Admin. November 30, 2012

Memorandum 2012-45

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.

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.

The following letters, email communications, and other materials are attached to and discussed 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.

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.

Fish and Wildlife Law

In January 2012, 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. See Memorandum 2012-5, Exhibit pp. 32-33.

The Commission decided to request legislative authorization to conduct the requested study, with the intention of beginning work on that topic in 2013. See Minutes (Feb. 2012), p. 4.

The requested authority was granted, as part of ACR 98 (Wagner). It reads:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law ….

2012 Cal. Stat. res. ch. 108. **Although the resolution does not set a deadline for completion of the study, the Commission should consider the study a legislative priority.**

Mediation Confidentiality

AB 2025 (Gorell) was introduced this year to create a new exception to the law governing the confidentiality of mediation communications. Under that bill, confidentiality would not apply to:

> The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her

attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.

On May 10, 2012, the bill was amended to remove its substance and instead require the Commission to study the matter. The bill was not enacted. Instead, ACR 98 (Wagner) was amended to authorize the proposed Commission study, thus:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (a) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:
>
> (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.
>
> (2) The availability and propriety of contractual waivers.
>
> (3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.
>
> (b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.

2012 Cal. Stat. res. ch. 108. **Again, the resolution does not set a deadline for completion of the study. Nonetheless, given its history, the Commission should consider this a legislative priority.**

Deadly Weapons

In 2006, the Legislature 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. See 2010 Cal. Stat. ch. 178; 2010 Cal. Stat. ch. 711. A clean-up bill was enacted the next year. See 2011 Cal. Stat. ch. 285. Further clean-up was achieved in this year's maintenance of the codes bill. See SB 1171 (Harman), 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 227.

A few minor clean-up revisions are still necessary, because some of the statutory revisions in earlier bills were chaptered out (i.e., nullified) by conflicting legislation. See Gov't Code § 9605. **Unless the Commission otherwise directs, the staff will contact the Office of Legislative Counsel about including the remaining clean-up revisions in next year's maintenance of the codes bill.**

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 in 2011 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 notice of 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 undertook to reexamine this area and related matters. See Memorandum 2011-36. Stakeholder input suggested little likelihood of consensus on significant reforms. **The staff will keep the Commission posted on 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. Six 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; 2012 Cal. Stat. ch. 470; ACA 15, approved by the voters Nov. 5, 2002 (Prop. 48).

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.

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 July 2013. The Commission will be considering a draft of a final recommendation on that topic at its December meeting. See Memorandum 2012-47. If the draft is approved, the staff will seek introduction of implementing legislation. If the draft is not approved in December, the Commission will need to continue refinement of its proposal in the first half of 2013, in order to meet the statutory deadline. **Either way, it will be necessary to conduct some work on this topic in 2013.**

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. It recently directed the staff to prepare a draft of a tentative recommendation to fix certain technical mistakes in the Probate Code, which we discovered in our work on UAGPPJA. See Minutes (Oct. 2012), p. 6. That is a narrow project, which should not take much time. **The staff will pursue it when resources permit.**

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 23 topics. See 2012 Cal. Stat. res. ch. 108. 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 had initially looked at possible revisions to applicable California statutes regarding the assignment for benefit of creditors process and decided not to pursue any amendments. Instead, the committee had assembled a "desk guide" containing relevant California statutes, important California and federal case law, and a legal bibliography on the subject. The publication is now in the production process, although no release date has been determined yet.

Given that Mr. Gould and the Insolvency Law Committee have independently concluded that there is no pressing need for statutory reform in this area, the staff recommends that the Commission request the deletion of this topic from its resolution of authority, at the next opportunity.

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 in 2011 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 Claims, Family Protections, and Nonprobate Assets

A few years ago, the Commission accepted an offer from its former Executive Secretary, Nathaniel Sterling, to prepare a background study on the liability of nonprobate transfers for creditor claims and family protections. In other words, if a decedent's property passes outside of probate (e.g., by a trust, joint tenancy, or transfer-on-death beneficiary designation), to what extent should that property be liable to satisfy the decedent's creditors (including persons who are entitled to the "family protections" applicable in probate)? And what procedures should be used to address any such liability?

Mr. Sterling summarizes the underlying problem as follows:

> The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent's just debts and to protect a decedent's surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.

See Exhibit p. 2. A concluding excerpt from Mr. Sterling's report is attached. *Id*. at 1-10.

In 2010, the Commission circulated the background study for a 120-day public comment period. See Memorandum 2010-27; Minutes (June 2010), p. 7. Copies of the study were sent, with a request for review and comment, to a number of interested groups and individuals. No detailed comments were

received in response to that request. The Commission did not follow up at that time, because new assignments from the Legislature had pushed the matter to the back burner.

The Commission should begin work on this topic as soon as its resources permit. The problems addressed by the study are important and it seems inevitable that California (and other jurisdictions) will need to address them eventually.

One obstacle to activating the study is its magnitude. The subject is complex and far-reaching and would likely require a significant sustained investment of the Commission's resources if it was undertaken in one bite. However, it might be possible to begin work on a more modest scale, by initially examining only a single narrow issue. For example, Mr. Sterling suggests that there would be significant benefit from simply codifying the substantive principle that nonprobate assets can be reached by a decedent's creditors:

> At a minimum the law should clearly state the substantive liability of a nonprobate transfer for the decedent's debts and family protections. That will save parties a trip to court to establish the rule. A clear rule will also facilitate out of court resolution of a liability dispute in the ordinary case.

See Exhibit p. 4.

There would be a number of advantages to opening the study by addressing only that one issue:

(1) The size of such a study would be manageable.
(2) It is likely that interested groups and individuals would have the resources to assist with a study of that modest scope.
(3) An initial small step would allow us to test the waters. If the time is not ripe for reform in this area, it would be better to discover that fact after a modest investment of resources, rather than after the much larger investment that would be required to take on the study in one bite.
(4) Law reform often proceeds incrementally. A successful first step could lay the groundwork for further efforts later.

The staff recommends the modest approach discussed above, as the most practical way to begin work on this topic.

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.**

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 in 2011. See 2010 Cal. Stat. ch. 697 (SB 189 (Lowenthal)); 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 did not become operative until July 1, 2012. **The staff recommends waiting until after there has been more experience with the new statutory scheme, before doing further work on mechanics liens.**

Commercial and Industrial Subdivisions

In connection with the Commission's active study of commercial 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. This study is nearly complete. **The staff recommends that the Commission continue its work on this study, in order to see it through to completion.**

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 made during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

Earlier this year, the Uniform Law Commission ("ULC") approved the Uniform Premarital and Marital Agreements Act. Any Commission study of this topic should begin by examining the Uniform Act.

If the Commission decides 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).

This is an appropriate topic for Commission study, however it does not appear to be as pressing as some of the other topics awaiting the Commission's attention.

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.

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

6. 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.**

7. 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 (UC Davis School of Law and Stanford Law School), 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.**

8. 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.

At this time, the Commission is not actively working on any proposal pursuant to that grant of authority. **However, the topic should be retained on the Calendar of Topics, in case such work appears appropriate in the future.** For instance, the newly assigned study of mediation confidentiality discussed above might alert the Commission to other aspects of alternative dispute resolution that warrant attention.

9. 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.**

10. 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.

11. 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**.

12. 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.

13. 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.

14. 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 were enacted in 2012. See 2012 Cal. Stat. ch. 180 (AB 805 (Torres)); 2012 Cal. Stat. ch. 181 (AB 806 (Torres)).

The Commission has nearly completed work on a "clean-up" recommendation, to correct any errors or conflicts that arose in enacting those two bills. It is expected that implementing legislation will be introduced in 2013. **That legislation should be uncontroversial, and will likely involve only a small amount of staff resources.**

The Commission recently approved a final recommendation on the application of the Davis-Stirling Act to commercial and industrial CIDs. It is hoped that implementing legislation will be introduced in 2013. **This legislation will probably require a significant amount of staff resources.**

In addition to the two matters 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.**

15. 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.**

16. 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.**

17. 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.**

18. 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 the results may be difficult to enact. **In light of current limitations on Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

19. 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.**

20. 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.**

21. 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 Commission issued its final report on that topic earlier this year. See *Charter Schools and the Government Claims Act,* 42 Cal. L. Revision Comm'n Reports __ (2012). No further work on this topic is currently pending. **Nonetheless, it would be prudent to preserve our existing**

authority, in case any future questions arise that the Commission needs to address.

22. Fish and Wildlife Law

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

23. Mediation Confidentiality

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

CARRYOVER SUGGESTIONS FROM PREVIOUS YEARS

The Commission retained a few suggestions from previous years for reconsideration this year.

Intestate Inheritance by a Half-Sibling

Marlynne Stoddard of Newport Beach would like the Commission to study intestate inheritance by a half-sibling. See Memorandum 2012-5, 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." Memorandum 2012-5, 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.* This suggestion was discussed at greater length in Memorandum 2012-5 and its First and Second Supplements.

For the coming year, the Commission does not have sufficient resources available to study this topic. 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.**

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. See Memorandum 2012-5, 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 to 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 readily addressed.

Due to other higher priority work, 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.**

California Tribal Governments and California Indians

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. Memorandum 2012-5, 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.

Bonds and Undertakings: References to "Bearer" Bonds and "Bearer" Notes

Attorney H. Thomas Watson requests that the Commission "consider proposing legislation to amend California Code of Civil Procedure sections 995.710, 995.720 and 995.760 so that they no longer refer to 'bearer' bonds or 'bearer' notes, but instead to simply 'bonds or notes.'" First Supplement to Memorandum 2012-5, Exhibit p. 14. He explains that the proposed amendments are needed "because the U.S. Treasury and the states ceased issuing bearer instruments in 1982." *Id.* He cites a federal regulation (26 C.F.R. 5f 103-1) as support for that proposition. *Id.*

On initial read, this sounds like it might be a straightforward matter of clarification, suitable for the Commission to address pursuant to its authority to "correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study." Gov't Code § 8298. But the current staff is not familiar with the usage and history of bearer bonds and notes, nor do we consider it likely that the Commission will have any resources available to devote to a topic like this during 2012. We recommend that the Commission **retain the suggestion for further consideration when the Commission conducts its next review of new topics and priorities.** If Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

Civil Procedure: Stay of Trial Court Proceeding During Appeal

Mr. Watson also suggests that the Commission consider amending Code of Civil Procedure Section 916 as shown in underscore below:

> (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.
>
> (b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.
>
> (c) The trial court retains jurisdiction to rule on all motions filed pursuant to Code of Civil Procedure sections 629, 630, and 657-663.2, regardless whether an appeal from the judgment or order has been perfected.

First Supplement to Memorandum 2012-5, Exhibit p. 12. He explains that this amendment "seeks to resolve the anomalous split of authority" on whether a trial court retains jurisdiction to resolve a motion for judgment NOV while a case is stayed during an appeal. *Id.* at 12-13. He believes that the trial court "should retain jurisdiction to rule on all post-trial motions regardless of whether a notice of appeal is perfected." *Id.* at 13. His proposed amendment seeks to accomplish that result.

The Commission is not currently authorized to study this area of the law, and the proposed reform is too significant to fall within the Commission's existing authority to correct technical or minor substantive defects. Because the Commission is already overloaded with other work, seeking authority to study this topic does not seem like a reasonable step at this time. The staff recommends **retaining Mr. Watson's suggestion for further consideration when the Commission conducts its next review of new topics and priorities.** Again, if Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

SUGGESTED NEW TOPICS

During the past year, the Commission received several new topic suggestions from various sources. Most 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, or obviously should be resolved by elected representatives rather than Commission appointees.

Probate Code

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

Commencement of Discovery in Trust Litigation

Attorney John Armstrong, of Lake Forest, suggests that the law governing the commencement of discovery by a plaintiff in trust litigation be revised, so that it more closely parallels the rule that governs commencement of discovery by a plaintiff in probate litigation. See Exhibit p. 13.

He points out that the relevant timing rules, in Code of Civil Procedure Sections 2025.210(b), 2030.020(b), 2031.020(b), and 2033.020(b), all turn in part on the service of a summons. For example, Section 2030.020(b) provides:

> 2030.020. …
> (b) A plaintiff may propound interrogatories to a party without leave of court at any time that is *10 days after the service of the summons on*, or appearance by, that party, whichever occurs first.

Emphasis added.

Mr. Armstrong states that the timing rules referenced above produce different results when applied in probate and trust cases, because a summons is used in probate litigation, but is *not* used in trust litigation. Because there is no "summons" in a trust case, the only way for a plaintiff to commence discovery is to either petition for leave of the court or find some reason to require an appearance by the other party. See Exhibit pp. 13, 15.

It is possible that this difference is an accident of differing formalities, rather than an intentional policy choice by the Legislature. If so, it would seem to make sense to harmonize the timing rules so that they operate the same way in both probate and trust litigation. On the other hand, it is possible that some substantive difference between those types of cases led the Legislature to intentionally create different timing rules. We cannot know which is the case

without studying the matter more thoroughly than is possible in the context of this memorandum.

Given the Commission's considerable body of work on the Probate Code and civil discovery law, this topic would seem to be appropriate for Commission study. However, given the other demands on the Commission's resources, it is unlikely that we could take this on as a new study in 2013. If the problem is as technical and straightforward as Mr. Armstrong suggests, it might be that the Trusts and Estates Section of the State Bar would have the resources to address it more quickly than the Commission. Furthermore, the Section's practical expertise might enable them to quickly assess whether the issue raised by Mr. Armstrong reflects a technical oversight or an intentional policy choice. **The staff recommends that the matter be referred to the Bar. If they cannot address it, we would raise it again when the Commission conducts its next review of new topics and priorities.**

Fee for Lodging a Will with the Court

Under existing law, the custodian of a will must deliver it to the court within a specified time after the death of the testator. See Prob. Code § 8200. There used to be no fee for doing so. However a budget-related bill enacted earlier this year established a $50 fee. See 2012 Cal. Stat. ch. 41, § 45.

Attorney Bradford J. Dozier, of Stockton, suggests that the new fee be eliminated. He believes that in some cases it is unjustified and that it will lead to noncompliance with the requirements of Section 8200. See Exhibit p. 16.

The staff strongly recommends that the Commission not act on this suggestion. It is not the Commission's function to substitute its judgment for that of the Legislature and the Governor, especially where (1) the matter was very recently decided, (2) the matter involves difficult and potentially controversial policy trade-offs, or (3) the matter was carefully considered in the legislative process. The staff believes that all three conditions are present here. In the current budget crisis, a decision to impose a new court fee is undoubtedly part of a broader package of carefully negotiated compromises. We should not intrude on that process.

Contract Law

The Commission received one new suggestion that appears to fall within the Commission's existing authority to study contract law.

Contract Requiring Action on Holiday

Attorney Nicholas Heidorn points out that Civil Code Section 11 affects the enforcement of a contract requiring that an act be performed on a holiday:

> 11. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

Mr. Heidorn goes on to note that the definition of "holiday" includes every Sunday. He questions whether that rule is an antiquated and unnecessary burden on commerce. See Exhibit p. 12.

Although Mr. Heidorn's focus is on the treatment of Sundays, the issue that he raises would seem to apply equally to any state holiday. Suppose one contracts to have musicians perform at a party held on July 4. Read literally, Section 11 would appear to allow the musicians to perform on the next business day, without violating the contract.

That would be an absurd result and the law shouldn't sanction it. That said, it isn't clear that the provision is causing significant problems in actual practice. Moreover, there may be widespread reliance on the existing rule in cases where it makes sense. For example, if a consumer contract limits the time for a consumer to exercise a particular remedy, that time should not be shortened because the last date happens to fall on a holiday. **The staff therefore finds the issue to be a low priority as compared to other possible Commission work and recommends against studying it.**

Deadly Weapons

As discussed above, the Legislature previously directed the Commission to study the statutes relating to the control of deadly weapons. 2006 Cal. Stat. res. ch. 128 (ACR 73 (McCarthy)). The scope of that assignment was limited — the Commission was to propose only *nonsubstantive* improvements to the organization of the deadly weapon statutes.

The Commission has received one new topic suggestion relating to deadly weapons, which is not within our existing study authority. In order to work on that topic, the Commission would first need legislative authorization.

Concealed Weapons

Mr. Bill R. Stelter suggests that the law regulating the issuance of concealed weapon permits should be relaxed and made uniform throughout the state. See Exhibit pp. 19-20.

The staff takes no position on the merits of Mr. Stelter's reform proposal.

However, the staff recommends against requesting authority to work on this topic. This is not the type of topic where the Commission's work is needed or particularly effective. The Commission is most effective and valuable when working on topics that involve large or technically complex legal issues, where the underlying issues do not turn on fundamentally political questions, and where there is no natural constituency to push for reform through the normal legislative process. The topic suggested by Mr. Stelter does not meet any of those criteria.

Technical or Minor Substantive Defects

The Commission has general authority to study "technical or minor substantive defects," pursuant to Government Code Section 8298. We received two new suggestions that *might* fall within the scope of that authority. If not, the Legislature would need to authorize study of the suggested topics, before work could commence.

Disparate Treatment of Communists

The Commission received one new suggestion, from Attorney Nicholas Heidorn, relating to statutory restrictions on members of the Communist Party. See Exhibit p. 11. For example, Government Code Section 1028 provides that membership in the Communist Party is sufficient grounds for dismissal of a public employee. Mr. Heidorn argues that these provisions are unconstitutional and should be repealed. See Exhibit pp. 11-12.

The Legislature is well aware of the concerns about these provisions. In 1998, Senator Quentin Kopp introduced a bill that would have repealed some of the language relating to Communists. See SB 1335 (Kopp) (as introduced). That language was not enacted.

More recently, in 2008, Senator Alan Lowenthal introduced a bill that would have repealed the discriminatory language. See SB 1322 (Lowenthal). That bill was approved by both houses of the Legislature and sent to the Governor.

It was vetoed by Governor Schwarzenegger, who wrote:

> To the Members of the California State Senate:
>
> I am returning Senate Bill 1322 without my signature. Many Californians have fled communist regimes, immigrated to the United States and sought freedom in our nation because of the human rights abuses perpetuated in other parts of the world. It is important particularly for those people that California maintains the protections of current law. Therefore, I see no compelling reason to change the law that maintains our responsibility to ensure that public resources are not used for purposes of overthrowing the U.S. or state government, or for communist activities.
>
> For these reasons, I am unable to sign this bill.

It is plain that the Legislature understands the issue that Mr. Heidorn raises. It has already analyzed the matter and developed specific reform legislation to address it. Further study by the Commission would not add anything to what is now clearly a political decision, best made by elected representatives. **The staff recommends against the Commission studying the matter.**

Counting Days

Joanne L. Boucher, of Cypress, suggests the revision of Code of Civil Procedure Section 12a, in order to clarify a possible ambiguity relating to the counting of days. See Exhibit p. 18. She writes:

> The problem lies in the interpretation of California Code of Civil Procedure Section 12a, which states "If the last day for the performance of any act provided or required by law to be performed with a specified period of time shall be a holiday, then that period is hereby extended to and including the next day which is not a holiday."
>
> When calculating a deadline and counting forward this poses no problem, the next court day after a holiday or weekend is obvious. The ambiguity arises when calculating a deadline counting backwards. When counting backwards and the date falls on a weekend or holiday, is the "next" court day the preceding day (backward) or the succeeding day (forward)?

Id.

This is an issue that the Commission might be able to address effectively. However, it is not clear whether the issue is causing significant problems. As Ms. Boucher indicates, there is a straightforward work-around (using the most conservative date) that appears to be in common usage. **For that reason, the staff believes this to be a low priority compared to other possible Commission work, and recommends against studying it.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2013. Completion of recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to projects for which a consultant has delivered a background study, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

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

(1) Matters for the next legislative year.
(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 2013, as detailed below.

Legislative Program for 2013

In 2013, the Commission's legislative program **is likely to include legislation on the following topics:**

- CID clean-up legislation
- Commercial and industrial CIDs (and perhaps related legislation on nonresidential subdivisions)
- Enforcement of money judgments: third decennial review of exemptions

We may also have legislation to conclude clean-up of the 2010 deadly weapons reforms. Managing this legislative program will consume a moderate amount of staff resources but should not require much attention from the Commission.

The Legislature's Priorities and Other Matters Deserving Immediate Attention

There are currently no legislative assignments that have fixed deadlines for completion. However, the Legislature has just added two new studies to the Commission's resolution of authority, with the clear expectation that work on those matters will begin soon. Those topics are:

- Fish and wildlife law.
- Mediation confidentiality as it relates to attorney misconduct.

The staff recommends that the Commission begin work on those topics in 2013 and dedicate sufficient resources to make significant progress.

The Commission should also **continue its work on UAGPPJA**, which it previously classified as a high priority study.

If resources permit, the Commission should **return to its study of trial court restructuring 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). **The Commission should turn to this topic as soon as its resources permit. If, as recommended above, that work begins on a narrow footing, it might be possible to commence work in 2013.**

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 unlikely to have time to begin new studies in these areas in 2013, but it should turn back to them when resources permit.

Other Activated Topics

The Commission has already decided to address certain technical defects in the Probate Code (identified in the UAGPPJA study), when resources permit.

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 2013. 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 2013, on a low priority basis,** if resources permit**.**

New Topics

Aside from the matters 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.

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.

Finally, the Commission should **request that the study of general assignment for the benefit of creditors be deleted from its Calendar of Topics.** As explained, the Commission previously concluded that there is no need for recodification of that law, and there do not seem to be any specific problems that need to be addressed.

Summary

If the Commission approves the staff recommendations made in this memorandum, the Commission's priorities for 2013 would include:

- The 2013 legislative program.
- Complete the third decennial review of exemptions from enforcement of money judgments (if not yet completed)
- Continue work on UAGPPJA
- Begin study of fish and wildlife law
- Begin study of mediation confidentiality as it relates to misconduct
- Continue work on trial court restructuring (as resources permit)
- Begin study of a single issue relating to creditor claims against nonprobate assets (as resources permit)

In addition, the Commission would request deletion of its existing authority to study the law governing general assignment for the benefit of creditors.

Respectfully submitted,

Brian Hebert
Executive Director

#L-4100

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Background Study

Liability of Nonprobate Transfer for Creditor Claims and Family Protections

authored by

Nathaniel Sterling

June 2010

The purpose of this background study is to solicit public comment on the contents of the study, including recommendations made by the study's author. A comment submitted to the Commission will be part of the public record. The Commission may consider the comment at a public meeting. It is just as important to advise the Commission that you approve of a recommendation made in this study as it is to advise the Commission that you have concerns about the recommendation.

COMMENTS ON THIS BACKGROUND STUDY SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **NOVEMBER 1, 2010.**

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

A unique policy consideration for application of family protections to a nonprobate transfer is the interrelation of the family protections with creditor rights. It must be determined which class of obligation should have priority. Most of the family protections are in the nature of exemptions and should have priority over the decedent's creditors. In extending the family protections to nonprobate transfers, it should be made clear that family protection of a nonprobate transfer is exempt to the same extent as a probate transfer.

VI. CONCLUSION

The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent's just debts and to protect a decedent's surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.

This study takes an overview of the law and policy governing liability of nonprobate transfers for creditor claims and family protections, with an eye to comprehensive legislative reform of the area. There are plenty of models in existing law that can be drawn from and generalized to create a workable legal framework.

OVERVIEW

The study envisions a regime where all of a decedent's at death transfers, probate and nonprobate, are equally subject to liability for the decedent's debts and for family protections. Liability would be imposed on the recipient of the property under general abatement principles, subject to the decedent's direction of the source of payment. Liability would be limited to the value of property received; exemptions from liability would be via the family protection mechanism. Liability would be subject to the over-arching one year statute of limitations. In case of insufficiency, family protections, secured debts, and unsecured debts would be ranked in the same priority as in probate.

Implementation of this regime would be entrusted to the personal representative if there is a probate proceeding, otherwise to the trustee of the decedent's revocable inter vivos trust if the trustee elects to act, otherwise to a special administrator or other person acting in a fiduciary capacity under an estate tax proration type procedure. The fiduciary would be charged with identifying probate and nonprobate property, notifying interested persons, allowing or disallowing claims, and allocating liability among transferees. Challenges would be resolved by the court on petition. Collection would be left to the creditor or protected family members.

The procedure to be followed would be based on the existing estate tax proration procedure that is in effect a truncated and narrowly focused version of probate; it

would be designed for the limited purpose of determining the liability of the decedent's probate and nonprobate transfers for debts and family protections. Its availability would preclude a creditor from resorting to probate in order to satisfy a debt.

PERSPECTIVE

Is it worth it to build all this complexity into the law — to complicate many probate proceedings and burden many nonprobate transfers with notice and other procedural mechanisms?

In the ordinary case a beneficiary voluntarily pays the decedent's debts, calling into question whether a nonprobate transfer liability scheme would actually be an improvement over the current situation.

The relatively short one year limitation period may cause potential problems simply to evaporate.

Most of the problems addressed in this study may be resolved or avoided by the transferor's properly drawn instrument directing the source of funds for satisfaction of debts.

There will be cases where the decedent fails to designate a fund for satisfaction of debts and family protections, or where the property is insufficient, or where there are disagreements among interested parties. The law should at least provide clarity, if not a reasonably effective remedy, for those cases. Such a remedy will be useful if the debt is large enough to justify the expense of a nonprobate transfer liability proceeding.

McCouch identifies advantages of a nonprobate liability procedural scheme:

> Protecting the rights of third parties, such as spouse and creditors, may justify invoking the procedural safeguards of the probate system and limiting the advantages of probate avoidance. The same is true of federal estate tax apportionment, which requires a centralized forum to identify the beneficiaries of probate and nonprobate transfers, compute the values of their respective interests and their shares of the tax, and enforce rights of contribution against them.[519]

The existence of clear rules and procedures will help make use of those procedures unnecessary, just as a creditor's access to the coercive powers of the probate system has a deterrent effect that aids the creditor in the attempt to obtain out of court satisfaction from a beneficiary. Andrews observes:

> At present, apparently, many creditors rely on voluntary measures to obtain payment of their claims because probate is too expensive. Many recipients of nonprobate property may be content to compromise claims without having a PR appointed, particularly where one person has received the bulk of the decedent's property. There is no obvious reason, under these circumstances, why creditors' rights to reach such assets should require the appointment of a PR. If creditor's

519. McCouch, *A Comment on Unification*, 43 Real Prop. Tr. & Est. L.J. 499 (2008).

> claims can be settled amicably by those receiving nonprobate assets without the need for a probate administration, then there should be a mechanism in place to allow this. Even if an amicable settlement cannot be reached without the need for court intervention, it may be possible to resolve the dispute without the appointment of a PR, and the parties should be entitled to try to do so.[520]

ALTERNATIVES

If the vision of a comprehensive liability scheme outlined above cannot be realized for whatever reason, much could still be done that would be helpful.

At a minimum the law should clearly state the substantive liability of a nonprobate transfer for the decedent's debts and family protections. That will save parties a trip to court to establish the rule. A clear rule will also facilitate out of court resolution of a liability dispute in the ordinary case.

In addition to establishing the principle of liability, it would help to make clear that standard abatement principles apply and to prescribe a rule of proportionality within abated classes. Abatement and proportionality principles would be difficult to implement without additional procedures, but at least the principles would be clear and the courts could devise appropriate remedies such as contribution and reimbursement.

A modest procedural revision that would go far would be an expansion of probate jurisdiction and the authority of the personal representative to make an enforceable allocation of liability to nonprobate transfers. That would entail expanded notice and an opportunity for a nonprobate transferee to be heard, but it would build incrementally on existing procedures. It would also enable a creditor or dependent to commence a probate proceeding in order to establish liability where there would otherwise be no enforcement mechanism.

California could profitably adopt the Uniform Act, with changes identified in this study. The Uniform Act makes clear the substantive liability of a nonprobate transfer, and relies on the existing probate administration mechanism to implement it. A creditor would have to commence a probate to obtain satisfaction, but that is no different from the situation today. Again, the availability of the remedy in many cases would make its use unnecessary.

The next step toward effective treatment of nonprobate transfer liability would be a simplified and abbreviated procedure — of the estate tax proration type — that would avoid the need to open a probate for the sole purpose of establishing liability or forcing prompt creditor claims.

An alternate approach that would simplify challenges presented by comprehensive treatment of nonprobate transfer liability is to limit coverage of the statute to the decedent's inter vivos trust. An integrated approach to liability of the

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520. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 122 (1990) (fn. omitted). See also Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1124 (1984).

decedent's estate and trust for nonprobate transfers and family protections would pick up the bulk of the decedent's property in the ordinary case. The logistics of such an approach would be straightforward, since the administrative mechanisms are already in place in the probate and trust laws for dealing with creditor claims systematically. Some nonprobate property would escape liability, but at least there would be a greater measure of fairness in the system than at present.

Thus, even if the comprehensive treatment of liability proposed in this study is not attainable, there are many improvements that may be made to the law in the interest of clarity, uniformity, and fairness. Throughout this study worthwhile procedures found in existing law are identified as possible models for improvement of the law governing nonprobate transfer liability.

The study also identifies a few major reforms that would be desirable but that are not recommended because they go beyond liability of a nonprobate transfer and would affect the entire probate and nonprobate transfer system. Principal among these is development of a hardship exemption to replace the existing scheme of exemptions and family protections. This study takes the position that the first priority should be to conform and integrate nonprobate transfer liability with probate transfer liability. Other reforms can come later.

PRINCIPAL RECOMMENDATIONS

LIABILITY FOR DEBTS

- All nonprobate transfers, including the decedent's interest in joint tenancy property, should be liable for a debt of the decedent.
- Probate and nonprobate transfers, including the decedent's inter vivos trust, should be liable on an equal basis.
- Liability of a probate or nonprobate transfer should be subject to general abatement principles of residuary, general, and specific gifts.
- Liability within each class of gift should be proportionate, based on the value of the property transferred.
- The decedent should be allowed to direct which transfers are primarily liable for debts. The decedent's direction should determine rights as between beneficiaries but should not prejudice a creditor's right to recover against any of the decedent's transfers.
- A secured creditor should be able to satisfy the debt from the security regardless of the decedent's direction of transfers primarily liable.
- If a creditor is satisfied from a transfer other than that directed by the decedent, the beneficiary of the property should be entitled to exoneration from that directed by the decedent.
- Existing exemptions from liability of a probate transfer, implemented via the family protection mechanism, should be extended to nonprobate transfers.

- Liability should be imposed on the transferee rather than on the property transferred.
- Liability should be limited to the net value (over liens and encumbrances) of the property interest received by the transferee, valued as of the date of the transfer or receipt of the property.

ENFORCEMENT PROCEDURE

- The statutes should make clear that the personal representative has the authority and the duty to allocate liability to nonprobate transfers in the regular course of administration of the estate, that nonprobate transfer liability is proportionate with probate transfer liability, that a nonprobate transferee is an interested person entitled to notice, and that the personal representative must deal with the nonprobate transfer on the same basis as a probate transfer, including the same fiduciary obligations. A nonprobate transferee should be entitled to commence a probate proceeding. Valuation of a nonprobate transfer should be based on the transferee's affidavit of value, subject to challenge by an interested person. The probate jurisdiction of the superior court should be expanded for the purpose of resolving a valuation dispute.
- The trust claim procedure should be expanded so that, if it is invoked by the trustee, the trustee will have the authority and duty to apportion liability among probate and nonprobate property. The trustee in the exercise of this authority should have the same fiduciary obligations to probate and nonprobate transfers and transferees as it does to trust property and beneficiaries.
- The probate and trust claim procedures should be supplemented by a procedure dedicated to discharge of the decedent's debts where there is no probate or trust claim proceeding. The procedure should be modeled after the estate tax proration procedure. The procedure should be invoked by any interested person but should be suspended if a probate or trust claim proceeding is commenced; a creditor should be precluded from commencing a probate proceeding. The procedure should require notice to creditors and to all the decedent's probate and nonprobate transferees. It should provide for allocation of the decedent's debts among probate and nonprobate transferees.
- Expenses of administration should be assessed against a nonprobate transferee only to the extent the expenses were attributable to enforcement of the liability against that transferee.
- The one year statute of limitations for a decedent's debts should apply to nonprobate transferee liability. A four month claim filing requirement should apply to a creditor notified under one of the liability allocation procedures.
- If the personal representative is unable to collect from a transferee to which liability has been apportioned, the uncollectible amount should be equitably prorated among others liable. A transferee required to pay a greater share should have a reimbursement right against a transferee that fails to pay its share. The statute of limitations for enforcement of the reimbursement right

should be the statute applicable to a cause of action or to enforcement of a judgment, depending on whether the proration was by court order or by fiduciary determination.

- The statute of limitations for enforcement of a liability assessment should be the statute applicable to enforcement of a judgment in the case of assessment by a court order and the statute applicable to a cause of action in the case of an assessment by administrative allocation.
- California should impose liability on a nonprobate transferee whether domiciled within or without the state and should recognize imposition of liability by a comparable procedure of an out of state court.
- The new law should have a one year deferred operative date and should apply to a nonprobate transfer that occurs on the death of a person thereafter.

LIABILITY FOR FAMILY PROTECTIONS

- The family protection statutes should be extended to nonprobate transfers. This has already been done for the small estate set-aside and to a limited extent for omitted spouse and child protections.
- The procedure for applying a nonprobate transfer to a decedent's debts should also be used for family protection.
- It should be made clear that the abatement statute does not apply to exempt property and probate homestead set asides.
- It should be made clear that family protection of a nonprobate transfer is exempt to the same extent as a probate transfer.

SECONDARY RECOMMENDATIONS

IMPLEMENTING RECOMMENDATIONS

- "Nonprobate transfer" should be broadly defined for the purpose of applying liability and family protections. If probate and nonprobate transfers are treated together, a definition is unnecessary.
- A person representing the decedent in defending against a creditor's claim or cause of action should be entitled to assert any defense, cross-complaint, or setoff that would have been available to the decedent.
- The rule of Probate Code Sections 11446 (probate) and 19326 (trust) exempting the surviving spouse's share of marital property from payment of the decedent's funeral expenses and expenses of last illness should be extended to other nonprobate transfers.
- The limitation on liability of a nonprobate transferee based on the value of the property should incorporate a formula derived from Probate Code Section 13112(b) that takes into account — in addition to fair market value — liens, encumbrances, income, and interest.
- If liability is imposed on nonprobate property rather than on a nonprobate transferee, bona fide purchaser protection should be added.

- If liability is imposed on nonprobate property rather than on a nonprobate transferee, the statute should include a formula for recovery of the property or its value if a probate proceeding is later commenced, based on Probate Code Section 13111.
- If liability is imposed on nonprobate property rather than on a nonprobate transferee, the statute should include a provision based on Probate Code Section 13206 for dealing with improvements made on property that is subsequently required to be restored to the probate estate.
- The spousal allocation of debts mechanism for discovery of property not within the control of the personal representative should be generalized for nonprobate liability.
- The family protections, including the possession of the family dwelling and exempt property and family allowance, should be extended to trust administration.
- Probate Code Section 5003 should be broadened to protect a fiduciary against claims of the decedent's creditors and to allow the personal representative or other fiduciary making an allocation of liability to place a hold on the transfer.

CONFORMING REVISIONS

- The proportionate liability principle applied by California law to several types of nonprobate transfers should be conformed to general abatement principles.
- The rule of the trust law, power of appointment law, and other California statutes that make specific nonprobate transfers liable if the probate estate is insufficient should be conformed to the rule of equal liability among probate and nonprobate property.
- The Medi-Cal claim recovery process should be excluded from coverage of the general nonprobate liability statute.
- The various small estate and spousal nonprobate liability procedures — e.g., Prob. Code §§ 13100 (affidavit procedure for collection or transfer of personal property), 13200 (affidavit procedure for real property of small value), 13500 (passage of property to surviving spouses without administration) — should be integrated into the general nonprobate liability statute.
- The Uniform Fraudulent Transfer Law should make clear that liability of a nonprobate transfer for a decedent's debts is based on statutory liability and not on fraudulent transfer law. That law should continue to apply to a transfer not covered by the nonprobate transfer liability scheme.
- Probate Code Section 9653, relating to recovery of a gift made in view of impending death or a nonprobate vehicle transfer for the benefit of creditors, should make property liable for debts and family protections on an equal basis with probate property.

- Code of Civil Procedure Section 377.40 should allow a cause of action to be asserted against the representative appointed to allocate nonprobate transfer liability.
- In Code of Civil Procedure Section 377.41 the "to the extent provided by statute" limitation should be replaced by a general provision imposing liability on a nonprobate transferee.
- The definition of "decedent's successor in interest" in Code of Civil Procedure Section 377.11 should be conformed to revisions affecting litigation on a cause of action by or against a decedent.
- Code of Civil Procedure Section 366.2 should make clear it applies to all causes against a decedent, including nonprobate transfer liability.
- Code of Civil Procedure Section 686.020 and Probate Code Section 9300 should make clear enforcement is not limited to property in the decedent's "estate."
- Probate Code Section 5000 should cross-refer to the nonprobate transfer liability scheme.

OTHER RECOMMENDED REVISIONS

PROBATE LIABILITY STATUTES

- A court order allocating a debt between the decedent's estate and surviving spouse under Probate Code Section 11444(b)(5) should bind creditors.
- The conflicts between Family Code and Probate Code provisions governing liability of probate and nonprobate marital property should be resolved by statute.

NONPROBATE LIABILITY STATUTES

Secured Debts

- A nonprobate beneficiary that discharges a general or nonconsensual lien against property received by that beneficiary should be entitled to exoneration from the estate.
- Joint tenancy property should pass subject to liens on the decedent's interest.

Unsecured Debts

- Code of Civil Procedure Section 686.020 and Probate Code Section 9300 should make clear that a judgment creditor may not enforce the judgment directly against nonprobate property.
- Probate Code Section 7664 (summary disposition of small estate) should provide that a person subject to a creditor's claim may assert any cross-complaint or setoff that would have been available to the decedent.

- The proportionate liability principle applied by California law to a few types of nonprobate transfers (e.g., Prob. Cod §§ 682 (power of appointment), 19402 (trust)), should be conformed to general abatement principles.
- A summary court procedure, similar to the procedure available in a probate proceeding for allocation of debts between the estate and surviving spouse, should be made available for allocation of debts between nonprobate transfers and the surviving spouse.

General Provisions

- The one year statute of limitations should override the fraudulent transfer limitation period that would otherwise apply to nonprobate transfer liability.
- The court should be authorized to name a guardian ad litem or special administrator to represent the decedent's interests in litigation (including exercise of the decedent's evidentiary privileges). The decedent's beneficiaries should be given notice and an opportunity to be heard on the representative to be appointed. A beneficiary should be bound by actions of the representative, including any settlement of the litigation subject, in the event of challenge, to court approval of an action that is not arbitrary, capricious, or fraudulent. Liability for reasonable expenses of the guardian ad litem or special administrator, as determined by the court, should be assessed among nonprobate transferees proportionately, on the same basis as their liability for the decedent's debts.
- The privilege statutes should provide that where the decedent's successor in interest conducts litigation on the decedent's behalf, the successor in interest is entitled to exercise the decedent's evidentiary privileges that survive the decedent's death with respect to that litigation. If the court names a guardian ad litem or special administrator to represent the decedent's interests in litigation, that person should be authorized to exercise the decedent's evidentiary privileges and should be designated a joint holder of the privilege for purposes of waiver. The fiduciary obligation of the decedent's representative should be broadened to include protection of all property, probate and nonprobate.
- If probate and nonprobate property is not made equally liable, a creditor should be allowed to proceed immediately against a trustee, with the trustee subrogated to the creditor's claim. The trustee should be authorized to proceed against other property in the decedent's estate or commence a probate proceeding if none is pending.
- A trustee or other fiduciary should have a duty to retain property if notified of a creditor's claim.
- The trust claim procedure should be clarified as to liabilities as between trusts.
- Additional procedural detail is needed in the statute governing liability of trust distributees, particularly relating to joinder of other creditors and apportionment of debts among distributees.
- Probate and trust property should be equally liable even if probate and nonprobate property generally is not made equally liable.

March 28, 2012

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

Re: Cal. Gov. Code §§ 1028 and 1028.1; Cal. Civil Code § 11

Dear Members of the California Law Revision Commission,

I understand one of the primary duties of this Commission is to eliminate obsolete provisions from California Codes. *See* Cal. Gov. Code § 8289 (a) ("The commission shall… [e]xamine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.)". As an attorney and member of the State Bar of California, and pursuant to Government Code § 8289 (c), I request that you consider two anachronistic laws that should be repealed and amended, respectively.

The first law is found in Government Code Sections 1028 and 1028.1 (d) and proscribes Communists from working in the government. Although Communist regimes have committed many atrocities in many areas of the world, this statute is unquestionably unconstitutional.

The second law is found in Civil Code Section 11 and prevents *contracting* parties from requiring that a service be performed on a Sunday; the law instead allows such service to be completed on the following business day. Needless to say, if contracts cannot require performance on one out of seven days of the year it would be a great burden on commerce.

Both changes could, I believe, be characterized as "technical or minor substantive defects" and so would not require a concurrent resolution of the Legislature for this Commission to address them. *See* Cal. Gov. Code § 8298. I know the Commission reviews matters of the utmost importance to the State, but I hope these two quick suggested Code clean-ups are not too inconvenient for your attention.

Government Code Sections 1027.5 and 1028.1 (d)

Government Code Section 1027 expresses the findings of the Legislature that "[w]ithin the boundaries of the State of California there are active disciplined communist organizations presently functioning" and that said communists are part of a "world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law." Cal. Gov. Code § 1027 (d) & (a). This Section merely expresses the opinion of the government, and as such not inherently objectionable, but it explains the following sections which act upon these findings.

Section 1028 states, in its entirety:

> "***It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party*** or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence."

(Emphasis added.) Whether sound policy or not, it plainly violates public employees First Amendment rights of free speech and association. A nearly identical New York law prohibiting "[a]nyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States" from working for the State University was struck down by the Supreme Court in *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 608-09 (1967). *See also Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974) (striking down similar restrictions on candidates for public office).

On the same grounds, Section 1028.1(d), which allows the questioning of public employees as to their affiliation with the Communist Party, should also be struck down.

(The Education Code is also replete with references to Communist Party membership that, similarly, probably need to be purged from the Code. *See*, *e.g.*, Cal. Ed. Code §§ 38136 (no granting use of school property to Communist Party); 44932 (a) (10) (allowing dismissal of employees for being members of the Communist Party); 88122 (same); 45303 (same); 44939 (provision for challenging finding of being a member of the Communist Party).)

Civil Code Section 11

While the anti-Communist provisions in California law are all unenforceable, Civil Code Section 11 appears to be legally valid and threatens capitalism in California far more than the Reds do today. Section 11 provides, in its entirety:

> "***Whenever any act of a secular nature***, other than a work of necessity or mercy, ***is appointed by*** law or ***contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.***"

Section 11 must be read in conjunction with Section 7 which lists *every* Sunday as a state holiday.

Early Supreme Court decisions confirm that Section 11 applies to private contracts, and not just contracts entered into by the government. *See Northey v. Bankers' Life Ass'n*, 110 Cal. 547, 552-53 (1895) ("as Northey had to and including the last day of April to pay the assessment against him, and as that day was Sunday, he was, under the law, as declared by the Codes and the cases cited, entitled to make the payment at any time during the ensuing Monday"); *Cheney v. Canfield*, 158 Cal. 342, 347 (1910) (Contracts under Section 11 "may or may not be done on the appointed day, as the party to perform it chooses or an opportunity presents"). *See also* 14A Cal. Jur. 3d Contracts § 255; 59 Cal. Jur. 3d TIME § 14.

Read literally, this provision would seem to say that any party (be they a shipping magnate, concert pianist, or restaurant worker) required by contract to deliver some performance on a Sunday can push it off to Monday without breaching the contract. While in the 19th century, when few worked at all on Sundays, this requirement may have made sense, today it seems like an undue burden on commerce. Fortunately for business, few Californians appear to be aware of this provision, but it is not entirely forgotten. In 2009 a class action was filed against banks for having some payments due on a holiday; the suit was dismissed because federal banking regulations preempt California's Civil Code; notably, however, the Court made no argument that the code was invalid. *See Miller v. Bank of America, N.A. (U.S.A.)*, 170 Cal. App. 4th 980 (2009).

While this provision may be beneficial as it applies to government, it should probably be amended to not include private contracts.

Thank you for your consideration of both items.

Sincerely,

Nicolas Heidorn
510-798-3425

EMAIL FROM JOHN ARMSTRONG AND BARBARA GAAL
(4/3/12, 4/5/12)

From: John Armstrong
Date: April 3, 2012
To: Brian Hebert
Subject: Proposed update to the CCP or Probate Code regarding initial discovery holds as they pertain to and affect trust proceedings

In my civil practice, I handle trust litigation. As you may know, in trust proceedings, such as trust contests, summonses are not issued. Service is ordinarily done by mailing the trustee and known beneficiaries. California Probate Code, § 1000 incorporates the Code of Civil procedure so as to apply to trust and other probate proceedings. And, as you may know, in trust litigation, a hearing is usually set on a petition concerning a trust several months out after the trust petition has been filed. (Trust petitions operate both as civil complaints and as motions.)

California Code of Civil Procedure sections 2025.210(b), 2030.020(b), 2031.020(b), and 2033.020(b), each provide that there is an initial "hold" on a plaintiff's ability to *initiate* discovery, which is 20 days for depositions, and 10 days for interrogatories, inspection demands, and requests for admission, *from the date of service of summons or from the date that the defendant appears, whichever occurs first.*

Since no summons is issued in trust proceedings, and since a trustee or other affected party has up until the time of hearing to appear on a trust petition, it ordinarily will be months before a trust petitioner could *initiate* civil discovery without leave of court under the Code of Civil Procedure. This needlessly delays trust litigation and burdens courts with motions for leave to initiate discovery in trust proceedings, which would be automatic in nearly all other cases.

I think it would be worthwhile for the California Law Revision Commission to consider proposing amendments to the above sections of the Code of Civil Procedure or to the Probate Code to provide that the same or a similar initial discovery holds apply to trust litigation. It could be based on the date of service on trustee and other affected parties, or could provide that there is a slightly longer period initiate discovery without leave of court to take into account service by mail, i.e., an additional five (5) days.

This would remove the burden of having to seek leave of court in trust proceedings, as discovery usually helps educate both petitioners and respondents about the evidence in a case, thereby fostering settlement and informal resolution of disputes. This problem is unique to trust proceedings in that a summons is ordinarily issued in will contests, but not in trust contests. Another suggestion would be to authorize the issuance of summonses in trust litigation. As you can see, there are several avenues to close the apparent gap regarding discovery in trust litigation, and I leave it to the commission to decide how best to do it.

Please feel free to call or write me with questions.

Sincerely,

John Armstrong

From: Barbara Gaal
Date: April 5, 2012
To: John Armstrong
Subject: New Topic Suggestion

Dear Mr. Armstrong:

Thank you very much for your well-written suggestion regarding the possibility of specifying a hold period for commencement of discovery in trust litigation. We appreciate the time you took to bring this matter to the attention of the Law Revision Commission.

Each fall, the Commission reviews its workload, the status of its ongoing projects, and any new topic suggestions it has received during the year. The Commission then sets its priorities for the coming year.

We will keep your letter on hand for consideration when the Commission conducts its next such review, which probably will be at a public meeting at UC Davis on Thursday, October 18.

Before that meeting, the Commission staff will prepare a memorandum presenting and analyzing the new topic suggestions. We will send you a copy of that memorandum when it becomes available.

Best regards,

Barbara Gaal

From: John Armstrong
Date: April 5, 2012
To: Barbara Gaal
Subject: RE New Topic Suggestion

Thank you for the nice comments.

It just struck me as strange that summonses are issued in will contests, but not in trust contests, so parties to trust contests have a more difficult time initiating discovery. Their options are either make a motion for leave to conduct discovery or to force a trustee or beneficiary to make a general appearance by making an application for a TRO or other immediate relief to require the respondent to make a general appearance in order to trigger the Discovery Act's timing of the right to seek discovery.

I do think a reform would be helpful to litigants, the bench, and the Bar if California has consistent rules regarding how will and trust contests are handled since will and trust contest claims are nearly identical, namely, whether the maker had sufficient capacity to make or amend the will or trust, was susceptible to undue influence, was defrauded, was coerced, etc.

Sincerely,

John

EMAIL FROM BRADFORD DOZIER
(8/20/12)

Subject: Fee for lodging a will with the court

This is a suggestion for eliminating the fee to lodge a will with the court after the testator's death. Probate Code 8200 now reads:

> 8200. (a) Unless a petition for probate of the will is earlier filed, the custodian of a will shall, within 30 days after having knowledge of the death of the testator, do both of the following:
> (1) Deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered.
> (2) Mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person' s whereabouts is known to the custodian.
> (b) A custodian of a will who fails to comply with the requirements of this section is liable for all damages sustained by any person injured by the failure.
> (c) The clerk shall release a copy of a will delivered under this section for attachment to a petition for probate of the will or otherwise on receipt of payment of the required fee and either a court order for production of the will or a certified copy of a death certificate of the decedent.
> (d) The fee for delivering a will to the clerk of the superior court pursuant to paragraph (1) of subdivision (a) shall be as provided in Section 70626 of the Government Code. If an estate is commenced for the dependent named in the will, the fee for any will delivered pursuant to paragraph (1) of subdivision (a) shall be reimbursable from the estate as an expense of administration.

Given that a Will will be probated only where the estate exceeds $150,000 (Probate Code 13100 et seq.) and there is no living trust, if a will IS to be probated the $50 "delivery" fee is justifiably (and mandatorily) payable. In the many other cases (e.g., (1) predeceased spouse's death where the house is in joint tenancy and the bank accounts are joint, (2) there is a living trust and the will is a "pourover," or (3) where the estate is less than $150,000 total) no one is likely to pay $50 just to "deliver" a will to the court, even if mandated by the terms of section 8200. The effect of adding this fee means many wills will simply never get lodged with the court.

As a suggestion, there should be no fee if the Legislature believes that the delivery to the court is an important thing. There was no fee until just recently.

Thank you.

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EMAIL FROM JOANNE BOUCHER
(9/24/12)

Subject: Proposed amendment to Code of Civil Procedure Section 12

Dear Sir/Madam:

I have worked my entire career in the legal field as a legal assistant specializing in family law. Throughout my career I have calculated deadlines according to the Code and find that there is ambiguity. I was successful in getting my employer to purchase a calendaring program, namely Compulaw, for calculating our deadlines to alleviate some of our problems. I was surprised to find that Compulaw gives in to the ambiguity the same way that I did when hand calculating deadlines, using the conservative approach, calculating the filing and service deadline a day early so we were sure to make the deadline.

The problem lies in the interpretation of California Code of Civil Procedure Section 12a, which states "If the last day for the performance of any act provided or required by law to be performed with a specified period of time shall be a holiday, then that period is hereby extended to and including the next day which is not a holiday."

When calculating a deadline and counting forward this poses no problem, the next court day after a holiday or weekend is obvious. The ambiguity arises when calculating a deadline counting backwards. When counting backwards and the date falls on a weekend or holiday, is the "next" court day the preceding day (backward) or the succeeding day (forward)?

Compulaw has stated that where statutory language is not clear, they believe it prudent to give their clients the most conservative date. I believe by amending the Code to define "next day which is not a holiday" for the two situations (counting from an event back or counting forward), this ambiguity will be gone making the Code very clear and deadline caluclations much easier.

I am hopeful that you will consider this for submission for revisions/clarification to CCP Section 12a. Thank you for your consideration.

Thank you.

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California Law Review Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94304-4739

October 17, 2012

Ref: California Concealed Weapons Laws

Dear Gentlemen:

Now that Lawenforcment Unions and Associations have successfully stripped California Residents of the legal ability to possess and carry an unloaded and non-concealed Handgun in public places it is time we take a second look at the laws that govern the issuance of concealed weapons permits.

I took a look at my local Sheriffs web site and was very upset when I read the requirements for a concealed handgun permit. The list of requirements that the Orange County Sheriff has set out in order to just qualify for a concealed weapons permit actually prohibits the general public from obtai8ning a permit if they are not associated with a Security company, law enforcement agency or have a recorded and verifiable threat against them.

I also was very surprised to find that the other sheriffs and police chiefs in California had different requirements to qualify for a weapons permit. What this means to me is that if I move to say Shasta County I would be able to obtain a concealed weapons permit because their requirements are different than Orange County and Los Angeles County.

Seeing this I would like to recommend that the commission look into this and either work on getting all of the counties using the same requirements or to change the laws that would allow

all residents of California who are not convicted felons to easily obtain a concealed weapons permit without having to qualify as a peace officer, security guard or have a documented threat against them before they are even allowed to file an application.

The granting of a concealed weapons permit should only consider the legal status and the Background of the individual who is applying for the permit. The applicant should not have to prove to the Sheriff or Police Chief that they need the permit because they have been officially threatened a licensed security guard, peace office, or handle large sums of money as their normal business duties.

I agree that the state should require the applicant to take a special course in the use of deadly force and the safe handling of firearms before they are issued a permit. A simple 832 p.c course would suffice.

A simple reason should be {To Comply with State Laws}. Then a background check and a course would be sufficient to issue the permit.

I have also noticed that since the law was passed that Los Angeles has had an increase in gun related shootings and that various Orange County police departments and Los Angeles police department has had an increase in officer related shootings of suspects. These agencies said that this type of shooting would decrease if the ability of all citizens to carry a non-concealed unloaded fire arm were taken away from therm. This has not happened as they stated. There are more officer involved or instigated shootings than before the law was passed.

My personal belief is that if the bad guys did not know who had a weapon and who did not that a lot of the robberies and shootings would stop. Since store owners are allowed to possess a loaded weapon on site and the bad guys know it the rate of liquor store robberies has decreased. The bad guys are shifting their robberies to other types of businesses where they know they will not encounter a weapon or any resistance

This new law still has not stopped or reduced the number of drive by shootings by gang members and the killing of innocent people in these drive bys. Just like the ban on assault weapons it just simply made the bad guys switch to other types of weapons such as shot guns, pistols and revolvers which still allows them to shoot only just shoot less rounds which are more accurately placed causing maximum damage.

Bill R. Stelter