented with the prenup until September 18 - and thus that he could not have validly signed it until seven days later, on September 25, after the marriage occurred.

(The evidence is this: In the agreement, the parties declared their intent not to marry without a prenup. They also declared that they would not fulfill a key condition of marriage - obtaining a license - until September 25. Thus, they seem to have anticipated that the prenup would not be signed until September 25, either.)

In that case, the prenup wouldn't be a prenup - but a postnup. And the law takes a dim view of marital partners attempting to change how the marriage, divorce, and alimony laws will apply to them once they are already married. Thus, the prenup - really not a prenup at all - would be invalid.

### **Does an Agreement to Stage a "Faux" Wedding Void the Marriage?**

But what about the "faux marriage" agreement? It's hard to say what effect it will have. That's because, as a friend of mine remarked, "there's no such animal in the legal zoo." An agreement to have a fake wedding is hardly a standard contract. Indeed, it's unheard of.

The reason this odd creature seems to have cropped up here is that

Britney and Kevin wanted to have a ceremony, and wanted their prenup to be valid -- but they didn't want to wait the seven days until the law said their prenup would be valid.

So Britney and Kevin tried to have their wedding cake and eat it too: They tried to arrange to have a fake wedding, and then (presumably) to have a real wedding later, after the seven-day waiting period had elapsed.

But in the event, they seem to have changed their minds - getting the license they promised not to get, and taking the vows they promised not to take. (Friends and relatives who attended the wedding seem to support the notion that the marriage was solemnized and the couple did state wedding vows. And, as noted above, Britney and Kevin both have affirmatively stated that they obtained a marriage license prior to the wedding.)

Given these breaches of the "faux marriage" contract by both Britney and Kevin, a court might well throw the "faux marriage" contract out the window. And even a court that was not especially worried about these breaches, might be very worried - and conflicted - about the effect of the "faux marriage" contract itself.

Typically, contracts are construed to effectuate the parties' intent - and here, their intent, as expressed, in the contract, was to not get married. So a court simply looking to the parties' intent, as expressed in the contract, would conclude that Britney and Kevin are not married.

But it's not that simple: Contract principles do not obviously apply to civil marriages, which are unique three-way agreements between two spouses and a state.

California marriage statutes are in the mix here, too. And it appears - as noted above - that Britney and Kevin fulfilled all the California law prerequisites to be married.

So the question is really: When a statute says that two persons are married, can a prior contract between them contradict the legislature, and say that they are not? Or put another way, would enforcing this contract contradict public policy - because public policy says that consent plus a license plus a ceremony equals marriage?

### **The Consent Issue - and Whether It Matters**

Finally, here's another wrinkle: Was there ever consent to marry here in the first place? Remember, if there was no consent, then under California law, there was no marriage.

Arguably, before they said "I do," the parties had agreed it would mean "I don't." And in contract law, a written agreement usually trumps contradictory oral statements. So if contract principles were applied here, the agreement not to marry might negate the oral "I do"s.

But again, contract law is not marriage law: The state, too, is a party here. And again, California statutes are in the mix: They arguably suggest that consent is to be judged by voluntary "I dos," and that the later fate of the marriage is to be governed by the state, not the parties' contract.

After all, the usual means for declaring a marriage invalid from the outset is an annulment proceeding - not a proceeding to enforce a "faux marriage" contract! And lack of consent alone is not enough.

Here, suppose the "faux marriage" agreement were taken to suggest lack of consent - despite the later "I dos." Even so, lack of consent is only a ground for annulment when it is the product of fraud, force, or mental incapacity. None of these appear to have been present here.

For all these reasons, the statute governing the nullification of marriages does not seem to apply here. Thus, if Britney were to seek an annulment of her marriage to Kevin, she might fare poorly - and be forced to seek divorce instead.

(In addition, if Britney merely began to claim publicly that there was no marriage, Kevin could bring a proceeding to have its validity "determined and declared," and because of the consent, the solemnization, and the issuance of the license, he would probably win.)

### **If the Prenup is Invalid, How Much Will Britney Pay in a Divorce?**

If the couple did divorce, what would happen?

California, like most other states, permits divorce virtually on either party's demand. But Britney might find that divorce would come at a high cost. Because remember, if her marriage is valid, then her prenup probably isn't - for the seven-day waiting period never elapsed.

Britney's earnings during the marriage--as well as Kevin's--would be presumptively split equally between the parties, under the rules of community property. Her premarital assets should not be vulnerable -- but there are circumstances under which a court

might order that some of them be used to support him.

The bottom line is this: With the kind of money she earns, even a short-lived marriage could result in a significant loss for her. And at the moment, she is not fully protected against such a loss - for it seems she validly married before she had a prenup in place.

#### What Do You Think? [Message Boards](#)

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Joanna Grossman, a FindLaw columnist, is a professor of law at Hofstra University. Her other columns on family law, and also on trusts and estates, and discrimination law, may be found in the archive of her columns on this site.

## COMMENTS OF DON GREEN (MARCH 8, 2001)

Nat,

I hope I'm wrong about this -- but it looks like UPAIA enacted in 1999 may have inadvertently eliminated the provision harmonizing interest for pecuniary gifts in trusts with pecuniary devises by will.

I picked this up from reading *Remsen v. Lavacot* -- 2001 DJDAR (Friday, March 2 issue).

PrC 16314 was a CLRC addition in 1989, to provide for interest on pecuniary gifts in trust.

It was repealed in 1999, replaced by 16340. The CLRC comment to PrC 16340 says "The substance of former Section 16314 is continued in Section 16340". But, 16340 only cross-references PrC 12000 et seq.; PrC 16340 doesn't expressly provide for interest as did former PrC 16314.

I had thought 12003 takes care of the problem, but on more careful reading (after being educated by the *Remsen* case), I don't think it does.

I would prefer that you politely direct me to the source of my erroneous analysis about this. If not, maybe we can get this quickly & quietly fixed.

Don

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§ 16340.

After the decedent's death, in the case of a decedent's estate, or after an income interest in a trust ends, the following rules apply:

(a) If property is specifically given to a beneficiary, by will or trust, the fiduciary of the estate or of the terminating income interest shall distribute the net income and principal receipts to the beneficiary who is to receive the property, subject to the following rules:

(1) The net income and principal receipts from the specifically given property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether the amounts accrued or became due before, on, or after the decedent's death or an income interest in a trust ends, and by making a reasonable provision for amounts the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

(2) The fiduciary may not reduce income and principal receipts from the specifically given property on account of a payment described in Section 16370 or 16371, to the extent that the will, the trust, or Section 12002 requires payment from other property or to the extent that the fiduciary recovers the payment from a third person.

(b) The fiduciary shall distribute to a beneficiary who receives a pecuniary amount, whether outright or in trust, the interest or any other amount provided by the will, the trust, or Chapter 8 (commencing with Section 12000) of Part 10 of Division 7, from the remaining net income determined under subdivision (c) or from principal to the extent that net income is insufficient.

(c) The fiduciary shall determine the remaining net income of the decedent's estate or terminating income interest as provided in this chapter and by doing the following:

(1) Including in net income all income from property used to discharge liabilities.

(2) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on death taxes, except that the fiduciary may pay these expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of these expenses from income will not cause the reduction or loss of the deduction.

(3) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the trust, or Division 10 (commencing with Section 20100).

(d) After distributions required by subdivision (b), the fiduciary shall distribute the remaining net income determined under subdivision (c) in the manner provided in Section 16341 to all other beneficiaries.

(e) For purposes of this section, a reference in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7 to the date of the testator's death means the date of the settlor's death or of the occurrence of some other event on which the distributee's right to receive the gift depends.

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Annotations Under Repealed Sections

SECTION 16314  
LAW REVISION COMMISSION COMMENTS  
2001 Electronic Pocket Part Update  
1999 Repeal

The substance of former Section 16314 is continued in Section 16340. See Section 16340 Comment. [29 Cal.L.Rev.Comm. Reports 245 (1999)]

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§§ 16300 to 16315. Repealed by Stats.1999, c. 145 (A.B.846), § 4

16314. (a) A specific gift, a general pecuniary gift, an annuity, or a gift for maintenance distributable under a trust carries with it income and bears interest from the date of the settlor's death or other event upon which the distributee's right to receive the gift occurs, in the same manner as a specific devise, a general pecuniary devise, an annuity, or a devise for maintenance under a will set forth in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7.

(b) For the purpose of this section, a reference in Section 12001 to "one year after the date of the decedent's death" means the date interest commences to run.

Enacted 1/1/1989 (A.B.No. 2841)

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Modified slightly, eff 1/1/91 (A.B.No. 759):

16314. (a) A specific gift, a general pecuniary gift, an annuity, or a gift for maintenance distributable under a trust carries with it income and bears interest from the date of the settlor's death or other event upon which the distributee's right to receive the gift occurs, in the same manner as a specific devise, a general pecuniary devise, an annuity, or a devise for maintenance under a will set forth in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7.

(b) For the purpose of this section, a reference in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7 to the date of the testator's death means the date of the settlor's death or other event upon which the distributee's right to receive the gift occurs.

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Modified slightly, eff 1/1/1993 (S.B. 1496)

16314. (a) A specific gift, a general pecuniary gift, an annuity, or a gift for maintenance distributable under a trust carries with it income and bears interest <<-\* \* \*->> in the

same manner as a specific devise, a general pecuniary devise, an annuity, or a devise for maintenance under a will set forth in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7.

(b) For the purpose of this section, a reference in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7 to the date of the testator's death means the date of the settlor's death or other event upon which the distributee's right to receive the gift occurs.

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PrC 12003 If a general pecuniary devise, including a general pecuniary devise in trust, is not distributed within one year after the testator's death, the devise bears interest thereafter.

But note, per *Remsen v. Lavacot*, PrC 12003 only applies to a general pecuniary devise TO a trust, not one IN a trust.

### **RESPONSE OF NATHANIEL STERLING (MAY 16, 2003)**

Don, I've been reviewing the materials concerning interest on a pecuniary gift in trust, and I believe I understand your concern.

However, there's at least one point that troubles me, and perhaps you can shed some light on it. Section 16340 refers to a distribution "after an income interest in a trust ends". Do you think this is meant to refer to the situation where the settlor of an inter vivos trust is the trust beneficiary during life, and at death the trust corpus is distributed? I don't think of the settlor as an "income beneficiary" of the trust, but maybe that's just my unfamiliarity with current terminology.

### **REPLY BY DON GREEN (SEPT. 30, 2004)**

Nat,

There were two hermits, living alone on different mountains. Each spring they would hike into town to purchase supplies when the snow cleared the mountain pass. So, they usually ran into each other on the trip.

One year, one hermit said to the other "I wonder how long before civilization creeps up on us."

The next year, the other hermit said "We can't let that happen. We'll have to fight to keep them out."

The following year, the first hermit said "I'm against violence."

The year after that, the second hermit said “You've got be be prepared to protect what's yours.”

The next year, the first hermit said “If you're going to keep up this constant bickering, I'm going to have to move away.”

So, back to this pecuniary gift problem ...

In answer to your question from May of 2003,

I understand “after an income interest in a trust ends” to refer to any provision for someone to receive some or all of the income of the trust. This would include the trustors' interest of the usual living trust which provides that they get some or all of the income. It would also include a interest like “after the trustors' death, the trustee shall pay income and principal as needed to Jane Doe for her lifetime.” For example, “after the trustors' death pay \$100,000 to John Doe”. Or, “after Jane Doe's death, pay \$100,000 to John Doe.”

In summary, generally there's been an effort to harmonize estates and trusts unless there's some particular reason for something to be treated differently. I can't think of any reason why delay of more than a year in paying a pecuniary gift from a trust should be treated differently, by not thereafter earning interest, than the same situation as to an estate. It appears to me that this difference was created accidentally by a CLRC re-write dealing with other issues. If so, perhaps CLRC could get the delayed pecuniary gift interest provisions re-harmonized.

Don

May 18, 2005

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Law Revision Commission  
OFFICE

MAY 20 2005

Dear Commissioner,

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

What can I do to get a California Family Law Code reviewed?

I have a concern that Family Law Code Section 7630(c) is not being properly interpreted. California Family Law Section 7630(c) states:

*An action to determine the existence of the father and child relationship with respect to a child who has no presumed father...may be brought by the child...the Department of Child Support Services...the mother...a man alleged or alleging himself to be the father....*

Some trial courts would have you believe the statute reads "...declare the existence..." instead of how it actually reads, which is "...determine the existence..." The word "determine" means to find out. It is not a synonym for "declare" and does not mean to establish in the affirmative.

A situation has developed where some courts force the petitioner to claim there is a father-child relationship, that the alleged father is in fact the natural, biological, or presumed father before they will adjudicate whether or not he really is the father.

Imagine forcing the mother or Child Support Services to argue in the affirmative to challenge a pedophile's false claim of paternity to attain child custody or unsupervised visitation rights.

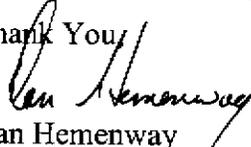
Imagine forcing a petitioner to plead in the affirmative to challenge a false claim of rape or incest to gain standing to present evidence showing the claim is false.

It is not hard to envision other situations where the best interests of the child and justice dictate the petitioner not encourage the court to adjudicate the status of an alleged father as the natural, biological father. It should not take a real life tragedy to emphasize the point the court should not attempt to force every determination of a father-child relationship be in the affirmative, beginning with forcing the petitioner to plead a relationship exists.

I believe requiring all petitioners to plead in the affirmative can create a hostile, if not intolerable legal environment in some situations. I believe the heavy-handed steering of the petitioner's pleading is arbitrary, needless, and prejudicial. It stands out in stark contrast to establishing the mother-child relationship under Section 7650(a), which is bias-free and does not require any such presumption of outcome. I believe the courts should support a neutral, non-prejudicial pleading free of any attempt to bias the judicial proceedings when determining if a father-child relationship exists.

I believe this is how the statute is written, is consistent with previous law and legislative intent, and is in the best interests of the child, mother, alleged father and Child Support Services.

In any event, it is the court's decision, not the petitioner's pleading, that prevails. This fact alone renders how the petitioner pleads moot but the requirement to plead in the affirmative adds a needless obstacle to justice that should not be tolerated in any courtroom.

Thank You  


Dan Hemenway  
1712 SE 7<sup>th</sup> Ct  
Renton, WA 98055-3943  
(425) 271-2969  
danhemenway@comcast.net

June 14, 2005

California Law Revision Commission  
Attn: Barbara Gaal, Staff Counsel  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Law Revision Commission  
RECEIVED

JUN 17 2005

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

Dear Barbara Gaal,

Thank you for your letter dated June 8, 2005.

I pray your letter is one of encouragement that the interpretation of California Family Law Section 7630(c) will get the strong review it needs.

Since my last letter, I've learned the situation is more serious than what I first imagined. Forcing the Petitioner to plead in the affirmative opens the door for the Respondent to purposefully default to automatically be adjudicated the father with no contrary evidence being presented.

In my first letter, I asked you to imagine forcing the mother or Child Support Services to argue in the affirmative to challenge a pedophile's false claim of paternity to attain child custody or unsupervised visitation rights. Courts that force a positive pleading make it a virtual certainty a Respondent's default will allow this unimaginable outcome to occur.

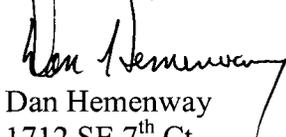
I also asked you to imagine forcing a Petitioner to plead in the affirmative to challenge a false claim of rape or incest to gain standing to present evidence showing the claim is false. Courts that force a positive pleading set themselves up to wrongly adjudicate the proceeding with full witness and knowledge justice was blocked when, by defaulting, the Respondent forces the court to adjudicate in their favor. There is no reason to believe this will not be exploited.

It should not take real life tragedies to emphasize the point the court should not unrelentingly and unapologetically blindly force every determination of a father-child relationship to be petitioned in the affirmative. It is clear this is not always in the child's best interests.

The mother-child relationship determination adjudication does not suffer for lack of this "forced affirmation" pleading requirement and it is working just fine (Section 7650(a)). In the father-child relationship determination, its only service is to block the courts from proceeding unencumbered on a clean and level playing field to make this very important determination.

Default judgments must not be allowed to automatically exclusively force an adjudication that a relationship exists. The courts must also allow a neutral or negative pleading if they are intent on protecting kids and allowing justice a fair shot at prevailing.

Thank You,



Dan Hemenway  
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danhemenway@comcast.net

Howard Hershops  
P.O. Box 190711  
San Francisco, California 94119-0711

Law Revision Commission  
RECEIVED

October 22, 2004

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

Barbara S. Gaal, Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94353-4739

Re: Santa Clara County Superior Court, Small Claims Division:

Dear Ms Gaal,

I have enclosed a copy of the writ of the mandate filed into the Court of Appeal, Sixth Appellate District, the case number that was assigned is H0280251.

The very same issue was filed into the Superior Court Santa Clara County, Appellate Department and they were denied under the basis that the Superior Court has no appellate jurisdiction over the small claims cases.

There are actually three issues in the writ of mandate: (1) Can the small claims court permit a plaintiff to split causes of action so that the small claims case exceeds the jurisdictional limit of the small claims case? (2) Does permitting the splitting of the cause of action violate § 116.231 Code of Civil Procedure and allow a plaintiff to bring more than two causes of action that seek over \$2,500.00 in any one calendar year? (3) Does the entry of 16 judges all done within ten minutes in the amount of \$42,176.00 violate the jurisdictional amount of \$5,000.00 set by statute, § 116.220 of the Code of Civil Procedure?

The record clearly shows that the plaintiff Kirsch and his associates sue in the Small Claims Court in Santa Clara County and seek judgments in excess of \$2,500.00 and the Small Claims Court permits the splitting of causes of action, which violates not only the Court of Appeal decision in *Lekse vs Municipal Court*, (1982) 138 Cal App 3<sup>rd</sup> 698; but also by permitting the splitting of the causes of actions violates the legislative intent of sections 116.220 and 116.231 of the Code of Civil Procedure.

Page Two Letter Dated October 22, 2004

Moreover, these patterns of abuses of the small claims court continues as the attached letter shows the intent of this group of people who think that they can file actions seeking more then \$5,000.00 in small claims court and who on a regular basis seek more the \$2,500.00 in there filings in small claims court as the attached records shows.

I hope that the Court of Appeal addresses these issues as the Superior Court of Santa Clara County has refused to address these issues and correct theses abuses.

Sincerely,



Howard Hersh

with enclosures, Writ of Mandate, Lodge Exhibits, and correspondence and web page from Junk Fax .org Mark Klein's Letter

IN THE COURT OF APPEAL  
STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

Kartina M. Hartwell,  
Petitioner,

vs

Superior Court of California  
Santa Clara County  
Small Claims Division

Respondent ,

S. Kirsch & Jiramy A Sutton

Real Parties in Interest

CASE No. \_\_\_\_\_

SMALL CLAIMS Nos. 2-04-SC-1187-99  
SMALL CLAIMS Nos. 2-04-SC-001214-15  
SMALL CLAIMS No. 2-04-SC-001217  
SMALL CLAIMS Nos 4-03-SC-003174  
SMALL CLAIMS Nos 04-04-006735-36

PETITION FOR WRIT OF MANDATE AND  
REQUEST FOR STAY OF THE JUDGMENT  
PURSUANT TO § § 1085 & 1086 OF THE  
CODE OF CIVIL PROCEDURE

Verified Petition For Writ of Mandate:

1. Petitioner, Katina M. Hartwell, petitions this court for a Writ of Mandamus and temporary stay of the proceedings in the Respondent Superior Court [case numbers, 2-04-SC-1187-99, 2-04-SC-001214-15 2-04-SC-001217 and Respondent Court Small Claims Division as the Small Claims Court's acted in excess of its jurisdiction and as such all orders and judgments entered are void as a matter of law.

2. Petitioner herein was the defendant in sixteen (16) small claims actions brought by Steven K. Kirsch in Respondent Court Small Claims Division and he is named in this petition as Real Party in Interest (hereinafter Real Party in Interest Kirsch). Respondent

Court Small Claims Division entered a judgment for *forty-two thousand one hundred seventy-six dollars* (\$42,176.00) and as such Real Party in Interest Kirsch is beneficially interested party in this Writ of Mandamus, see Exhibit 4 pages 16-32..

3. Additionally, Petitioner herein was the defendant in three (3) small claim actions brought by Jimmy A Sutton in Respondent Court Small Claims Division and he is named in this petition as Real Party in Interest (hereinafter Real Party in Interest Sutton). Respondent Court Small Claims Division properly dismissed those actions on June 30, 2004. Real Party in Interest Sutton filed a Motion to Vacate the order of June 30, 2004 for the sole purpose of it's denial to bring appeal, see Exhibit 3, pages 6-15.

4. The Respondent Court Small Claims Division acts were and are in excess of its jurisdiction as the entering of judgments totaling *forty-two thousand one hundred seventy-six dollars* (\$42,176.00) in a Small Claims Court is jurisdictionally limited to *five thousand dollars* (\$5000.00), and Respondent Court Small Claims Division cannot split causes of actions.

5. Respondent Court Small Claims Division's entry of judgments in case numbers 2-04-SC-1187-99, 2-04-SC-001214-15, and 2-04-SC-001217 in the amount of *forty-two thousand one hundred seventy-six dollars* (\$42,176.00) in these case is in excess of its jurisdiction and as such are is void as a matter of law. California prohibits the splitting of causes of actions in small claims court pursuant to statute and case law.

6. Respondent Superior Court, in case numbers 4-03-SC-003174, 4-04-SC-006735-36 permitted Real Party in Interest Sutton after appearance, to appeal /vacate a dismissal of the judgment of the Respondent Court Small Claims Division which is prohibited by State Law.

7. Because of the above-described actions of Respondent Court and based upon the unduly burdensome costs to appeal the *sixteen* (16) actions separately and in furtherance of judicial economy Petitioner brought a Writ of Mandate in the Appellate Department of the Superior Court which summarily denied the Writ. Petitioner respectfully brings this Writ of

Mandamus to vacate the judgment(s) entered by Respondent Court and prohibit Real Party in Interests to bring an appeal after a dismissal of a Small Claims case.

8. Respondent Court Small Claims Division has, and continues to violate, Petitioner's Constitutional Rights as petitioner has a Federal and State Constitutional right of not being deprived of her property without Due Process of Law. Further, because Petitioner's real property in the amount *forty two thousand one hundred seventy-six dollars* (\$42,176.00) of was taken by Respondent Court without being permitted to have a jury decide, Petitioner's Constitutional Rights of Due Process of Law and Equal Protection have been violated by the State of California's Respondent Court.

9. Because of the above-described actions of Respondent Court, Petitioner will have real property in the amount of *forty-two thousand one hundred seventy-six dollars* (\$42,176.00) taken by and through Respondent Court's actions and will be suffer irreparable injury if this Writ of Mandamus and request for stay is not granted.

10. Petitioner has no other plain, speedy, or adequate remedy at law other than the relief sought in this petition.

WHEREFORE, in light of the foregoing, Petitioner respectfully requests that this Honorable Court order:

1. That an alternative writ of mandamus and stay of the execution of judgment issue; issue an *ex parte* stay of the judgements of Respondent Court Small Claims Division, case nos.2-04-SC-1187-99, 2-04-SC-001214-15 and 2-04-SC-001217, and Dismiss the Appeal/Motion to Vacate in Respondent Court Small Claims Division, case numbers 4-03-SC-003174 and 4-04-SC-006735-36;

2. That a peremptory writ of mandamus issue ordering Respondent Court to vacate the judgment which joined *sixteen* (16) small claim causes of actions; enter a dismissal in the appeal/motion to vacate from a dismissal entered in Respondent Court case numbers 4-03-SC-003174 and 4-04-SC-006735-36 which is prohibited by state statute;

3. That Petitioner recover costs of this action and attorneys fees; and

4. Any other relief this Honorable Court deems just and proper.

Dated October 20, 2004

By \_\_\_\_\_

Katrina M. Hartwell

#### VERIFICATION

I declare as follows;

I am the petitioner herein and I have read the foregoing petition for writ of mandate, and know its contents and they are true and correct.

I declare under penalty of perjury that all of the foregoing is true and correct under the laws of the State of California

Dated October 20,2004

At San Jose, California

By \_\_\_\_\_

Kartina M. Hartwell

IN THE COURT OF APPEAL  
STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

Kartina M. Hartwell,  
Petitioner,

vs

Superior Court of California  
Santa Clara County  
Small Claims Division

Respondent ,

---

S. Kirsch & Jimmy A Sutton

Real Parties in Interest

---

CASE No. \_\_\_\_\_  
Small Claims Nos. 2-04-SC-1187-99  
Small Claims Nos. 2-04-SC-001214-15  
Small Claims No. 2-04-SC-001217  
Small Claims No. 4-03-SC-003174  
Small Claims No. 4-04-SC-006735-36

POINTS AND AUTHORITIES  
IN SUPPORT OF WRIT OF MANDATE  
AND REQUEST FOR A STAY OF  
JUDGMENT AND DISMISSAL OF  
ALL SMALL CLAIMS CASES  
BROUGHT BY REAL PARTIES  
IN INTEREST

I

**PETITIONER HAS NO PLAIN SPEEDY  
AND ADEQUATE REMEDY THAT EXISTS  
AT LAW IN THIS CASE.**

The undisputed facts of this case evidence that Respondent Court Small Claims Division entered (16) separate judgments each in the amount of *two thousand five hundred dollars* (\$2,500.00) plus *one hundred thirty-six dollars* \$136.00 for costs on September 9,

2004, in cases 2-04-SC-1187-99, 2-04-SC-001214-15 and 2-04-SC-001217 brought by Real Party in Interest, against Petitioner herein, when California Law prohibits the splitting causes of actions.

The Small Claims Courts are governed by the applicable statutory and case law which designates them courts of limited jurisdiction. The dollar amount of judgement said Courts are permitted to enter cannot to exceed *five thousand dollars* (\$5,000.00) pursuant to § 116.220 CCP.

It goes without saying that a judgment entered against Petitioner in the amount of *forty two thousand one hundred seventy six dollars* (\$42,176.00) brought by Real Party in Interests exceeds *five thousand dollars* (\$5000.00). Therefore Respondent Court's judgement was in excess of its jurisdiction, see Exhibit 4, pages 16-32.

Additionally, the Respondent Court Small Claims Division, in case numbers 4-03-SC-003174 and 4-04-SC-006735-36 permitted an appeal/motion to vacate after a dismissal by the judge when no appeal can be taken, see *ERA-Trotter Giroard Assoc. vs. Superior Court of San Mateo County*, 50 Cal App 4<sup>th</sup> 1851. In the case stated above the Court entered a dismissal and the plaintiff appeal/motion to vacate and granted relief when none could have been brought, see Exhibit 3, pages 6-15.

The general rule is that the writ must issue when there is no "plain, speedy, and adequate remedy, in the course of law.", see Section 1086 Code of Civil Procedure.

Under those circumstances, the petitioner is entitled to the writ as a matter of right, see *May v. Board of Directors*, (1949) 34 C 2d 125 at 133.

Petitioner has no plain or speedy remedy at law other then this writ of mandamus to vacate the orders of Respondent court which are clearly in excess of its jurisdiction.

II

**THE SMALL CLAIMS COURT CANNOT  
CIRCUMVENT ITS JURISDICTIONAL  
AMOUNT OF ITS AUTHORITY BY  
ALLOWING A PLAINTIFF TO BRING  
16 SEPARATE ACTIONS ON THE VERY  
SAME TIME AND DONE TO EXCEED  
THE \$5,000.00 LIMIT.**

Real Party in Interest in this case filed *sixteen* (16) separate causes of action against petitioner herein and all cases were heard in Respondent Court Small Claims Division on September 9, 2004.

Respondent Court Small Claims Division entered *sixteen* (16) separate judgments totaling *forty two thousand one hundred seventy six* \$42,176.00 against Petitioner, see Exhibit 1. No person may file more than two (2) small claims actions in which the amount demanded exceeds *two thousand five hundred dollars* (\$2,500.00) anywhere in the state in one calendar year pursuant to California code of civil Procedure Section 116.231.

Additionally, Real Party in Interest has filed *sixty seven* (67) causes of actions in Santa Clara County Small Claims Court seeking more than *two thousand five hundred dollars* (\$2,500.00) in violation of § 116.231CCP.

It is Petitioner's contention that the filing of *sixteen* (16) separate Small Claims actions by one party violates the prohibition that actions exceed five thousand dollars against a party in one calendar year cannot be split to be brought for adjudication in a Small Claims forum, see *Lekse vs Municipal Court* , (1982) 138 Cal App 3<sup>rd</sup> 698

The Court of Appeal in *Lekse*, supra, held that the filing of just two small claims cases was abusive in an attempt to exceed the jurisdictional limit was abusive.

The Court of Appeal in *Leske*, supra, held that a party cannot split causes of action to circumvent the jurisdictional limit of the Court.

Moreover, Petitioner is being deprived by Respondent Court of her real property in the amount exceeding *forty two thousand dollars* (\$42,176.00) has an absolute right to a complete search and investigation of all the cases that Real Party in Interest has filed. Based on information and belief, Real Party in Interest has brought more than two actions in which he has recovered more than \$2,500.00 in any calendar year.

Real Party in Interest and Respondent Court, jointly and severally, are wrongfully depriving Petitioner of her real property in the amount exceeding *forty thousand dollars* (\$42,176.00) and Petitioner respectfully requests a stay of the judgments in cases as Real Party in Interest is prohibited by statute from filing actions in small claims court against a party exceeding *five thousand dollars* (\$5000.00) and Respondent Court is prohibited from entering judgements against Petitioner in an amount exceeding *five thousand dollars* (\$5000.00) for actions brought by the same party, pursuant to Section 116.231 CCP.

### III

**THE SMALL CLAIMS CLERK PERMITTED  
AN APPEAL/MOTION TO VACATE A DISMISSAL  
BY THE PLAINTIFF WHEN THE STATUTORY  
PROVISIONS AND CASE LAW PROHIBITS  
SAID ACTS.**

The case of ERA-Trotter Girouard Assoc. vs Superior Court, (1996) 50 Cal App 4<sup>th</sup> 1851 holds that a plaintiff who brings a Small Claims action cannot appeal or a motion to vacate a dismissal of his case.

In this case Real Party in Interest Sutton small claims cases were dismissed and Real Party in Interest Sutton filed for a motion to vacate/appeal in case numbers 4-03-SC-003174 and 4-04-SC-006735-36 and pursuant to section 116.780 CCP.

The Appeal/Motion to vacate was heard and is in excess of the Court's jurisdiction and as such no appeal or motion to vacate can be heard, see Exhibit 3, pages 6-15.

#### IV

**PETITIONER RIGHTS TO DUE PROCESS OF  
LAW HAVE BEEN VIOLATED AS TO ENTER  
JUDGMENTS TOTALLY \$42,176.00 IN A SMALL  
CLAIMS CASE IN WHICH REAL PARTY IN  
INTEREST BROUGHT 16 SEPARATE COMPLAINT  
AND WHICH PETITIONER HAD NO RIGHT OF  
OR THE RIGHT TO A JURY TRIAL IS A VIOLATION  
OF THE FOURTEENTH AMENDMENT TO  
THE CONSTITUTION**

It is axiomatic that a party cannot be deprived of their property unless the proceeding complies with Due Process and Equal Protection of the Law. This has been the law for quite some time.

To permit Respondent Court Small Claims Division to enter a judgment for *forty two thousand one hundred seventy six dollars* (\$42,176.00) and deny a person their rights to a jury trial is outrageous and said judgement should not stand as a matter of law.

The judgment of Respondent Court was entered in violation of Petitioner's rights guaranteed to her by the IV, V, VI and XIV Amendments of U.S. Constitution.

WHEREFORE, in light of the foregoing, Petitioner respectfully requests that this Honorable Court grant a stay of the judgements of Respondent Court case numbers 2-04-SC-1187-99, 2-04-SC-001214-15 and 2-04-SC-001217, pending issuance of the writ of mandamus and enter a dismissal of Respondent Court's judgements for case numbers 4-03-SC-003174 and 4-04-SC-006735-36, as no appeal/motion to vacate can be brought under California Law.

Dated Oct. 20, 2004

By \_\_\_\_\_

Katina M. Hartwell

LANG, RICHERT & PATCH  
A Professional Corporation • Attorneys at Law

Law Revision Commission  
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AUG 8 2005

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

August 3, 2005

Robert L. Patch, II  
Val W. Saldaña  
Michael T. Hertz  
Victoria J. Salisch  
René Lastreto, II  
Charles Trudrung Taylor  
Mark L. Creede  
Laurie L. Quigley  
Tamara L. Equals  
Douglas E. Griffin

Frank H. Lang  
(Of Counsel)

Matthew W. Quall  
Tracy E. Sagle  
Craig B. Fry  
Jason P. Hamm  
Kirsten O. Zumwalt  
Bradley K. Boulden  
R. Thomas Dunn  
John C. Fowler  
David T. Richards

William T. Richert  
(1937 - 1993)

John T. Skewes, CPA  
Firm Manager

Mr. Brian Hebert  
CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Re: Proposal concerning Deed of Trust Foreclosures  
File No. 01001

Dear Mr. Hebert:

I enjoyed speaking with you concerning the California Law Revision Commission. I would like to submit to you here a proposal which the Commission might want to consider concerning foreclosures under deeds of trust in California.

The basic California foreclosure system is one which is accomplished through private foreclosure companies and title companies. Many of the larger lenders have their own captive foreclosure companies, so in effect they are foreclosing on their own without any real oversight by disinterested parties. At the same time, because the foreclosures take place "on the courthouse steps" (generally at 11:00 a.m. on a given weekday), the number of people who can actually participate in any auction is quite limited. Any reasonable amount of research would show that the actual third party purchasers at foreclosure sales tend to be the same people. Those persons on many occasions act in concert, sometimes by forming partnerships on the spur of the moment at the time of the foreclosure and thereby preventing overbidding. I took the deposition of one of these foreclosing persons in the course of litigation, and the background discussion was quite illuminating. He disclosed completely his methodology for "tracking" sales and possible bids, and how he acted at the foreclosures.

I certainly would not recommend returning to a court-driven system (which exists in many states), because that is cumbersome and expensive, and trying to keep expenses down would be beneficial for all concerned. At the same time, with the advent of the Internet and the existence of multiple listing services in real estate, it appears to me that a system could be devised -

Mr. Brian Hebert  
August 3, 2005  
Page 2

building on the present foreclosure system - which would transfer the “windfall” recoveries now being obtained by the third party buyers back to the owners who are being foreclosed out.

I would recommend, first of all, that there be established a statewide foreclosure website and that it be a legal requirement that any foreclosure be posted there. Furthermore, there should be a mechanism for bidding over the Internet, with appropriate safeguards to make certain that the actual bidders are able to perform. The cost of the Internet site and safeguarding mechanism would be borne by a fee on foreclosures. I would not anticipate this being a substantial amount of money, and the cost could plainly be justified by the substantial likelihood that it would increase the amount bid for homes in foreclosure and thus cover these additional costs.

Furthermore, in the event that legitimate offers are made and accepted on the property in foreclosure and escrow is opened, there should be a mechanism which would extend the foreclosure date (again with safeguards) so that the property could be sold. Having these sorts of mechanisms might well avoid the filing of Chapter 13 and other bankruptcies, which simply add to the cost and confusion.

When a default is recorded, there should be genuine complete information provided to the owner in foreclosure of the options available, with appropriate warnings about people trying to buy property for too little money, and information as to how the property can be appropriately listed for sale to try to maximize recovery. To avoid the sort of “bottom feeding” which occurs when foreclosures are noticed, it might well be an appropriate requirement that bids for properties be shown on the central Internet board and that failure to provide information for public consumption would render the sale completely void.

Some of the concerns I have expressed here, of course, arise from the present situation in which real property values are on the increase. In my personal practice, I have learned of situations in which individual debtors have abandoned their property, filed Chapter 7 bankruptcy, and the bankruptcy trustee has effectively been able to sell the property for many of thousands of dollars above the amount owing, in some cases paying all the unsecured creditors and leaving money left over for the debtor. With a public system providing information, it is likely that the individual debtors would have been contacted by one or more real estate brokers interested in selling the property. Failing that, there would have been an open system so that if foreclosure were to take place, there would be real bidding over an extended period of time, by persons interested in occupying the property and not purchasing it simply for turnover gain.

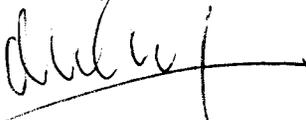
Mr. Brian Hebert  
August 3, 2005  
Page 3

I would be happy to provide you with some of the background in the case that I mentioned in the event that you would like this as an example. The documents are all a matter of public record or were in depositions as part of the matter of public record.

As you can see from the foregoing, it is my opinion that there have been technological changes which would vastly improve the present system and undercut the unfairness and economic waste which it engenders. Naturally, if the economy retrenches and the amount of equity in homes is not as considerable, there will not probably be as many bidders, and the lienholders may well have to purchase the properties for what is owing and then try to market them for what they can get. Nevertheless, by having a truly open auction system coupled with the protected opportunity to sell property during foreclosure period, the number of actual properties going back to the lenders would be more limited and - overall - more value would go to the owners and lenders. I also believe that the number of bankruptcies would drop, which would also be cost saving as well as a saving in emotional distress and hardship for the owners.

Very truly yours,

LANG, RICHERT & PATCH



Michael T. Hertz

MTH/dw

## COMMENTS OF MIKE KELLY

From: Mike Kelly <mike.kelly@legislativecounsel.ca.gov>  
Date: August 22, 2005  
To: <Sterling@CLRC.ca.gov>  
Subject: Section 394 of the Code of Civil Procedure

Nat,

As a follow up to our conversation, here are the details regarding a venue statute, regarding an issue raised by the Second District Court of Appeal.

In *Public Employees Retirement System v. Superior Court*, (8/4/05; nonpublished opinion), the court, in footnote 8, directed the clerk to send a copy of the decision to the Legislative Counsel, regarding the clarity of Section 394 of the Code of Civil Procedure.

The case relates to procedural (venue) issues in the a case brought by PERS against the Sacramento City School District regarding their shadow ("CASA") retirement system. The court (in its footnote) indicates that it believes Section 394 of the Code of Civil Procedure is a "mass of cumbersome phraseology" (citing *County of San Bernardino v. Superior Court* (1994) 30 Cal. App. 4th 378) and that the complexities of the case and the voluminous briefing "point to the need for a revision and clarification of the venue statutes."

We defer to your expertise in determining whether a broader review of venue statutes is in order; however, a review of the present case and the prior reported cases does seem to indicate that Section 394 of the Code of Civil Procedure needs to be restructured.

Thanks for your consideration,

Mike Kelly Principal Deputy Legislative Counsel (916) 341-8044

**Patricia Nolan Mackenzie**  
**29039 Indian Ridge Court, Agoura Hills, California 91301**  
**(818) 889-3094, mackenpg@cs.com**

January 14, 2005

Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-1  
Palo Alto, Ca. 94303-4739

Law Revision Commission  
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JAN 18 2005

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

Re: **Without Legal Conscience**

Dear Mr. Sterling,

Thank you for your willingness to explore my concern. Enclosed is my book. I understand that there's no guarantee and no time frame. *I do appreciate this opportunity.*

As I stated before, this book only covers the first 4 years of my estate experience. As of today, the ordeal has gone on for 11 years. Please know that my father's trust was never challenged by his children, nor did we ever challenge the entitlement he wished for my stepmother. Yet, our entitlement required and still requires defense from a biased trustee, well enabled by her team of rotating professionals. Many beneficiaries would have walked away and just lost their inheritance. Many people can't afford the struggle. It has been a real battle to see that my father's wishes were/are honored, as he instructed. And, much has been lost to this trust and its beneficiaries because protection has a cost.

The law hints that the duty of the trustee, trust attorney, and trust accountant is to act in the best interest of all per the trust. However, in practical application the reality is that the hired help works for the trustee, regardless of any damages caused the trust or other beneficiaries. A trust's execution can truly become a game, sorry to say.

Therefore, I believe that the law requires review and revision to embrace, *with absolute accountability*, that a trust attorney and trust accountant are responsible to ALL in a trust, not just the trustee and that "no attorney client privilege" should be permitted when, in effect, all vested beneficiaries are paying the attorney bills charged the trust's principal. The imbalance of a trustee's protected power vs. a beneficiary's unprotected entitlement is alarming. A trust is too important to be this vulnerable to the whims of the trustee. I look forward to the day when a trust attorney can be honest with a beneficiary regarding the trustee's actions or competence, and when he/she can direct the trustee in a way which has some meaning.

Thank you for your time,



## **WITHOUT LEGAL CONSCIENCE, A BENEFICIARY'S TRUTH**

**Nolan Mackenzie**

Following a death, the execution of a Trust can be a difficult experience for beneficiaries. As the legal system is now set up, not only are financial considerations important, but the family dynamic and the preservation of a family is just as crucial. It is my hope that with open discussion, families and Trusts can be better served.

My experience in Trust execution was so incredible, I was asked to write about it. When my father died, I believed that my stepmother would honor her role as trustee to oversee a fair execution of the Trust's instruction. Overnight we went from believing in a system of laws and Trust instruction that would protect our interests . . . to learning that we were truly vulnerable to the whims of a Trustee. The Trustee was our adversary, not the protector of our father's wishes, not the person who was to manage the Trust in the highest and best interest of the Trust and beneficiaries.

- I've seen just how far a Trustee can go, without accountability, in compromising a Trust.
- I have learned that a Trustee has tremendous power to direct the Trust, right or wrong.
- I've learned that a beneficiary's only true recourse is to hire attorneys and spend thousands of dollars, if only to achieve that which the Trust had instructed in the first place. It's simply a beneficiary's tough luck.
- I learned that simply talking, as civil human beings and family, to alleviate the need for lawyers was NOT a form of communication we could enjoy. Communication requires two willing parties.
- I learned that if a Trustee commits perjury before a court, a judge doesn't really care.
- I learned the "rule of the widow." Widows have real and unfair advantage.
- I've learned that it's extremely difficult to remove a Trustee, particularly a widow.
- I learned that agreements do not stop errant Trustees. Over 11 years, we've had three expensive and drawn-out agreements to resolve "disputes" created by the Trustee.
- I've learned that an accounting can be a game board and the game moves are endless; not the clear reflection of Trust activity I had imagined.
- I learned that a Trust and family become a living compromise when bias rules.
- I learned how alone it can feel to be a beneficiary.

My experience is just one case. There are so many more out there. The purpose of my book is to create interest. We need to seriously consider exploring the responsibility and accountability of the professional community toward Trusts and ALL beneficiaries. I do not ultimately blame my wayward stepmother for my experience. Whatever objectives she initiated, the true problem was/is that the system allowed her bias to exist. Had the system not allowed it, my stepmother or any other fiduciary could not have wielded the damage suffered. The important message I hope to share is that our system today places beneficiaries and families at a great disadvantage in comparison to the power it gives a Trustee. This imbalance places Trusts and the lawful entitlement of beneficiaries at risk.

The first 4 years of my experience as a beneficiary is in the book WITHOUT LEGAL CONSCIENCE. I would be happy to share my experience with you. If you feel your organization might benefit from hearing my story, please contact me.

Sincerely,

***Pat Nolan Mackenzie***

(818) 889-3094

mackenpg@cs.com

PS: WITHOUT LEGAL CONSCIENCE can be found on Barnes & Noble, Amazon, and PublishAmerica websites. I also maintain a supply of books.

## COMMENTS OF GRAYSON MCCOUCH

Date: Thursday, February 3, 2005  
To: commission@clrc.ca.gov  
From: Grayson McCouch <gmccouch@sandiego.edu>

Dear Mr. Sterling,

At the suggestion of Bill McGovern, I'm passing on to you a question concerning the treatment of domestic partners under the Cal. Probate Code. In sec. 6401, dealing with the surviving spouse's intestate share, the legislature added a parallel reference to a surviving domestic partner in subd. (c) (separate property) but not in subd. (a) or (b) (community and quasi-community property). Also, in sec. 6451, dealing with the effect of adoption on the a child's relationship with natural parents and relatives, the references to a spouse in subd. (a) and (b) have not been expanded to include a domestic partner.

A literal reading of these provisions might lead to the conclusion that a surviving domestic partner is not always treated the same as a surviving spouse for purposes of intestate succession. Example: Natural parents are married and live together with their child until divorce a few years later. Mother gets custody of child and moves in with her domestic partner. Domestic partner adopts the child. If the term "spouse" in sec. 6451 does not include a domestic partner, it appears that the adoption will sever the child's relationship with the natural mother, terminating the child's ability to inherit from the mother (and vice versa).

On the other hand, the amendments to the domestic partner provisions of the Family Code that took effect in January provide broadly that domestic partners have the same rights and obligations as married couples. If this was intended as a back-door way of redefining "spouse" to include "domestic partner," it seems odd that the legislature bothered to add parallel references to domestic partners to selected provisions of the Probate Code while leaving others unchanged.

I'd appreciate hearing any thoughts about what the legislature intended here. All best wishes,

Grayson McCouch

Grayson M.P. McCouch  
University of San Diego School of Law  
5998 Alcalá Park  
San Diego, CA 92110  
tel.: (619) 260-7716

## **RESPONSE OF NATHANIEL STERLING**

This office has not been involved in the development of the statutes relating to domestic partners, and we have not followed them closely. There may be a point at which we become involved, due to the many complications and unanswered questions that have resulted from these statutes.

With respect to your specific questions relating to the Probate Code provisions, I believe the anomalies have arisen as a result of the historical development of the law relating to domestic partnership. The inheritance rights of domestic partners were narrowly addressed by 2002 legislation amending Section 6401. The broader legal rights of domestic partners, which would eclipse the 2002 legislation, were added in 2003 (AB 205).

Although I am no expert in this and have not studied the matter, I think it can be assumed that the legislative intent was to broaden inheritance rights notwithstanding the earlier narrow legislation, and to apply the same stepparent adoption principles to domestic partners as to spouses notwithstanding the failure to amend individual statutes to provide for that directly.

My guess is that the magnitude of the task of amending every statute that refers to spouses -- which probably run into the thousands if not tens of thousands -- was so daunting that the drafters settled for the expedient of simply providing that domestic partners are treated in the same way as spouses for purposes of legal rights and duties.

As I have indicated, it is possible we could become involved in this area at some point in the future. I will save your note in anticipation of that possibility.

## **REPLY BY GRAYSON MCCOUCH**

Dear Mr. Sterling,

Thanks very much for your prompt response. It seems a perfectly sensible explanation, and I can well understand why the drafters of the 2003 legislation didn't want to undertake a thorough revision of the Probate Code. All best,

Grayson McCouch

## COMMENTS OF MARILYNN MC LAUGHLIN

Date: November 10, 2004

I would like to see a law passed that gives Grandparents legal standing when their grandchildren are involved in CPS/Social Services/State Adoptions. Currently the law does not provided that "Notice" to be given to the biological Grandparents regarding any court hearings. When Grandparents do attempt to attend court, they have "no standing" even when the parents have abandoned the children or when reunification services have been terminated. Once a child is placed in the "complete care, custody and control" of State Adoptions Grandparents participation in their grandchildren lives is completely severed.

See PEWS Commission Report - June 2004

Your prompt attention is greatly appreciated.

Marilynn Mc Laughlin  
1514 Pacific Avenue  
San Leandro, California 94577  
(510) 706-0636  
<mailto:gramarte@aol.com>gramarte@aol.com

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AND HAWAII STATE BARS

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1323 S.E. THIRD AVENUE  
FT. LAUDERDALE, FL 33316  
(954) 522-9441

OF COUNSEL  
ALAN R. BURNS  
JOHN ROBERT HARPER  
Limited Liability Partnerships

May 4, 2005

Law Revision Commission  
RECEIVED

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

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Code of Civil Procedure §1260.040, AB 237, c.248, 2001

Gentlemen:

I write to express concern with the application of Code of Civil Procedure §1260.040. It provides in an eminent domain action, if a party disputes an evidentiary or other legal issue affecting the determination of compensation, that party may move the Court for a ruling on the issue no later than 60 days before trial. A court that issues such a ruling may postpone other statutory deadlines for sufficient period of time to enable the parties to comply with the effect of the Court's ruling. The problem is that the State of California, and possibly other condemnors, have construed "a ruling on the issue" to include dismissal of the action. The statute clearly is beneficial for the purpose of deciding certain contested issues such as date of valuation, admissibility of a comparable sale, reproduction costs studies, probability of a change in zone, highest and best use, etc. The State, and possibly other condemnors, is currently using this section for the purpose of dismissing inverse condemnation actions by filing sworn affidavits of experts who provide factual declarations with respect to items such as noise, vibration, dust and other factors affecting real property affected by construction of a public improvement. If opposition is filed, the judge is asked to weigh the respective testimony. This remedy is far more drastic than that contemplated by a motion for summary judgment or a motion in limine re prospective evidence. Then comes the procedural "rub". Under standard motion practice, the condemnor may take several months amassing its evidence for the purpose of the motion, formulating declarations and exhibits thereto, and then file a motion. Under the provisions of Code of Civil Procedure §1005, the property owner in an inverse condemnation case has only seven court days to respond with competent evidence sufficient to defeat the motion. This is inherently unfair; it recently happened to the undersigned in an eminent domain proceeding in Los Angeles County. When I pointed out to the judicial officer that seven court days was not enough time to respond to the experts retained by the State in their voluminous pages of testimony and exhibits, the Court did provide me with 30 days to obtain and furnish rebutting evidence.

LAW OFFICES  
MICHAEL B. MONTGOMERY

California Law Revision Commission  
Re: Code of Civil Procedure §1260.040, AB  
237, c.248, 2001  
May 3, 2005  
Page 2

We were still several months before what would have been the required exchange of expert names and statements.

As a practicing member of the Eminent Domain Bar since 1963, I would ask the Commission for consideration of the following:

1. Either provide that the Code section may be used only to resolve evidentiary disputes and may not be used as a "death-penalty" to cause the action to be dismissed; or,
2. Provide as much time to respond to such a motion as that which applies to summary judgment proceedings.

I would be more than happy to discuss this matter with the Commission. Thank you for your time and attention.

Very truly yours,

  
MICHAEL B. MONTGOMERY

MBM/pp

## COMMENTS OF CHRIS MOORE

From: <chris@mbslawcorp.com>  
To: <sterling@clrc.ca.gov>  
Date: Thursday, Oct. 21, 2004

Nat:

Is the attached something that CLRC would like to get involved with? If not, just let me know. We know you have plenty to do and we're not trying to add to your load. If you have any questions, you may contact Richard Burger at [richard@richardburger.com](mailto:richard@richardburger.com) or Jeff Dennis-Strathmeyer at [Jeffrey.Dennis.Strathmeyer@ceb.ucop.edu](mailto:Jeffrey.Dennis.Strathmeyer@ceb.ucop.edu).

Chris Moore

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CEB excerpt from the June 2004 Reporter, discussing Estate of DeLoreto:

*Estate of DeLoreto* (May 20, 2004, B166989) 2004 Daily Journal DAR 6038, 2004 Recorder CDOS 4376

**COMMENT:** The decision in this case makes no mention of a 2002 technical "correction" made to Prob C §6103 that was probably a technical mistake. That code section has long provided that certain other code sections applicable to wills do not apply to testators who died before January 1, 1985. Until the enactment of Stats 2002, ch 138, the referenced statutes included "Chapter 5 (commencing with section 6140)," which formerly contained the rules of construction applicable to wills. This reference had been obsolete ever since Stats 1994, ch 806, generalized the rules of construction applicable wills to make them applicable to revocable trusts and other documents, and moved the rules, including the Prob C §21115 adult adoption rule, to Prob C §§21101-21140. The 1994 legislation contained its own transition rule generally applying the construction rules to all documents whenever executed. The rule not applying the will construction statute to estates of testators dying before 1985 was pre[PAGE 167]served only for cases involving some 1983 (effective 1985) changes in laws pertaining to advancements. The changes included the repeal of former Prob C §§1050-1053 and the amendment of former Prob C §1054.

In 2001, the California Law Revision Commission (CLRC) studied the rules of construction and proposed a variety of modifications that were eventually enacted (with changes not relevant to the present discussion) as Stats 2002, ch 138. During its study, the CLRC determined that the portion of Prob C §21140 that continued to preserve pre-1985 law with respect to advancements was now obsolete and should be eliminated. See *Rules of Construction for Trusts and Other Instruments*, 31 Cal L Rev'n Comm'n Reports 167, 185-186 (2001). Probate Code §21140 now simply states, "This part applies to all instruments regardless of when they were executed."

Unfortunately, the CLRC study also resulted in the discovery that there were a half dozen or so obsolete cross-references to old Chapter 5~including the one in Prob C §6103. Accordingly, the study recommended technical corrections. 31 Cal L Rev'n Comm'n Reports 185-186. The technical correction for Prob C §6103 that would have been consistent with the study's stated recommendations would have been simple deletion of the reference to Chapter 5. Unfortunately, Murphy's Law being what it is, the "correction" as actually proposed resulted in an updating of the old reference so that it would refer to "Part 1 (commencing with section 21101) of Division 11"~even though Part 1 has its own transition rule in Prob C §21140. (As Dave Barry would say, "I'm not making this up!") Alas, the legislature enacted the technical correction exactly as it had been proposed.

At this juncture, Prob C §21115 and the other rules of construction are now subject to two separate transition rules~at least superficially. Under Prob C §21140, the statute applies to all instruments whenever executed, and under Prob C §6103 the statute does not apply if the testator died before 1985. A legislative fix to delete the latter would be appropriate.

## COMMENTS OF KEVIN NORTE

Date: Sat., Jan. 15, 2005  
From: Kevin M Norte <KMNorte@LASuperiorCourt.org>  
To: <billwein@pacbell.net>  
Cc: <Saul.Bercovitch@calbar.ca.gov>  
Subject: FC 297.5 Applicable to Evidence Code

Bill:

It was great to discuss my issue with you about how Family Code 297.5 applies to the privileges in the Evidence Code if one looks at the Legislative history of AB 205 for the intent. I, however, find it confusing that the privilege is called the marital privilege. Perhaps the CLRC. can change the titles of the statutes to change the word "Marital" in the privilege section to "Spouse". I know it would take years to change the words in the statutes but perhaps someone can look at changing the titles of the statutes where "marriage" or "marital" is used.

I am CC:ing Saul Berkovitch, the staff attorney for the State Bar for the "CAJ" on this.

Thanks for listening.

Kevin Norte  
Court Research Attorney  
The Stanley Mosk Courthouse  
213.974.7938

**RUTTER**  
**HOBBS**   
**DAVIDOFF**  
INCORPORATED  
LAWYERS

Law Revision Commission  
RECEIVED

AUG 5 2005

File No.: 1480.013

August 2, 2005

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

Barbara S. Gaal, Esq.  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room#D2  
Palo Alto, CA 94303-4739

**Re: Attorney-Client Privilege**

Dear Barbara:

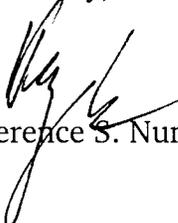
Enclosed is a copy of a new article which William Burford and I recently published in the California Trusts & Estates Quarterly concerning the post-death status of the attorney-client privilege. As we suggest in the article, this is an area of the law we believe the Law Revision Commission should review.

The current structure of Evidence Code §§ 953 and 954 does not take account of applicable post-death probate procedures and practices and can give rise to unpredictable and obviously unfair results. Based on comments I have received concerning the article, I believe the termination of the privilege after a client's death is also contrary to expectations of most people, including most attorneys.

While uniformity in the law is not always a virtue, when the law of the United States and the law of the largest state of the United States reach fundamentally different results on non-political issues such as the rules of evidence, one must wonder which law better articulates the expectations of most citizens.

I am providing copies of this letter and the enclosure to others who may have an interest in the subject of this letter.

Sincerely,

  
Terence S. Nunan

TSN:gt  
Enclosure

cc: Honorable Arnold Gold - Judicial Council (w/encl.)  
Professor Edward Halbach (w/encl.)

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## DEAD MAN TALKING: IS THERE LIFE AFTER DEATH FOR THE ATTORNEY-CLIENT PRIVILEGE?

By William R. Burford and Terence S. Nunan

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### I. INTRODUCTION

On Valentine's Day 2005, the Supreme Court of California delivered a small surprise to some members of the bar. In *HLC Properties, Ltd. v. Superior Court*,<sup>1</sup> a royalties disputes involving the recordings by the late Harry Lillis (Bing) Crosby, the court ruled that, under §§ 953 and 954 of the California Evidence Code, the attorney-client privilege was extinguished upon the discharge of Crosby's executor in 1981 and consequently that dozens of decades-old written communications to and from Crosby's lawyers were subject to disclosure.

Most probate lawyers are already aware that a personal representative is entitled to claim or waive the attorney-client privilege on behalf of a decedent and are familiar with various exceptions to the privilege recognized when a decedent's testamentary intentions are placed at issue. Some (thoroughly nonscientific) polling suggests, however, that few practitioners understand the attorney-client privilege to vanish entirely upon the discharge of an executor or estate administrator, and fewer still have ever considered the impact post-death probate procedures and pre-death planning can have on the viability of the attorney-client privilege after a client's death.

This article contrasts the California and common law rules governing the posthumous application of the attorney-client privilege, identifies some of the ambiguities and uncertainties created by the "personal representative" rule adopted in Evidence Code §§ 953 and 954, and reviews various means for maintaining – or even reviving – the privilege after the death of a client.

### II. SOURCES OF THE ATTORNEY-CLIENT PRIVILEGE

#### A. The Common Law

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law"<sup>2</sup> and "has been a hallmark of Anglo-American jurisprudence for almost 400 years."<sup>3</sup> "While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions."<sup>4</sup>

The purpose of the attorney-client privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>5</sup> The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."<sup>6</sup>

The protections provided by the attorney-client privilege have been described as "absolute" and are generally recognized "without regard to relevance, necessity or any particular circumstances peculiar to the case."<sup>7</sup> Although application of the privilege may result in the suppression of important information, "the privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence."<sup>8</sup>

#### B. California Evidence Code

The laws governing the attorney-client privilege in California are set forth in Evidence Code §§ 950-962 and follow the so-called "modern" trend, under which privilege claims are not automatically recognized but must be asserted by a party entitled to do so.<sup>9</sup>

Evidence Code § 954 provides, in pertinent part, that a client possesses a privilege to refuse to disclose or to prevent another from disclosing a confidential attorney-client communication when such privilege is claimed by (a) the "holder of the privilege," (b) a person "authorized to claim the privilege by the holder of the privilege," or (c) the lawyer who received the confidential communication, except when "there is no holder of the privilege in existence."<sup>10</sup> Section 954(c) appears unique in expressly prohibiting an attorney from claiming the privilege if there is no holder of the privilege in existence.<sup>11</sup>

Evidence Code § 953(c) states that when a client is deceased, the holder of the attorney-client privilege is the decedent's "personal representative," i.e., the executor or administrator of the client's estate. At the same time, the law also recognizes several "testamentary" exceptions to the attorney-client privilege after a client's death. For example, Evidence Code § 957 provides that there is no privilege with respect to confidential communications between a lawyer and a deceased client when the communication is relevant to a dispute between parties who claim through a deceased client. The Evidence Code also recognizes exceptions to the privilege when an issue exists as to a decedent's intentions or competence in executing a document, the circumstances surrounding the execution of a document, or the validity of a document purporting to affect an interest in property.<sup>12</sup>

The enactment of the California Evidence Code in 1965 was one of the first comprehensive codifications of the law of the evi-

dence and has been characterized as a significant legislative achievement. "Through its enactment, California replaced an incomplete, inconsistent, and confusing body of statutory and case law with a comprehensive statute." The statutory foundation of the rules of privilege in California restricts the traditional role of the courts. "The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions."<sup>14</sup>

### III. POSTHUMOUS APPLICATION OF THE PRIVILEGE

#### A. *Swidler & Berlin v. United States*

It may come as a bit of a surprise to learn that, outside of testamentary disputes, the courts have had relatively few occasions to address the scope and availability of the attorney-client privilege after the death of a client. In *Swidler & Berlin v. United States*,<sup>15</sup> a 1998 decision, the United States Supreme Court was provided such an opportunity.

*Swidler & Berlin* involved a request by Independent Counsel Kenneth Starr for recognition of a limited exception to the attorney-client privilege in the context of a pending criminal investigation. At issue were notes made by James Hamilton, an attorney for Vincent Foster, who was then Deputy White House Counsel, during a two-hour meeting between Hamilton and Foster shortly before Foster's death in 1993. As part of an investigation of the dismissal of employees of the White House Travel Office, the so-called "Travelgate" investigation, a grand jury (at the request of Starr's office) issued subpoenas for the production of handwritten notes taken by Hamilton during his meeting with Foster. Hamilton and his law firm, Swidler & Berlin, moved to quash the subpoenas.

The District Court reviewed the notes in camera and granted the motion to quash. The Court of Appeals reversed, holding that the District Court should have weighed the importance of the communications to the pending criminal investigation against the decedent's interests in shielding the notes from disclosure. The Supreme Court then reversed the ruling of the Court of Appeals, holding that the attorney-client privilege survived Foster's death and protected his attorney's notes from disclosure and rejecting the use of a balancing test to determine the applicability of the privilege.

Chief Justice Rehnquist, writing for a six-member majority, identified the issue presented – broadly but simply – as "the extent to which the privilege survives the death of the client."<sup>16</sup> In the course of reviewing the existing case law on the issue, the court acknowledged that while previous rulings have "most often involv[ed] the testamentary exception" to the privilege, the cases "uniformly presume the privilege survives, even if they do not so hold."<sup>17</sup> Finding in the "great body of this case law" a presumption that the privilege remains in force after a client's death, the court declared that "at the very least the burden is on the

Independent Counsel to show that 'reason and experience' require a departure from this rule."<sup>18</sup>

The Independent Counsel relied on the routine admission of confidential communications on testamentary issues, along with the absence of financial harm to a deceased client's estate, to argue for the recognition of an exception to the attorney-client privilege where confidential communications are shown to be of substantial importance to a pending criminal investigation.<sup>19</sup> The Independent Counsel asserted that the creation of such a limited exception would not adversely affect a client's willingness to disclose sensitive matters to legal counsel, a position bolstered by scholarly and other criticisms of the posthumous application of the attorney-client privilege.<sup>20</sup>

The majority disagreed and dismissed these arguments as "at odds with the goals of full and frank communication and of protecting the client's interests."<sup>21</sup> The court noted that clients consult attorneys "for a wide variety of reasons" and that attorneys are often called on to act "as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice."<sup>22</sup> In light of the legitimate concerns a client may have for matters of reputation and for harms that might befall friends or family members after death, "[p]osthumous disclosure of communications may be as feared as disclosure during the client's lifetime."<sup>23</sup> Accordingly, the open communication upon which the privilege is founded would be encouraged only if a client knows that the matters discussed will remain confidential even after death.

The court recognized that the Independent Counsel's arguments were "by no means frivolous," but at the same time found "weighty reasons that counsel in favor of posthumous application" of the attorney-client privilege.<sup>24</sup> In the end, the majority viewed the Independent Counsel's arguments as founded on "thoughtful speculation" and rejected the adoption of a "no harm in one more exception" rationale in the absence of empirical evidence that posthumous termination of the privilege would have no adverse effect on a client's willingness to confide in an attorney.<sup>25</sup>

#### B. *HLC Properties, Limited v. Superior Court*

The California Supreme Court also recently had a rare opportunity to address the posthumous application of the attorney-client privilege outside of the testamentary context. In *HLC Properties, Ltd. v. Superior Court*, the court was asked to decide two distinct questions. First, was Bing Crosby's unincorporated business office, operating under the name Bing Crosby Enterprises ("Enterprises"), a client and "holder" of the attorney-client privilege? Second, did HLC Properties, a limited partnership formed following Crosby's death, succeed to the attorney-client privilege, either from Enterprises or from Crosby himself?

HLC was formed by Crosby's surviving spouse, Kathryn, and the executor of his estate to manage a wide-ranging portfolio of

investments and intellectual property. Crosby's estate was closed in 1981, approximately four years after his death, at which time the probate court approved the formation of HLC, the executor's transfer of assets of the estate to HLC and the distribution of limited partnership interests in HLC to various trusts established for members of the Crosby family.

Nearly two decades later, in 2000, HLC filed suit against MCA Records, Inc., alleging that the record company had underpaid royalties due under three recording contracts executed in 1943, 1949 and 1956. In the course of discovery and again at the time of trial, HLC and the law firm that represented Crosby during his lifetime refused to produce 59 written communications between lawyers and employees acting on Crosby's behalf during a contractual audit conducted in 1959 and 1960.<sup>27</sup> The claim of attorney-client privilege was based on the position that Enterprises was the client at the time the communications were made and that HLC was entitled to assert the privilege as a successor to Enterprises. MCA countered that Crosby himself was the client, that his executor was the only party entitled to claim the attorney-client privilege after his death, and that the ability to assert the privilege terminated upon the discharge of the executor.

The trial court agreed with MCA, finding that Crosby was the client at the time of the communications at issue and that the attorney-client privilege terminated following his death. The Court of Appeal granted HLC's petition for a writ of mandate and reversed the trial court, ruling that Bing Crosby Enterprises was an entity qualified to hold and claim the attorney-client privilege and that HLC could assert the privilege as a successor to Enterprises. MCA petitioned for review by the California Supreme Court, which reversed the Court of Appeal's decision. In a unanimous opinion authored by Justice Baxter, the Supreme Court held that even if Enterprises constituted an entity or association qualified to claim the attorney-client privilege under the law, the trial court had found that Crosby himself – not Enterprises – was the client with respect to the documents at issue and that Crosby's executor was the only party entitled to claim the privilege under Evidence Code §§ 953 and 954.

In reviewing the relevant provisions of the Evidence Code, the court looked to the plain language of § 953(c), which states “without qualification” that a client's personal representative is the holder of the attorney-client privilege after death.<sup>28</sup> The court also reviewed Evidence Code § 954, which provides that the privilege may be claimed only by (a) the holder of the privilege, (b) a person authorized by the holder to claim the privilege, or (c) the client's attorney, so long as a holder of the privilege is in existence. According to the court, “[t]aken together, these two sections unambiguously provide that only a personal representative may claim the attorney-client privilege in the case of a deceased client.”<sup>29</sup>

Despite the purported clarity of Evidence Code §§ 953 and 954, the court sought additional guidance from the California Law Revision Commission's Comments to § 954. In its commen-

tary, the Commission stated that while the privilege may be claimed legitimately by a personal representative during administration of a decedent's estate, particularly where the estate is a party to litigation, “there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged.”<sup>30</sup> The Commission's commentary further explained that, under § 954, “the privilege ceases to exist when the client's estate is finally distributed and his personal representative is discharged.”<sup>31</sup> According to the court, the Commission's statements confirm “the plain meaning” of Evidence Code §§ 953 and 954 – that “the attorney-client privilege of a natural person transfers to the personal representative after the client's death, and the privilege thereafter terminates when there is no personal representative to claim it.”<sup>32</sup>

#### IV. AN UNCERTAIN PRIVILEGE

In *HLC Properties*, the California Supreme Court viewed its task as a simple, relatively straightforward exercise in statutory construction, based on certain factual findings by the trial court. In light of the apparent relevance, and recent vintage, of *Swidler & Berlin*, however, the court's omission of any reference to the opinion or its discussion of the attorney-client privilege after death is curious.<sup>33</sup> While the Law Revision Commission declared in 1965 there was “little reason” to apply the privilege after a deceased client's estate is closed, a majority of the United States Supreme Court determined in 1998 that there were compelling reasons to maintain the privilege after death. In such circumstances, courts often take notice of opposing policy arguments, and perhaps even spend some time pondering their merits, before concluding that their options are limited and a particular result is dictated by a controlling precedent or statute. In contrast, in *HLC Properties*, the California Supreme Court evidenced not the slightest wish to consider the premises or wisdom of the personal representative rule in light of its departure from the common law, nor any apparent questions or misgivings about its application in, and beyond, the case at hand.

On one hand, the decision in *HLC Properties* is almost certainly an appropriate interpretation of the relevant statutory provisions and legislative history presented to the court. On the other, consideration of the realities of estate administration and review of the relevant provisions of the Probate Code reveal ambiguities and uncertainties in the scope of the attorney-client privilege after death and suggest that, as a practical matter, the application of the personal representative rule is not nearly as simple or straightforward as it would appear from the court's unanimous opinion in *HLC Properties*.

In *Swidler & Berlin*, the United States Supreme Court rejected the use of a case-by-case balancing test for posthumous application of the attorney-client privilege, finding that that the weighing of a deceased client's interests against the importance of information to a pending criminal investigation would introduce “substantial uncertainty” as to the availability of the privilege after

death and, thereby, inhibit full and frank communications.<sup>34</sup> In earlier cases, the court had declared in a similar fashion that if the foundational purposes of the attorney-client privilege are to be served, clients and their lawyers “must be able to predict with some degree of certainty” whether a particular communication will be protected from disclosure.<sup>35</sup> “An uncertain privilege, *or one which purports to be certain but results in widely varying applications by the courts*, is little better than no privilege at all.”<sup>36</sup>

The common law provides certainty by generally proscribing disclosure of privileged communications after the death of the client. On the other end of the continuum, predictability would also be provided by the termination of the attorney-client privilege upon the death of the client, the rule espoused by Judge Learned Hand and scholars such as Professor Charles T. McCormick.<sup>37</sup> One might also attempt to balance the competing concerns of client confidentiality and the availability of relevant evidence by maintaining the privilege for a specified number of years following a client’s death.<sup>38</sup>

Evidence Code § 953(c), which adopts a middle ground position between the common law and a termination-on-death rule, is founded on a policy objective of protecting a deceased client’s estate from premature disclosure of confidential communications while allowing for the discovery of such communications after a client’s affairs have been wound up. In this respect, the personal representative rule is comparable to a rule that would extinguish the privilege after the expiration of a defined period of time following a client’s death.<sup>39</sup> Unlike each of those rules, however, § 953(c) fails to achieve either predictability or certainty in its application and, in this way, fails to further the purpose of the attorney-client privilege in fostering full and frank communications between clients and their attorneys.

As illustrated below, Evidence Code § 953(c), as interpreted by the Law Revision Commission and the California Supreme Court, appears to be premised on an incomplete and outdated understanding of estate planning and probate procedures. The personal representative rule leads to differing results depending on immaterial, arcane and arbitrary distinctions in post-mortem probate procedures. Indeed, this seemingly straightforward rule may raise more questions than it answers.

## A. Effect of Death on Existence of the Privilege

A simple but seemingly intractable issue arising under the personal representative rule – and left unanswered by *HLC Properties* – is whether the attorney-client privilege exists in any form after a client’s death in the event that a personal representative is not or has not been appointed.

An apparent assumption underlying Evidence Code § 953(c) is that a personal representative is appointed as a matter of course following a client’s death. Whatever validity this assumption may have had in 1942 when the American Law Institute first issued the

Model Code of Evidence, or in 1965 when California lawmakers enacted the Evidence Code, it does not reflect an accurate understanding of contemporary post-death trust and estate proceedings. Indeed, given the prevalent use of revocable trusts, many “clients” never have a personal representative appointed after death, yet their affairs are wound up and all of their assets are transferred just as in a formal estate administration.

In the event that a personal representative has not been appointed after a client’s death, the Evidence Code presents at least two opposing possibilities: (i) the privilege expires on death, but may be “revived” by appointment of a personal representative; or (ii) the privilege remains effective following the client’s death and may be terminated only by the discharge of a personal representative. The choice between these alternatives may be irrelevant or inconsequential when a traditional probate proceeding is commenced and completed after death. On the other hand, if alternative procedures (e.g., a spousal property petition) are employed or a revocable trust is utilized to transfer a decedent’s assets after death, the attorney-client privilege may reside in a state of limbo, and the choice between these options may not be purely an idle or academic concern.

## B. Discharge of the Personal Representative

Probate Code § 12250(a) provides that, after a personal representative has complied with the terms of an order for final distribution, “the court shall, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter.” In *HLC Properties*, the court, relying on the Law Revision Commission’s commentary to Evidence Code § 954, concluded that the attorney-client privilege terminated “once Crosby’s estate was finally distributed *and his personal representative discharged*.”<sup>40</sup> On examination, the emphasis placed on the discharge of a personal representative poses a number of questions. For example, is the issuance of an order discharging the personal representative a condition precedent for the termination of a decedent’s privilege? Does the availability of the privilege continue in the event that a personal representative fails (or declines) to file the necessary affidavit of discharge to cause the probate court to issue an order under Probate Code § 12250?

An order discharging a personal representative provides a clear indicator of the termination of the “office” of personal representative. It is questionable, however, whether the issuance of an order of discharge is – or should be – as significant as it is made to appear in *HLC Properties*. Probate Code § 12250 is not referenced in and has no per se significance to any of the relevant provisions of the Evidence Code. The Probate Code also imposes no requirement that a personal representative ever obtain an order of discharge. In fact, it is not uncommon for a personal representative to complete an estate administration but not to file the necessary papers to cause a discharge of his liabilities. The failure to file for discharge may be due to inadvertence or inattention. Alternatively, the omission may be intentional and in considera-



tion of issues the personal representative may have to address following the completion of probate administration.<sup>41</sup>

These issues are not merely abstract or hypothetical concerns. Indeed, shortly after the Supreme Court's decision in *HLC Properties*, the partnership filed a petition for rehearing, arguing that the court erroneously concluded that Crosby's executor had in fact been discharged. According to HLC's petition, there was no evidence in the record before the court or in the probate court's files to support this conclusion.

By endowing an order of discharge with undue legal significance, the personal representative rule relies on a largely immaterial and often overlooked procedure for relieving a personal representative of liability to define the parameters and availability of the attorney-client privilege. While this disjointed approach may present problems infrequently, it nevertheless creates undesirable confusion and uncertainty in the application of the attorney-client privilege after death.

### C. Subsequent Administration of an Estate

Probate Code § 12252 provides that a court may order subsequent administration of an estate "because other property is discovered" or "because it becomes necessary or proper for any cause." If a personal representative is appointed a second time, is the attorney-client privilege, which was previously terminated, effectively resurrected? Could a member of the Crosby family have sought the appointment of a personal representative (even while the matter was being considered by the appellate court) for the purpose of claiming the attorney-client privilege in the royalties dispute with MCA?

In *Estate of St. John*,<sup>42</sup> the Court of Appeal held that an estate should be reopened for purposes of ordering the proration of inheritance taxes among nonprobate beneficiaries and preventing the executrix from being forced to pay such taxes "out of pocket." In *O'Brien v. Nelson*,<sup>43</sup> the California Supreme Court stated that "after final settlement and distribution of an estate, further letters of administration should not be issued unless there remains property not disposed of, or some act to be done which only an administrator can do." While these opinions do not address a court's duty or ability to order subsequent administration to allow for the assertion of attorney-client privilege, Probate Code § 12252 at least provides for the possibility that in the right circumstances a court may find it necessary and proper to appoint a personal representative for this purpose.

Again, actions taken following the issuance of the California Supreme Court's opinion in *HLC Properties* suggest that arcane issues such as these, which may appear mere speculative or theoretical ruminations, are in fact real, substantial considerations for both parties and the courts in applying the personal representative rule. After the decision in *HLC Properties* was issued, a request was filed in probate court to appoint a special administrator for subsequent administration of Bing Crosby's estate. Once appoint-

ed, the administrator asserted the attorney-client privilege to prevent production of the same communications considered in the Supreme Court's opinion. In view of these recent maneuvers, we may not have seen the last appellate decision on post-death assertion of the privilege under Evidence Code §§ 953 and 954.<sup>44</sup>

### D. Post-Death Administration of a Living Trust

#### 1. Use of Living Trusts in Lieu of Estate Administration

Under California law, the existence of the attorney-client privilege after death depends on the appointment, or perhaps the discharge, of a personal representative. If a client employs a revocable trust as a will substitute, however, the appointment of a personal representative is generally unnecessary and uncommon. If an estate administration has not been commenced after a client's death, may a party attempting to claim the attorney-client privilege, or one seeking disclosure of confidential communications, file a petition for probate for the sole purpose of activating or terminating the privilege? Would such action be necessary to assure the availability – or, conversely, the termination – of the attorney-client privilege?

Probate Code § 8000 allows for commencement of an estate administration at "any time" after death. It is not entirely clear, though, that the courts should permit an estate administration to proceed or continue in the absence of property subject to probate or claims against a decedent's estate. Probate Code § 12251(a) provides that "[a]t any time after appointment of a personal representative and whether or not letters have been issued, if it appears there is no property of any kind belonging to the estate and subject to administration, the personal representative may petition for the termination of further proceedings and for discharge of the personal representative."<sup>45</sup> Section 12251 suggests the need for property to proceed with an estate administration, yet by its terms allows for the possibility that a personal representative may be appointed and an order of discharge issued even if there is no property subject to probate administration.

If a long period of time has passed since the death of a client and his or her affairs have been "wound up" (through a trust administration or procedures other than a formal estate administration), it is possible a court may find that the privilege no longer exists and cannot be claimed even if a personal representative could still be appointed. Under a "rule of reason" approach such as this, a court could deny a claim of privilege if the purposes of Evidence Code § 953(c) in protecting the interests of a decedent's estate have been served and a "reasonable" period of time has passed to allow for estate administration. A rule of reason approach may avoid the necessity of making certain choices concerning the viability of the privilege after death. However, the scope of the attorney-client privilege after death would remain uncertain and unpredictable because, like other fact-specific, balancing tests, a court may decide to order disclosure or permit nondisclosure depending on a variety of factors unknown and unknowable to the client at the time he or she consults an attorney.

## 2. *Transfer of the Privilege to a Successor Trustee*

It may be interesting to compare the events that transpired in *HLC Properties* with what might have occurred if Bing Crosby had transferred his royalty rights to an inter vivos revocable trust.

In *Moeller v. Superior Court*, the California Supreme Court held that when an attorney is hired by a trustee to advise on trust matters, the privilege is not personal to a particular trustee but is held by the “office of the trustee.” Under *Moeller*, a successor trustee becomes the “client” under Evidence Code § 951, the holder of the attorney-client privilege under Evidence Code § 953(a) and the party empowered to claim or waive the privilege under Evidence Code § 954(a). Thus, even though revocable trusts are disregarded for many purposes, such as income taxes and creditor’s rights, and an identity of interest is often recognized between the trust and the person holding the power to revoke it, a significant difference exists between trusts and natural persons with respect to the viability of attorney-client privilege after death.

Assume that Crosby had transferred his royalty and contractual rights to a trust after the formation of the recording contracts in 1943 through 1956, but before the 1959 and 1960 audits that led to the generation of the documents at issue in *HLC Properties*. If Bing Crosby, as trustee, had hired employees and lawyers to administer and protect the trust’s contractual rights, a successor trustee would be entitled to claim the privilege under *Moeller*. Similarly, if Crosby’s assets were held in trust at the time of his death and HLC had been formed by a successor trustee, rather than by the executor of his estate, the attorney-client privilege might have been claimed by the trustee or a subsequent successor trustee and, perhaps, even by HLC itself after termination of the trust.

By use of a living trust, a person may be able to achieve a measure of “immortality” – at least with respect to the attorney-client privilege – that cannot be obtained by a person who holds property in his or her own name at death. The personal representative rule once again leads to anomalous results based on relatively insignificant or even arbitrary differences in the titling of assets and a client’s choice of estate planning vehicles.

## V. PLANNING TO PROTECT THE PRIVILEGE

If past history is indicative of the future, we should expect that issues concerning the disclosure of confidential attorney-client communications after a client’s death will continue to arise primarily in testamentary disputes, in which the privilege is not recognized and disclosure is mandated. Nevertheless, these issues will arise again in nontestamentary cases, as they did in *Swidler & Berlin* and *HLC Properties*. This may be particularly true for entertainers, business owners and investors whose property interests continue to produce income for their heirs.

Faced with the possibility that their descendants may have to

enforce contractual or intellectual property rights or may be involved in litigation involving a business or income-producing investments, attorneys and clients may not wish to rely solely on reactive post-death strategies, such as those discussed above, but may also wish to consider taking proactive measures during a client’s life to allow for the continued availability of the privilege after death.

Two possibilities for pre-death planning are discussed below. These measures may be suitable across a variety of situations, although they certainly are not the only tools one may employ to extend the life of the privilege. Other available options, such as the use of corporate entities and limited liability companies, may also be suitable and shaped to fit the individual needs of a client.

### A. Employ Legal Counsel in Name of the Trustee

An individual employing legal counsel may retain the attorney in his or her own name, even if the assets at issue in a legal proceeding (e.g., business interests or investment property) are held in the name of the trustee. In addition, legal proceedings often involve both claims by or against an individual as well as trust property. As discussed above, the attorney-client privilege of a trustee may be claimed or waived by those succeeding to the office of trustee, while the privilege held by a natural person passes to the executor or administrator of the individual’s estate and terminates on discharge of the personal representative. If legal advice or representation is sought on a matter that relates to or may ultimately involve property held in a revocable trust, it may be prudent to assure that the client enters into the engagement in his or her capacity as trustee.

### B. Authorization to Claim the Privilege

Evidence Code § 954(b) provides that, in addition to the holder of the privilege and the client’s attorney, the attorney-client privilege may be asserted by “[a] person who is authorized to claim the privilege by the holder of the privilege.” In planning to protect the privilege after death, a client (and the holder of the privilege) may attempt to extend the life of the attorney-client privilege by granting another the authority to claim the privilege.

The term “person who is authorized to claim the privilege” is not defined, nor apparently limited, by the provisions of the Evidence Code. In *Rudnick v. Superior Court*,<sup>48</sup> the California Supreme Court held that, under Evidence Code § 994(b), a defendant drug manufacturer who received reports of adverse reactions to its product from various physicians was authorized to claim the physician-patient privilege on behalf of the affected patients. The decision in *Rudnick* was based in large part on the determination that particular transmittals were “reasonably necessary for the accomplishment” of the purpose for which a physician was consulted.<sup>50</sup> In such cases, the court held that communications by physicians to the drug manufacturer did not constitute waivers of the privilege, whether or not the patient consented to the disclosure, and that the recipient of the report would be deemed a “per-



son who is authorized to claim the privilege by the holder of the privilege.”

If one is able to establish the benefits to a client of authorizing a third party to claim the privilege after the client’s death and the authorization’s furtherance of the purposes for which the client has sought legal advice, there appears little reason why a court should not honor an express authorization issued by the client under Evidence Code § 954(b). If a client has legitimate concerns about the use of confidential communications after death, it may be prudent to authorize a third party – an individual or series of individuals, a trustee or even a corporation or other entity – to claim the privilege on the client’s behalf. The authorization may be provided to the other party during life. Alternatively, it may be implemented by will or other directive effective upon death. Implementation of this strategy, although untested, imposes no significant costs and may provide a simple, cost-effective means of escape from the strictures of the personal representative rule.<sup>51</sup>

## VI. CONCLUSION

California’s personal representative rule seeks to balance the policy goals underlying the attorney-client privilege and society’s legitimate interests in allowing for the discovery and disclosure of relevant evidence. This balance, however, may be achieved at the expense of the clarity and certainty thought by some (including the United States Supreme Court) as necessary to fulfill the fundamental purposes of the privilege – to encourage full and frank communication, free from the apprehension of disclosure, and thereby promote the public interest in the administration of justice. Analysis of Evidence Code §§ 953 and 954, against the backdrop of the common law and in conjunction with relevant provisions of the Probate Code, reveals that the availability of the attorney-client privilege after the death of a client may vary dramatically based on seemingly inconsequential differences in estate planning choices and post-death probate procedures.

While appellate decisions addressing the posthumous availability of the attorney-client privilege outside of testamentary disputes have been rare to date, two significant opinions – *Swidler & Berlin v. United States* addressing the common law and *HLC Properties Ltd. v. Superior Court* examining the California Evidence Code – have been issued since 1998 and, based on post-opinion developments in the *HLC Properties* case, more decisions in this area may be on the horizon. Given the uncertainties created by the existing statutory framework, the Law Revision Commission and Legislature should reexamine the applicable provisions of the Evidence Code and Probate Code to ensure their consistency with the realities of post-death administration and to provide clarity as to the scope of the attorney-client privilege after a client’s death.

In the meantime, attorneys and clients interested in assuring that confidential communications are protected from posthumous disclosure may wish to carefully consider strategies aimed at

extending the life of the attorney-client privilege beyond the period of estate administration.

## ENDNOTES

1. *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54.
2. *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389, citing 8 Wigmore, Evidence, at § 2290 (McNaughton rev. 1961).
3. *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citing McCormick, Evidence, at § 87 (2d ed. 1972) and Wigmore, at § 2290.
4. *Mitchell*, 37 Cal.3d at 600.
5. *Upjohn*, 449 U.S. at 389.
6. *Hunt v. Blackburn* (1888) 128 U.S. 464, 470.
7. *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.
8. *Mitchell*, 37 Cal.3d at 599-600.
9. The modern approach to attorney-client privilege was first adopted in the Model Code of Evidence drafted by the American Law Institute in 1942 and, since that time, has been enacted in varying forms in 26 states. R. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165, 1182-88 (1999).
10. In contrast to Evidence Code § 954, Business & Professions Code § 6068(e)(1) sets forth a broader ethical duty upon attorneys “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” The ethical duty extends beyond a client’s death and covers all nonpublic information received by a lawyer in the course of a representation. It is this obligation, rather than the attorney-client privilege, which prevents a lawyer from writing a tell-all memoir after a client has passed away. Wydick, note 9, at 1178-79.
11. *See Swidler & Berlin v. United States* (1998) 524 U.S. 399, 405 n.2 (recognizing the adoption of the personal representative rule in approximately one-half of the states, but describing California law as “exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate’s personal representative) exists, suggesting the privilege terminates when the estate is wound up”). An alternate view is that Evidence Code § 954(c) may be unique only in expressly stating that which is implied in other codifications of the personal representative rule. Wydick, note 9, at 1186-87 & n. 121.
12. Evidence Code §§ 959-61.
13. B. Gaal, Cal. Law Rev. Comm’n Staff Memorandum 2002-41, *Comparison of Evidence Code with Federal Rules: Introduction of Study and Definition of Hearsay* (Aug. 29, 2002) (announcing study to determine whether Evidence Code should be conformed to the Federal Rules of Evidence), available at [www.clrc.ca.gov/pub/2002/MM02-41.pdf](http://www.clrc.ca.gov/pub/2002/MM02-41.pdf).
14. *HLC Properties*, 35 Cal.4th at 67.
15. *Swidler & Berlin*, 524 U.S. at 410.
16. *Id.* at 403.
17. *Id.* at 404.
18. *Id.* at 405-06, quoting Fed. R. Evid. 501. Rule 501 of the Federal Rules of Evidence provides that privilege claims “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,” unless state law supplies the rule of decision on a claim or defense, in which case the issue of privilege shall be determined in accordance with state law. The adoption of the common law and “reason and experience” test in Federal Rule of Evidence 501 was a compromise enacted in 1974 after disputes arose over specific privileges included in the proposed rules sent to Congress.
19. Approximately 95% of the decisions in which courts have cited the common law’s “general rule” have involved the application of the broad testa-

- mentary exception to the attorney-client privilege. Transcript of Oral Argument in *Swidler & Berlin v. United States*, 1998 WL 309279, at \* 4-5 (June 8, 1998). See also I. Ruiz, *Swidler & Berlin v. United States: Ye Shall Know the Truth If the Truth Shall Set Ye Free*, 74 Notre Dame L. Rev. 1403, 1419 (1999).
20. *Swidler & Berlin*, 524 U.S. at 406-07.
  21. *Id.* at 410.
  22. *Id.* at 407-08.
  23. *Id.* at 407.
  24. *Id.* at 410.
  25. *Id.*
  26. Crosby was a prodigious entertainer who, among other things, released over 1,700 recordings, topped the pop charts 42 times, and was the highest-grossing box-office draw for five consecutive years in the 1940s. Crosby was also a highly successful businessman who, while alive, may have had more than a passing interest in the attorney-client privilege. It is told that Crosby entered Gonzaga College in 1920 with the intention of becoming a lawyer, but after acquiring a set of drums, he was quickly drawn to the music scene and launched on the road to stardom. See [www.kcmetro.cc.mo.us/Pennvalley/biology/lewis/crosby](http://www.kcmetro.cc.mo.us/Pennvalley/biology/lewis/crosby).
  27. Evidence Code § 951 defines the term "client" to include "a person who, directly or through an authorized representative, consults a lawyer" for purposes of obtaining legal services and advice.
  28. *Id.* at 65.
  29. *Id.*
  30. *Id.*, quoting Comments to Evidence Code § 954, 7 Cal. Law Rev. Comm'n Reports 173 (1965).
  31. *Id.*
  32. *Id.* at 65-66.
  33. The U.S. Supreme Court's interpretation of California law in *Swidler & Berlin*, see note 11, *supra*, was repeatedly cited and heavily relied upon by MCA in its Petition for Review to the California Supreme Court.
  34. *Swidler & Berlin*, 524 U.S. at 409.
  35. *Upjohn*, 449 U.S. at 393. See also *Jaffee v. Redmond* (1996) 518 U.S. 1, 17-18.
  36. *Upjohn*, 449 U.S. at 393 (emphasis added).
  37. Wydick, note 9, at 1180.
  38. *Id.* at 1182.
  39. Among Crosby's vast collection of recordings are titles that capture the tenor of each of positions taken by courts, legislatures and commentators, from the personal-representative rule (*It's Mine, It's Yours*) to the common law (*They Can't Take That Away From Me*), and from rules that would extinguish the privilege on death (*You Can't Take It With You*) or after a specific period of years (*As Time Goes By*) to the open-ended, ex post balancing tests adopted by some courts (*Maybe*). Indeed, as even a cursory review of Crosby's discography suggests, he was telling the truth when, shortly before his death, he recorded a song entitled *There's Nothing That I Haven't Sung About*.
  40. *HLC Properties*, 35 Cal.4th at 66 (emphasis added).
  41. A commonly cited treatise on California estate administration takes the position that a representative may not wish to obtain a discharge "if there are further functions to be performed as representative, e.g., dealing with tax authorities on returns of the decedent of the estate" and observes that some attorneys follow a general practice of not having representatives discharged. 2 CEB, California Decedent Estate Practice § 21.44.
  42. *Estate of St. John* (1971) 19 Cal.App.3d 1008, 1011-12.
  43. *O'Brien v. Nelson* (1913) 164 Cal. 573, 575.
  44. The issuance of letters raises a host of additional questions. For example, is the party seeking discovery, although not an heir or beneficiary or creditor of the estate, entitled to notice of a petition or ex parte application for issuance of letters of subsequent administration? Is the party seeking disclosure an "interested party" with standing to object or to bring a petition for closure of the estate? Compare Probate Code § 48(a)(1) ("interested person" includes an "heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding") with Probate Code § 48(b) (identity of an interested party "may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding").
  45. No provision is made for parties other than the personal representative to file a petition under § 12251.
  46. *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131-1134.
  47. It is at least debatable under what circumstances a trustee's attorney-client privilege survives, or may be extinguished upon, the termination or distribution of a trust estate.
  48. *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932-33.
  49. Evidence Code § 994, which establishes the physician-patient privilege and follows the same framework as the definition of the attorney-client privilege provided in Evidence Code § 954, lists the following as parties able to claim the privilege: (a) the holder of the privilege; (b) a person who is authorized to claim the privilege by the holder of the privilege; and (c) the person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.
  50. *Rudnick*, 11 Cal.3d at 932-33; Evidence Code § 912(d).
  51. A "person who is authorized to claim the privilege by the holder of the privilege" would not claim the privilege as a "holder of the privilege" under Evidence Code §§ 953 and 954(a) but would make the claim based solely on the provisions of § 954(b). Consequently, even if an authorization were given post-death effect, it may cause at least one anomalous result. Because a person "authorized" to claim the privilege under Evidence Code § 954(b) is not a "holder" of the privilege as defined in § 953, an attorney might still be required to disclose a client's confidential communications under § 954(c), which prevents a lawyer from claiming the privilege "if there is no holder of privilege in existence." Evidence Code § 954, however, by its terms, grants a party authorized to claim the privilege the power "to prevent another," presumably including the client's attorney, from disclosing a confidential communication. It is also quite possible that § 954 may be interpreted to exclude the assertion of the attorney-client privilege by a person "authorized to claim the privilege by the holder of the privilege" when there is no longer any holder of the privilege in existence, although in this regard, § 954(b) is not limited in the same manner as § 954(c).

Please give to: Mr. Nathaniel Sterling  
----- Executive Secretary -----

Attn.: Nathaniel  
Sterling  
CLRC Executive Director

From: Sam Shabot  
3610 S. Midvale Avenue, Apt. 106  
Los Angeles, CA 90034-6674

Mr. Sterling:

- ① Please ~~write~~ <sup>write</sup> me <sup>a letter</sup> ^ to confirm you have received this. My mailing address is:  
Sam Shabot, 3610 S. Midvale Avenue, Apt. 106,  
Los Angeles, CA 90034-6674. I cannot receive facsimiles back to my number.
- ② Please make photocopies of these materials for all CLRC board members.
- ③ I would like to pursue forced heirship legislation in California, to protect against parental disinheritance of children in CA.

**Bibliography of Law Review Articles Supporting Forced Heirship Statutes (Children's Statutory Elective Share); Protecting Against Disinheritance of Children by Reason of Divorce and Subsequent Remarriage of Parents; Protecting Children's Rights of Inheritance**

Compiled by Sam Shabot

Last Updated: Tuesday, May 10, 2005

Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 Hastings L. J. 1197, 1253 (1990): "Protected Inheritance is substantially similar to the [legitimate] or forced heirship found in civil law countries and in Louisiana today."

Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 Case W. Res. L. Rev. 83 (1994).

Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 La. L. Rev. 1 (1996).

Howard W. Brill, *Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation*, 1992 Ark. L. Notes 1.

June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Hous. L. Rev. 359, 373 (1994).

John R. Cunningham, *Mortmain Statutes: The Dead Hand Still Survives*, 27 Idaho L. Rev. 49 (1990).

Joseph Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 La. L. Rev. 42, 68 n.134 (1941).

Furstenberg, Hoffman, and Shrestha, *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 Demography 319 (1995): "The problem of disinheritance of children has reached an acute level because of divorce and remarriage."

Mary Ann Glendon, *The New Family and the New Property*, 80-84 (1981): "A 'Children-First' principle would make 'explicit what is implicit' and 'mandatory what is now optional.'" *Id.* at 1560.

Shirley N. Jones, *The Demise of Mortmain in the United States*, 12 Miss. C.L. Rev. 407 (1992).

Thomas B. Lemann, ***Forced Heirship in Louisiana: In Defense of Forced Heirship***, 52 Tul. L. Rev. 20, 20 (1977).

Mary F. Radford, ***The Case Against the Georgia Mortmain Statute***, 8 Ga. St. U.L. Rev. 313 (1992).

Vincent D. Rougeau, ***Empire of Personal Desire: American Law and the Destruction of Communal Forms of Meaning*** (need cite).

Katherine Shaw Spaht, et al, ***The New Forced Heirship Legislation: A Regrettable Revolution***, 50 La. L. Rev. 409, 410, 416-417 (1990): "Forced heirship recognizes that special link between parent and child that exists without regard to the age of the child. It is not bound to the notion of support."

Katherine Shaw Spaht, ***Forced Heirship Changes: The Regrettable Revolution Completed***, 57 La. L. Rev. 55, 58 (1996).

Barbara Bennett Woodhouse, ***Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family***, 8 B.Y.U. J. Pub. L. 321 (1994).

Tamara York, ***Protecting Minor Children From Parental Disinheritance: A Proposal for Awarding A Compulsory Share of the Parental Estate***, 3 Det. C.L. Mich. St. U. 861 (1997).

## COMMENTS OF BOB SHOWEN

From: "bob" <bobshowen@sbcglobal.net>  
Date: November 2, 2004  
To: <sterling@clrc.ca.gov>  
Subject: Probate Code Section 13650 (Property Passing to Surviving Spouse)

The new Probate Code, effective July 1, 1991, continues the prior Probate Code Section 13655 without substantive change. The prior Probate Code Section 13655 was amended in 1988 by substituting "petitioner" for "personal representative" in the required notice to all persons interested in the the trust, "if the petitioner is the trustee of a trust that is a devisee under the will of the decedent". In paragraph 11 of the mandatory Judicial Council Spousal Property Petition the petitioner is required to disclose that she or he is the trustee of such a trust.

The foregoing has produced some unforeseen consequences. The Probate Code recognizes that a surviving spousal trustee of a trust that is a devisee under the will of the predeceased spouse clearly can be the petitioner in a Spousal Property Petition, but in the Courts of some Counties, they take the position that property can be confirmed to a surviving spouse only if the property passes outright, by intestacy or by will, to such surviving spouse.

### PROBATE CODE SECTION 13655

13655. (a) If proceedings for the administration of the estate of the deceased spouse are pending at the time a petition is filed under this chapter, or if the proceedings are not pending and if the petition filed under this chapter is not filed with a petition for probate of the deceased spouse's will or for administration of the estate of the deceased spouse, notice of the hearing on the petition filed under this chapter shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220 and each person named as executor in any will of the deceased spouse.

(2) All devisees and known heirs of the deceased spouse and, if the *petitioner* is the trustee of a trust that is a devisee under the will of the decedent, all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1),(2), or (3) of subdivision (a) of Section 15804.

(b) The notice specified in subdivision (a) shall also be mailed as provided in subdivision (a) to the Attorney General, addressed to the office of the Attorney General at Sacramento, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve either of the following:

(1) A testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state.

(2) A devise for a charitable purpose without an identified devisee or beneficiary.

## COMMENTS OF SIDNEY TINBERG

Date: Mon., Feb. 28, 2005  
From: Sidney Tinberg <stinberg@pacbell.net>  
Subject: EJ-001  
To: sterling@clrc.ca.gov

Dear Sirs,

Form EJ-001, and case law, requires that the judgment creditor place the judgment debtor's driver's license number and social security number on the Form, if he knows them, which Form can become a public record.

Sidney Tinberg  
(805) 585-2116  
<mailto:stinberg@pacbell.net>stinberg@pacbell.net  
21 S. California Street, Suite 206  
Ventura, CA 93001

### INQUIRY RE JUDICIAL COUNCIL WORK ON ISSUE RAISED BY TINBERG

From: Nathaniel Sterling [mailto:sterling@clrc.ca.gov]  
Sent: Monday, February 28, 2005  
To: O'Donnell, Patrick  
Cc: Pone, Daniel; stinberg@pacbell.net  
Subject: Fwd: EJ-001

Patrick, here is a copy of an email we received about personal information required in a Judicial Council form. Our correspondent, Mr. Tinberg, indicates that case law requires this. I have not researched the matter; it is quite possible the statute requires it (we worked on it quite a few years ago).

In our work on financial privacy, we came across a similar issue in connection with the abstract of judgment that is recorded to obtain a judgment lien on real property. In that case, the statute requires quite a bit of personal information, which upon recording becomes a matter of public record. At the time, we concluded there was not a direct conflict between the abstract of judgment statute and the California Personal Information Privacy Act due to broad exceptions in that Act. However, we also felt that the abstract of judgment statute probably should be reviewed to determine whether inclusion of the statutorily prescribed information is necessary for proper identification of the judgment debtor or the property to which a lien attaches.

Please let me know what, if anything, the Judicial Council may be doing on these matters. Thanks a lot.

- Nat

**RESPONSE FROM PATRICK O'DONNELL, ADMINISTRATIVE OFFICE OF  
THE COURTS**

From: patrick.o'donnell@jud.ca.gov  
Subject: RE: EJ-001  
Date: February 28, 2005  
To: sterling@clrc.ca.gov  
Cc: Daniel.Pone@jud.ca.gov, stinberg@pacbell.net

We receive inquiries several times a year about the inclusion of the space to provide the social security number on the Abstract of Judgment(form EJ-001). As you note, this information is required by the statute, which is what we inform those making inquiries.

There is no immediate action pending on the statute and, though an advisory committee is going to propose some changes to form EJ-001, they do not include any changes regarding the social security number.

I would mention, however, that I spoke with a representative of the California Association of Collectors a month or so ago about the statute and the form. He suggested that, from his point of view, a change in that statute and the form to require only the last four digits of the social security number would probably be sufficient to insure that the lien is on the right person, while protecting the person's financial identity. This might be a good legislative solution.

Is this something the CLRC might be able to take up?

(The collections attorney suggested that the one group that might have some concerns about using only the last four digits was the title companies. So if a proposal is going ahead on this, we should probably get their input. They may be ok with the proposal, too.)