Admin. January 27, 2012

Memorandum 2012-5

New Topics and Priorities

Once a year, the Commission reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively enacted Calendar of Topics Authorized for Study ("Calendar of Topics"). Usually, the Commission undertakes this analysis in the fall, after the Legislature has adjourned for the year.

Last fall, however, the Commission's membership was in transition and a lawsuit potentially having a major impact on the Commission's workload was pending before the California Supreme Court. Consequently, the annual consideration of new topics and priorities was postponed.

Now that the Governor has filled most of the vacancies on the Commission, and the California Supreme Court has decided *California Redevelopment Ass'n v. Matosantos,* __ Cal. 4th __ (2010) (S194861), it is time for the Commission to develop a workplan for 2012.

To assist the Commission in that process, this memorandum summarizes the status of topics that the Legislature has directed the Commission to study, other topics that the Commission is actively studying, topics that the Commission has previously expressed an interest in studying, and new topics that have been suggested in the last year. 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 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. Absent discussion, the staff will handle the topic as recommended in this memorandum.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

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

PREFATORY NOTE

In reviewing this memorandum, Commissioners and other persons should bear in mind that the Commission's resources are very limited, its existing workload is substantial, and it must continue to produce a valuable work-product to survive in today's economy.

The Commission's current staff is tiny, consisting of three attorneys, a secretary and a half-time administrative assistant. The Commission also receives some assistance from externs and other law students, particularly from UC Davis School of Law.

While its staff resources are more limited than in the past, the Commission must nonetheless continue to demonstrate its value to the state by producing high quality reports that significantly improve the law and benefit the citizens of California. It would not be enough to pontificate, without achieving effective reform.

To accomplish what it needs to do, **the Commission must use its resources wisely, focusing on projects that serve the Legislature's needs or appear likely to lead to helpful changes in the law.** The Commission cannot afford to spend time on topics that are unlikely to produce a good result.

COMMISSION AUTHORITY

The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: (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, by statute or concurrent resolution. Gov't Code § 8293.

In the past, the bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Once 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 have become much more common in recent years. Many of the Commission's recent studies were directly assigned by the Legislature, not requested by the Commission.

CURRENT LEGISLATIVE ASSIGNMENTS

Several topics have been specifically assigned to the Commission by statute or resolution. They are described below.

Community Redevelopment Law Clean-Up Legislation

Last year, the Legislature passed and the Governor signed a bill that directs the Commission to "draft a Community Redevelopment Law cleanup bill for consideration by the Legislature no later than January 1, 2013." See Health & Safety Code § 34189(b); 2011 Cal. Stat. ch. 5, § 7 (AB1X 26 (Blumenfield)). That is a very short deadline for a Commission study. **To timely complete the study, the Commission will need to give it top priority and devote extensive staff resources to it during the coming year.** For further discussion of this new assignment, see Memorandum 2012-7.

Charter School as a Public Entity

In 2009, the Legislature directed the Commission to analyze "the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code," which governs claims and actions against public entities and public employees. See 2009 Cal. Stat. res. ch. 98. The Legislature did not specify a due date for this study, but presumably it would like the work completed promptly.

The Commission has made steady progress on this topic, and is close to being able to approve a final recommendation. **The Commission should continue to give the topic high priority.**

Deadly Weapons

Another measure directed the Commission to study the statutes relating to control of deadly weapons. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)). The objective was to propose legislation that would clean up and clarify the statutes, without making substantive changes. The Commission completed its final report on this topic in compliance with the due date of July 1, 2009.

Two voluminous bills were enacted in 2010 to implement the Commission's recommendation, and a clean-up bill was enacted last year. See 2010 Cal. Stat. ch. 178; 2010 Cal. Stat. ch. 711; 2011 Cal. Stat. ch. 285.

Further clean-up legislation is necessary this year, because some of the statutory revisions in last year's bill were chaptered out (i.e., nullified) by conflicting legislation due to the bill's subordination clause. See Gov't Code § 9605. For further details, see Memorandum 2012-6.

If time permits, the Commission **might also want to consider some of the matters identified in its report as "Minor Clean-Up Issues for Possible Future Legislative Attention."** See 2010 Cal. Stat. ch. 711, § 7; *Nonsubstantive Reorganization of Deadly Weapon Statutes,* 38 Cal. L. Revision Comm'n Reports 217, 265-80 (2009). These are narrow issues that are generally suitable for student projects under staff supervision.

Trial Court Unification Follow-Up Studies

Government Code Section 70219 directs the Commission and the Judicial Council to study certain topics identified in the Commission's report on *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998). The Commission was given primary responsibility for some of those topics, the Judicial Council was given primary responsibility for other topics, and a few topics were jointly assigned to the Commission and the Judicial Council.

Topics For Which the Commission Has Primary Responsibility

The Commission has completed work on all but one of the topics for which it has primary responsibility. The remaining topic is publication of legal notice in a county with a unified superior court.

Before trial court unification, numerous statutes required publication in a newspaper of general circulation *in a particular judicial district*, rather than in a particular county. On the Commission's recommendation, that situation was preserved through the unification process: Even though municipal courts no longer exist, certain legal notices are still required to be published in a newspaper of general circulation in a district historically used for municipal court elections. See Gov't Code § 71042.5; *Revision of Codes, supra,* at 72.

In proposing that approach, however, the Commission warned that preserving municipal court districts for purposes of publication "may be unsatisfactory in the long-term because it would not account for changing demographics." *Id.* at 86 n.131. The Commission recommended conducting a follow-up study of the matter. *Id.* at 85-86.

The Commission has been deferring work on that follow-up study until interested parties gain experience with legal publication in a unified superior court. By now, however, a full decade has passed since trial court unification was completed. In addition, a bill enacted last year underscores the importance of conducting the study in question.

That bill — SB 279 (Emmerson), 2011 Cal. Stat. ch. 65 — focused on Business and Professions Code Section 21707, relating to a lien sale of property at a self-service storage facility. For many years, both before and after unification, Section 21707 required that such a sale be posted in conspicuous places in the neighborhood of the proposed sale, or advertised in a newspaper of general circulation in the "judicial district" where the sale is to be held — i.e., the municipal court district (see Gov't Code § 71042.5). In 2010, however, an eleventh hour amendment replaced the phrase "judicial district" with "county." See 2010 Cal. Stat. ch. 439, § 4 (AB 655 (Emmerson)).

That appears to have been an inadvertent error, and the California Newspaper Publishers Association ("CNPA") promptly sponsored SB 279 to undo it. *See, e.g.*, Senate Judiciary Committee Analysis of SB 279 (March 22, 2011), pp. 3-4. As enacted, SB 279 restores the original language requiring publication in a newspaper of general circulation in the "judicial district" where the sale is to be held.

The enactment of SB 279 demonstrates not only that the concept of local publication (as opposed to countywide publication) remains viable, but also that groups like CNPA will fight to preserve it on the ground that it is necessary to help ensure that legal notices reach their intended audience. Further, while the

bill was pending, the staff learned from contacts at the Administrative Office of the Courts ("AOC") that the practicalities of using municipal court districts for publication purposes have become problematic, because there is no readily available source defining the district boundaries. That problem should be addressed in some manner, the sooner the better.

For these reasons, **the Commission should commence the legislatively mandated study of publication of legal notice as soon as its resources permit.**

Topics Jointly Assigned to the Commission and the Judicial Council

The Commission's report on *Trial Court Unification: Revision of Codes* also called for a joint study with the Judicial Council reexamining the three-track system for civil cases (traditional superior court cases, traditional municipal court cases, and small claims cases) in light of unification. Under this rubric, the Commission worked on two projects with the Judicial Council. One of them ended with the enactment of legislation. See *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases,* 30 Cal. L. Revision Comm'n Reports 443 (2000); 2001 Cal. Stat. ch. 812.

The second joint project was a study of the jurisdictional limits for small claims cases and limited civil cases. Consensus among the stakeholders proved difficult to reach. In early 2004, the Commission decided to put that study on hold until the state budget situation improved or there were other developments suggesting that further work would be productive. The Judicial Council suspended its work on the project at about the same time.

Since then, the Legislature has twice increased the jurisdictional limit for a small claims case, but the jurisdictional limit for a limited civil case remains unchanged. The Judicial Council's Small Civil Cases Working Group recently began to reexamine this area and related matters. As the staff reported in Memorandum 2011-36, however, it is not yet clear whether that effort will lead anywhere. **The staff will keep the Commission posted on what develops and whether the Commission should consider taking any action in this area.**

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, the Commission has done a vast amount of work. Five bills and a constitutional measure implementing revisions recommended by the

Commission have become law, affecting over 1,700 sections throughout the codes. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56; 2010 Cal. Stat. ch. 212, §§ 2, 3, 6, 7, 8, 10, 11, 12; ACA 15, approved by the voters Nov. 5, 2002 (Prop. 48).

The Commission also has several other trial court restructuring proposals ready for introduction in 2012. For further details, see Memorandum 2012-6.

More work needs to be done to complete the assigned task of revising the codes to reflect trial court restructuring. **Consistent with other demands on staff resources, the Commission should continue its work in this area.**

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the 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.

Code of Civil Procedure Section 703.120(a) requires the Commission to review the statutory exemptions from enforcement of money judgments, and recommend any changes in exempt amounts that appear proper, every ten years.

In 2003, the Commission completed its second decennial review of these exemptions. Legislation recommended by the Commission was enacted. See 2003 Cal. Stat. ch. 379. The third decennial review is due in 2013. **To meet that deadline, the Commission will need to prioritize this topic in 2012.**

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.

For example, a few years ago the Commission received a suggestion to replace "Tort Claims Act" with "Government Claims Act" throughout the codes. See Memorandum 2009-38, pp. 38-39. The latter term more accurately describes the content of the Act and is preferred by the California Supreme Court. The Commission studied the matter and approved a final recommendation along the lines suggested. **The staff is currently seeking an author to introduce the recommended legislation in 2012.** See Memorandum 2011-6.

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 unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily propose legislation to effectuate these recommendations.

No new action on this topic is required at this time.

CALENDAR OF TOPICS

The Commission's Calendar of Topics currently includes 22 topics. See 2009 Cal. Stat. res. ch. 98 (copy attached to Memorandum 2012-1). The next section of this memorandum reviews the status of each topic listed in the Calendar. On a number of the listed topics, the Commission has completed work, but the topic is retained in the Calendar in case corrective legislation is needed in the future.

In a number of instances, we also describe some possible areas of future work, which have been raised in previous years and retained for further consideration. New suggestions are discussed later in this memorandum.

1. Creditors' Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditors' remedies. In 1982, the Commission obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of this statute, the Commission has submitted a number of narrower recommendations on this topic to the Legislature.

Possible subjects for study under this topic are discussed below.

Judicial and Nonjudicial Foreclosure of Real Property Liens

The Commission has long recognized that foreclosure is a topic in need of work. Nevertheless, the Commission has consistently deferred undertaking a project on this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

In recent years, the Commission has received suggestions from a number of sources regarding foreclosure procedure. See Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; Memorandum 2005-29, p. 20; Memorandum 2002-17, p. 5 &

Exhibit p. 47; Memorandum 2001-4, Exhibit pp. 1-2. The Commission has not pursued any of those suggestions, but has kept them on hand.

Given the current economic crisis, the Legislature has been working on numerous foreclosure-related reforms, as has the federal government. It would be best for the Commission to wait for that process to play out. **Unless the Legislature affirmatively seeks the Commission's assistance in addressing the topic of foreclosure, it does not appear to be a good time for the Commission to commence a study of this subject.**

The Commission is not well-suited to address highly controversial matters involving competing policy considerations. That is more appropriately the role of the Legislature, whose members are elected by the public.

Assignments for the Benefit of Creditors

In 1996, the Commission decided to study whether to codify, clarify, or change the law governing general assignments made for the benefit of creditors. The Commission indicated that such a study might also include consideration of whether or how this procedure might be applied to a reorganization or liquidation of a small to medium sized business.

A general assignment for the benefit of creditors is a largely common law cooperative procedure in which an insolvent debtor assigns all assets to an assignee, who then distributes the assets to the debtor's creditors in some pro rata fashion. It is typically used as an alternative to a bankruptcy proceeding.

In 1997, the staff recommended against a general codification of the law governing general assignments. This recommendation was based on stakeholder input, as well as a prior Commission study of this subject, which had reached the same conclusion. The stakeholder input suggested that the law was functioning well, and that there was no need for a statute. See Memorandum 1997-7; First Supplement to Memorandum 1997-7.

The staff recommended instead that it might be possible to identify and address specific problems with the operation of the general assignment law.

With that in mind, the Commission hired attorney David Gould of Los Angeles to prepare a background study on this topic. Mr. Gould prepared a summary of existing law quite some time ago, but did not identify any specific problems with the law.

In late 2010, in response to a follow-up inquiry about whether such problems exist, Mr. Gould wrote:

> The California law relating to Assignments for the Benefit of Creditors ("ABCs") has been functioning satisfactorily and the impression that I have received from speaking to a substantial number of participants in the process is "if it works, don't fix it."
>
> Naturally, there are areas which could be improved but the risk is that if what was intended to be "tweaks" turns into a significant rewrite effort more harm than good would result.
>
> The Insolvency Law Committee of the State Bar Business Law Section is considering doing a study on the subject. *Perhaps it might be best for the Commission to put this project on the back burner and let the Insolvency Law Committee see what it might propose.* The Commission could always decide that the subject merits further study.

Memorandum 2010-39, Exhibit p. 5 (emphasis added). The Commission decided to follow Mr. Gould's advice and monitor the progress of the State Bar Insolvency Law Committee. See Memorandum 2010-39, p.9; Minutes (Oct. 2010), p. 3.

Accordingly, the staff recently contacted the State Bar to check on the progress of the Insolvency Law Committee. We were told that the committee has been working on the topic, and will soon be publishing a report on it in lieu of pursuing a legislative proposal. The State Bar will send us a copy of the report when it becomes available. **Unless the Commission otherwise directs, the staff will continue to monitor this situation.**

2. Probate Code

The Commission drafted the current version of the Probate Code in 1990. The Commission continues to monitor experience under the code, and make occasional recommendations.

The Commission is currently pursuing, or has previously expressed interest in pursuing, a number of probate-related topics, as discussed below.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Legislative Counsel Diane Boyer-Vine is a member of the California Commission on Uniform State Laws ("CCUSL"), as well as the Law Revision Commission. On behalf of the CCUSL, two years ago she requested that the Law Revision Commission commence a study to compare existing California law with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") and to make recommendations based upon that study. Several other organizations, including the Alzheimer's Association, AARP, and the

Congress of California Seniors, also urged the Commission to commence such a study.

The Commission began working on UAGPPJA a year ago and has made considerable progress in exploring the issues. This is an important topic focusing on jurisdictional issues relating to "adult guardianships" (referred to as "conservatorships" here in California), as well as similar problems involving more than one state. The resulting legislation could benefit many families that are trying to help someone who is unable to care for himself or herself. **The Commission should continue to give this topic high priority.**

Creditor's Rights Against Nonprobate Assets

A nonprobate transfer passes property outside the probate system. As the use of nonprobate transfers in estate planning has increased, the proper treatment of a decedent's creditors has emerged as a major concern.

A few years ago, the Commission accepted an offer from the Commission's former Executive Secretary, Nathaniel Sterling, to prepare a background study on this important topic. Mr. Sterling completed his report in early 2010 and it is now ready for the Commission to consider.

This will be a substantial undertaking, which will consume significant Commission resources. **The Commission should turn to it as soon as it can.**

Application of Family Protection Provisions to Nonprobate Transfers

Should the various family protections applicable to an estate in probate, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? This is another important area that the Commission is well-suited to study.

The background study prepared by Mr. Sterling also addresses this topic. Again, **the Commission should commence consideration of this topic as soon as it can, so that the background study will not become stale.**

Presumptively Disqualified Fiduciaries

A number of years ago, the Legislature directed the Commission to study the operation and effectiveness of Probate Code provisions that establish a statutory presumption of fraud and undue influence when a person makes a gift to a "disqualified person" (i.e., to the drafter of the donative instrument, to a fiduciary who transcribed the donative instrument, or to the care custodian of a

transferor who is a dependent adult). After studying the topic, the Commission recommended a number of improvements to those provisions. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). Legislation to implement that recommendation was introduced in 2009, as SB 105 (Harman).

The same year, the Commission began studying a related matter — whether the statutory presumption described above should also apply to an instrument naming a fiduciary. In other words, should there be a presumption of fraud or undue influence when an instrument names a "disqualified person" as the fiduciary of the person executing the instrument?

Because of the functional interrelationship between the two studies (both would apply the same factual predicate and evidentiary rules in defining the scope and effect of the presumption), the Commission decided to table the latter study until after the Legislature decided the fate of SB 105.

In 2010, the Legislature enacted SB 105, with amendments. See 2010 Cal. Stat. ch. 620; Prob. Code §§ 21360-21392. **With that matter settled, the Commission should reactivate its study of presumptively disqualified fiduciaries, once its resources permit.**

Attorney Paul Levine, writing on behalf of his client Paul Clowdus, urges the Commission to reactivate the study of presumptively disqualified fiduciaries "as soon as possible." See Exhibit p. 27. However, his suggestion is not based on any particular interest in the application of the statutory presumption to *fiduciaries*. Rather, he believes that a reactivated study would provide a "forum" for the Commission to revisit a decision that it made regarding the statutory presumption that applies to *gifts*. *Id*. That suggestion is discussed later in this memorandum, under "Suggested New Topics."

Uniform Custodial Trust Act

In 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.

California has not yet adopted the Uniform Custodial Trust Act, so the matter remains an appropriate topic for study. However, **this topic does not appear to be as pressing as some of the other topics awaiting the Commission's attention.**

3. Real and Personal Property

The study of property law was authorized by the Legislature in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Two subjects under this umbrella are discussed below.

Mechanics Lien Law

Several years ago, the Commission recommended a complete recodification of mechanics lien law. A bill to implement the Commission's recommendation was enacted in 2010, and a clean-up bill was enacted last year. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); see also 2011 Cal. Stat. ch. 44 (SB 190 (Lowenthal)).

In preparing the recommendation and seeking its enactment, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that those proposals were better addressed after a reorganization of the existing statute had been enacted.

The recodification of mechanics lien law will not become operative until July 1, 2012. **The staff recommends waiting until after the new statutory scheme is operative and people have had some time to adjust to it before doing further work on mechanics liens.**

Commerical and Industrial Subdivisions

In connection with the Commission's active study of commerical and industrial common interest developments (discussed later in this memorandum), the Commission is examining a closely related matter: the scope of the existing exemption of commercial and industrial subdivisions from the public report requirements of the Subdivided Lands Act. **The staff recommends that this study be reactivated when the Commission is able to recommence its work on the topic of commercial and industrial common interest developments.**

4. Family Law

The Family Code was drafted by the Commission in 1992. Since then, the general topic of family law has remained on the Commission's agenda for ongoing review.

One aspect of this topic, which the Commission has kept in mind for possible future study, is discussed below.

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. Yet 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.

If the Commission decided to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements. See Memorandum 2005-29, p. 25 & Exhibit pp. 21-36. In particular, the Commission could study circumstances in which the right to support can be waived. See *In re Marriage of Pendleton and Fireman*, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).

Although this area may be an appropriate matter for the Commission to study in the future, the Uniform Law Commission ("ULC") is currently conducting a study of premarital and marital agreements. **It would be better to consider this area after the ULC completes its study than to commence such work now.**

5. Discovery in Civil Cases

The Commission has been studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms have already been enacted, most recently the Commission's recommendation on *Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99 (2007). No new proposal is in progress at this time.

The Commission has received numerous suggestions from interested persons, and has also identified other topics to address. Thus far, the focus has been on relatively noncontroversial issues of clarification. This approach has been successful and may be more productive than investigating a major reform that might not be politically viable.

Due to staffing considerations, the Commission deferred further work on this study until after completion of the deadly weapons assignment. Now the Commission has essentially completed the deadly weapons assignment, but it must devote its limited resources to other high priority topics, most notably the redevelopment clean-up assignment.

The Commission should reactivate the discovery study when its resources permit. At that time, it can assess which discovery topic to pursue next.

In that regard, the Commission should consider Presiding Justice Klein's concurring opinion in *Toyota Motor Corp. v. Superior Court,* 197 Cal. App. 4th 1107, 1131, 130 Cal. Rptr. 3d 131 (2011), which gives numerous reasons why the Legislature should revisit the relationship of Code of Civil Procedure Section 1989 to Code of Civil Procedure Section 2025.260 "at the earliest opportunity." Among other things, Presiding Justice Klein explains:

> The policy question which the Legislature should review is whether California courts should have the discretionary authority to require a corporate defendant's foreign officers, directors, managing agents or employees to appear for deposition in California.
>
> ….
>
> … We are now living in a global economy. Permitting the deposition in California of nonresident employees of foreign corporations doing business here would help maintain the integrity of our judicial system by enabling the superior court to exercise control over discovery in the event litigation should arise. It would also enable California to exercise its jurisdiction over foreign corporations whose products are distributed here.

Id. at 1130.

6. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for different types of public improvements. The statutes overlap, duplicate each other, and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980, with the objective that the Commission might be able to develop one or more unified statutes to replace the variety of specific statutes that now exist.

The Commission has not commenced work on this study, and since it was first authorized, has not heard of any serious problems caused by the existing multiplicity of special assessment statutes. While development of a unified statute probably would be worthwhile, it would involve mostly non-substantive recodification on a large scale.

In light of other demands on Commission and staff resources, **the staff does not recommend that the Commission undertake this project at this time**. Further, **the Commission should consider requesting that the topic be deleted from its Calendar of Topics.**

7. Rights and Disabilities of Minor and Incompetent Persons

Since authorization of this study in 1979, the Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons. There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case such a proposal is presented in the future.**

8. Evidence

The Evidence Code was enacted in 1965 on recommendation of the Commission. Since then, the Commission has had continuing authority to study issues relating to the Evidence Code. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez (Stanford Law School and UC Davis School of Law), which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. A number of years ago, the Commission began to examine some topics covered in the background study, but encountered resistance from within the Legislature and suspended its work in 2005.

The staff later compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial. See Memorandum 2006-36, Exhibit pp. 70-71. The Commission directed the staff to seek guidance from the judiciary committees regarding whether to pursue those issues. The staff explored this matter to some extent, without a clear resolution. **Unless the Commission otherwise directs, we will raise the matter with the judiciary committees again, but not until there is a realistic possibility of being able to work on this matter.**

9. 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.

The Commission is not actively working on any proposal relating to this topic at this time. **However, the topic should be retained on the Calendar of Topics, in case such work appears appropriate in the future.**

10. Administrative Law

This topic was authorized for Commission study in 1987, both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

11. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988, pursuant to a suggestion of the California Judges Association ("CJA"). The staff did a substantial amount of preliminary work on the topic in 1990, but the work was suspended pending guidance from CJA on specific problems requiring attention, which were never identified.

In 1999, the Commission began studying one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission considered a number of issues and drafts, but had to put the matter on the back burner in 2001 due to other demands on staff and Commission time.

The Commission has also considered studying the possibility of standardizing various attorney's fee statutes.

The Commission might want to turn back to the topic of attorney's fees at some time in the future, when its resources permit.

12. Uniform Unincorporated Nonprofit Association Act

In 1993, the Commission was authorized to study whether California should enact the Uniform Unincorporated Nonprofit Association Act. The Commission ultimately decided not to recommend enactment, but made other recommendations to clarify the status and governance of unincorporated associations, which were enacted.

There are no active proposals relating to this topic before the Commission at this time. But the ULC revised the Uniform Unincorporated Nonprofit Association Act in July 2008. At some point, it may be appropriate to examine the revised act and consider whether to adopt any aspect of it in California. In any

event, **the Commission should retain the topic on its Calendar of Topics, in case issues arise relating to provisions enacted on its recommendation**.

13. Trial Court Unification

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

Further work still needs to be done, as discussed under "Current Legislative Assignments," above.

The Commission also did extensive work on two other projects: (1) appellate and writ review under trial court unification, and (2) equitable relief in a limited civil case. **Neither of those topics would be appropriate to pursue under current budgetary conditions.** See Memorandum 2008-40, pp. 3-4.

14. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, which includes a study of 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, the staff has 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. However, in 2000, related federal legislation was enacted, the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). 15 U.S.C. 7001-7006, 7021, 7031.

The interrelationship of the two legislative acts is complex, but it appears E-SIGN may preempt at least some aspects of state UETA law. As yet, the courts have not resolved this complicated issue.

The staff will continue to monitor this situation, but does not recommend commencing a project in this area until the courts have offered more guidance on the preemption issue.

15. Common Interest Developments

CID law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission has been actively engaged in a study of various aspects of this topic since that time, and has issued several recommendations, most of which have been enacted.

In late 2007, the Commission completed work on a proposed recodification of CID law. A bill that would have implemented the Commission's recommendation was introduced in 2008 (AB 1921 (Saldaña)), but both the bill and the Commission recommendation were withdrawn in order to allow for analysis of late-arising comment.

After further study, the Commission made various revisions to its approach and approved another final recommendation on the same subject. See *Statutory Clarification and Simplification of CID Law* (Feb. 2011). Two bills to implement that recommendation are currently pending in the Legislature. For further details, see Memorandum 2012-6. **Shepherding those bills through the remainder of the legislative process will require some of the staff's attention during the coming year.**

The Commission is also studying application of the Davis-Stirling Act to commercial and industrial CIDs. The Commission has already circulated a tentative recommendation and analyzed the comments received. **The Commission is close to finalizing a recommendation and should try to do so in the coming year, despite competing demands for its attention.**

In addition to the two projects described above, the Commission previously decided to address miscellaneous other areas of CID law in which the application of the Davis-Stirling Act appears inappropriate or unclear — e.g., a stock cooperative without a declaration, a homeowner association organized as a for-profit association, or a subdivision with a mandatory road maintenance association that is not technically a CID. See Minutes (Oct. 29, 2008). **The Commission is unlikely to have resources available to pursue these projects this year.** The staff recommends **revisiting these topics in the next year's review of new topics and priorities.**

The Commission also has a long list of other suggestions relating to CID law. **We will keep them on hand for future attention.**

16. Statute of Limitations for Legal Malpractice

A number of years ago, the Commission did extensive work on the statute of limitations for legal malpractice. After circulating both a tentative recommendation and a revised tentative recommendation, the Commission decided that further work probably would be unproductive and discontinued the study without issuing a final recommendation. **The topic remains on the**

Commission's Calendar of Topics, in case future developments make it worthwhile to recommence work in this area.

17. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important study, we have not given it priority. **In light of current constraints on Commission and staff resources, the staff does not recommend that the Commission undertake a project of this scope and complexity at this time.**

18. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission began to work on this matter, but received negative input and the proposal was tabled.

In 2006, the Legislature directed the Commission to study and report on a nonsubstantive reorganization of the statutes governing deadly weapons, which include criminal sentencing enhancements relating to the possession or use of deadly weapons. That study has now been completed, but follow-up work is still in progress. See discussion in "Current Legislative Assignments," above. **In light of its possible relevance to the deadly weapons study, the existing authority to study criminal sentencing should be retained.**

19. Subdivision Map Act and Mitigation Fee Act

In 2001, a study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics, at the request of the Commission. The objective of the study would be a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

This project would be a massive, mostly nonsubstantive recodification. Recent experience shows that such projects can take several years to complete and may not produce enactable legislation. **In light of current limitations on**

Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.

20. Uniform Statute and Rule Construction Act

In 2003, a study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics, at the request of the Commission.

The Commission has previously indicated its intention to give this study a low priority. **The staff does not recommend that the Commission undertake this project at this time.**

21. Venue

In 2007, the Calendar of Topics was revised at the Commission's request, to add a study of "[w]hether the law governing the place of trial in a civil case should be revised." 2007 Cal. Stat. res. ch. 100. That request was prompted by an unpublished decision in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes." See Memorandum 2005-29, Exhibit p. 59. The court of appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel, which in turn alerted the Commission.

The Commission should begin work in this area when its resources permit. **Unfortunately, that is not likely to be possible in the coming year.**

22. Charter School as a Public Entity

See discussion of this topic under "Current Legislative Assignments," above.

NEW TOPIC SUGGESTED BY LEGISLATIVE COMMITTEE CHAIRS

On occasion, the Commission receives a new topic suggestion from a legislative committee. For example, its study of mechanics liens originated with a written request from the Chair and Vice-Chair of the Assembly Committee on Judiciary.

The Commission pays particular attention to this type of request, because the Commission's function is to assist the Legislature and the Governor in improving California law. When members of the Legislature have taken the time to inform

the Commission of a particular need for assistance, the Commission makes every effort to meet that need.

Just this week, the Commission received a letter jointly signed by the Chair of the Senate Natural Resources and Water Committee (Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (Assembly Member Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code. Exhibit pp. 32-33.

The letter states:

> As chairs of the Senate and Assembly policy committees with subject matter jurisdiction over fish and wildlife policy issues, we are writing to request the Law Revision Commission take on the project of conducting a *substantive* review of the Fish and Game Code for purposes of making recommendations to the Legislature on changes to update, clarify, and improve the Code. *We are particularly interested in your suggestions that would help to clarify the scopes of responsibility of the Department of Fish and Game and the Fish and Game Commission.*

Id. at 32 (emphasis added).

The letter goes on to explain that a strategic visioning process is underway, and the proposed Commission study would complement that effort:

> As the result of the passage of AB 2376 (Huffman) in 2010, the California Natural Resources Agency this past year has been facilitating a strategic visioning process for the Department of Fish and Game and the Fish and Game Commission. The process has involved the appointment of a state executive committee, a blue ribbon commission and a broad-based stakeholder advisory process. One of the recommendations in the draft vision released for public comment in November, 2011, was the need for a comprehensive, thorough review and updating of the Fish and Game Code, to identify obsolete, inconsistent or duplicative sections, and to provide support for more readily understood and enforceable fish and wildlife regulations.

Id. The authors do not set forth any timetable or deadline for the proposed study, but they make clear that it would be helpful to begin the study sooner rather than later. "Given the strategic visioning process that is currently underway, the Law Revision Commission's undertaking of this project would be particularly timely." *Id.* at 33.

The Commission is well-suited to conduct a project of this type. It has considerable experience with large-scale recodification projects. However, the Commission does not currently have authority to study this topic.

The staff recommends that the Commission **seek such authority in this year's resolution regarding its Calendar of Topics, which will soon be introduced in the Legislature.** See Memorandum 2012-6. Assuming that such authority is granted, the staff further recommends that the Commission **commence the requested study as soon thereafter as possible.**

OTHER SUGGESTED NEW TOPICS

During the past year, the Commission also received a number of new topic suggestions from various other sources. Many of those suggestions are discussed below. A few suggestions do not warrant discussion in this memorandum, because they clearly are a poor fit for the Commission's expertise (e.g., an inmate's complaint about a policy affecting calculation of his good time credits), or obviously should be resolved by elected representatives rather than Commission appointees (e.g., a suggestion to create a property tax reduction for the disabled, or to eliminate the deposit on recyclable beverage containers).

Creditors' Remedies

The Commission received two new suggestions that appear to fall within the Commission's existing authority to study creditor remedies.

Foreclosure — Buyer's Choice Act

Sam Shabot of Palos Verdes Peninsula draws the Commission's attention to the "Buyer's Choice Act" (Civ. Code §§ 1103.20-1103.25). See Exhibit pp. 42-47; additional materials submitted by Mr. Shabot are available for inspection on request but are too voluminous to reproduce here.

The Buyer's Choice Act was enacted in 2009, and is scheduled to sunset on January 1, 2015. The legislation was prompted by a practice that became common during the ongoing foreclosure crisis: When selling a property on which it foreclosed, a bank would often require the buyer to purchase title insurance or escrow services from a particular provider. The Buyer's Choice Act seeks to curtail that practice by prohibiting a seller of residential real property with four or fewer dwelling units from "requir[ing] directly or indirectly, as a condition of selling the property, that title insurance covering the property or escrow service provided in connection with the sale of the property be purchased by the buyer from a particular title insurer or escrow agent." Civ. Code § 1103.22(a).

After the Buyer's Choice Act was enacted, its author introduced follow-up legislation to refine the Act. See AB 1720 (Galgiani) (2009-2010). That follow-up legislation died in the Senate Committee on Banking, Finance, and Insurance.

Mr. Shabot believes the Buyer's Choice Act "is practically unenforceable, as it has 'no teeth.'" Exhibit p. 45. He has urged Assembly Member Galgiani to reintroduce her follow-up legislation to "beef up" the Act. *Id.* at 44-45. He has not provided any information about her response, if any, to his request.

In addition, Mr. Shabot apparently plans to ask the Commission to commence a study of the Buyer's Choice Act. In the materials he recently submitted to the Commission, Mr. Shabot does not explicitly request as much. But he expresses concern about "the difficulties that aggrieved consumers face when they attempt to enforce their 'rights'" under the Act, and states that he would like an opportunity to address the Commission at its upcoming meeting. Exhibit p. 43.

Regardless of whether Commission members agree with Mr. Shabot's concerns, **the Commission should not get involved in the debate over the Buyer's Choice Act unless the Legislature seeks such help.** The Legislature has recently weighed the competing interests not just once but twice (when the Act was proposed, and when the follow-up legislation was introduced). It would be inappropriate and disrespectful for the Commission to revisit the Legislature's recent determination of how to handle this matter.

Homestead Exemption — Challenge to Existence of a Dwelling

The next suggestion comes from attorney John Schaller of Chico, who represented a judgment creditor who sought to levy on a piece of real property. According to Mr. Schaller, there was no dwelling on the property, yet the debtor nonetheless recorded a homestead declaration and later claimed a homestead exemption. Exhibit p. 35. Mr. Schaller writes that "there is no procedure in the Code for a creditor who levies on real property to get rid of falsely recorded homestead filings in the situation where there is no dwelling on the property." *Id.* He further explains:

> The court in my case held that I had to follow the dwelling procedures even though there is no dwelling. It would seem that there should be an explicit procedure so that:
>
> 1. The sheriff does not have to make the determination to institute the dwelling procedures, and even if the sheriff sends the notice, to have a procedure by which the court determines whether or not there is a dwelling after application by the creditor.

> 2. There also needs to be a procedure for a creditor to go to court when there is no dwelling to remove the false homestead. The sheriff on a sale should not be in the position of determining whether the declarations are valid.

Id.

The staff has done some preliminary research on this matter. Based on that research, Mr. Schaller appears to be correct that the Code of Civil Procedure does not provide clear guidance on what procedure to follow when there is a dispute over the existence of a dwelling on the debtor's property (as opposed a dispute regarding whether a dwelling is the debtor's homestead, and thus qualifies for the homestead exemption).

The Commission would be well-suited to address this issue, because it drafted the Enforcement of Judgments Law and has done extensive work on the homestead exemption in the past. Some of that work proved controversial; certain reforms recommended by the Commission were not enacted, leaving the law in what the staff described as "a sorry and confusing state." Memorandum 1999-5, p. 1; see also Tentative Recommendation on *Homestead Exemption* (April 1999); Memorandum 1999-76; First Supplement to Memorandum 1999-76; Minutes (Oct. 1999), p. 5. But Mr. Schaller's issue would be a relatively narrow matter of clarification, which may be more susceptible to being satisfactorily addressed.

Due to the redevelopment clean-up study and other pressing demands on the Commission's time, the Commission does not have sufficient resources to consider this homestead issue in the coming year. **The staff recommends keeping the suggestion on hand for further consideration when the Commission conducts its next review of new topics and priorities.**

Probate Code

The Commission received three new suggestions that appear to fall within the Commission's existing authority to study the Probate Code.

Uniform Principal and Income Act

The first of these suggestions relates to the Uniform Principal and Income Act ("UPIA"), which was drafted by the ULC and enacted with some modifications in California in 1999, on recommendation of the Law Revision Commission. See 1999 Cal. Stat. ch. 145; Prob. Code §§ 16320-16375. California's version of the UPIA has been amended several times since; the State Bar Trusts and Estates

Section sponsored most of these amendments. See 2004 Cal. Stat. ch. 54, § 1 (SB 1021 (Poochigian)); 2005 Cal. Stat. ch. 100 (SB 754 (Poochigian)); 2006 Cal. Stat. ch. 569 (AB 2347 (Harman)); 2010 Cal. Stat. ch. 71, (AB 229 (Calderon)); 2010 Cal. Stat. ch. 621, § 10 (SB 202 (Harman)). In addition, the ULC revised the UPIA in 2008 to conform to IRS policy and make other technical changes. California adopted those revisions the following year, without involvement of the Law Revision Commission. See 2009 Cal. Stat. ch. 152 (AB 1545 (Committee on Revenue & Taxation)).

The UPIA provides guidance to trustees in accounting for trust assets; it consists of rules for determining which assets are principal and which are income. One of those rules, Probate Code Section 16350, specifies how to allocate money received from an "entity."

For this purpose, "entity" is defined as:

> a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or decedent's estate to which Section 16351 applies, a business or activity to which Section 16352 applies, or an asset-backed security to which Section 16367 applies.

Prob. Code § 16350(a). The ULC Comment to this provision further explains:

> **Entities to which [this section] applies.** The reference to partnerships in [this section] is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. *The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.*

(Emphasis added.)

Attorney Russell Davis says that the italicized language relating to tenancies in common is problematic:

> Because tenant in common investments (also known as "TIC's") have proliferated in recent years, they include investments in real estate ventures with properties valued in excess of $50 million often times with hundreds of investors. If a trust invests in a TIC, then the trustee cannot merely report distributions received as trust receipts. Instead, such a trustee would be required to account separately by preparing an accounting at the enterprise level. Every rental receipt would have to be accounted for and every expense

> itemized. Had the trustee invested in a partnership or a limited liability company, only distributions received from the enterprise would be reported as a trust receipt. The requirement of a separate accounting for larger TIC's would pose a monumental task and would discourage trustees from making such investments.

Exhibit p. 2. In other words, Mr. Davis believes that for some types of tenancies in common, strict adherence to the approach described in the Comment can result in unduly burdensome accounting requirements.

Mr. Davis attributes the Comment in question to the Law Revision Commission, and seems to suggest that the Commission should revise its Comment instead of proposing any statutory change:

> I believe that the statute as written is satisfactory as an appropriate tenant in common can be included or excluded as determined by the court according to the facts of the particular case. When there are several unrelated tenants in common in a larger investment that is professionally managed, it seems prudent to have the trustee merely report as a trust receipt the amounts distributed. *What might be required is a rethinking of the strict line of the nonapplicability of § 16350 to tenants in common.* Few judges want to go out on a limb by deciding a case that is contrary to a statement issued by the Law Revision Commission.

Id. at 3 (emphasis added).

It is true that in preparing its recommendation on the UPIA, the Commission incorporated the ULC Comment in question, and also drafted its own Comment to Section 16350. See *Uniform Principal and Income Act*, 29 Cal. L. Revision Comm'n Reports 245, 295-98 (1999). That is the Commission's standard procedure when it studies an act drafted by the ULC.

Because the critical language was prepared by the ULC rather than by the Commission, however, it may be more appropriate for the ULC to consider Mr. Davis' concern than for the Commission to do so. The proper treatment of a tenancy in common under the UPIA would seem to be an issue of nationwide importance, not just a California matter.

Further, once a Commission recommendation has been enacted, the recommendation is legislative history and is entitled to great weight in determining legislative intent. See Memorandum 2012-4, Attachment pp. 16-22 & cases cited therein. Thus, a Comment that is included in a Commission recommendation cannot be substantively modified after-the-fact. Any

substantive change would have to be accomplished through a statutory revision, which could be accompanied by a new Comment.

The staff therefore recommends that the Commission **refer Mr. Davis' comments to the ULC, through its California delegation (CCUSL).** The ULC could then assess whether any adjustment of the UPIA is needed, and, if so, how it should be accomplished. Should the ULC decide to revise its approach, California and other states could then make their own assessments of whether to follow the ULC's lead.

In addition, it may be advisable to **alert the State Bar Trusts and Estates Section to the issue,** because that group has been active in this area**.** They might be able to provide helpful assistance to the ULC in evaluating the issue. Alternatively, if the ULC does not act, the Trusts and Estates Section might be able to develop a California solution (assuming one is needed) before the Commission has any resources available to tackle this matter.

Intestate Inheritance by a Half-Sibling

Marlynne Stoddard of Newport Beach would like the Commission to study intestate inheritance by a half-sibling. Exhibit pp. 48-51. She explains that her brother recently died intestate (i.e., without leaving a will or other testamentary instrument). She is his closest living relative, but he also had two half-siblings from his father's second marriage. Except in circumstances not relevant here, California law on intestate succession provides that "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood." Prob. Code § 6406. Ms. Stoddard believes that "the current half-blood statute … produces grossly unfair and irrational results in cases like mine." Exhibit p. 50.

She explains that when she and her brother were young, their father left their mother for another woman and subsequently had two children with that woman. According to Ms. Stoddard, she and her brother "had no relationship with these half-siblings at all." *Id.* at 48. Rather, she and her brother "always considered them to be in the enemy's camp because their mother broke up our parent's marriage and caused our mother, and us, so very much pain." *Id.* at 49.

Ms. Stoddard correctly notes that "the purpose of California Intestate Succession Law is to distribute a decedent's wealth in a manner that closely represents how he would have designed his Estate Plan, had he had a Will." *Id.* at 48; *see, e.g., Inheritance From or Through Child Born Out of Wedlock,* 26 Cal. L.

Revision Comm'n Reports 13, 18 (1996). She explains that this purpose is not properly served in circumstances like hers:

> My brother and I had a very close relationship and we loved each other very much. Were he to know that the State of California plans to give 2/3rds of his Estate to the estranged half-siblings, he would die all over again. *These half-siblings are the last people in the world that he would want to have any of his Estate* and they did not even come to mind, nor were they part of our conversation, when he was discussing his wishes with me for the distribution of his Estate prior to his death. They have not been part of our family at all.

Exhibit p. 50 (emphasis added).

She urges the Commission to "recommend this unjust law be changed without delay …." *Id.* She also draws the Commission's attention to scholarly work in this area conducted by Prof. Ralph Brashier of the University of Memphis. *Id.*

In a lengthy article on this subject, Prof. Brashier notes that the Uniform Probate Code and many jurisdictions (including California) treat whole-blood and half-blood survivors the same way for purposes of intestate succession. *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 SMU L. Rev. 137, 138 (2005). He criticizes that approach as unrealistic under current conditions:

> In a perfect world, perhaps half-blood relatives would know and love each other. Perhaps half-siblings … would indeed consider each other family. In the real world, however, growing numbers of people who have one common parent have no social or emotional ties with each other. They may not know of each other's existence, and consanguinity alone does not truly make them a family. In the current milieu of evolving relationships, people are often surprised (and occasionally appalled) to learn that most states provide a default rule that entitles half-relatives to share equally in a decedent's intestate estate regardless of their actual family relationship with the decedent. For most of these surprised observers, disapproval of the majority default rule has little to do with antiquated notions that half-blood relatives are somehow inferior to those of the whole-blood. Rather, disapproval stems from the refusal of probate law to recognize a central truth concerning modern half-blood relationships: family ties among half-blood relatives run the gamut, and as families fracture and regroup, a default rule mandating universal inclusion is unduly broad.

Id. at 140 (footnotes omitted). He suggests some alternative approaches, including "a more flexible, but still primarily objective, approach that examines interaction between the decedent and half-blood claimants to the estate," and "invest[ing] probate courts with discretion in determining the intestate share of half-blood survivors." *Id.* at 141, 186-94; *see also* Brashier, *Half-bloods, Inheritance, and Family*, 37 U. Mem. L. Rev. 215 (2007).

One impetus for Prof. Brashier's work in this area was a California Supreme Court decision, *Estate of Griswold*, 25 Cal. 4th 904, 24 P.3d 1191, 108 Cal. Rptr. 2d 165 (2001). In that case, a man died intestate, leaving a surviving spouse, but no children or parents. However, it turned out that the decedent had been born out-of-wedlock, and his father had two children from a subsequent marriage. These half-siblings did not even know of the decedent's existence during his lifetime. Although there are limitations on when a parent may inherit from an out-of-wedlock child (see Prob. Code § 6452), the California Supreme Court reluctantly concluded that those limitations were satisfied in this case, and thus that the decedent's half-siblings were entitled to half of his estate (the share that would have gone to the decedent's father had his father been alive). *Griswold*, 25 Cal. 4th at 924. The Court noted, however, that the result did not seem to reflect good policy:

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

Id. Justice Brown's concurring opinion was even more blunt:

> I believe our holding today contravenes the overarching purpose behind our laws of intestate succession — to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's offspring.…
>
> ….

> Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. *I urge it to do so here.*

Id. (Brown, J., concurring) (emphasis added).

In response to the Court's decision, the Commission reexamined the statute invoked in the case, because the Commission had drafted it. In introducing that study, the former Executive Director of the Commission wrote:

> The Commission takes responsibility for continuing review and maintenance of statutes enacted on its recommendation. One statute enacted on Commission recommendation seems to have required more fine tuning than most — Probate Code Section 6452 (inheritance from or through a child born out of wedlock).

Memorandum 2002-35, p. 1. He suggested various alternative approaches to out-of-wedlock inheritance, including the possibility of leaving existing law in place:

> The staff believes an equally strong argument can be made for not attempting to tweak the statute to accommodate the *Griswold* case. We have continually fussed with the wording of Probate Code Section 6452 since its enactment, yet cases still arise under which the standard of the law appears inappropriate.… At least existing law provides an easily administered test that gives the right result in most cases. We've had six shots at trying to get it right (original enactment plus five amendments); that's enough. No standard will ever achieve perfect justice; the existing statute is no worse than any other that has surfaced so far.

Id. at 20-21. After exploring these alternatives to some extent, the Commission eventually decided "not to recommend any change in existing law on the matter." Minutes (Dec. 2002), p. 11.

A few years later, the ULC reexamined its provision on inheritance by half-siblings (Unif. Prob. Code § 2-107), which is the same as the provision Ms. Stoddard questions (Prob. Code § 6406). The drafting committee considered the *Griswold* case, as well as Prof. Brashier's 2005 article. But the committee ultimately decided to leave the provision as is. See Memorandum from Larry Waggoner to Drafting Committee to Amend Intestacy Provision of the Uniform Probate Code (Feb. 6. 2007) (available at www.law.upenn.edu/bll/archives/ulc).

This history shows that this area of the law is not easy to address. As Prof. Brashier puts it, "[i]n today's world of half-blood relationships, there is no typical decedent for whom states can derive a completely satisfactory, purely objective default inheritance rule." 58 SMU L. Rev. at 194. **The Commission**

should be cautious about devoting further resources to what might prove an elusive goal. While situations like the one Ms. Stoddard describes are heart-wrenching, such results are at least avoidable through the use of a will or other testamentary instrument.

For the coming year, the Commission does not have sufficient resources available to study this topic, even if it was so inclined. The staff recommends that the Commission **monitor developments in the area, and revisit the matter when it conducts its next review of new topics and priorities.**

Family Member Exception to Statutory Presumption of Fraud or Undue Influence

As previously discussed, attorney Paul Levine encourages the Commission to reactivate its study of presumptively disqualified fiduciaries, but not because he wants the Commission to address some aspect of that topic. Instead, he views that study as an opportunity for the Commission to revisit a decision it made in its earlier study of donative transfer restrictions, which culminated in the enactment of SB 105 (Harman). See the discussion of "Presumptively Disqualified Fiduciaries" above.

The study of donative transfer restrictions focused on a statutory presumption of fraud and undue influence that applies when a person makes a gift to a "disqualified person," such as the drafter of the donative instrument. That presumption was first enacted in 1993. See 1993 Cal. Stat. ch. 293. From its inception, the statutory presumption has always provided an exception for a beneficiary who is related by blood or marriage to the transferor. In other words, gifts to family members (within the specified degree of kinship) are not subject to the statutory presumption. See Prob. Code § 21351(a).

In its study, the Commission reviewed the long-standing family member exception and found no reason to disturb it. As the Commission noted:

> Family members are … the most likely intended beneficiaries of an at-death transfer. The "naturalness" of a gift to a family member weighs heavily against the presumption that such a gift was the product of undue influence.

Donative Transfer Restrictions, 38 Cal. L. Revision Comm'n Reports 107, 125 (2008).

Mr. Levine does not agree with the Commission's recommendation on that issue. He asserts that the family member exception "is not supportable from a legal or practical perspective." See Exhibit p. 27. He believes that "more often than not" a family member who helps to draft a donative instrument "does so in

a way so as to benefit himself or herself to the detriment of the other family members." *Id*. at 28.

As a matter of general policy, the Commission does not revisit recommendations that have been enacted into law, unless there is some clearly demonstrated need to do so. See CLRC Handbook Rule 3.5 ("[U]nless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation.").

The staff does not believe that Mr. Levine's disagreement with the Commission's recommendation provides sufficient cause to re-open the matter, especially so soon after enactment of implementing legislation. Mr. Levine had the opportunity to make his case to the Commission during the ordinary study process. In fact, he raised his concerns with the Commission in April 2008, before the Commission had framed even a tentative recommendation in the study. He also took advantage of the opportunity to share his views with the Legislature while the implementing legislation was pending. He contacted legislative staff to express his concerns about the family member exception and to advocate for amendments along the lines he has proposed in the attached letter.

Because many of the members of the current Commission were appointed after the Commission completed its work on this subject, it is worth briefly responding to a few of the specific points made in Mr. Levine's letter:

- **His letter seems to suggest that the family member exception treats a transferor's spouse differently from the transferor's child.** See Exhibit p. 28. However, that is not the case. The family member exception applies to persons who are related to a transferor by blood, marriage, or domestic partnership. See Prob. Code §§ 21351(a), 21374, 21382(a).
- **The letter also suggests that the family member exception makes a gift to a family member "'immune' from a claim of undue influence."** See Exhibit p. 28. That's a significant overstatement. It would certainly be much *easier* to contest a gift if the statutory presumption applies. But gifts to family members are not immunized from a contest based on claims of undue influence. Such a contest would simply proceed under the common law, without the benefit of the statutory presumption.
- **The letter proposes that the family member exception be narrowed so that it does not apply when a family member is given an "unnatural" gift. Framed another way, the exception would only apply if gifts given to relatives of the same degree of kinship are roughly "equal."** See Exhibit pp. 29-31. Under this approach, the statute would effectively nullify an unequal gift to a

> family member who is involved in drafting the donative instrument. (The statutory presumption of undue influence that applies to a drafter *cannot be rebutted*. See Prob. Code §§ 21351(e)(1), 21380(c).)
>
> That would be a significant new limitation on testamentary freedom, creating a trap for those who assist a family member in drafting an estate planning document.

When the Legislature directed the Commission to study the statutory presumption, it specifically directed the Commission to preserve "the freedom of transferors to dispose of their estates as they desire…." 2006 Cal. Stat. ch. 215. By creating new limitations on gifts to family members, the reforms proposed by Mr. Levine would be at odds with that statutory direction. **It would be unwise for the Commission to pursue his suggestion.**

Family Law

One suggestion relates to family law and could be studied under the Commission's existing authority.

Child Support — Presumption Based on Repeated Misconduct

In late 2010, Amy Di Costanzo of Berkeley contacted the Commission because she had encountered problems in collecting child support from her ex-husband. She was frustrated about having to go to court over and over again, and having to prove her case from scratch each time. She suggested establishing a rule similar to the three strikes concept in the context of child support collection. First Supplement to Memorandum 2010-39, Exhibit p. 1. The Commission did not pursue her suggestion. See Minutes (Oct. 2010), p. 3. The staff notified her of this decision, explaining that this type of topic

> is not well-suited to the Commission's study process, because it is likely to be quite controversial. A better option may be to seek a state legislator to introduce the idea in the Legislature, where it could be evaluated by elected representatives of the public. If you wish to pursue this matter, I suggest that you contact your state Senator or Assembly Member, or a member of the Legislature who has shown interest in child support issues.

Letter from B. Gaal to A. Di Costanzo (Nov. 1, 2010) (on file with Commission).

Thereafter, Ms. Di Costanzo resubmitted her suggestion, but she now proposes a different approach to the problem. She writes:

> I would like to introduce the element of PRESUMPTION into the law regarding these self-employed dead beats that says

> basically "if it has been determined twice that one of the parties perjured he/herself, or was dishonest, or submitted fraudulent documents in two separate Child Support trials or hearings about a material matter, he/she will be presumed (there will be a 5 year presumption) to have less credibility in future hearings." This presumption would then need to be satisfactorily rebutted to lift the presumption. It should be more difficult than it currently is to perjure oneself again and again and place the burden to prove the ex is lying on the already stressed-out parent who has full time custody.

Exhibit p. 24 (footnote omitted).

In making this suggestion, Ms. Di Costanzo notes that "[t]his PRESUMPTION is used in cases of domestic violence where the (once convicted) accused denies a new charge." *Id.* She does not cite any authority in support of this assertion.

Based on minimal research, the staff suspects that Ms. Di Costanzo might be referring to Evidence Code Section 1109(a)(1). That provision states an exception to the general rule that "evidence of person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evid. Code § 1101(a). Specifically, Section 1109(a)(1) provides:

> (a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

This provision does not establish a presumption of domestic violence, but eases proof of an incident of domestic violence by allowing the prosecution to use evidence of a defendant's prior domestic violence to help prove the alleged new incident.

Presumably, Ms. Di Costanzo believes a similar rule should apply with regard to proof of perjury or other dishonest or fraudulent conduct in a child support case — i.e., evidence that a person committed perjury or engaged in other dishonest or fraudulent conduct in a prior child support case could be used to help prove that the person was guilty of similar conduct in a new child support case. The staff will contact her before the Commission meets and give her an opportunity to explain whether this is a correct statement of her position.

Regardless of the exact nature of Ms. Di Costanzo's suggestion, the fact remains that child support issues tend to be controversial and are not well-suited to being addressed by the Commission. For that reason, **the Commission should stay out of this matter.**

Discovery in Civil Cases

One new suggestion relates to civil discovery and could be studied under the Commission's existing authority.

Briefing Schedule for a Petition to Preserve Evidence

Barbara Hass, an advanced certified paralegal, suggests that the Commission propose legislation to clarify the briefing schedule for a petition to preserve evidence under Code of Civil Procedure Sections 2035.010-2035.050 prior to commencement of a civil action. She writes:

> Not mentioned at all in this code section is the deadlines for opposing or replying to oppositions to a Petition to Preserve Evidence, or a reference to follow a certain statute regarding same. I have asked several attorneys what code section I should follow to docket an opposition/reply, and each attorney's response is different because 2035 is silent on this issue. The one response from an attorney I lean toward is to follow the law and motion opposition/reply timeline in CCP Section 1005(b).
>
> Is there a way to amend this statute to either include a deadline timeline or refer to another code section to calculate these important deadlines?

Exhibit p. 25. Ms. Hass has also suggested some statutory language to address her concern. Her language is modeled on Code of Civil Procedure Section 1005(b), which requires that opposition papers be filed and served at least nine court days before a hearing, and reply papers be filed and served at least five court days before a hearing. *See id.* at 25-26.

Ms. Hass is correct that Sections 2035.010-2035.050 do not provide a timetable for opposition and reply papers. They only specify that notice of a petition to preserve evidence must be made on each expected adverse party "at least 20 days prior to the date specified in the notice for the hearing on the petition." Code Civ. Proc. § 2035.040. This notice is to be served "in the same manner provided for the service of a summons." *Id.*

One could perhaps argue that the briefing schedule is governed by Code of Civil Procedure Section 1005. But the language of that provision does not clearly extend to this situation.

Ms. Hass has thus identified a narrow issue of clarification. Guidance on the point could be helpful to practitioners and litigants dealing with a prelitigation petition to preserve evidence. Although that is a relatively uncommon procedure, it is useful and necessary in some circumstances, and people should not have to expend undue effort trying to determine the applicable rules.

However, the proper way to handle this matter is not immediately obvious. Because a petition to preserve evidence is a prelitigation procedure, the recipients of such a petition may not have counsel to assist them in responding to the petition. To expect them to retain counsel and file an opposition brief well before the hearing date might not be realistic. Perhaps it is no accident that Sections 2035.010-2035.050 fail to specify a due date for opposition and reply papers; the drafters might have contemplated that opposition papers, if any, could be submitted at the hearing or at any time before it. Nonetheless, it would be preferable to address the matter clearly, rather than leaving practitioners and litigants to guess at the proper procedure.

The staff therefore recommends that the Commission **add this topic to its list of discovery issues that may be worth investigating when it is able to reactivate its study of civil discovery.**

Alternative Dispute Resolution

One suggestion relates to alternative dispute resolution and could be studied under the Commission's existing authority.

Mandatory Pre-Dispute Binding Arbitration Clause in Consumer Contract of Adhesion

In late 2008, Sam Shabot asked the Commission to study "the important topic of binding arbitration in consumer contracts of adhesion." He submitted voluminous materials in support of his request. See Memorandum 2009-38, pp. 25-26; see also Second Supplement to Memorandum 2009-38.

In presenting Mr. Shabot's suggestion to the Commission, the staff wrote:

> The use of binding arbitration in consumer contracts is an important topic, which has been widely discussed and debated. **Nonetheless, the staff recommends against undertaking such a study.** As some Commissioners may recall, the Commission began a study of arbitration only a few years ago, with the benefit of a background study prepared by Prof. Roger Alford of Pepperdine Law School. The Commission quickly terminated that study, because all of the major stakeholders agreed that such a study would not be a good use of Commission resources. See Minutes (Feb. 2006), p. 3. There is no reason to believe that the stakeholders'

> positions on this point have changed. Moreover, arbitration is better-suited to federal legislation than to state legislation, because of the Federal Arbitration Act and the doctrine of federal preemption. In fact, federal reforms relating to consumer arbitration are currently under consideration. The staff is dubious that the Commission could productively study that topic at this time.

Memorandum 2009-38, p. 26 (emphasis in original). As the staff recommended, the Commission chose not to pursue this topic. See Minutes (Oct. 2009), pp. 3-4.

Mr. Shabot recently reiterated his concern regarding "[a]buse of 'mandatory' pre-dispute binding arbitration clauses in consumer contracts of adhesion." Exhibit p. 43. As before, he has submitted voluminous materials on the topic. To conserve resources, the staff has not reproduced those materials here, but they are available for inspection on request.

The staff's view on this matter remains unchanged: **Absent some indication that the major stakeholders and the Legislature want the Commission to examine this topic, the Commission should stay out of it.** The Commission has plenty enough to do without plunging into this difficult and controversial topic essentially uninvited.

Attorney's Fees

One new suggestion relates to attorney's fees and could be studied under the Commission's existing authority.

Attorney Fee "Weirditudes"

Judge Charles Treat of Contra Costa County Superior Court has written a lengthy law review article on the California statutes governing recovery of attorney's fees. *See* Treat, *A Proposed Revision of California's Procedural Statutes and Rules for Seeking Prevailing-Party Attorney Fees,* 12 JFK L. Rev. 11 (2009). The article begins by stating:

> California's procedural statutes and rules governing claims for attorney fees are a mess. The procedural requirements they impose can be confusingly overlapping and contradictory. In some instances they can create unreasonable or even impossible procedural barriers to the enforcement of clear substantive entitlements. They establish no filing deadlines at all for some claims. They work in effect to defeat the parties' contractual intent, in ways that serve no policy purpose, while only incompletely carrying out some policies intended to modify contractual terms. They create irrational differences in result between closely related

> categories of fee claims. They even cause different results in different parts of the same case. There is little indication that these awkward results were consciously intended by the legislators in drafting these statutes and rules.

Id. at 12 (footnote omitted). Judge Treat goes on to support his assertions and offer proposed statutory solutions. In doing so, he does not intend to disrupt conscious legislative policy decisions concerning entitlement to attorney's fees. *Id.* at 13-14. Rather, he focuses on "more neutral proposals," which would revise existing fee statutes "with the object of improving their consistency, rationality, and fidelity to substantive objectives." *Id.* at 12, 14; see also Exhibit p. 52.

Judge Treat has also written a much shorter, more colloquial article on the same subject, which highlights some of his key points. *See* Treat, *Attorney Fee Weirditudes,* 19 ABTL Rpt. 1 (Fall 2009). A copy of that article is attached here, to give the Commission a flavor for the types of issues Judge Treat has addressed. See Exhibit pp. 53-55.

In his shorter article, Judge Treat refers to his proposed statutory solutions, but warns that they might not get legislative attention: "[R]umor has it that the Legislature has more urgent matters on its mind these days, so my proposed amendments will likely vanish into the Great Abyss of Unheeded Good Ideas." Exhibit p. 53.

Just over a year ago, Jordan Posamentier of the California Judges Association encouraged Judge Treat to bring the foregoing articles to the attention of the Law Revision Commission, and Judge Treat followed up on that suggestion. See Exhibit p. 52. The staff has kept those articles on hand for consideration in connection with the Commission's annual review of new topics and priorities.

The types of issues that Judge Treat discusses in his articles are closely similar to some of the issues the Commission was examining in its study on award of costs and contractual attorney's fees to the prevailing party. As previously discussed, the Commission had to interrupt that study quite some time ago due to more pressing demands on staff and Commission time. **The Commission should give both of Judge Treat's articles close consideration when the Commission has sufficient resources to resume its work in this area.**

Common Interest Developments

As previously discussed, the Commission has been working on CID law for many years, and has accumulated a long list of suggestions relating to this topic.

New suggestions continued to arrive during the past year. The staff has added these to the Commission's list, and has described some of them in meeting materials during the past year. One set of suggestions deserves discussion here.

Common Interest Development Clean-Up Bill

In 2011, the Commission recommended the recodification of the Davis-Stirling Common Interest Development Act. See *Statutory Clarification and Simplification of CID Law* (Feb. 2011). Legislation to implement that recommendation was approved by the Assembly in 2011 and is now being considered in the Senate. See AB 805 (Torres) and AB 806 (Torres).

Given the considerable size of those two bills, it is likely that some of their provisions will be "chaptered out" by other bills enacted in 2012. (As a general rule, when two bills both contain provisions that would amend or repeal the same code section, only the provision in the last bill to be signed by the Governor (i.e., the last bill "chaptered") is given effect. The earlier signed provision is "chaptered out." See Gov't Code § 9605.)

If this happens, then clean-up legislation will need to be introduced in 2013 to restore the provisions that were chaptered out. Such clean-up legislation could also be used as a vehicle to correct any technical errors in the bill language that might be discovered in the interim. This type of clean-up is routine. If it proves necessary, the staff will work it into the Commission's schedule as resources permit.

In addition, the Commission could use the clean-up process to make minor technical improvements to the language of the Davis-Stirling Act. After the Commission finalized its recommendation in this study, it received numerous suggestions for improvements to the language of the proposed law. The staff was reluctant to address those suggestions in the pending bills, in large part out of a concern that doing so would unduly complicate the legislative process.

Instead, the staff raised the possibility of examining the suggestions in 2012, for possible incorporation into clean-up legislation in 2013. See Memorandum 2011-20, p.3. The staff added:

> If the Commission is interested in the possibility of such a follow-up study, it might be best to include the matter in the memorandum on New Topics and Priorities that will be presented at the October or December meeting. That would permit a fuller description of the scope of the possible follow-up study, and would allow the matter to be considered in the context of other demands on the Commission's resources.

Id. The Commission agreed with that general approach (See Minutes (June 2011), p. 2), and so the matter is being raised again in this memorandum.

In the abstract, the staff has no objection to examining the suggestions that have been submitted, for possible incorporation into clean-up legislation. However, the Commission will have a lot on its plate in 2012, and it may not be possible to do further polishing of the Davis-Stirling Act language at this time.

California Tribal Governments and California Indians

Last, but not least, the Commission has received a letter from the California Association of Tribal Governments ("CATG"), the non-profit statewide association of federally recognized California Indian tribes. Exhibit p. 34. CATG "requests the California Law Revision Commission add to its agenda of active studies an examination of California law concerning California tribal governments and California Indians." *Id.*

CATG further states:

> In accordance with California Government Code §§ 8280-8298 [i.e., the statute governing the Commission], California tribes are prepared to submit suggestions for your consideration concerning defects and anachronisms in the law. We believe your examin[ation] of such information would result in recommendations for changes in the law necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this state into harmony with modern conditions.

Id. CATG has not provided any specific examples of issues warranting the Commission's attention, but has suggested that any questions be directed to its Executive Director. CATG urges the Commission to give its "closest attention to our request." *Id.*

This topic may be a good fit for the Commission, in which the Commission could work productively and achieve significant improvements in the law. However, it is not within the Commission's existing authority. In addition, the Commission is so overloaded with other work, particularly work requested by the Legislature, that seeking such authority does not seem like a reasonable step at this time. The staff recommends **retaining CATG's request for further consideration when the Commission conducts its next review of new topics and priorities.** In the meantime, we invite CATG to provide further information regarding the types of issues that it would like the Commission to address.

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2012. As should be clear from the foregoing discussion, the Commission's plate is full and in fact overflowing with topics warranting its attention.

Without question, **the redevelopment clean-up study should receive highest priority in the coming year,** so that the Commission can meet the statutory deadline of January 1, 2013. That study has been requested by both the Governor and the Legislature, and is of great importance to the state. To handle the study effectively, the Commission probably will need to devote almost all of its resources to the topic this year.

In evaluating the remaining topics, new Commissioners should be aware of the Commission's traditional scheme of priorities. Matters for the current legislative session are given the highest priority. 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.

To summarize, the Commission's traditional scheme of priorities is:

(1) Matters for the current legislative session.
(2) Matters directed by the Legislature and other matters the Commission has concluded deserve immediate attention.
(3) Matters for which the Commission has an expert consultant.
(4) Other matters that have been previously activated but not completed.
(5) New topics that appear appropriate for the Commission to study.

This priority scheme has worked well over the years. The staff recommends that the Commission continue to follow it in 2012, as detailed below.

Legislative Program for 2012

In 2012, the Commission's legislative program **is likely to include legislation on the following topics:**

- Statutory clarification and simplification of CID law

- Trial court restructuring:
    - Rights and responsibilities of the county as compared to the superior court
    - Appellate jurisdiction of bail forfeiture
    - Writ jurisdiction in a small claims case
    - Compensation under Evidence Code Sections 731, 752, and 753
- Nonsubstantive reorganization of deadly weapon statutes (further clean-up legislation)
- Statutory cross-references to the "Tort Claims Act"
- The Commission's resolution of authority.

See Memorandum 2012-6 for further information. Managing this legislative program will consume significant staff resources but should not require much attention from the Commission.

The Legislature's Priorities and Other Matters Deserving Immediate Attention

In addition to the redevelopment clean-up study, **the Commission must complete the following study in the coming year:**

- Enforcement of money judgments: Third decennial review of exemptions from enforcement

This is a relatively narrow topic that should not require much work.

If at all possible, the Commission should also **try to complete its study of charter school as a public entity,** because it is nearly complete and we have considerable momentum on that subject. In addition, the Commission should try to **continue its work on UAGPPJA**, which it previously classified as a high priority study.

Furthermore, if resources permit, the Commission should **return to its study of TCR and commence work on publication of legal notice in a county with a unified superior court.**

Consultant Studies

For some studies, the Commission has the benefit of a consultant's assistance. In particular, the Commission is fortunate to have Mr. Sterling's extensive background study on *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (June 2010). This is a large and challenging new topic, which the Commission should turn to as soon as its resources permit. Unfortunately, that probably will not be possible in 2012.

The Commission also has background studies on the following topics, which it has already studied to some extent:

- Common interest development law (background study prepared by Prof. Susan French of UCLA Law School).
- Civil discovery (background study prepared by Prof. Gregory Weber of McGeorge School of Law).
- Review of the California Evidence Code (background study prepared by Prof. Miguel Méndez of Stanford Law School and UC Davis School of Law)

The Commission is close to completing a final recommendation on application of the Davis-Stirling Act to commercial and industrial CIDs; **it should continue working towards that goal in 2012 so as not to lose momentum.** The Commission is unlikely to have time for the other two studies in 2012, but it should turn back to those studies, and investigate other CID issues, once it has resources available.

Other Activated Topics

Closely related to the study of commercial and industrial CIDs is the study of commercial and industrial subdivisions. **Because that study is narrow in scope and the Commission has momentum on it, the Commission should try to continue working on it in 2012.**

Two other topics the Commission has actively studied are attorney's fees, and presumptively disqualified fiduciaries. Those studies are currently on hold, and it is unlikely that the Commission will have resources available to reactivate either of them in 2012. They should be addressed when time permits.

The Commission has also worked on a few of the issues in the list of "Minor Clean-Up Issues for Possible Future Legislative Attention" that it compiled while preparing its nonsubstantive reorganization of the deadly weapon statutes. Those issues are narrow in scope and generally suitable for student projects. **The Commission might be able to address some of these issues in 2012, on a low priority basis,** because they would not consume much staff or Commission time**.**

New Topics

Aside from the statutorily mandated studies discussed above, the Commission almost certainly will not be able to commence any new studies this year. In response to a request from the Second District Court of Appeal, however, the Commission previously requested and received authority to study

venue in a civil case. The Commission should activate that study at some point; this year does not appear to be a good time for it, but it should not be delayed for too long.

One step the Commission should take now is to seek authority to study the Fish and Game Code, as requested by the Chair of the Senate Natural Resources and Water Committee and the Chair of the Assembly Water, Parks, and Wildlife Committee. Assuming the Legislature grants such authority, the Commission should be in a position to commence work on that topic next year.

The Commission should also **request that the study of special assessments for public improvements be deleted from its Calendar of Topics.** As already explained, such a study would be time-consuming, yet there is no clear indication of a need for it.

The other suggested new topics should be handled as previously discussed. The staff regrets that the Commission's resources are so limited and it is unable to promptly address all of the topics that could benefit from its attention.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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July 26, 2011

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

Re: Probate Code §16350

Dear Mr. Hebert:

This is a follow up to my telephone call of July 25, 2011 in which I pointed out a problem that we encountered with respect to the application of a provision in the Principal and Income Act as set forth in the California Probate Code.

Background.

Trustees are required to account according to the provisions of the Uniform Principal and Income Act set forth in Probate Code §§16320 et seq. Section 16350(b) provides that a trustee shall allocate to income monies received from an "entity" and that a trustee shall allocate to principal receipts from an entity specific types of distributions such as property other than money or received in total or partial liquidation of the entity.

For purposes of section 16350(b), an entity is defined in section 16350(a) as the usual traditional entities such as a corporation, partnership, and a limited liability company but also specifically includes any other organization in which a trustee has an interest including a business **"or activity to which Section 16352 applies."** [emphasis added]

The thrust of section 16350 is that if a trust owns a 25% interest in a partnership or corporation, it shall include as a trust receipt whatever amounts are distributed to it during a given year. If a corporation distributes dividends of $5,000, then the trust includes $5,000 as a trust receipt. If the trust owns a partnership interest, instead of reporting its pro rata share of the net income as a receipt, the trust account will include only the amounts distributed to the trust by the partnership. In other words, if a trust's pro rata share of the partnership's net income is $10,000 but the partnership only distributes $3,000, the trust will only account for $3,000 as a receipt.

Application of §16350 to Tenants in Common

The difficulty is encountered by the following language in the Background from the Uniform Act as set forth by California Law Revision Commission:

> *Entities to which Section 401[Prob. Code §13350] applies.* The reference to partnerships in Section 401(a) [Prob. Code §16350(a)] is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. **The Section does not apply, however to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.**" [emphasis added]

At first blush, the bold portion of the quoted language would seem appropriate. If the trust owns an interest as a tenant in common with two or three other owners, then the trustee would not report as if it were a partner in a partnership or a shareholder in a corporation. Instead, such a trustee that owns an undivided interest as a tenant in common in a real estate venture would be required to account separately for each rental receipt and each disbursement. Such a procedure is described in section 16352 and the amounts actually distributed to the trust would be irrelevant.

Because tenant in common investments (also known as "TIC's") have proliferated in recent years, they include investments in real estate ventures with properties valued in excess of $50 million often times with hundreds of investors. If a trust invests in a TIC, then the trustee cannot merely report distributions received as trust receipts. Instead, such a trustee would be required to account separately by preparing an accounting at the enterprise level. Every rental receipt would have to be accounted for and every expense itemized. Had the trustee invested in a partnership or a limited liability company, only distributions received from the enterprise would be reported as a trust receipt. The requirement of a separate accounting for larger TIC's would pose a monumental task and would discourage trustees from making such investments.

In a recent case, a trust owned a 21% interest as a tenant in common in real property that owned and operated about 21 warehouse units. The remaining 79% was held by about 10 other investors. The property was managed by a property manager who collected the rents and disbursed fund for expenses. The rentals were in excess of $30,000 per month. The property manager retained security deposits and a reserve for certain expenses. The balance was distributed to the investors. The trustee reported as a trust receipt all amounts

distributed to the trust by the property manager. Upon objections filed by a remainder beneficiary, the probate court ruled that this was an improper method of trust accounting because the California Law Commission specifically noted that tenants in common are specifically excluded from the application of Probate Code Section 16350. The Court of Appeal sustained the trial court and stated that it relied heavily on the comments of the California Law Revision Commission.

In my judgment, if the Probate Code were interpreted as written, Section 16350 would allow a trustee that held a minority interest in a larger TIC to report like a partnership. The reason is that Probate Code §16350(a) defines an "entity" as "a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or **any other organization in which a trustee has an interest** other than a trust or decedent's estate to which Section 16351 applies, or an asset-backed security to which Section 16367 applies.

A minority interest in a TIC presumably would come within the definition of "any other organization in which a trustee has an interest....." More than likely, the court would have so held had it not been for the Law Commission's comment that the section does not apply to tenancies in common.

Recommendation

I believe that the statute as written is satisfactory as an appropriate tenant in common can be included or excluded as determined by the court according to the facts of the particular case. When there are several unrelated tenants in common in a larger investment that is professionally managed, it seems prudent to have the trustee merely report as a trust receipt the amounts distributed. What might be required is a rethinking of the strict line of the nonapplicability of §16350 to tenants in common. Few judges want to go out on a limb by deciding a case that is contrary to a statement issued by the Law Revision Commission.

Although the original property manager was unable to provide the separate records of all receipts and disbursements, the trustee was able to construct an accounting from profit and loss statements on a Schedule C for a tax return. The results from the two methods of accounting were dramatic. When a separate accounting was prepared, it was determined that the income beneficiary should have received an additional $95,000 in distributions over a 7 year period.

For your information, I am including a copy of a non-published opinion rendered by the Fourth District in the Cantor Trust.

Thank you for your consideration.

Very truly yours,

RUSSELL L. DAVIS

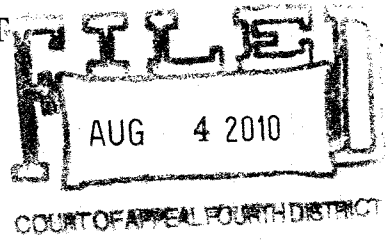
RLD:mw
Enc.
cc: Margaret G. Lodise, Chair, Trust and Estates Section
of the California State Bar

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



MARTHA JIMENEZ et al.,

Plaintiffs and Appellants,

v.

JEWISH FEDERATION OF PALM SPRINGS,

Defendant and Respondent.

E048898

(Super.Ct.No. INP015818)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge. Affirmed.

Russell L. Davis for Plaintiffs and Appellants.

Michael S. Kahn; Schlecht, Shevlin & Shoenberger and John C. Shevlin for Defendant and Respondent.

After the filing of a fifth amended petition for approval of an account filed on behalf of Laura Gray (appellant), the cotrustee and income beneficiary of the Edward B. Cantor Trust, and objections filed by remainder beneficiary Jewish Federation of Palm Springs (respondent), the probate court denied appellant's request for time to file a sixth

amended account, removed her as a cotrustee, and set respondent's objections to the fifth amended account for trial. On appeal, appellant contends that the fifth amended account was in proper form and, therefore, the court erred in removing her as cotrustee. We affirm.

FACTUAL AND PROCEDURAL HISTORY

As amended on February 21, 1989, Edward B. Cantor created an inter vivos trust, which effectively provided that the net income of the residuary trust estate upon his death be distributed to his friend, appellant, during her lifetime. Upon appellant's death, the corpus of the trust was to be distributed in the following amounts amongst the following charitable organizations: Fifty percent to Project Exodus,[1] 25 percent to Hebrew University, and 25 percent to Israeli Tennis Association. Cantor died on August 24, 1991.

The primary asset of the trust was a 21 percent undivided interest in commercial real property in Las Vegas known as the Arville Industrial Building (Arville). The original purchasers executed an agreement whereby Arville would be owned by them as tenants in common. The agreement explicitly refuted that it created a partnership.

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[1] On November 18, 2008, appellant filed a petition below to ascertain the beneficiaries of the Cantor Trust, essentially seeking the court's determination of whether respondent was a legitimate successor to the remainder beneficiary Project Exodus and, hence, had standing to object to the accounts. In a stipulation for appointment of a successor trustee between appellant and the remainder beneficiaries dated April 18, 2001, it was noted that Jewish Federation of Palm Springs was also known as Project Exodus. The trial court overruled appellant's objection to respondent's standing noting "It's a bogus objection."

Appellant eventually came to personally own an independent 36 percent interest in Arville.

Robert Murray succeeded Cantor as trustee upon the latter's death. On January 15, 1998, Murray filed a petition for first account. After objections filed by appellant, Murray and appellant filed a petition for court approval of a stipulation and settlement agreement on July 21, 1998, which required, in part, that Murray file a supplemental account for the period from November 1, 1997, through April 30, 1998. After objections by respondent, the court eventually approved the settlement on February 17, 1999, which provided for Murray's resignation and the appointment of Helen Mae Rose as the new successor trustee.

On November 17, 2000, Rose resigned as trustee. Appellant filed a petition for acceptance of Rose's resignation and for appointment of a successor trustee. On April 18, 2001, appellant and the remainder beneficiaries entered into a stipulation for appointment of Martha Jimenez as the trustee. The court granted the stipulation. On November 22, 2005, Jimenez filed a petition for an order appointing appellant as a cotrustee noting that "[Appellant] is very active in the day-to-day operations of the trust administration and has been since the inception of the Trust." The court granted appellant's appointment as cotrustee. On September 18, 2006, Jimenez filed a petition for an order accepting her resignation as cotrustee and appointing appellant as the sole trustee. On February 28, 2007, appellant petitioned the court for approval of an accounting of cotrustee Jimenez for the period of March 1, 2001, through January 31, 2007. On April 26, 2007, respondent filed objections to the accounting including that

(1) the period between February 14, 2006, and January 31, 2007, was not presented by both cotrustees; (2) Jimenez failed to file a bond as required by the April 18, 2001, stipulation; (3) Jimenez was in propria persona and must be represented by counsel; and (4) the format failed to meet the requirements of Probate Code[2] sections 16063, 1060 et seq.; on the same day, the court set an OSC regarding why sanctions should not be imposed for appellant's failure to file an amended account: She "probably ought to be sanctioned for not doing what she was ordered to do. And when we see her account, of course if there's any discrepancy she's going to be personally liable for everything." The court refused to allow Jimenez's resignation until the issues with regard to her account and bond were resolved.

On June 12, 2007, appellant filed an amended petition for approval of accounting of cotrustee Martha Jimenez. On July 17, 2007, respondent filed objections to the petition including the following: (1) again noting that the period of the accounting between February 14, 2006, and January 31, 2007, should be presented by both cotrustees; (2) the amended account should have been brought more current than January 31, 2007; (3) that there were substantial differences in amounts listed in the first accounting and the amended accounting. At the hearing on that amended petition for approval of accounting on August 27, 2007, the parties stipulated to permit Jimenez to resign as cotrustee and to permit appellant to choose one person from five enumerated individuals to serve as cotrustee.

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[2] All further statutory references are to the Probate Code unless indicated.

On October 4, 2007, appellant filed a second amended petition for approval of first accounting of Jimenez and appellant. On October 16, 2007, respondent filed the following objections to the second amended petition for approval of accounting: (1) unexplained differences in the amounts represented in it and previous accountings; (2) failure to provide a determination of how the distributions to the life income beneficiary were calculated; (3) failure to allocate any depreciation or reserve principal disbursements from income to principal; (4) failure to account for the trust's share of reserves obtained from a refinance; (5) disbursements made personally to appellant rather than as cotrustee which fail to allocate between income and principal. At the hearing on the second amended petition on February 19, 2008, counsel for appellant agreed to file an amended accounting in order to obviate respondent's objections to the second amended accounting. Only one of the five enumerated individuals in the stipulation for appointment of a cotrustee, Richard Jandt, was willing to serve. The court appointed Jandt to serve as cotrustee.

On May 30, 2008, the court held an OSC regarding appellant's failure to file a third amended account. Counsel for Appellant indicated they needed more time to prepare the amended account. Respondent's counsel objected to an extension of time. Appellant's counsel noted that "we have to kind of clean up some of the things that [Jimenez has] done . . . ." The trial court granted appellant an extension to file a third amended account and set the matter for an OSC on July 15, 2008, with potential sanctions of $1,500 for failure to account.

On July 14, 2008, appellant filed a third amended petition for approval of accounting. On July 31, 2008, respondent filed the following objections to the third amended petition for approval of accounting: (1) distribution of rent incomes from the management company directly to the income beneficiary without a proper determination of net income; (2) failure to make allocations for depreciations; (3) "The Co-trustees have failed to account for the activity of the management company, reporting only the net income actually received from the management company"; (4) dispersal of income receipts by the property management directly to appellant personally and not as cotrustee; (5) failure to show the cash balance maintained by the management company; (6) payment of attorney's fees out of the trust for personal legal matters of appellant, rather than legal services in her capacity as cotrustee; (7) failure to appropriately account for fees paid and requested by appellant as cotrustee; and (8) reimbursements requested by appellant for services that did not appear to total the amounts requested and did not appear to be for the benefit of the trust.[3]

At the hearing on the third amended petition for approval of accounting on August 15, 2008, counsel for appellant contended that the accounting was correct, complete, and addressed all respondent's prior issues with it. The court opined that respondent's continued objection was well taken: "[T]he objection[] appear[s] to be valid that the property manager was just paying her the—the full amount of the rent and—and not accounting for the expenses . . . in other words, she was receiving more than just the

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[3] Respondent alleged that "Laura Gray, individually, is an owner of a portion of the real estate of which the trust is also an owner, yet she fails to allocate the costs between her personal interest (36%) and the trust's interest (21%)."

earnings. She was digging into the expenses of the trust as well. And she's—appears she's been over paid and she should account for that." Respondent's counsel concurred: "Your Honor, the problem with this accounting is it does not account for what the property manager was doing. So we are shooting from the hip a little bit as to what happened with the money, the refinance, putting something like a hundred thousand dollars with the property manager. I'm not sure of the exact amount. But a principal amount was taken by refinance and handed to the property manager. [¶] Now, we don't know how that money was handled because the funds handled by the property manager are not accounted for in this accounting. And that's our problem. So we don't know that the balance on hand from the refinance is still on hand or has been distributed, which would be an invasion of principal." Appellant's counsel responded, "I believe in—in speaking with the accountant, what they said, the money with the manager we accounted for the trust. So the money with the property manager is with the property manager. So there's been no distribution. It's just that's where it is. So when it gets distributed or if something happens, then it will be accounted for." The court denied approval of the third amended accounting and ordered appellant to file a fourth amended account addressing the issues raised by respondent.

On October 2, 2008, appellant filed a fourth amended petition for approval of accounting. On November 4, 2008, respondent filed the following objections to the fourth amended petition: (1) "The primary issue which the Petitioners have failed to address is the failure to account for the receipts and disbursements made by the management company which operates the building of which the trust owns 21%. The

management company receives rent income, security deposits, and, on one occasion, funds from the re-finance of the property. The management company pays current operating expenses, long term repairs and replacements (e.g. new roof), loan payments to the debt holder (principal and interest), and repayments of security deposits. Therefore, the management company is receiving and paying a *potpourri* of principal and income as defined under the Uniform Principal and Income Act (Probate Code § 16320 *et seq.*). Cash distributed by the management company is, therefore, attributable to both income and principal and must be analyzed to determine the portion of the cash distribution which is income and the portion (if any) which is principal. It cannot be assumed that the cash distribution is all income in light of the management company's handling of both income and principal."

At the hearing on the fourth amended petition on November 19, 2008, the court noted, "My understanding is [respondent] basically want[s] the backup figures on the management company's dealings and—and I think they're entitled to that, and apparently you haven't given that to them. They [have] been requesting it now for—[¶] . . . [¶] . . . the past three amendments to this account." Counsel for appellant responded, "Well, our issue there is the management company is an independent entity. We've got a trustee. We've accounted for the trust . . . as required . . . ." However, in order to comply with the court's order and respondent's request, appellant's counsel acknowledged, "We'll have to do an audit of the management company." The court agreed: "You'll have to do that. They're [your] agent. I'm sustaining that objection. And if you don't provide this information, I'm going to sanction or remove your client.

I may even hold her in contempt. I mean, information has been requested over and over and over again." "I'm not going to set a contested hearing until I get an accounting that has been ordered multiple times, which your client apparently—either she's going to provide it or she's not. If she's not, then I'm going to set a hearing why she shouldn't be held in contempt." Appellant's counsel responded, "We've provided—we'll provide it. I have the accounting. We've made several attempts to provide it. We've relied on the advice of the accountant who specifically stated we account for the trust and that the management company is an independent entity . . . ." The court concluded: "They are her agents. I'm ordering her to file a full accounting of her agent's activities."

On January 27, 2009, appellant filed a fifth amended petition for approval of accounting. The next day she filed a supplemental petition in support of the fifth amended accounting in which she cited section 16352 for the proposition that "if a trustee [who] conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or other activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate account[ing] records for its transactions, whether or not its assets are segregated from other trust assets." Thus, appellant asserted that she could only be required to account for the income disbursements made by the management company in her accounting unless she herself determined to account separately for Arville. Respondent filed objections to the fifth amended petition for approval of accounting based on appellant's failure to account for security deposits; characterization of costs

incurred relative to roof repair as improvements rather than repairs, and failure to account for the receipts and disbursements of the management company.

At the hearing on the fifth amended petition the court indicated that after reviewing the filings it did not see anything that exempted appellant from providing an accounting of the property management: "I don't think this is a business entity under [section] 16350 as you indicate. It's merely several people that own property as a tenancy in common. It's not a partnership. It's not a business. I don't think it falls under [section] 16350. [¶] And I don't think [section] 16350 exempts her from providing an accounting for the backup information. [Section] 16350 basically says that the income is—or that the receipts are income if it's a business entity. I don't think anybody is challenging she's entitled to income." It also expressed concern, " that [appellant], with her personal ownership in the property and acting as trustee for the additional 21 percent, put her as the controlling owner of the property[,] counting the interest that she was accounting as a fiduciary for. [¶] And this person that provided the services was—she had control over that person. It was her agent."

The court stated, "I would assume that every time these interests, the tenant in common of this property, received a distribution from this manager, this agent—[appellant's] agent—that he must have provided a summary of account as to what was paid, what the distributions were for maintenance and everything else, and then what the bottom line was, and how it was divided up between the tenants in common. Aren't those documents in existence, and can't they be provided to [respondent] so they can see whether it answers their questions? There must be—somebody must have those

documents. Weren't those prepared by the manager?" Appellant's counsel responded that the property manager's computer had crashed and that those records were no longer available. At respondent's request, the court continued the matter to permit one final attempt at settling the matter between the parties so that trust funds would not be exhausted in litigation regarding the matter.

In a supplemental response to respondent's objections to the fifth amended accounting filed on March 25, 2009, appellant contended that Arville was an entity pursuant to section 16350 such that the income the trust received from it was required to be allocated as income. Furthermore, pursuant to section 16352, she maintained that a trustee may elect to account separately for a business or activity or may account according to the trust general accounting method. Thus, since the trustee did not elect to account separately for Arville, she could not be required to do so now. Also on March 25, 2009, appellant filed a declaration in which she asserted that Jimenez was never provided an accounting statement from the *former* property manager of Arville during Jimenez's entire tenure as trustee and cotrustee; Arville's former property manager indicated that he had a computer crash, due to which all former records were unavailable; the current property manager indicated he had not received any records from the former property manager when he took over in July 2006.

At the continued hearing on the fifth amended petition, appellant's counsel submitted that her fifth amended accounting was correct; however, to the extent that the court continued to find it improper, she requested an extension of time to file a sixth amended account. The current cotrustee indicated, "[W]hen the property was

refinanced, equity was pulled. That is a principal distribution; that is not an income distribution. We are able to ascertain those types of numbers. If we're to buy Counsel's argument, he would classify those as income and, therefore, distributable to his client. Uniform Principal and Income Act says, no, that is not distributed to his client. Those are principal distributions." The court noted that appellant had been requested to provide the property management's accounts for the last three to four accountings. The court then denied the request for approval of accounting, removed appellant as cotrustee, appointed Jandt as sole trustee, and set trial on respondent's objections to the fifth amended accounting.

DISCUSSION

Appellant argues on appeal, as she did below, that pursuant to section 16350, Arville is an entity from which all distributions must automatically be allocated to income; hence, she contends that she cannot be required to provide a separate accounting of Arville in its entirety because it would essentially be pointless, i.e., appellant would still be entitled to receive as income all the distributions made by Arville to the trust. Additionally, appellant contends that as trustees, she and Jimenez never elected to file a separate accounting of Arville; thus, pursuant to section 16352 their non-election to provide such an accounting barred the probate court from ordering one. We agree with respondent that the probate court acted within its discretion in declining to approve the accountings and ordering a separate accounting of Arville upon respondent's well-taken objections.

Section 16350, subdivision (a) provides that "[f]or the purposes of this section, 'entity' means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or decedent's estate to which Section 16351 applies, a business or activity to which Section 16352 applies, or an asset-backed security to which Section 16367 applies." Subdivision (b) provides that "[e]xcept as otherwise provided in this section, a trustee shall allocate to income money received from an entity."

The first problem with appellant's argument is that the law revision commission's comments to section 16350 specifically denote that it "does not apply . . . to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common." (Cal. Law Revision Com. com., reprinted at West's Ann. Prob. Code § 16350.) While appellant takes issue with both the necessity of resorting to the law commission's comments and the veracity of its statement, "[w]e give the Law Revision Commission comments 'substantial weight.' [Citation.]" (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 524 (*Esslinger*).)

Here, the original purchasers executed an agreement whereby Arville would be owned by them as tenants in common. The agreement explicitly refuted any notion that it created a partnership. Thus, Arville is not an "entity" within the meaning of section 16350. Moreover, section 16350 deals with *allocation* of disbursements from the trust, not an *accounting* of the trust. The issue at hand is not whether appellant, her cotrustee,

and the prior trustee properly allocated disbursements from the trust; rather, the issue is whether they provided a proper accounting for the trust. Only upon the provision of a proper accounting could the probate court and the remainder beneficiaries determine whether the trustees properly allocated disbursements from the trust.

Section 16352, subdivision (a) provides that "If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or other activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets." "Businesses and other activities for which a trustee may maintain separate accounting records include . . . [¶] . . . [¶] . . . Managing rental properties." (Section 16352, subdivision (c)(4).) Thus, appellant contends that because she did not elect to file a separate accounting for Arville, but chose only to file an accounting of the disbursements made by Arville to the trust, appellant cannot be compelled to submit a separate accounting of Arville.

First, we would question, as did respondent and the probate court below, any determination by a trustee that it was in the best interests of the beneficiaries not to maintain a separate accounting of the Arville property in its entirety. This is because the property manager, who had no interest in and no apparent expertise in the administration of the trust, could not be expected to make appropriate determinations as to whether monies derived from the operation of Arville would properly be allocated to the income or principal of the trust.

Second, while a separate accounting of Arville would probably be unnecessary were the trust to consist only of a 21 percent interest in the receipts or profits of Arville, the trust, in fact, consisted of a 21 percent undivided interest in the property of Arville itself. Thus, the only manner of ensuring that monies received by Arville, in whatever form, were not being exclusively and improperly allocated to income, would be to account for Arville in its entirety. Indeed, respondent contended below that the accountings provided failed to account for security deposits received, costs incurred for repairs or improvements, reserves, depreciation, and amounts received from refinancing; expenses that may have been improperly charged to principal and receipts which could have been improperly allocated to income.

Third, and finally, while the statute may allow a trustee to elect whether to initially provide a separate accounting for the business, it does not compel the probate court to approve such an accounting nor does it prohibit the court from ordering a separate accounting when it deems this appropriate. As we will discuss below, the probate court has broad discretion to order an accounting on any terms it deems requisite in ensuring the propriety of the administration of the trust. It bears repeating, we are not concerned here with whether the trustee properly allocated income and expenses, but rather, with whether the probate court acted within it discretion in ordering an accounting that it deemed necessary for it to make such a determination at a later date.

A trustee is generally required to provide an accounting of the trust assets annually, at termination of the trust, and upon a change of trustee. (§ 16062.) The accounting must include a statement of the assets and liabilities of the trust during the

covered period. (§ 16063, subd. (a)(2).) The accounting must be provided to each beneficiary to whom income or principal is required or authorized to be currently distributed. (§ 16062.) A remainder beneficiary has standing to petition the probate court for an order compelling a trustee to provide "a particular account." "The probate court has discretion to grant or deny such a petition." (*Esslinger*, *supra*, 144 Cal.App.4th at pp. 520, 525.) Insofar as a remainder beneficiary has standing to compel an accounting, he or she also has standing to object to an accounting already filed. (§ 17200, subd. (b)(12); see 2 Cal. Trust Admin. (Cont.Ed.Bar 2d ed. 2009) Court Proceedings, § 15.30, p 1298.) Moreover, the court has an independent duty to inquire into the prudence of a trustee's administration of the trust when presented with a petition for approval of an accounting. (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.)

The court has "wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by [a] section 17200 petition. [Citation.] Among the remedies in the probate court's arsenal is the express power to remove a trustee on its own motion, *without a petition* [citations], along with the express authority to suspend a trustee pending a hearing on a petition for the trustee's removal. [Citation.]" (*Id.* at p. 427.) "[T]he probate court has the '*inherent power* to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust.' [Citation.] This inherent equitable power of the probate court has long been recognized to encompass the authority to take remedial action. 'Under California trust law, a court can intervene to prevent or rectify abuses of a trustee's powers. [Citations.]' [Citation.] And, where a probate court has the express

authority to remove a trustee sua sponte [citation], it necessarily has the inherent equitable power to employ the less extreme remed[ies]." (*Id.* at pp. 427-428.)

"The trustee's conduct can be attacked for fraud or bad faith and an accounting compelled for improper acts which had been hidden from the ultimate beneficiaries. [Citations.]" (*Evangelho v. Presto* (1998) 67 Cal.App.4th 615, 620, 624) "[U]pon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to report information about the trust and to account." (§ 16064, subd. (a).) A trustee has a duty to provide remainder beneficiaries with information that is reasonably necessary to help them enforce their rights under the trust or redress a breach of trust. (*Salter v. Lerner* (2009) 176 Cal.App.4th 1184, 1189; see 13 Witkin, Summary of Cal. Law (2009 supp.) Trusts, § 85, subd. (2), pp. 120-121.)

A "particular account" means particular to the beneficiary's request for information, petition, or objection. (*Esslinger*, *supra*, 144 Cal.App.4th at p. 524.) It may be as broad or narrow as that deemed appropriate by the probate court in proper exercise of its discretion to "'make any orders and take any other action necessary or proper to dispose of the matters presented . . . .' [Citation.]" (*Id.* at pp. 524-525; see *Id.* at p. 529 (dis. opn. of Bedsworth, P.J.).) "If the trustee uses agents for the custody of securities or for property management, reports provided by those agents may be incorporated into an account and sent directly to the trust beneficiary. . . . [S]ome courts will require complete itemization of the information." (1 Cal. Trust Admin. (Cont.Ed.Bar 2d ed. 2009) Court Proceedings, § 2.6, p 30.)

Here, the probate court acted within its broad discretion in refusing to approve appellant's accounting and removing her as trustee due to her failure to provide a separate accounting of Arville despite repeated orders to do so. As noted above, it would be difficult if not impossible to determine whether the trustee(s) had appropriately allocated receipts and expenses without a full accounting of the management of Arville. There were repeated and well-taken objections to appellant's management of the trust. Indeed, it was alleged that appellant could essentially dictate to the property manager decisions regarding income and expenses by virtue of her essential control of the Arville property; she owned a personal, separate interest of 38 percent in Arville and occupied positions as trustee and cotrustee of the trust with a 21 percent interest, affording her a status of virtual majority owner of the property. This placed her, at the very least, in a position that had the appearance, if not the actuality, of a conflict of interest with the remainder beneficiaries. Respondent alleged appellant allocated the expenses of administration of her personal interest in the property to the trust. Even prior to appellant's position as either cotrustee or trustee, Jimenez indicated that appellant "is very active in the day-to-day operations of the trust administration and has been since the inception of the trust"; an inherently suspicious position for her to occupy when she had no official duties regarding the trust.

The various accountings provided failed to appropriately account for security deposits, depreciation, repairs, improvements, reserves, and a refinancing of the property; all items which could substantially affect allocation of receipts and expenses. The assertion that the former property manager had lost all records of the management

of Arville for the period prior to July 2006 was inherently suspect; as is the implied contention that appellant could not acquire the property manager's records from some other source such as another owner of the property who would surely have received it. Furthermore, the fact that amounts listed in some of the various accountings diverged, further supported the probate court's determination that an accounting of Arville was necessary to ensure the remainder beneficiaries' interests in the trust were being protected.

DISPOSTION[4]

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ RICHLI
Acting P. J.

/s/ KING
J.

[4] Appellants' request for judicial notice filed February 5, 2010, is denied. Appellants fail to argue how the proposed document is relevant to the issues raised on appeal. (*People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2)

Dear Sirs and Madams of the California Law Revision Commission, Nov. 6, 2010

My name is Amy Grossman Di Costanzo and I live at 1710 Sonoma Ave. Berkeley, CA 94707, tel # 510 772-6324 (cell). I was referred to you by my lawyer. I know that there have been many positive reforms in the last few years regarding Child Support collection laws. However, there is one situation whereto none of those laws pertain. A case where there is no paycheck, the bank account is not used for depositing income, and property is hidden in the name of other people. I am speaking about my case and surely that of many others. I have been in a CS case for 5 years wherein the father of my children is self-employed. He has made evading CS responsibility seemingly his life's goal. We separated end of 2005 and I went about trying to prove how much money he made in 2006. I proved that he was asking for payments in cash and later asking his customers to make the checks out to his girlfriend into whose (dedicated) checking account he placed all his check earnings. He began by fraudulently declaring he earned $19,000/yr. By the end of 2006 he had admitted to (fraudulently) $59,000 for that year. By the end of 2008, right before the CS trial he was forced to admit in writing to the Court he had earned $104,000 in 2006. I proved he had earned an additional $22,000 on top of that for a grand total of $126,000 in 2006. He was assessed $2,226/month CS going forward in Jan 2009 by Judge Daniel Grimmer in Fremont. Judge Grimmer's decision told of my ex's untruthfulness and all the fraudulent documents he and his girlfriend produced for the Court. Everything from I&E's, invoices, Profit & Loss Statements etc. were proven fraudulent.

Needless to say he has never paid CS. He purchased a house in 2008 but put it and the mortgage in his girlfriend's name. My only recourse is to file contempt of Court charges which end up costing me money as each time there must be a trial and I have to prove he is willfully not paying although he can afford to. He tells the Court he is destitute and can't even pay the rent (to the girlfriend who is his "landlady" in the house that he purchased). I have even had to hire witnesses to pretend to be customers to show that he asks for cash, doesn't declare it, and has plenty of work. This is ridiculous.

Yet every time we have a new contempt trial he gets to start fresh, as if he had never done anything bad in the recent past. At trial, under oath every single time, he says he is destitute and it is up to me to prove that he isn't, even though HE HAS BEEN GOING TO JAIL FOR WILLFULLY NOT PAYING CS IN THE RECENT PAST! He even tells people he would rather go to jail than pay CS. Yet the Judge says we can't use previous findings even though they show that he perjured himself over and over again. He has been assessed my Lawyer's fees but he doesn't pay, of course.

I would like to introduce the element of PRESUMPTION into the law regarding these self-employed dead beats that says basically "if it has been determined twice that one of the parties perjured him/herself, or was dishonest, or submitted fraudulent documents in two separate Child Support trials or hearings about a material matter, he/she will be presumed (there will be a 5 year presumption) to have less credibility in future hearings". This presumption would then need to be satisfactorily rebutted to lift the presumption. * It should be more difficult than it currently is to perjure oneself again and again and place the burden to prove the ex is lying on the already stressed-out parent who has full time custody.

*This PRESUMPTION is used in cases of domestic violence where the (once convicted) accused denies a new charge.

Sincerely,

Amy Di Costanzo

EMAIL FROM BARBARA HASS TO BRIAN HEBERT (1/25/12, #1)

Sheila Mohan of the Legislative Counsel suggested that I contact the California Law Revision Commission concerning my inquiry below.

Specifically, California Code of Civil Procedure Sections 2035.010 through 2035.050 relate to a Petition to Preserve Evidence prior to the commencement of a civil action. Not mentioned at all in this code section is the deadlines for opposing or replying to oppositions to a Petition to Preserve Evidence, or a reference to follow a certain statute regarding same. I have asked several attorneys what code section I should follow to docket an opposition/reply, and each attorney's response is different because 2035 is silent on this issue. The one response from an attorney I lean toward is to follow the law and motion opposition/reply timeline in CCP Section 1005(b).

Is there a way to amend this statute to either include a deadline timeline or refer to another code section to calculate these important deadlines?

Regards,

Barbara Hass, ACP/CAS
Advanced Certified Paralegal
Chain/ Cohn/Stiles
1430 Truxtun Avenue, Bakersfield, CA 93301
Telephone: (661) 334-4929
Facsimile: (661) 324-1352

EMAIL FROM BARBARA HASS TO BRIAN HEBERT (1/25/12, #2)

Attached is a proposed revision to this code section. It mimics CCP 1005(b), the code section for civil law and motion.

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CCP 2035.040:

"(a) The petitioner shall cause service of a notice of the petition under Section 2035.030 to be made on each natural person or organization named in the petition as an expected adverse party. This service shall be made in the same manner provided for the service of a summons.
(b) The service of the notice shall be accompanied by a copy of the petition. The notice shall state that the petitioner will apply to the court at a time and place specified in the notice for the order requested in the petition.
(c) This service shall be effected at least 20 days prior to the date specified in the notice for the hearing on the petition.
(d) If after the exercise of due diligence, the petitioner is unable to cause service to be made on any expected adverse party named in the petition, the court in which the petition is filed shall make an order for service by publication.
(e) If any expected adverse party served by publication does not appear at the hearing, the court shall appoint an attorney to represent that party for all purposes, including the cross-examination of any person whose testimony is taken by deposition. The court shall order that the petitioner pay the reasonable fees and expenses of any attorney so appointed."

PROPOSED ADDITION TO 2035.040:

(f) All papers opposing a petition shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing. The court, or a judge thereof, may prescribe a shorter time.
(g) Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. The court, or a judge thereof, may prescribe a shorter time.

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September 30, 2011

Mr. Brian Hebert
California Law Revision Commission
c/o UC Davis School Of Law
400 Mrak Hall Drive, Room 1128
Davis, CA 95616

Re: Study L-623 regarding changes to, *inter alia*, Probate Code §§21351 and 21382
Client: Paul Clowdus

Dear Brian:

I note from Staff Memoranda and the Minutes of two (2) meetings of the Law Revision Commission (held on April 23, 2009 and August 28, 2009) that the above-referenced Study was "put on hold until the fate of SB 105 is settled" and that the "Commission decided to suspend any further work on this Study until after the Legislature and the Governor have taken final action on Senate Bill 105 (Harman)." Even though Senate Bill 105 has been enacted, and even though Study L-623 remains on the Commission's website as an "Active Study", it has not been placed on the Commission's agenda for further work. I urge the Commission to "re-activate" Study L-623 as soon as possible by placing it on the Agenda.

Study L-623, which deals with possible amendments to Probate Code §15642, and would affect executors of wills, conservators, and powers of attorney and appointment, could also be used as a "forum" to recommend to the Legislature changes to Probate Code §21382, which allows family members/blood relatives to be exempt from the sections of the Probate Code, now amended by SB105, "which establish a statutory presumption of menace, duress, fraud, or undue influence with respect to a provision of a donative instrument that makes a gift to the drafter of the instrument..." Memorandum 2009-22. This "free pass" for family members is not supportable from a legal or practical perspective. Although the Commission tries to justify this by asserting that

"family members are the most natural objects of a transferor's bounty [and that] a gift to such a person is natural and expected, and therefore less likely to have been the product of fraud or undue influence", Memorandum 2009-22, page 4, that is only true if the family members are getting along with each other. More often than not, however, the family member who drafts the testamentary instrument does so in a way so as to benefit himself or herself to the detriment of the other family members.

For example, according to a recent article in Yahoo! News concerning Zsa Zsa Gabor and her daughter's ongoing disputes with her husband, when Ms. Gabor passes away, both her daughter and her husband are likely to submit "competing" wills for probate to the Probate Court. Under the present state of the law as codified after Senate Bill 105 was enacted, the daughter will be "immune" from a claim of undue influence, *etc.* in obtaining Ms. Gabor's signature on a will which she (the daughter) has drafted, even though, according to the article, she has "rewrit[ten] it without telling [Ms. Gabor's husband]". On the other hand, Ms. Gabor's husband, who, by definition, is not a blood relative, will be subject to a claim under Probate Code §21350/21380, because he is a care-giver to Ms. Gabor and because he has apparently drafted wills for Ms. Gabor to execute.

This makes no sense from a public policy perspective—why should the daughter be "exempt", even though she is engaging in the exact same conduct as the husband?

In my client Paul Clowdus's case, I wanted to challenge the "80/20 will" (the will prepared by my client's brother, Richard, which left 80% of their father's Estate to Richard) on my client's behalf under Probate Code §21350, which would have provided a "safe harbor" to do so without the risk of Richard's invocation of the "no-contest clause", Probate Code §21310(b)(6) (as Richard was clearly the drafter of that will), but could not do so because of the exemption for family members provided by Probate Code §21351(a) [now §21382(a)]. In the Memorandum filed with the Sacramento Superior Court for a hearing on April 23, 2008, I said on my client's behalf:

> "There is no reason why a blood-relative who causes an elderly person to leave him the bulk of his estate should be treated any differently than a non-blood-relative. Under the current statutory scheme, where a non-blood-relative financially abuses an elder in this fashion, an affected

person can bring a Petition under Probate Code §21350 "at any time after letters are first issued to a general representative and before an order for final distribution is made", Probate Code §21356(a); it is the Respondent who bears the burden of proving the lack of undue influence; and a "no-contest" provision in the will is rendered "unenforceable", Probate Code §21306(a)(3).

On the other hand, where the elder-abuser is a blood-relative, the affected party is limited to bringing a Petition to revoke the probate of the will "within 120 days after a will has been admitted to probate...", Probate Code §8270(a); it is the Petitioner who bears the burden of proving that the elder-abuser unduly influenced the testator; and the "no-contest" clause may, or may not be (Probate Code §21307) enforceable against the Petitioner.

This distinction between blood-relatives and non-blood-relatives makes no sense from a public policy perspective. Elders should be protected from financial predators, blood-relatives and strangers alike. That is why the Legislature will almost certainly amend the entire statutory scheme."

I wish my "prediction had come true", and that the Law Revision Commission and the Legislature had acted as I had hoped it would. However, it is not too late to allow my client, along with scores of other similarly-situated Californians (including, of course, Ms. Gabor's husband) who have been victimized by unscrupulous family members, to have his "day in Court".

Re-activating L-623, which has already been supported by the Executive Committee of the Trusts and Estates Section of the State Bar of California and the California Judges Association, will provide a "forum" for recommending to the Legislature the enactment of legislation which I am hereby suggesting to amend the Probate Code to exempt "unnatural" bequests to blood relatives when that relative is responsible for drafting the very testamentary instrument which makes that bequest; *i.e.* where, as in my client's case, the blood relative drafter of a will in effect "leaves himself" much more than he is entitled to.

The Commission can recommend to the Legislature the following amendments to Probate Code Section 21382 which would, in fact, eliminate the concern which you expressed in your April 25, 2011 email message to my client that "overbroad application

that might defeat legitimate gifts" be avoided **(language to be added underlined and in bold):**

> 21382. Section 21380 does not apply to any of the following instruments or transfers:
> (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor **but only when the transfer does not constitute an unnatural gift to such person or an undue benefit to such person.**
> (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor **but only when the instrument does not contain an unnatural gift to such person or provide an undue benefit to such person.**

Alternatively, the Legislature could amend the statute as follows:

> 21382. Section 21380 does not apply to any of the following instruments or transfers:
> (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor **but only when the transfer treats such person and all other persons related to such person by the same degree equally.**
> (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor **but only when the instrument contains equal gifts or benefits to such person and all other persons related to such person by the same degree.**

Finally, the Legislature could simply adopt the same or similar language to that found in Probate Code §15642:

> 21382. Section 21380 does not apply to any of the following instruments or transfers, **unless, based upon any evidence of the intent of the transferor and all other facts and circumstances, which shall be made known to the court, the court finds that the transfer is not consistent with the transferor's intent and was the product of fraud or undue influence:**
> (a) A donative transfer to a person who is related by blood

or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.
(b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

The distinction between blood-relatives and non-blood-relatives makes no sense from a public policy perspective. Elders should be protected from financial predators, blood-relatives and strangers alike. Please arrange for the Law Revision Commission to put Study L-623 on the Agenda as soon as possible.

Please do not hesitate to contact me at any time if you wish to discuss any of these matters.

Very truly yours,

Paul S. Levine

cc: Paul G. Clowdus

CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
95814

JAN 25 2012

January 23, 2012

Justice John Zebrowski (ret.), Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

RE: Comprehensive Review of the Fish and Game Code

Dear Chairperson Zebrowski:

As chairs of the Senate and Assembly policy committees with subject matter jurisdiction over fish and wildlife policy issues, we are writing to request the Law Revision Commission take on the project of conducting a substantive review of the Fish and Game Code for purposes of making recommendations to the Legislature on changes to update, clarify, and improve the Code. We are particularly interested in your suggestions that would help to clarify the scopes of responsibility of the Department of Fish and Game and the Fish and Game Commission.

As the result of the passage of AB 2376 (Huffman) in 2010, the California Natural Resources Agency this past year has been facilitating a strategic visioning process for the Department of Fish and Game and the Fish and Game Commission. The process has involved the appointment of a state executive committee, a blue ribbon commission and a broad-based stakeholder advisory process. One of the recommendations in the draft vision released for public comment in November, 2011, was the need for a comprehensive, thorough review and updating of the Fish and Game Code, to identify obsolete, inconsistent or duplicative sections, and to provide support for more readily understood and enforceable fish and wildlife regulations.

While there have been some legislative updates to the Fish and Game Code in recent years (see for instance AB 1729 (Committee on Water, Parks & Wildlife) of 2007 and AB 1442 (Committee on Water, Parks and Wildlife) of 2009), it has been many years since a thorough and comprehensive review of the entire code has been conducted.

As part of the Law Revision Commission's review, it would also be particularly helpful if the Commission could provide a list of all of the mandates and responsibilities of the Department and the Fish and Game Commission, identify areas where particular mandates and responsibilities may overlap with the mandates and responsibilities of other agencies, and identify programs that lack identified funding sources. In addition, it would be helpful if the Law Revision Commission could identify areas where there may be a lack of clarity regarding

the roles of the Department and the Fish and Game Commission, with recommendations on options as to how such lack of clarity might be addressed.

Thank you for your consideration of this request. Given the strategic visioning process that is currently underway, the Law Revision Commission's undertaking of this project would be particularly timely. If you have any questions, please feel free to contact Chief committee consultants Bill Craven at the Senate Natural Resources & Water, or Diane Colborn at the Assembly Water, Parks & Wildlife Committees.

Sincerely,

FRAN PAVLEY, Chair
Senate Natural Resources & Water Committee

JARED HUFFMAN, Chair
Assembly Water, Parks & Wildlife Committee

cc: Brian Hebert, Executive Director, CA Law Revision Commission
Diane Boyer-Vine, Legislative Counsel
John Laird, California Secretary for Natural Resources
Chuck Bonham, Director, Department of Fish and Game

January 21, 2011

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Dear Commissioners,

The California Association of Tribal Governments (CATG), the non-profit state-wide association of federally recognized California Indian tribes, requests the California Law Revision Commission add to its agenda of active studies an examination of California law concerning California tribal governments and California Indians.

In accordance with California Government Code §§ 8280-8298, California tribes are prepared to submit suggestions for your consideration concerning defects and anachronisms in the law. We believe your examine of such information would result in recommendations for changes in the law necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this state into harmony with modern conditions.

We request your closest attention to our request. Thank you.

Please direct any questions to the CATG Executive Director, Mr. Will Micklin, at (619) 368-4382. Thank you.

Sincerely,

Mark Romero, Chairman
CATG Board of Directors

Cc: The Honorable Jerry Brown, Governor
c/o Sate Capitol, Suite 1173
Sacramento, CA 95814

The Honorable Darrell Steinberg, Senate President Pro Tem
California State Senate
State Capitol, Room 205
Sacramento, CA 95814

The Honorable John A. Perez, Speaker of the Assembly
California State Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0046

- Big Lagoon Rancheria
- Big Pine Rancheria
- Big Sandy Rancheria
- Cahuilla Band of Mission Indians of the Cahuilla Reservation
- Cher–Ae Heights Indian Community of the Trinidad Rancheria
- Cloverdale Rancheria
- Enterprise Rancheria of Maidu Indians of California
- Ewiiaapaayp Band of Kumeyaay Indians
- Greenville Rancheria of Maidu Indians of California
- Habematolel Pomo of Upper Lake
- Hoopa Valley Tribe
- Hopland Band of Pomo Indians of the Hopland Reservation
- Ione Band of Miwok Indians of California
- Jamul Indian Village
- Karuk Tribe of California
- Kashia Band of Pomo Indians of the Stewarts Point Rancheria
- Los Coyotes Band of Cahuilla and Cupeno Indians
- Mesa Grande Band of Kumeyaay Indians
- Morongo Band of Mission Indians
- North Fork Rancheria of Mono Indians of California
- Pit River Tribe
- Ramona Band of Cahuilla Indians
- Resighini Rancheria
- Scotts Valley Rancheria Band of Pomo Indians of California
- Smith River Rancheria
- Soboba Band of Luiseno Indians
- Susanville Indian Rancheria
- Sycuan Band of the Kumeyaay Nation
- Washoe Tribes of California and Nevada
- Wiyot Tribe
- Yurok Tribe of the Yurok Reservation

JOHN C. SCHALLER
Attorney at Law

ALSO OFFICE IN
GRAEAGLE (530) 836-0132
website: schallerjclawoffice.com
email: jcslaw@pacbell.net

1458 The Esplanade
Chico, California 95926
(530) 893-8891
FAX (530) 893-0124

PLEASE DIRECT ALL
CORRESPONDENCE TO
THE CHICO OFFICE

May 27, 2011

MAY 31 2011

Law Revision Commission
Attention: Barbara Goal
4000 Middlefield Road, #D2
Palo Alto, CA 94303-4763

Re: Spear v. Rowe
Case No. 143482

Dear Ms. Goal,

As per our conversation there is no procedure in the Code for a creditor who levies on real property to get rid of falsely recorded homestead filings in the situation where there is no dwelling on the property. The court in my case held that I had to follow the dwelling procedures even though there is no dwelling. It would seem that there should be an explicit procedure so that:

1. The sheriff does not have to make the determination to institute the dwelling procedures, and even if the sheriff sends the notice, to have a procedure by which the court determines whether or not there is a dwelling after application by the creditor.

2. There also needs to be a procedure for a creditor to go to court when there is no dwelling to remove the false homestead. The sheriff on a sale should not be in the position of determining whether the declarations are valid.

There is no explicit procedure for the court or the sheriff to determine whether any other recorded liens (such as a recorded deed of trust which has been paid in full, but not reconveyed) is dealt with in the sale of a non-dwelling piece of real estate. C.C.P. 704.850 (a) puts the onus on the sheriff to distribute to "all liens and encumbrances".

Enclosed are some points and authorities which were of no avail. The "judicial counsel form" only deals with dwellings. C.C.P. 704.770 (b)(1). This is required to be used and served.

For that matter I do not see even in the dwelling house procedure that the creditor is required to notice any claimed lienholder although the court needs in its determination under C.C.P. 704.780 to specify the amount to be paid to a lienholder. There is no procedure if there is

no valid lien to have the recorded lien be removed from the record even if the sheriff is ordered not to collect the lien, whatever that is on its face.

This entire area of law and procedure needs redrafting. Please take this up at the commission.

Yours truly,

John C. Schaller
Attorney at Law

JCS:mlc
Enclosures

John C. Schaller
State Bar #39375
1458 The Esplanade
Chico, CA 95926
Tel: 530-893-8891
Fax: 530-893-0124

Attorney for Plaintiffs

MAR 1 8 2010

Superior Court of California

County of Butte

Paul A. Spear and Kimiko Bostwick, Plaintiffs, v. Michael E. Rowe and Does I through V, Defendants.	Case No.: 143482 Points and Authorities in Support of Petition Date: 4-9-10 Time: 9:00 AM Dept: Civil

I.

FACTS.

Paul A. Spear and Kimiko Bostwick have a judgment against Michael E. Rowe in the amount of $91,595.00. An amended abstract of judgment was recorded by the creditor on December 12, 2008. The original judgment of $70,320.00 was entered on July 25, 2008 and an abstract of judgment was recorded on July 31, 2008.

Michael E. Rowe owns property at 32 Sheltering Pines Road, Berry Creek, California. He recorded one homestead declaration on January 27, 1997 declaring there was a dwelling on the property and that was where he was residing then.

After the homestead declaration was recorded Mr. Rowe on August 13, 2003 declared he was residing at 5 Sir Aaron Court, Chico, California, in his declaration of domestic partnership.

Michael Rowe moved out of 5 Sir Aaron Court, Chico, before March 4, 2008. The property there had been foreclosed on and Mr. Rowe advised he was moving to Brazil.

II.

THERE IS NO VALID DECLARED HOMESTEAD.

In order to be a declared homestead there must be a dwelling (CCP 704.91). A dwelling is a place where a person actually resides (CCP 704.710(a)). As applicable here, there needs to have been "a house," subsection (1), or a "mobile home" subsection (2). Since there were neither in 1997 nor in 2009 there cannot be a declared homestead. CCP 704.710(c) defined homestead as "the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditors lien attached to the dwelling and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the court determination that the dwelling is a homestead. Since there was no dwelling, Rowe could not comply with this provision. Rowe was also living in Chico from at least 2003 when he became a domestic partner to March 2008 when he abandoned 5 Sir Aaron Court. See *California Coastal Commission v. Allen* (2008) 167 C.A. 4th 322, 83 Cal. Rptr. 3d 906. Since there is no dwelling on the property CCP 704.740 (court order for sale) does not apply.

The 1997 homestead has been abandoned by the time in 2008 the abstract of judgment had been recorded and the 2009 new homestead declaration was recorded.

The Assessor's office asserts there is no dwelling unit on the property. There is no homeowner exemption on the property tax bill and John Denton who recently inspected the Berry Creek property found no dwelling unit on the property.

On June 22, 2009 Michael Rowe filed another declaration of homestead on the Berry Creek property.

This petition seeks to strike the two homestead declarations on the property as false, seeks an order that the 1997 homestead declaration was abandoned ~~ever~~ if it was ever valid, that both homestead declarations be stricken from the record, that the 2009 homestead being subsequent to the judgment lien has no force and effect.

That there is no dwelling on the real property so that the provisions of CCP 704.710 *et seq.* are not applicable and that there is no homestead exemption from the proceeds of a Sheriff's sale.

The 2009 homestead declaration has no effect since the abstracts were before it even if there was a dwelling and Rowe resided there (which he did not).

Nor is there to be any proceeds of the Sheriff's sale that will be applicable to a homestead exemption under CCP 704.720 since there is no homestead on the property since there is no house or mobile on the property (no dwelling) and Michael Rowe did not and does not reside there.

The statutory scheme after levy by the Sheriff sometimes requires an application for order for sale under CCP 704.750. The section only applies where there is a "dwelling" upon the property. At that time the Sheriff is required to serve the creditor with a notice. It would be difficult for the Sheriff to make a determination as to whether or not there is a "dwelling" on the 11.58 acre parcel. Hence it is appropriate to have the court determine at this time that there is no dwelling and that the procedure of CCP 704.750 *et seq.* does not apply.

Hence the orders requested of the court are proper.

Dated : March 16, 2010

John C. Schaller
Attorney for Plaintiffs

John C. Schaller
State Bar #39375
1458 The Esplanade
Chico, CA 95926
Tel: 530-893-8891
Fax: 530-893-0124

Attorney for Plaintiffs

Superior Court of California

County of Butte

Paul A. Spear and Kimiko Bostwick,	)	Case No.: 143482
	)	
Plaintiffs,	)	SUPPLEMENTAL POINTS AND
	)	AUTHORITIES
v.	)	
	)	Date: 4-30-2010
Michael E. Rowe and Does I through V,	)	Time: 9:00 AM
	)	Dept: Civil
Defendants.	)	
	)	

The court asked counsel for the defendant Michael Rowe to provide any authority which addresses a mechanism under the California Enforcement of Judgment Law whereby a judgment creditor may challenge a recorded homestead which is fraudulent and of no force and effect since there is in fact no dwelling on the property levied on at the time of levy.

Counsel for Mr. Rowe has pointed out no procedure under the law which addresses the issue or provides the creditor with a procedure to challenge the declared homestead. He only points to C.C.P. 704.740 which addresses requirements for the sale of real property dwellings. The sections presuppose that there is a dwelling on the property and does not address the situation as here when there is no dwelling on the property levied on.

The petition filed by the creditor provides a mechanism to afford the judgment debtor an opportunity to show that the declared homesteads are not fraudulent and are in effect and that in fact the time of levy there was a dwelling on the property. It was interesting that when Mr.

Driscoll was asked in court whether there is a dwelling on the property, he did not answer. C.C.P. 187 provides sufficient authority for the court to proceed to make a determination as to whether the homestead declarations are valid and whether there is a dwelling on the property entitling Mr. Rowe to a statutory homestead exemption.

Dated : April 27, 2010

John C. Schaller
Attorney for Plaintiffs

Public Record Item

page 1

Date: 12/25/11

CC: California Land Title Association (CLTA)

Attn.: Barbara Sandra Gaal, J.D., Esq.

CONFIDENTIAL AND PRIVILEGED
Attorney-Client Work Product

CC: California Escrow Association (CEA)

Title: Chief Deputy Counsel

CC: Escrow Institute of California (EIC)

Firm: California Law Revision Commission (CLRC)

Re: Binding Arbitration; AB 957

From: Sam Shabot

Mail: P.O. Box 4444
Palos Verdes Pnsl., CA
90274-9595

CONFIDENTIAL AND PRIVILEGED
Attorney-Client Work Product

SAM SHABOT
PO BOX 4444
PALOS VERDES PNSL, CA 90274-9595
OPT-OUT / OMIT FROM BULK MAIL LISTS

NO e-mail; NO fax-back

Public Record Item 12/25/11 (Page 2)

SAM SHABOT
PO BOX 4444
PALOS VERDES PNSL, CA 90274-9595
OPT-OUT / OMIT FROM BULK MAIL LISTS

Dear Ms. Gaal,

Attached hereto, please find a signed written letter to me from the highest governmental real estate license law official in the State of California that concerns: ("AB 957")

1) California's "Buyer's Choice Act", codified as Civil Code §1103.20 et seq., and the difficulties that affriered consumers face when they attempt to enforce their "rights", and

2) Abuse of "mandatory" pre-dispute binding arbitration clauses in consumer contracts of adhesion.

Thank You

I would like to address ALL of the attached [illegible] at your next CFRC meeting.

SAM SHABOT
PO BOX 4444
PALOS VERDES PNSL, CA 90274-9595
OPT-OUT / OMIT FROM BULK MAIL LISTS

(In Re: Buyer's Choice Act)

Important Matter

(1)

To: Member Cathleen A. Galgiani and Staff

From: Sam Shabot
P.O. Box 4444
Palos Verdes Pnsl., CA
CA 90274-9595

Re: "Buyer's Choice Act"

Dear Member Galgiani,

Can you PLEASE re-introduce your refinements and "beef-up" amendments to your original

[OVER] →

Buyer's Choice ACT legislation!

Your original AB Bill was Bill No. 957 and your modification "beef-up" bill was AB 1720. I am an aggrieved consumer who cannot enforce my rights under Civil Code § 1103.20 et seq. because the Bill is practically unenforceable, as it has "no teeth." Please carefully read the attached letter from former Real Estate Commissioner Jeff Davi, the highest real estate license law official in the State of California. (Thank You!!)

DEPARTMENT OF REAL ESTATE *Serving Californians Since 1917*
OFFICE OF THE COMMISSIONER
2201 Broadway
P.O. Box 187000
Sacramento, CA 95818
(916) 227-0782

November 4, 2010

RECEIVED
Department of Real Estate
JUL 0 1 2011
ENFORCEMENT - LADO

Mr. Sam Shabot
P.O. Box 4444
Palos Verdes Peninsula, CA 90274

RE: Buyers Choice Act

Dear Mr. Shabot:

I am writing to you in response to your personally delivered letter of October 16, 2010, in which you asked if the Department of Real Estate (DRE) was "ready and able to enforce the Buyer's Choice Act (Act) as well as the follow-up bill expanding the Act to all transactions."

First, I was able to track down Member Galgiani's follow-up bill to the Buyer's Choice Act. It was Assembly Bill 1720 and it failed to make it out of the legislature. If you wish to learn more about AB 1720, you can visit www.leginfo.ca.gov or you may wish to call Member Galgiani's Capitol office at 916-319-2017.

The failure of AB 1720 notwithstanding, let me state that the DRE has been enforcing the Act since its adoption. It is worth noting that the DRE's authority to enforce the Act only extends to real estate licensees who violate the Act. In other words, the DRE cannot discipline a seller who violates the Act if the seller is not a real estate licensee. To the extent that you have any knowledge of a seller, who is licensed by the DRE, violating the Act, I would encourage you to give us the details so that we may investigate the allegations and pursue appropriate action.

Next, I would like to speak to your concerns regarding the use of pre-printed purchase contracts that contain binding arbitration clauses. I understand you believe that such purchase contracts, like the ones the California Associations of Realtors® (CAR) produces for its members, corner buyers into selecting "binding arbitration" for dispute resolution as opposed to allowing the dispute to be settled in a civil court of law. The DRE does not require the use of any particular purchase contract; rather, the law requires that purchase agreements must be in writing. While the CAR form does provide an option for the principals to agree to binding arbitration, it is up to each buyer and seller to decide if such an option is appropriate. As you know, a purchase contract is legally binding upon the parties and as such, should be read and reviewed by a buyer and seller thoroughly. If a principal to the contract is concerned about any particular language in any purchase agreement, then he or she needs to seek the advice of legal counsel. If you have any evidence of a licensee using misleading tactics or undue coercion to force a consumer to agree to terms against his or her will, please send it forth immediately so that we can investigate the matter. Such behavior cannot be tolerated.

I think it is worth noting that you and I met at a financial literacy event in Southern California. While the department is committed to ridding the industry of bad practitioners, we also believe

it is important for consumers to be educated and informed. Consumers need to know with whom they are dealing by checking out a licensee's license status on the DRE's website and they need to understand everything they are signing, consulting with experts or attorneys as necessary. I think we can agree that being an informed consumer goes a long ways towards avoiding potential disputes and becoming a victim of fraud.

I hope that I have adequately responded to your questions.

Sincerely,

JEFF DAVI
Real Estate Commissioner

JD:rmb

cc: Tom Pool

EMAIL FROM MARLYNNE STODDARD TO DAMIAN CAPOZZOLA (12/12/11)

Re: Inequitable intestate inheritance by half-blood siblings

Dear Mr. Capozzola,

I live in Newport Beach and am in jeopardy of losing my inheritance from my brother because of the overly broad application of the California Probate Code concerning intestate succession by half-blood siblings. I know that you are a member of the California Law Revision Commission which decides on how to reform laws and that the majority of the Commission's recommendations have been enacted into law. I pray that you can help me.

I understand that the purpose of California Intestate Succession Law is to distribute a decedent's wealth in a manner that closely represents how he would have designed his Estate Plan, had he had a Will. But the current statute concerning half-blood inheritance is grossly flawed and produces inequitable results because it treats a half-blood sibling who is estranged from a decedent, or has had no relationship with a decedent, and has never been a functional part of the decedent's family to inherit the same as a full-blood sibling who is of the same blood and is an active member of the same family. The statute fails to require any type of proven relationship, at all, before it unfairly distributes a decedent's Estate to those whom he may least like to have his wealth.

Would you want someone with whom you have had no relationship to inherit your Estate? California has enacted statutes for foster and stepchildren to inherit from an intestate step-parent by requiring that the child be "...in a continuous parent-child relationship with a decedent" (Section 6408) and that "...a relationship of parent and child exists for the purpose of determining intestate succession" (Section 6450). The same requirement should apply to half-siblings for intestate inheritance, no relationship = no inheritance.

My brother, Jim, passed away in California on October 29, 2010, at age 65 without a Will.

My parents were married about 11 years and my father's constant adulterous relationships eventually caused the breakup of their marriage. They lived in Honolulu for the majority of their marriage where my brother was born in 1945. Afterward, they moved to Los Angeles where I was born in 1946. My father went on a business trip to Las Vegas and met another woman. When he returned from the trip, he told my mother that he was moving back to Hawaii and that he would let her know when she, my brother, and I could join him. Friends had heard that my father had met this woman in Las Vegas and that he was taking her to live with him in Hawaii. My mother was informed, and being so very hurt, she filed for divorce. My father moved to Hawaii with that woman, and once my parent's divorce was finalized (when I was 2 years old), he married her and they subsequently had two children.

My brother, Jim, and I had no relationship with these half-siblings at all. Jim had never met either of them and I had only met the half-brother once. We never called, nor

sent cards or letters, nor had any association with them at all. Jim and I always considered them to be in the enemy's camp because their mother broke up our parent's marriage and caused our mother, and us, so very much pain. Growing up fatherless made us feel unloved by him and like outcasts in society. These half-siblings grew up in my father's home and, no doubt, enjoyed a very nice life. My mother never remarried and bore the burden of raising us by herself without any help from my father.

When my parents were divorced, the Court in Los Angeles mandated that my father pay Child Support which was to include half of all expenses for our medical, dental, schooling, etc. He constantly complained that he could not afford to do so because "business was bad" and, therefore, he did not pay her. My mother never took him back to Court because she believed that he was broke. However, at that time, he was providing for these half-siblings while denying support for us. (I only wish that the Bradley Amendment had been passed prior to 1986; it states that unpaid Child Support triggers a non-expiring lien which accrues yearly with interest. Perhaps, then my mother could have recovered what my father owed her.)

Nevertheless, when my father died in 1986, he was a very wealthy man and he disinherited all his children leaving his vast fortune to his last wife (who was half his age) by whom he had no children. When this last wife heard of my brother's death through an heir hunter, she apparently contacted the half-siblings to tell them. They got an attorney and contacted the Probate Attorney to let him know that they were entitled to 2/3rds of my brother's Estate. When I was informed by the Probate Attorney that the California Probate Code considers half-blood the same as whole-blood in intestacy, I could not believe it. These people were not part of our family, and my brother's Estate consists mostly of property that he and I had inherited together from our mother and her sister. It is ancestral property from their bloodline alone. Nothing came from my father. We had no Child Support payments, no help, no emotional support, and no inheritance from him. Why should these children by my father and the woman who broke up my parent's marriage be entitled to any of my brother's Estate? Jim didn't know them or even want to know them. Why should they receive any of our family property and money that came from our mother and aunt? I cannot believe that such an injustice will be forced upon me by the California Probate Court because of an exceedingly unreasonable, overly inclusive, statue concerning intestate inheritance by half-blood siblings even though they have had no relationship with a decedent.

In the summer of 2010 on two different occasions (June 18th and August 27th), my brother told me that he wanted me to have the family property and money. He told me how to handle his Estate should he die without a Will since he had not made one. We both thought that his Estate would automatically pass to his closest relative, which was me. There was no question in our minds that it could or would be handled otherwise. Jim unexpectedly died of a massive heart attack two months after he last told me his wishes.

In the past, my brother always told me how grateful he was to me for handling all of the care of our mother and her sister and for taking care of our mother's home, because he worked and was not able. He lived out of state for many years and was not present to do these things, but even after he had moved back to our area, he did not have the time. Somehow I always made the sacrifice to do everything for the family even though I, too, worked for many years, but Jim was always very appreciative and constantly thanked me.

My brother and I had a very close relationship and we loved each other very much. Were he to know that the State of California plans to give 2/3rds of his Estate to the estranged half-siblings, he would die all over again. These half-siblings are the last people in the world that he would want to have any of his Estate and they did not even come to mind, nor were they part of our conversation, when he was discussing his wishes with me for the distribution of his Estate prior to his death. They have not been part of our family at all.

I have been searching the Internet for help and learned of Professor Ralph C. Brashier's work in the area of intestate inheritance concerning half-blood siblings. He is a Professor of Law at the Cecil C. Humphreys School of Law at the University of Memphis and an author of Inheritance Law and the Evolving Family (Temple University Press, 2004), as well as many other publications, but his work entitled Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family (58 SMU L. Rev. 137, 2005) addresses the need to change current intestate inheritance laws.

Professor Brashier believes these laws should be revised to exclude half-blood relatives who are unknown or did not grow up in the household of the same biological parent. His argument that half-blood relatives should inherit only if they had a proven relationship with the decedent makes sense.

In general, Professor Brashier suggests a statute which says:

(1) A relative of the half-blood does not inherit from the decedent unless the relative proves,

(a) by a preponderance of the evidence, the existence of a shared upbringing

(b) by clear and convincing evidence, the existence of significant interaction between the half-blood relative and the decedent demonstrating that the decedent considered the half-blood relative to be a member of the decedent's family.

(2) A relative of the half-blood who satisfies the requirements of paragraph (1) inherits as though he or she were a relative of the whole-blood.

I have always believed that the law would provide an equitable result if it could be proven that the application of a particular statue would not be just. Intestate inheritance by half-blood siblings, in my particular case, is not just and is contrary to my brother's expressed wishes for the distribution of his Estate. We had no relationship with our estranged half-siblings and did not consider them part of our family at all. This horribly unfair law needs to be changed and made retroactive to the date of my brother's death (10-29-10) so that justice will, then, prevail and my brother's Estate will not pass to those whom he would least want to have it. The application of the current statute concerning intestate inheritance by half-blood siblings contradicts the purpose of the Intestate Law which intends to distribute a decedent's Estate according to what it believes he would have done.

Please review and recommend that this unjust law be changed without delay before it harms me and all of those who are in a similar situation. Any help that you can give me will be greatly appreciated.

I am so sorry for the long story (believe it or not this is not the entirety of it but only the meat of the issue), but you needed to have an idea of what I am facing for you to understand the flaws in the current half-blood statute which produces grossly unfair and irrational results in cases like mine. Thank you for taking the time to read my letter.

God bless you and I look forward to hearing from you.

Sincerely,

Marlynne Stoddard
2700 Newport Blvd., #326
Newport Beach, CA 92663
(949) 723-6077

EMAIL FROM HON. CHARLES TREAT, SUPERIOR COURT OF CONTRA COSTA COUNTY, TO BARBARA GAAL (12/7/10)

Re: Proposal on Attorney Fee Procedures

Jordan Posamentier of the CJA suggested I contact the CLRC about some proposed legislation. Your website didn't say who the appropriate contact person is, so if it's someone else, please forward.

I am a Superior Court Judge in Contra Costa. Last year I published an article proposing a clean-up of procedural statutes and rules for seeking prevailing-party attorney fees. The proposals are substantive only in seeking to rationalize criteria under Civil Code section 1717; otherwise they are basically procedural. The article is 12 JFK L Rev 11. Specific revised language is appended.

If this might be of interest, I would be happy to send you a reprint of the article, along with a severely condensed version published in the ABTL newsletter. I also have electronic versions of both, though the longer one is in its pre-edited form.

Thanks for your consideration.

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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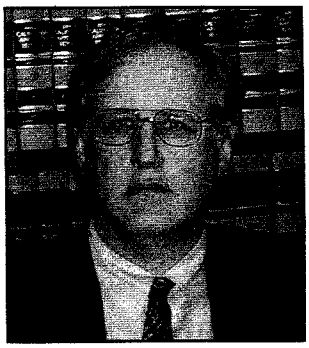
Attorney Fee Weirditudes

Congratulations — you won your civil case. Better yet, the case is covered by either a statute or a contractual clause authorizing the prevailing party to collect attorney fees. You draw up your fee motion so you can collect your bill, your client will be even happier than the average winning litigant, and all will be well in the world. Right?



Hon. Charles S. Treat

Most of the time, yes. But California law has some weirditudes in its statutes and rules for collecting prevailing-party fees. I have recently published a proposal to fix these anomalies. *See* Treat, Charles S., "A Proposed Revision of California's Procedural Statutes and Rules for Seeking Prevailing-Party Attorney Fees," 12 JFK L. Rev. 11 (2009). But rumor has it that the Legislature has more urgent matters on its mind these days, so my proposed amendments will likely vanish into the Great Abyss of Unheeded Good Ideas. Let's point out a few of the things you may need to watch out for in the meantime.

I not only won my case, but I beat the bums down so hard, they dismissed the case voluntarily during trial —with prejudice and apologies to the court for wasting its time. That's a lock for collecting my attorney fees, isn't it?

It depends. If you're relying on an attorney fee statute, you should be on solid ground. Each case depends on its own facts, but in general the courts have little difficulty in recognizing that when the plaintiff dismisses voluntarily (especially with prejudice), the defendant is the prevailing party for purposes of awarding attorney fees. *See Castro v. Superior Court*, 116 Cal.App. 4th 1010, 1018-21 (2004) (summarizing cases).

If the case was one for breach of contract and your fees rest on a contract clause, however, no dice. Civil Code section 1717 governs the award of contract-based attorney fees for contractual causes of action. Subdivision (b)(2) expressly provides that "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purpose of this section." That means that, just as a plain-

Continued from page 1

Attorney Fee Weirditudes

tiff has the right to voluntarily dismiss his case at any time, he also has the ability to evade liability for contractual attorney fees by voluntarily dismissing. Even where the fee clause makes the defendant the prevailing party in this situation as a matter of contractual interpretation, the statutory command overrides the parties' contractual agreement. *Santisas v. Goodin*, 17 Cal. 4th 599 (1998).

Is there anything I can do about that?

No.

What if I have a contractual fee provision, but the claims in the lawsuit were torts? Does that make a difference?

It does if your contractual fee clause is broad enough. Section 1717 applies only to "any action on a contract." In *Santisas*, the Supreme Court held that section 1717 governs only contract-based causes of action. The section's bar on awarding fees upon voluntary dismissal, therefore, "applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717." *Id.* at 617. So if your fee clause is construed to cover tort causes of action and voluntary dismissals, then section 1717 will not stand in the way of a fee award as to the tort claims.

So I can rely on my contract to collect the fees incurred defeating a tort claim, but not the fees incurred defeating a contract claim? Isn't that kind of backwards?

Correct. And some might think so.

What if it's not a voluntary dismissal, but a settlement?

If you are going to settle your case, settle all of your case, including any issue of entitlement to attorney fees. If the settlement is a simple matter of one side agreeing to pay the other a set amount of money, then one would expect that any claim (or claims) for fees would have influenced the agreed amount, and the settlement should effectively subsume the negotiated value of fee claims. The release in the settlement agreement should include mutual releases of fee claims. If either side wants to segregate fee payments from other consideration in the settlement, though, they can do so. The agreement can provide as one of its terms that party X will pay party Y a stated amount as attorney fees — again, preferably, with an appropriate release. If party X then doesn't pay, section 1717 should not stand in the way of collection, because the money at issue would no longer be attorney fees awarded by the court to a prevailing party upon dismissal, but would instead simply constitute a contractual payment obligation under the settlement agreement.

Even if the fees turn out to be the last obstacle to settlement, you can write a provision into your settlement agreement stipulating that party Y is the prevailing party for purposes of the fee clause in your underlying contract, and providing that that party's fee claim will be litigated in court. That practice was approved in *Jackson v. Homeowners Assn. Monte Vista Estates-East*, 93 Cal.App. 4th 773, 785-86 (2001), though it took some fairly fancy judicial footwork to reach that sensible result under the present statute.

What you should not do, however, is ignore the subject of attorney fees in your settlement, figuring that once the ink is dry you can just file a motion asserting that your client is the prevailing party. That approach will run squarely into section 1717. Even without the statute, moreover, you may have difficulty persuading your judge that you have "prevailed" in a settlement, if the other side does not stipulate in the settlement that that is so.

A vendor sued my client on a balance. We beat the suit by proving that the goods were no good. Their form sales contract provides that the vendor would recover its expenses of collection including attorney fees, but makes no provision for the buyer to get fees if it wins. Can my client recover its fees?

Yes. Civil Code section 1717(a) says that when a contract provides for attorney fees, the prevailing party is entitled to fees even if the contract purports to limit recovery to the other side. The statute thus operates to convert a one-way contractual fee clause into a bilateral clause. Further, even if the clause purports to be limited to certain issues (such as "collection"), the clause must be "construed" [*sic*] to apply to the entire contract (with an exception not applicable here). So your opponent gets bitten by its own form contract, and your client gets to collect its attorney fees.

That's good news, thanks. And I assume that applies also to the tort cross-complaint that we also won?

Probably not. That's because, again, section 1717 applies only to "any action on a contract." Your tort claim probably doesn't qualify. So as to that non-contract claim, the statute doesn't help you and your client is stuck with the unilateral fee clause in the contract. *See Moallem v. Coldwell Banker Commercial Group*, 25 Cal. App. 4th 1827 (1994). Don't give up too fast, though, because the courts will often stretch to conclude that a claim, not formally sounding in contract, nevertheless rests on contractual duties — bringing the claim within section 1717's forced bilaterality. *See, e.g., Kangarlou v. Progressive Title Co.*, 128 Cal. App. 4th 1174 (2005).

Proving the defects in the goods required a couple of high-priced experts. I assume I can recover their fees too?

Whether your client has a valid claim for expert fees depends on the statute or contract that provides for a fee award. Courts generally don't read attorney fee statutes as including expert fees unless they say so expressly. *See, e.g., Olson v. Automobile Club*, 42 Cal. 4th 1142, 1156-57 (2008). The result is likely to be the same for contract clauses. If your contract is sufficiently broad or clear to include expert fees, however, that agreement is substantively enforceable. There's no statutory prohibition on private parties agreeing that the prevailing party recovers expert fees. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 492 (1996).

Good. The client was really fussing about those

Continued on page 10

Continued from page 8

Attorney Fee Weirditudes

expert fees, but the fee clause expressly includes them.

Not so fast. I said your client was substantively entitled to recover expert fees. I didn't say your client would in fact recover them. If you have already been to trial, it won't.

Why the heck not?

Because under Code of Civil Procedure section 1033.5, attorney fees are technically classified as a subset of costs, even though they're sought by a different procedure from that used to seek ordinary costs. And section 1033.5 expressly excludes expert fees from "costs" (unless the expert was court-ordered). Hence, the courts reason, the statute prohibits recovery of expert fees as "costs," meaning that you can't seek them in your post-trial attorney fee motion. *Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616 (1994). And this rule applies to everything else the statute excludes as "costs," such as investigation expenses, telephone charges, and postage.

So my client is substantively entitled to collect those expert fees under the contract, but nevertheless has to eat them because of some procedural quirk in the statute?

That's one way of putting it. Another is that your client's lawyer missed the boat.

What boat?

You could have proved up your expert fees at trial and sought them as damages; that's what happened in *Arntz*. The same is true for your postage, investigation expenses, and so on, if your contract covers them. But only if you had the nerve to parade all this stuff before your jury.

Could I have gotten around that by paying the experts myself, and then including their fees as disbursements on my legal bill to the client?

Ripley thought of that, and rejected it. Said the court: "[A]ttorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include costs and costs do not include attorney fees." 23 Cal. App. 4th at 1626. That's an odd way of putting it, given that the basis for *Ripley's* holding is a statute stating that fees are actually a subset of costs. But the court's underlying point is that putting something in a lawyer's bill doesn't transform that item into "attorney fees." (And, though not directly on point, you may want to consider that you'd be shifting the risk of the client's nonpayment from the expert onto yourself.)

What if I incur expert or copying expenses after trial? How could I have proved them up at trial?

Good question. Under the logic of *Ripley*, you may be flatly out of luck on those. But you should argue that you cannot be denied recovery for failing to prove at trial something that did not exist at the time of trial. The judge may or may not buy the argument.

What if we're in federal court on diversity?

I was hoping you wouldn't ask me that. It gives me a headache.

On the one hand, the *Ripley* problem is one of procedure, not substance, arising under the Code of Civil Procedure. In particular, it arises from state law's specification of recoverable costs, which is ordinarily a matter of procedure concerning which the federal courts apply their own rules. This reasoning suggests that you can use federal court procedures to enforce your client's substantive entitlement under *Arntz*. Federal Rule of Civil Procedure 54(d)(2) says that the federal procedure for seeking "attorneys' fees and related non-taxable expenses" is by motion. Expert fees would be "related non-taxable expenses."

But the catch is that the state court procedure for recovering these items is to seek them as damages. Under Rule 54, the motion procedure is not available if "the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." So does "such fees" include "non-taxable expenses"? Probably. Is Code of Civil Procedure section 1033.5 "substantive law" and not just procedure? Good question.

I thought I was asking the questions. So basically, you don't know?

I think it's procedural, but the question could come out either way. I'll let the life-tenure folks figure that one out.

Just one last question. Can I recover the fees I spend litigating my fee motion?

It depends on the statute or contract providing for fee recovery, but probably yes. The courts generally construe fee statutes as allowing recovery of these "fees on fees." *See Estate of Trynin*, 49 Cal. 3d 868, 874-76 (1989) (collecting cases). The result will likely be the same for a contractual fee clause.

Never believe a lawyer who says "just one last question." How do I go about that — in my original motion or a later one?

The technically correct answer is that it is neither practical nor mandatory for you to try to include these "fees on fees" in your initial fee motion. It's not practical because you haven't finished incurring them and can't prove them yet. It's not mandatory because this is a post-judgment proceeding in the trial court, not subject to the usual 60-day motion deadline. *See Crespin v. Shewry*, 125 Cal.App. 4th 259 (2004). But don't count on the court sticking with the technically correct answer. The only known appellate case on point (unpublished) rejected a request for "fees on fees" because they should have been included in the first fee motion. No doubt the court had in mind the theoretically endless string of fee motions that might otherwise result — fees on fees on fees, and so on. Problems of proof were passed over somewhat lightly. I suggest you see if the other side will stipulate to a procedure, and if not, ask the court in advance for guidance. If neither of those helps, include your "fees on fees" in your first motion to preserve the claim, but argue that the issue ought to wait for a later, properly documented motion.

Charles (Steve) Treat is a judge of the Contra Costa Superior Court. "Weirditudes" is his own pet coinage.