

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report



December 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 15 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1981.

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SUMMARY OF WORK OF COMMISSION

In 1979, seven of eight bills recommended by the Commission were enacted. One modernized almost 30 percent of the Probate Code by streamlining and consolidating the divisions relating to guardianships and conservatorships. The others dealt with confessions of judgment, wage garnishment, conforming California attachment law to the new Federal Bankruptcy Act, ad valorem taxes when property is taken for public use, and rules for construction of the Probate Code. Commission recommendations enacted by the 1979 session affected 966 sections of the California statutes: 483 new sections were enacted, 193 sections were amended, and 290 sections were repealed.

The Commission plans to submit recommendations to the 1980 session dealing with such matters as the probate homestead, agreements for the entry of support and paternity judgments, quiet title actions, undertakings for costs, Evidence Code property valuation rules, special assessment liens on property acquired for public use, assignments for the benefit of creditors, vacation of public streets, highways, and service easements, enforcement of judgments against public entities, psychotherapist-patient privilege, enforcement of obligations after death, and the Uniform Veterans' Guardianship Act. The Commission also plans to complete work during 1980-1981 on a new comprehensive statute relating to the enforcement of judgments (including such matters as exemptions from execution) and to work on other major projects—problems under the community property statutes, whether a Marketable Title Act should be enacted in California, and a new adoption statute.

During 1979, the Commission also reviewed decisions of the Supreme Court of the United States and the Supreme Court of California, as required by Section 10331 of the Government Code, to determine whether any statutes of this state have been held to be unconstitutional or have been impliedly repealed.

CALIFORNIA LAW REVISION COMMISSION

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December 1, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In conformity with Government Code Section 10335, the California Law Revision Commission herewith submits this report of its activities during 1979.

I am pleased to report that at the 1979 legislative session seven of the eight bills introduced to implement the Commission's recommendations were enacted.

I would like to give special recognition to Assemblyman Alister McAlister who carried seven bills recommended by the Commission, to Assemblywoman Maxine Waters who carried one bill recommended by the Commission, and to Senator Omer L. Rains, Senator David A. Roberti, and Senator Alan Robbins who managed and explained bills recommended by the Commission on the Senate floor.

I also want to acknowledge the Commission's indebtedness to Commissioner David C. Lee (Oakland) and William S. Johnstone, Jr. (Pasadena) who attended legislative hearings on the new guardianship-conservatorship law and gave the legislative committees the benefit of their experience in this field.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

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ANNUAL REPORT FOR THE YEAR 1979

INTRODUCTION

The primary objective of the California Law Revision Commission is to study the statutory and decisional law of this state to discover defects and anachronisms and to recommend legislation to make needed reforms.

The Commission consists of a Member of the Senate appointed by the Committee on Rules, a Member of the Assembly appointed by the Speaker, and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel is an *ex officio* nonvoting member of the Commission.

The Commission assists the Legislature in keeping the law up to date by:

- (1) Intensively studying complex and sometimes controversial subjects;
- (2) Identifying major policy questions for legislative attention;
- (3) Gathering the views of interested persons and organizations; and
- (4) Drafting recommended legislation for legislative consideration.

The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems in preparing background studies, working out intricate legal problems, and drafting needed legislation. The Commission thus enables the Legislature to accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time. In some cases, the Commission's report demonstrates that no new legislation on a particular topic is needed, thus relieving the Legislature of the need to study the topic.

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has a calendar of 26 topics,¹ including two topics added by the Legislature at the 1979 session.

Commission recommendations have resulted in the enactment of legislation affecting 5,371 sections of the California statutes: 2,298 sections have been added, 1,137 sections amended, and 1,936 sections repealed. Of the 120 Commission recommendations submitted to the Legislature, 107 (90%) have been enacted into law either in whole or in substantial part.²

¹ See listing of topics under "Calendar of Topics for Study" *infra*.

² See listing of recommendations and legislative action in Appendix I *infra*.

The Commission's recommendations and studies are published in pamphlet form and later in the form of bound volumes. A list of past publications and information on where and how copies of publications may be obtained may be found at the end of this Report.

1980 LEGISLATIVE PROGRAM

The Commission plans to submit the following recommendations to the 1980 Legislature:

(1) *Recommendation Relating to Security for Costs*, 14 Cal. L. Revision Comm'n Reports 319 (1979).

(2) *Recommendation Relating to Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm'n Reports 301 (1980).

(3) *Recommendation Relating to Special Assessment Liens on Property Acquired for Public Use* (September 1979), published as Appendix VI to this Report.

(4) *Recommendation Relating to Assignments for the Benefit of Creditors* (September 1979), published as Appendix VII to this Report.

(5) *Recommendation Relating to Vacation of Public Streets, Highways, and Service Easements* (September 1979), published as Appendix VIII to this Report.

(6) *Recommendation Relating to Quiet Title Actions* (September 1979), published as Appendix IX to this Report.

(7) *Recommendation Relating to Agreements for Entry of Paternity and Support Judgments* (November 1979), published as Appendix X to this Report.

(8) *Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities* (November 1979), published as Appendix XI to this Report.

(9) *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

(10) *Recommendation Relating to Uniform Veterans' Guardianship Act* (October 1979), published as Appendix XII to this Report.

(11) *Recommendation Relating to Psychotherapist-Patient Privilege* (November 1979), published as Appendix XIII to this Report.

(12) *Recommendation Relating to Enforcement of Obligations After Death* (November 1979), published as Appendix XIV to this Report.

Other recommendations will be submitted if work on them is completed in time to permit their submission to the 1980 Legislature.

MAJOR STUDIES IN PROGRESS

Enforcement of Judgments

During the last five years, the Commission has devoted a substantial portion of its time and resources to a major study looking to the enactment of a comprehensive revision of the law relating to enforcement of judgments. The new statute being drafted by the Commission will cover such matters as the manner of levy of execution, exemptions, redemption, third-party claims, and judgment liens. Professor Stefan A. Riesenfeld, Boalt Hall, University of California at Berkeley, serves as the Commission's consultant on this topic.

In March 1979, the Commission distributed a tentative recommendation, consisting of more than 300 typewritten pages, to interested persons and organizations for review and comment. The Commission is reviewing the comments received and plans to publish its recommendation on this subject during 1980 and to submit the proposed legislation for enactment by the 1981 Legislature.

The Commission also plans to submit recommendations to the 1980 session dealing with particular aspects of this subject. The recommendations will deal with probate homestead,¹ enforcement of claims and judgments against public entities,² assignments for the benefit of creditors,³ agreements for the entry of paternity and support judgments,⁴ and enforcement of obligations after death.⁵

Marketable Title Act and Related Matters

During 1979, the Commission commenced active study of another major topic—whether a Marketable Title Act should be enacted in California. This study will also cover two other topics on the Commission's agenda—whether the law relating to possibilities of reverter and powers of termination should be revised, and whether Section 1464 of the Civil Code should be repealed or revised.

¹ *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

² *Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities* (November 1979), published as Appendix XI to this Report.

³ *Recommendation Relating to Assignments for the Benefit of Creditors* (September 1979), published as Appendix VII to this Report.

⁴ *Recommendation Relating to Agreements for Entry of Paternity and Support Judgments* (November 1979), published as Appendix X to this Report.

⁵ *Recommendation Relating to Enforcement of Obligations After Death* (November 1979), published as Appendix XIV to this Report.

Professor James L. Blawie, Santa Clara Law School, the Commission's consultant on this topic, has prepared an analysis of the areas and problems that might be covered in this study. Because of the complexity and magnitude of the study, the Commission anticipates that a number of years will elapse before comprehensive legislation on this subject can be recommended for enactment.

Community Property

Another major topic under active study by the Commission is the law relating to community property. Work on this study has been divided into two phases. The first phase will cover the liability of various kinds of community property and separate property to third-party creditors for debts and tort obligations of either or both of the spouses. Related matters—such as whether the statute relating to married women as sole traders (Code Civ. Proc. §§ 1811-1821) should be revised or repealed—will also be considered. Professor William A. Reppy, Jr., Duke Law School, is the Commission's consultant. The Commission will begin work on this phase of the topic when Professor Reppy completes his background report early in 1980.

The second phase will cover the problems in connection with equal management and control of community property, the division of community property upon dissolution of marriage, and related problems. Professor Carol S. Bruch of the Law School, University of California at Davis, is preparing a background report on this phase of the topic.

Adoption

The existing adoption statute is in great need of reorganization and simplification. In addition, substantive changes appear to be needed. The Commission has retained Professor Brigitte M. Bodenheimer of the Law School, University of California at Davis, as its consultant on this topic. Her background report is published. See *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975). (The background study does not represent the views of the Commission; the Commission's views will be reflected in its own recommendation.)

The Commission's staff has commenced work on a new comprehensive adoption statute, and the Commission itself will begin work on this topic during 1980 if time permits.

CALENDAR OF TOPICS FOR STUDY

Topics Authorized for Study

The Commission has on its calendar of topics the topics listed below. Each of these topics has been authorized for Commission study by the Legislature.¹

Topics Under Active Consideration

During the next year, the Commission plans to devote substantially all of its time to consideration of the following topics:

Creditors' remedies. Whether the law relating to creditors' remedies including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, and related matters should be revised.²

The Commission plans to submit a number of recommendations to the 1980 Legislature covering various aspects of this topic.³

Child custody, guardianship, and related matters. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.⁴

The Commission plans to submit a recommendation on one aspect of this topic to the 1980 Legislature. See *Recommendation Relating to Uniform Veterans' Guardianship Act* (October 1979), published as Appendix XII to this Report.

Eminent domain. Whether the law relating to eminent domain should be revised.⁵

¹ Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for study.

² Authorized by 1974 Cal. Stats. res. ch. 45. See also 1972 Cal. Stats. res. ch. 27; 1957 Cal. Stats. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 15 (1957).

³ See discussion of "Major Studies in Progress," *supra*.

⁴ Authorized by 1972 Cal. Stats. res. ch. 27. See also 10 Cal. L. Revision Comm'n Reports 1122 (1971); 1956 Cal. Stats. res. ch. 42; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 29 (1957).

⁵ Authorized by 1977 Cal. Stats. res. ch. 17. See also 1965 Cal. Stats. res. ch. 130; 1956 Cal. Stats. res. ch. 42; 4 Cal. L. Revision Comm'n Reports 115 (1963).

The Commission plans to submit a recommendation on one aspect of this topic to the 1980 Legislature. See *Recommendation Relating to Special Assessment Liens on Property Taken for Public Use* (September 1979), published as Appendix VI to this Report.

Marketable Title Act and related matters. Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use, should be revised.⁶

For additional information on this topic, see discussion under "Major Studies in Progress," *supra*.

Possibilities of reverter and powers of termination. Whether the law relating to possibilities of reverter and powers of termination should be revised.⁷

For additional information on this topic, see discussion of "Marketable Title Act and Related Matters" under "Major Studies in Progress," *supra*.

Civil Code Section 1464. Whether Section 1464 of the Civil Code should be revised or repealed.⁸

For additional information on this topic, see discussion of "Marketable Title Act and Related Matters" under "Major Studies in Progress," *supra*.

Community property. Whether the law relating to community property should be revised.⁹

For additional information on this topic, see discussion under "Major Studies in Progress," *supra*.

Quiet title actions. Whether the law relating to quiet title actions should be revised.¹⁰

The Commission plans to submit a recommendation on this topic to the 1980 Legislature. See *Recommendation Relating to Quiet Title Actions* (September 1979), published as Appendix IX to this Report.

⁶ Authorized by 1976 Cal. Stats. res. ch. 30. See also 1975 Cal. Stats. res. ch. 82.

⁷ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 528 (1974).

⁸ Authorized by 1978 Cal. Stats. res. ch. 65.

⁹ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 22 (1978).

¹⁰ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 22 (1978).

Abandonment or vacation of streets and highways. Whether the law relating to the abandonment or vacation of public streets and highways by cities, counties, and the state should be revised.¹¹

The Commission plans to submit a recommendation on this topic to the 1980 Legislature. See *Recommendation Relating to Vacation of Public Streets, Highways, and Service Easements* (September 1979), published as Appendix VIII to this Report.

Evidence. Whether the Evidence Code should be revised.¹²

The Commission plans to submit recommendations relating to two aspects of this topic to the 1980 Legislature. See *Recommendation Relating to Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm'n Reports 301 (1979); *Recommendation Relating to Psychotherapist-Patient Privilege* (November 1979), published as Appendix XIII to this Report.

The Commission also plans to undertake a study of the differences between the newly adopted Federal Rules of Evidence and the California Evidence Code when time permits. Professor Jack Friedenthal of the Stanford Law School is the Commission's consultant on this study. The experience under the Evidence Code will be reviewed in the course of this study to determine whether any revisions are needed.

Other Topics Authorized for Study

The Commission has not yet begun the preparation of a recommendation on the topics listed below.

Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised.¹³

The Commission is deferring consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. See 1976 Cal. Stats. res. ch. 160.

Class actions. Whether the law relating to class actions should be revised.¹⁴

The Commission is deferring consideration of this topic because it is under study by the California Uniform State Laws Commissioners and the California State Bar.

¹¹ Authorized by 1978 Cal. Stats. res. ch. 65.

¹² Authorized by 1965 Cal. Stats. res. ch. 130.

¹³ Authorized by 1971 Cal. Stats. res. ch. 75.

¹⁴ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 524 (1974).

Offers of compromise. Whether the law relating to offers of compromise should be revised.¹⁵

The Commission is deferring consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. See 1976 Cal. Stats. res. ch. 160.

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.¹⁶

Involuntary dismissal for lack of prosecution. Whether the law relating to involuntary dismissal for lack of prosecution should be revised.¹⁷

The Commission has retained Garrett H. Elmore as a consultant on this topic. Mr. Elmore is preparing a background report.

Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.¹⁸

Topics Continued on Calendar for Further Study

On the following topics, studies and recommendations relating to the topic, or one or more aspects of the topic, have been made. The topics are continued on the Commission's calendar for further study of recommendations not enacted or for the study of additional aspects of the topic or new developments.

Arbitration. Whether the law relating to arbitration should be revised.¹⁹

Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised.²⁰

Unincorporated associations. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to

¹⁵ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 525 (1974).

¹⁶ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 526 (1974).

¹⁷ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 23 (1978).

¹⁸ Authorized by 1979 Cal. Stats. res. ch. 19. See also 14 Cal. L. Revision Comm'n Reports 217 (1978).

¹⁹ Authorized by 1968 Cal. Stats. res. ch. 110. See also 8 Cal. L. Revision Comm'n Reports 1325 (1967).

²⁰ Authorized by 1967 Cal. Stats. res. ch. 81. See also 1956 Cal. Stats. res. ch. 42.

the liability of such associations and their members should be revised.²¹

Partition. Whether the law relating to partition should be revised.²²

Modification of contracts. Whether the law relating to modification of contracts should be revised.²³

Governmental liability. Whether the law relating to sovereign or governmental immunity in California should be revised.²⁴

The Commission is deferring further consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. See 1976 Cal. Stats. res. ch. 160. The Commission plans, however, to submit a recommendation on one aspect of the topic to the 1980 Legislature. See *Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities* (November 1979), published as Appendix XI to this Report.

Inverse condemnation. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to liability for damages resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised.²⁵

Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.²⁶

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised.²⁷

Parol evidence rule. Whether the parol evidence rule should be revised.²⁸

²¹ Authorized by 1966 Cal. Stats. res. ch. 9. See also 1957 Cal. Stats. res. ch. 202.

²² Authorized by 1977 Cal. Stats. res. ch. 17. See also 1959 Cal. Stats. res. ch. 218; 1956 Cal. Stats. res. ch. 42; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 21 (1957).

²³ Authorized by 1974 Cal. Stats. res. ch. 45. See also 1957 Cal. Stats. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 21 (1957).

²⁴ Authorized by 1977 Cal. Stats. res. ch. 17. See also 1957 Cal. Stats. res. ch. 202.

²⁵ Authorized by 1971 Cal. Stats. res. ch. 74. See also 1970 Cal. Stats. res. ch. 46; 1965 Cal. Stats. res. ch. 130.

²⁶ Authorized by 1965 Cal. Stats. res. ch. 130. See also 1957 Cal. Stats. res. ch. 202.

²⁷ Authorized by 1973 Cal. Stats. res. ch. 39. See also 1969 Cal. Stats. res. ch. 224.

²⁸ Authorized by 1971 Cal. Stats. res. ch. 75. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).

Powers of appointment. Whether the law relating to powers of appointment should be revised.²⁹

Topics for Future Consideration

The Commission now has a number of major studies on its calendar. During the next year, studies under active consideration will include enforcement of judgments, revision of property law, community property, and adoption. Because of the substantial and numerous topics already on its calendar (two of which were added by the 1979 Legislature), the Commission does not at this time recommend any additional topics for inclusion on its calendar of topics.

²⁹ Authorized by 1979 Cal. Stats. res. ch. 19. See also 1965 Cal. Stats. res. ch. 130; 14 Cal. L. Revision Comm'n Reports 218 (1978).

FUNCTION AND PROCEDURE OF COMMISSION

The California Law Revision Commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is ex officio a nonvoting member.¹

The principle duties of the Law Revision Commission are to:

(1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,² bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in law as it deems necessary to bring the law of this state into harmony with modern conditions.³

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. The Commission may study only topics which the Legislature, by concurrent resolution, authorizes it to study.⁴

The Commission's work on a recommendation is commenced after a background study has been prepared. In some cases, the study is prepared by a member of the Commission's staff, but some of the studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration.

The background study includes a discussion of the existing law and the defects therein and suggests possible methods of eliminating those defects. The study is given careful

¹ See Gov't Code § 10301. See also Gov't Code §§ 10300-10340 (statute establishing Law Revision Commission).

² The Commission's Executive Secretary serves as an Associate Member of the National Conference of Commissioners on Uniform State Laws.

³ See Gov't Code § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the Supreme Court of the United States. Gov't Code § 10331.

⁴ See Gov't Code § 10335.

consideration by the Commission and, after making its preliminary decisions on the subject, the Commission ordinarily distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what recommendation, if any, the Commission will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a printed pamphlet.⁵ If the background study has not been previously published,⁶ it usually is published in the pamphlet containing the recommendation.

The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports⁷ to reflect amendments⁸ made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and potential problems in its meaning or application. The Comments are written as if the legislation were enacted since their primary purpose is to explain the statute to those who will have occasion to use it after it is in effect. They are entitled to substantial weight in construing the statutory provisions.⁹ However, while the Commission endeavors in the Comment to explain any changes in the law made by the section, the Commission does not claim that every inconsistent case is noted in the Comment, nor can it

⁵ Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission.

⁶ For a listing of background studies published in law reviews, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971), 11 Cal. L. Revision Comm'n Reports 1008 n.5 & 1108 n.5 (1973), and 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976).

⁷ Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App.3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). For an example of such a report, see Appendix V to this Report.

⁸ Many of the amendments made after the recommended legislation has been introduced are made upon recommendation of the Commission to deal with matters brought to the Commission's attention after its recommendation was printed. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

⁹ *E.g.*, *Van Arsdale v. Hollinger*, 68 Cal.2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968). The Comments are published by both the Bancroft-Whitney Company and the West Publishing Company in their editions of the annotated codes.

anticipate judicial conclusions as to the significance of existing case authorities.¹⁰ Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.¹¹

The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the state.¹² Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is considered for enactment by the Legislature.¹³ The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state.

¹⁰ See, e.g., *Arellano v. Moreno*, 33 Cal. App.3d 877, 109 Cal. Rptr. 421 (1973).

¹¹ The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). See also 1974 Cal. Stats. ch. 227.

¹² See Gov't Code § 10333.

¹³ For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965).

PERSONNEL OF COMMISSION

As of December 1, 1979, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Beatrice P. Lawson, Los Angeles, <i>Chairperson</i>	October 1, 1979
Hon. Omer L. Rains, Ventura, <i>Senate Member</i>	*
Hon. Alistair McAlister, San Jose, <i>Assembly Member</i>	*
Judith Meisels Ashmann, Los Angeles, <i>Member</i>	October 1, 1979
George Y. Chinn, San Francisco, <i>Member</i>	October 1, 1981
Ernest M. Hiroshige, Los Angeles, <i>Member</i>	October 1, 1981
Jean C. Love, Davis, <i>Member</i>	October 1, 1979
Warren M. Stanton, Encino, <i>Member</i>	October 1, 1981
Vacancy, <i>Member</i>	October 1, 1983
Bion M. Gregory, Sacramento, <i>ex officio Member</i>	†

* The legislative members of the Commission serve at the pleasure of the appointing power.

† The Legislative Counsel is *ex officio* a nonvoting member of the Commission

In May 1979, Governor Brown appointed Warren M. Stanton, Encino, to replace Howard R. Williams whose term had expired. In March 1979, Senator Omer L. Rains was appointed by the Senate Rules Committee to serve as the Senate Member of the Law Revision Commission.

In September 1979, Beatrice P. Lawson was elected Chairperson of the Commission for a term expiring on December 30, 1981.

As of December 1, 1979, the staff of the Commission is:

Legal

John H. DeMouilly <i>Executive Secretary</i>	Robert J. Murphy III <i>Staff Counsel</i>
Nathaniel Sterling <i>Assistant Executive Secretary</i>	Stan G. Ulrich <i>Staff Counsel</i>

Administrative-Secretarial

Juan C. Rogers <i>Administrative Assistant</i>	Violet S. Harju <i>Word Processing Technician</i>
Kristine A. Clute <i>Word Processing Technician</i>	

In 1979, the Commission's Executive Secretary was elected as an Associate Member of the National Conference of Commissioners on Uniform State Laws. This will help coordinate the activities of the Commission and the Conference with respect to a number of topics on the Commission's agenda that are dealt with by Uniform Acts or are under study by the Conference.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1979 LEGISLATIVE SESSION

The Commission recommended one concurrent resolution and eight bills for enactment at the 1979 session. The concurrent resolution was adopted and seven of the eight bills were enacted.

Creditors' Remedies

Three bills relating to creditors' remedies were recommended by the Commission for enactment at the 1979 session.

Wage garnishment. Assembly Bill 11, which became Chapter 66 of the Statutes of 1979, was introduced by Assemblyman Alistair McAlister to delay the operative date of and make technical changes in the wage garnishment legislation enacted in 1978 upon recommendation of the Law Revision Commission. See 1978 Cal. Stats. ch. 1133; *Recommendation Relating to Wage Garnishment*, 13 Cal. L. Revision Comm'n Reports 1703 (1976). Chapter 66 delays the operative date of the wage garnishment legislation to January 1, 1980, and revises provisions relating to service of notices and documents. The bill was enacted as introduced.

Effect of new bankruptcy law on the Attachment Law. Assembly Bill 617, which became Chapter 177 of the Statutes of 1979, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Effect of New Bankruptcy Law on the Attachment Law* (February 1979), published as Appendix II to this Report. The bill was enacted as introduced.

Confessions of judgment. Assembly Bill 714, which became Chapter 568 of the Statutes of 1979, was introduced by Assemblywoman Maxine Waters to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Confessions of Judgment* (March 1979), published as Appendix III to this Report. The bill was enacted as introduced.

Guardianship-Conservatorship Revision

Three bills—Assembly Bills 167, 212, and 261—were introduced by Assemblyman McAlister to effectuate the Commission's recommendations on this subject. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). A number of substantive, technical, and clarifying amendments were made

before Assembly Bills 167 and 261 were enacted. These amendments are not listed here because the Commission, in cooperation with the California Continuing Education of the Bar, plans to publish the new law as enacted.

The Assembly Judiciary Committee and the Senate Judiciary Committee adopted special reports revising the official Comments to Assembly Bills 167 and 261. See *Report of Assembly Committee on Judiciary on Assembly Bills Nos. 261 and 167*, Assembly J. (May 9, 1979) at 4341, republished as Appendix IV to this Report; *Report of Senate Committee on Judiciary on Assembly Bill No. 261*, Senate J. (July 20, 1979) at 6084, republished as Appendix V to this Report.

Assembly Bill 261, which proposed the enactment of a new guardianship-conservatorship law, was enacted after numerous amendments as Chapter 726 of the Statutes of 1979.

Assembly Bill 167, making changes in various codes to conform to the new guardianship-conservatorship law, was enacted after a number of amendments as Chapter 730 of the Statutes of 1979.

Assembly Bill 212, which proposed the inclusion in the Probate Code of standard construction provisions found in various other California codes, was enacted as Chapter 165 of the Statutes of 1979. The bill was enacted as introduced.

Ad Valorem Property Taxes

Assembly Bill 135, which became Chapter 31 of the Statutes of 1979, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings*, 14 Cal. L. Revision Comm'n Reports 291 (1978).

After the bill was introduced, the following amendment was made: Revenue and Taxation Code Section 5082 was amended to substitute the word "acquiring" for the word "public" in subdivisions (a), (b), and (c). Technical amendments were also made.

Security for Costs

Assembly Bill 145 was introduced by Assemblyman Alister McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Security for Costs*, 14 Cal. L. Revision Comm'n Reports 319 (1978). The bill was not enacted. The Commission plans to submit the recommended legislation for enactment by the 1980 Legislature.

Resolution Approving Topics for Study

Assembly Concurrent Resolution No. 8, introduced by Assemblyman McAlister and adopted as Resolution Chapter 19 of the Statutes of 1979, authorizes the Commission to continue the study of 24 topics previously authorized for study and authorizes the study of two new topics—powers of appointment and rights and disabilities of minors and incompetent persons.

REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and of the California Supreme Court published since the Commission's last Annual Report was prepared,¹ and has the following to report:

(1) No decision of the United States Supreme Court or the California Supreme Court holding a statute of this state repealed by implication has been found.

(2) No decision of the United States Supreme Court holding a California statute unconstitutional has been found.²

(3) Two decisions of the California Supreme Court held state statutes unconstitutional.³

¹ This study has been carried through 99 S. Ct. 3107 (Advance Sheet No. 18, July 15, 1979) and 25 Cal.3d 90 (Advance Sheet No. 25, September 11, 1979).

² One United States Supreme Court decision imposed a constitutional qualification on the application of a state statute without invalidating any statutory language. In *Japan Line, Ltd. v. County of Los Angeles*, 99 S. Ct. 1813 (1979), California ad valorem property taxes under Revenue and Taxation Code Sections 117, 405, and 2192 were held unconstitutional under the commerce clause of the U.S. Constitution as applied to cargo containers of foreign shipping companies which are based, registered, and subject to property tax in their home ports and used exclusively in foreign commerce since the tax results in multiple taxation of the instrumentalities of foreign commerce and is inconsistent with Congress' power to regulate commerce with foreign nations.

³ Five other decisions of the California Supreme Court imposed constitutional qualifications on the application of state statutes without invalidating any statutory language:

In *Hale v. Morgan*, 22 Cal.3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978), the court held that the application of Civil Code Section 789.3, which assesses a penalty of \$100 a day against a landlord who willfully deprives his tenant of utility services for the purpose of evicting him, was constitutionally excessive in the case of a mobile home park owner who disconnected a tenant's water and electrical lines after the tenant had failed to pay rent for three months. Reasoning that the statute may be subject to both constitutional and unconstitutional applications, the court directed that the propriety of its application be evaluated by the courts on a case-by-case basis.

In *In re Moye*, 22 Cal.3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978), the court held, on equal protection grounds, that the duration of institutional confinement of persons committed to state institutions following an acquittal of criminal charges because of insanity under Penal Code Section 1026 cannot exceed the maximum term for the underlying offense, unless the People or other committing authority establish grounds for an extended commitment.

In *Conservatorship of Roulet*, 23 Cal.3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979), the court held that due process requires that before a conservator may be appointed under the Lanterman-Petris-Short Act (Welf. & Inst. Code §§ 5000-5464), the proposed conservatee must be shown to be gravely disabled by proof beyond a reasonable doubt and so found by a unanimous jury.

In *Sonoma County Organization of Public Employees v. County of Sonoma*,⁴ the court held provisions of Government Code Sections 16280 and 16280.5—which invalidate agreements of local public agencies granting wage and salary increases in excess of that granted to state employees—invalid as an impairment of contracts in violation of both the federal and state constitutions and as an interference with the right of chartered cities and counties, under Article XI, Section 5, of the California Constitution, to determine the compensation of their employees.

In *Fair Political Practices Commission v. Superior Court*,⁵ the court held that Government Code Section 86202, which prohibits certain political contributions by lobbyists, imposed an unconstitutional restriction of the lobbyists' freedom of association. The court also held invalid Government Code Sections 86107(d)-(e) and 86109(d)-(e), which require lobbyists to make detailed reports concerning various kinds of financial transactions, as being an unconstitutionally onerous interference with the right to petition the government for redress of grievances.⁶

In *Larios v. Superior Court*, 24 Cal.3d 324, 594 P.2d 491, 155 Cal. Rptr. 374 (1979), the court held that Penal Code Section 1123, authorizing a mistrial where a juror is unable to perform his duty because of illness or "other good cause" and where no alternate juror is available, must be read to authorize mistrials only where there has been consent of the accused or where "good cause" amounts to "legal necessity," since, under the double jeopardy clause of the California Constitution (Art. I, § 15), the accused may not be retried for the same offense if the jury has been discharged without the accused's consent and without "legal necessity" for the discharge.

In *Horn v. County of Ventura*, 24 Cal.3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979), the court held that county approval of a tentative subdivision map is an adjudicatory function which, under principles of due process, requires that both appropriate prior notice and an opportunity to be heard be given to persons whose property interests may be significantly affected. In *Horn*, the county had made a finding under the California Environmental Quality Act (Pub. Res. Code §§ 21000-21176) that the proposed subdivision would not have a significant effect on the environment. The county's administrative regulations adopted under the CEQA provided for posting of environmental documents at central public buildings and for mailing of notice to persons who specifically request it. These were held to be constitutionally inadequate to give notice to significantly affected landowners. The court refrained, however, from providing a specific formula detailing adequate notice provisions, preferring to leave these determinations to affected local governments. The court also held that the CEQA evaluation process does not constitute an adequate "hearing" since it is designed to evoke public response to the general environmental aspects of a proposed project, rather than addressing the specific objections of affected landowners, and permits but does not require a public hearing.

⁴ 23 Cal.3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

⁵ 25 Cal.3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979).

⁶ Government Code Sections 86107, 86109, and 86202 were enacted as part of the Political Reform Act of 1974, an initiative measure approved by the voters in 1974. See 1974 Cal. Stats. at A-163.

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study (see "Calendar of Topics for Study" *supra*).

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent that those provisions have been held to be unconstitutional.

APPENDIX I

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

Recommendation	Action by Legislature
1. <i>Partial Revision of Education Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 12 (1957)	Enacted. Cal. Stats. 1955, Chs. 799, 877
2. <i>Summary Distribution of Small Estates Under Probate Code Sections 640 to 646</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 50 (1957)	Enacted. Cal. Stats. 1955, Ch. 1183
3. <i>Fish and Game Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1957 at 13 (1957); 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1956 at 13 (1957)	Enacted. Cal. Stats. 1957, Ch. 456
4. <i>Maximum Period of Confinement in a County Jail</i> , 1 CAL. L. REVISION COMM'N REPORTS at A-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 139
5. <i>Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at B-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 540
6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see Cal. Stats. 1975, Ch. 461, enacting substance of this recommendation.
7. <i>The Dead Man Statute</i> , 1 CAL. L. REVISION COMM'N REPORTS at D-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 1261.
8. <i>Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere</i> , 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 490
9. <i>The Marital "For and Against" Testimonial Privilege</i> , 1 CAL. L. REVISION COMM'N REPORTS at F-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 970.
10. <i>Suspension of the Absolute Power of Alienation</i> , 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 14 (1959)	Enacted. Cal. Stats. 1959, Ch. 470

Recommendation	Action by Legislature
11. <i>Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378</i> , 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 102
12. <i>Judicial Notice of the Law of Foreign Countries</i> , 1 CAL. L. REVISION COMM'N REPORTS at I-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 249
13. <i>Choice of Law Governing Survival of Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957)	No legislation recommended.
14. <i>Effective Date of Order Ruling on a Motion for New Trial</i> , 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959)	Enacted. Cal. Stats. 1959, Ch. 468
15. <i>Retention of Venue for Convenience of Witnesses</i> , 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957)	Not enacted.
16. <i>Bringing New Parties Into Civil Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 1498
17. <i>Grand Juries</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959)	Enacted. Cal. Stats. 1959, Ch. 501
18. <i>Procedure for Appointing Guardians</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959)	Enacted. Cal. Stats. 1959, Ch. 500
19. <i>Appointment of Administrator in Quiet Title Action</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959)	No legislation recommended.
20. <i>Presentation of Claims Against Public Entities</i> , 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959)	Enacted. Cal. Stats. 1959, Chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., Art. XI, § 10 (1960)
21. <i>Right of Nonresident Aliens to Inherit</i> , 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959); 11 CAL. L. REVISION COMM'N REPORTS 421 (1973)	Enacted. Cal. Stats. 1974, Ch. 425.
22. <i>Mortgages to Secure Future Advances</i> , 2 CAL. L. REVISION COMM'N REPORTS at C-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 528

Recommendation	Action by Legislature
23. <i>Doctrine of Worthier Title</i> , 2 CAL. L. REVISION COMM'N REPORTS at D-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 122
24. <i>Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving</i> , 2 CAL. L. REVISION COMM'N REPORTS at E-1 (1959)	Not enacted. But see Cal. Stats. 1972, Ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. <i>Time Within Which Motion for New Trial May Be Made</i> , 2 CAL. L. REVISION COMM'N REPORTS at F-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 469
26. <i>Notice to Shareholders of Sale of Corporate Assets</i> , 2 CAL. L. REVISION COMM'N REPORTS at G-1 (1959)	Not enacted. But see CORP. CODE §§ 1001, 1002, enacting substance of recommendation.
27. <i>Evidence in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961)	Not enacted. But see EVID. CODE § 810 <i>et seq.</i> enacting substance of recommendation.
28. <i>Taking Possession and Passage of Title in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961)	Enacted. Cal. Stats. 1961, Chs. 1612, 1613
29. <i>Reimbursement for Moving Expenses When Property Is Acquired for Public Use</i> , 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961)	Not enacted. But see GOVT. CODE § 7260 <i>et seq.</i> enacting substance of recommendation.
30. <i>Rescission of Contracts</i> , 3 CAL. L. REVISION COMM'N REPORTS at D-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 589
31. <i>Right to Counsel and Separation of Delinquent From Nondelinquent Minor In Juvenile Court Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at E-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 1616
32. <i>Survival of Actions</i> , 3 CAL. L. REVISION COMM'N REPORTS at F-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 657
33. <i>Arbitration</i> , 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 461
34. <i>Presentation of Claims Against Public Officers and Employees</i> , 3 CAL. L. REVISION COMM'N REPORTS at H-1 (1961)	Not enacted 1961. See recommendation to 1963 session (item 39 <i>infra</i>) which was enacted.

Recommendation	Action by Legislature
35. <i>Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere</i> , 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 636
36. <i>Notice of Alibi in Criminal Actions</i> , 3 CAL. L. REVISION COMM'N REPORTS at J-1 (1961)	Not enacted.
37. <i>Discovery in Eminent Domain Proceedings</i> , 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967)	Enacted. Cal. Stats. 1967, Ch. 1104
38. <i>Tort Liability of Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 801 (1963)	Enacted. Cal. Stats. 1963, Ch. 1681
39. <i>Claims, Actions and Judgments Against Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1001 (1963)	Enacted. Cal. Stats. 1963, Ch. 1715
40. <i>Insurance Coverage for Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1201 (1963)	Enacted. Cal. Stats. 1963, Ch. 1682
41. <i>Defense of Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1301 (1963)	Enacted. Cal. Stats. 1963, Ch. 1683
42. <i>Liability of Public Entities for Ownership and Operation of Motor Vehicles</i> , 4 CAL. L. REVISION COMM'N REPORTS 1401 (1963); 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. Cal. Stats. 1965, Ch. 1527
43. <i>Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer</i> , 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963)	Enacted. Cal. Stats. 1963, Ch. 1684
44. <i>Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes</i> , 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963)	Enacted. Cal. Stats. 1963, Chs. 1685, 1686, 2029
45. <i>Evidence Code</i> , 7 CAL. L. REVISION COMM'N REPORTS 1 (1965)	Enacted. Cal. Stats. 1965, Ch. 299

Recommendation	Action by Legislature
46. <i>Claims and Actions Against Public Entities and Public Employees</i> , 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. Cal. Stats. 1965, Ch. 653
47. <i>Evidence Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 101 (1967)	Enacted in part. Cal. Stats. 1967, Ch. 650. Balance enacted. Cal. Stats. 1970, Ch. 69
48. <i>Evidence—Agricultural Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 201 (1967)	Enacted. Cal. Stats. 1967, Ch. 262
49. <i>Evidence—Commercial Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 301 (1967)	Enacted. Cal. Stats. 1967, Ch. 703
50. <i>Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property</i> , 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967)	Enacted. Cal. Stats. 1968, Chs. 457, 458
51. <i>Vehicle Code Section 17150 and Related Sections</i> , 8 CAL. L. REVISION COMM'N REPORTS 501 (1967)	Enacted. Cal. Stats. 1967, Ch. 702
52. <i>Additur</i> , 8 CAL. L. REVISION COMM'N REPORTS 601 (1967)	Enacted. Cal. Stats. 1967, Ch. 72
53. <i>Abandonment or Termination of a Lease</i> , 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); 9 CAL. L. REVISION COMM'N REPORTS 153 (1969)	Enacted. Cal. Stats. 1970, Ch. 89
54. <i>Good Faith Improver of Land Owned by Another</i> , 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1373 (1967)	Enacted. Cal. Stats. 1968, Ch. 150
55. <i>Suit By or Against an Unincorporated Association</i> , 8 CAL. L. REVISION COMM'N REPORTS 901 (1967)	Enacted. Cal. Stats. 1967, Ch. 1324
56. <i>Escheat</i> , 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967)	Enacted. Cal. Stats. 1968, Chs. 247, 356
57. <i>Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding</i> , 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967)	Enacted. Cal. Stats. 1968, Ch. 133

Recommendation	Action by Legislature
58. <i>Service of Process on Unincorporated Associations</i> , 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967)	Enacted. Cal. Stats. 1968, Ch. 132
59. <i>Sovereign Immunity—Statute of Limitations</i> , 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); 9 CAL. L. REVISION COMM'N REPORTS 175 (1969)	Enacted. Cal. Stats. 1970, Ch. 104
60. <i>Additur and Remittitur</i> , 9 CAL. L. REVISION COMM'N REPORTS 63 (1969)	Enacted. Cal. Stats. 1969, Ch. 115
61. <i>Fictitious Business Names</i> , 9 CAL. L. REVISION COMM'N REPORTS 71 (1969)	Enacted. Cal. Stats. 1969, Ch. 114
62. <i>Quasi-Community Property</i> , 9 CAL. L. REVISION COMM'N REPORTS 113 (1969)	Enacted. Cal. Stats. 1970, Ch. 312
63. <i>Arbitration of Just Compensation</i> , 9 CAL. L. REVISION COMM'N REPORTS 123 (1969)	Enacted. Cal. Stats. 1970, Ch. 417
64. <i>Revisions of Evidence Code</i> , 9 CAL. L. REVISION COMM'N REPORTS 137 (1969)	Enacted in part. Cal. Stats. 1970, Ch. 69. See also Cal. Stats. 1970, Chs. 1396, 1397
65. <i>Mutuality of Remedies in Suits for Specific Performance</i> , 9 CAL. L. REVISION COMM'N REPORTS 201 (1969)	Enacted. Cal. Stats. 1969, Ch. 156
66. <i>Powers of Appointment</i> , 9 CAL. L. REVISION COMM'N REPORTS 301 (1969)	Enacted. Cal. Stats. 1969, Chs. 113, 155
67. <i>Evidence Code—Revisions of Privileges Article</i> , 9 CAL. L. REVISION COMM'N REPORTS 501 (1969)	Vetoed. But see Cal. Stats. 1970, Chs. 1396, 1397
68. <i>Fictitious Business Names</i> , 9 CAL. L. REVISION COMM'N REPORTS 601 (1969)	Enacted. Cal. Stats. 1970, Ch. 618
69. <i>Representations as to the Credit of Third Persons and the Statute of Frauds</i> , 9 CAL. L. REVISION COMM'N REPORTS 701 (1969)	Enacted. Cal. Stats. 1970, Ch. 720
70. <i>Revisions of Governmental Liability Act</i> , 9 CAL. L. REVISION COMM'N REPORTS 801 (1969)	Enacted in part. Cal. Stats. 1970, Chs. 662, 1099

Recommendation	Action by Legislature
71. <i>"Vesting" of Interests Under Rule Against Perpetuities</i> , 9 CAL. L. REVISION COMM'N REPORTS 901 (1969)	Enacted. Cal. Stats. 1970, Ch. 45
72. <i>Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions</i> , 10 CAL. L. REVISION COMM'N REPORTS 501 (1971)	Enacted. Cal. Stats. 1971, Chs. 244, 950. See also Cal. Stats. 1973, Ch. 828
73. <i>Wage Garnishment and Related Matters</i> , 10 CAL. L. REVISION COMM'N REPORTS 701 (1971); 11 CAL. L. REVISION COMM'N REPORTS 101 (1973); 12 CAL. L. REVISION COMM'N REPORTS 901 (1974); 13 CAL. L. REVISION COMM'N REPORTS 601 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1703 (1976); 14 CAL. L. REVISION COMM'N REPORTS 261 (1978)	Enacted in part. Cal. Stats. 1978, Ch. 1133. See also Cal. Stats. 1979, Ch. 66
74. <i>Proof of Foreign Official Records</i> , 10 CAL. L. REVISION COMM'N REPORTS 1022 (1971)	Enacted. Cal. Stats. 1970, Ch. 41
75. <i>Inverse Condemnation—Insurance Coverage</i> , 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971)	Enacted. Cal. Stats. 1971, Ch. 140
76. <i>Discharge From Employment Because of Wage Garnishment</i> , 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971)	Enacted. Cal. Stats. 1971, Ch. 1607
77. <i>Civil Arrest</i> , 11 CAL. L. REVISION COMM'N REPORTS 1 (1973)	Enacted. Cal. Stats. 1973, Ch. 20
78. <i>Claim and Delivery Statute</i> , 11 CAL. L. REVISION COMM'N REPORTS 301 (1973)	Enacted. Cal. Stats. 1973, Ch. 526
79. <i>Unclaimed Property</i> , 11 CAL. L. REVISION COMM'N REPORTS 401 (1973); 12 CAL. L. REVISION COMM'N REPORTS 609 (1974)	Proposed resolution enacted. Cal. Stats. 1973, Res. Ch. 76. Legislation enacted. Cal. Stats. 1975, Ch. 25.
80. <i>Enforcement of Sister State Money Judgments</i> , 11 CAL. L. REVISION COMM'N REPORTS 451 (1973)	Enacted. Cal. Stats. 1974, Ch. 211
81. <i>Prejudgment Attachment</i> , 11 CAL. L. REVISION COMM'N REPORTS 701 (1973)	Enacted. Cal. Stats. 1974, Ch. 1516. See also Cal. Stats. 1975, Ch. 200.

Recommendation	Action by Legislature
82. <i>Landlord-Tenant Relations</i> , 11 CAL. L. REVISION COMM'N REPORTS 951 (1973)	Enacted. Cal. Stats. 1974, Chs. 331, 332
83. <i>Pleading</i> (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973)	Enacted. Cal. Stats. 1972, Ch. 73
84. <i>Evidence—Judicial Notice</i> (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1025 (1973)	Enacted. Cal. Stats. 1972, Ch. 764
85. <i>Evidence—"Criminal Conduct" Exception</i> , 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973)	Not enacted 1974. See recommendation to 1975 session (item 90 <i>infra</i>) which was enacted.
86. <i>Erroneously Compelled Disclosure of Privileged Information</i> , 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973)	Enacted. Cal. Stats. 1974, Ch. 227
87. <i>Liquidated Damages</i> , 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973); 13 CAL. L. REVISION COMM'N REPORTS 2139 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1735 (1976)	Enacted. Cal. Stats. 1977, Ch. 198
88. <i>Payment of Judgments Against Local Public Entities</i> , 12 CAL. L. REVISION COMM'N REPORTS 575 (1974)	Enacted. Cal. Stats. 1975, Ch. 285
89. <i>View by Trier of Fact in a Civil Case</i> , 12 CAL. L. REVISION COMM'N REPORTS 587 (1974)	Enacted. Cal. Stats. 1975, Ch. 301
90. <i>Good Cause Exception to the Physician-Patient Privilege</i> , 12 CAL. L. REVISION COMM'N REPORTS 601 (1974)	Enacted. Cal. Stats. 1975, Ch. 318
91. <i>Improvement Acts</i> , 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974)	Enacted. Cal. Stats. 1974, Ch. 426
92. <i>The Eminent Domain Law</i> , 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974)	Enacted. Cal. Stats. 1975, Chs. 1239, 1240, 1275
93. <i>Eminent Domain—Conforming Changes in Special District Statutes</i> , 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974)	Enacted. Cal. Stats. 1975, Chs. 581, 582, 584, 585, 586, 587, 1176, 1276

Recommendation	Action by Legislature
94. <i>Oral Modification of Written Contracts</i> , 13 CAL. L. REVISION COMM'N REPORTS 301 (1976); 13 CAL. L. REVISION COMM'N REPORTS 2129 (1976)	Enacted. Cal. Stats. 1975, Ch. 7; Cal. Stats. 1976, Ch. 109.
95. <i>Partition of Real and Personal Property</i> , 13 CAL. L. REVISION COMM'N REPORTS 401 (1976)	Enacted. Cal. Stats. 1976, Ch. 73
96. <i>Revision of the Attachment Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 801 (1976)	Enacted. Cal. Stats. 1976, Ch. 437
97. <i>Undertakings for Costs</i> , 13 CAL. L. REVISION COMM'N REPORTS 901 (1976)	Not enacted 1976. But see recommendation to 1979 session (item 118 <i>infra</i>).
98. <i>Admissibility of Copies of Business Records in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2051 (1976)	Not enacted.
99. <i>Turnover Orders Under the Claim and Delivery Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 2079 (1976)	Enacted. Cal. Stats. 1976, Ch. 145
100. <i>Relocation Assistance by Private Condemnors</i> , 13 CAL. L. REVISION COMM'N REPORTS 2085 (1976)	Enacted. Cal. Stats. 1976, Ch. 143
101. <i>Condemnation for Byroads and Utility Easements</i> , 13 CAL. L. REVISION COMM'N REPORTS 2091 (1976)	Enacted in part (utility easements). Cal. Stats. 1976, Ch. 994
102. <i>Transfer of Out-of-State Trusts to California</i> , 13 CAL. L. REVISION COMM'N REPORTS 2101 (1976)	Enacted. Cal. Stats. 1976, Ch. 144
103. <i>Admissibility of Duplicates in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2115 (1976)	Not enacted. But see Cal. Stats. 1977, Ch. 708, enacting substance of recommendation in modified form.
104. <i>Service of Process on Unincorporated Associations</i> , 13 CAL. L. REVISION COMM'N REPORTS 1657 (1976)	Enacted. Cal. Stats. 1976, Ch. 888
105. <i>Sister State Money Judgments</i> , 13 CAL. L. REVISION COMM'N REPORTS 1669 (1976)	Enacted. Cal. Stats. 1977, Ch. 232
106. <i>Damages in Action for Breach of Lease</i> , 13 CAL. L. REVISION COMM'N REPORTS 1679 (1976)	Enacted. Cal. Stats. 1977, Ch. 49

Recommendation	Action by Legislature
107. <i>Nonprofit Corporation Law</i> , 13 CAL. L. REVISION COMM'N REPORTS, 2201 (1976)	Not enacted. Legislation on this subject, not recommended by the Commission, was enacted in 1978.
108. <i>Use of Keepers Pursuant to Writs of Execution</i> , 14 CAL. L. REVISION COMM'N REPORTS 49 (1978)	Enacted. Cal. Stats. 1977, Ch. 155
109. <i>Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors</i> , 14 CAL. L. REVISION COMM'N REPORTS 61 (1978)	Enacted. Cal. Stats. 1977, Ch. 499
110. <i>Review of Resolution of Necessity by Writ of Mandate</i> , 14 CAL. L. REVISION COMM'N REPORTS 83 (1978)	Enacted. Cal. Stats. 1978, Ch. 286
111. <i>Use of Court Commissioners Under the Attachment Law</i> , 14 CAL. L. REVISION COMM'N REPORTS 93 (1978)	Enacted. Cal. Stats. 1978, Ch. 151
112. <i>Evidence of Market Value of Property</i> , 14 CAL. L. REVISION COMM'N REPORTS 105 (1978)	Enacted in part. Cal. Stats. 1978, Ch. 294
113. <i>Psychotherapist-Patient Privilege</i> , 14 CAL. L. REVISION COMM'N REPORTS 127 (1978); Appendix XIII to this Report	Vetoed 1978. Recommendation will be submitted to 1980 session.
114. <i>Parol Evidence Rule</i> , 14 CAL. L. REVISION COMM'N REPORTS 143 (1978)	Enacted. Cal. Stats. 1978, Ch. 150
115. <i>Attachment Law—Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action,"</i> 14 CAL. L. REVISION COMM'N REPORTS 241 (1978)	Enacted. Cal. Stats. 1978, Ch. 273
116. <i>Powers of Appointment</i> (technical changes), 14 CAL. L. REVISION COMM'N REPORTS 257 (1978)	Enacted. Cal. Stats. 1978, Ch. 266
117. <i>Ad Valorem Property Taxes in Eminent Domain Proceedings</i> , 14 CAL. L. REVISION COMM'N REPORTS 291 (1978)	Enacted. Cal. Stats. 1979, Ch. 31
118. <i>Security for Costs</i> , 14 CAL. L. REVISION COMM'N REPORTS 319 (1978)	Not enacted 1979. But recommendation will be submitted to 1980 session

Recommendation	Action by Legislature
119. <i>Guardianship-Conservatorship Law</i> , 14 CAL. L. REVISION COMM'N REPORTS 501 (1978)	Enacted. Cal. Stats. 1979, Chs. 165, 726, 730
120. <i>Effect of New Bankruptcy Law on The Attachment Law</i> (February 1979) (published as Appendix II to this Report)	Enacted. Cal. Stats. 1979, Ch. 177
121. <i>Confessions of Judgment</i> (March 1979) (published as Appendix III to this Report)	Enacted. Cal. Stats. 1979, Ch. 568
122. <i>Special Assessment Liens on Property Taken for Public Use</i> (September 1979) (published as Appendix VI to this Report)	Recommendation to be submitted to 1980 legislative session
123. <i>Assignments for the Benefit of Creditors</i> (September 1979) (published as Appendix VII to this Report)	Recommendation to be submitted to 1980 legislative session
124. <i>Vacation of Public Streets, Highways, and Service Easements</i> (September 1979) (published as Appendix VIII to this Report)	Recommendation to be submitted to 1980 legislative session
125. <i>Quiet Title Actions</i> (September 1979) (published as Appendix IX to this Report)	Recommendation to be submitted to 1980 legislative session
126. <i>Agreements for Entry of Paternity and Support Judgments</i> (November 1979) (published as Appendix X to this Report)	Recommendation to be submitted to 1980 legislative session
127. <i>Application of Evidence Code Property Valuation Rules in Noncondemnation Cases</i> , 15 CAL. L. REVISION COMM'N REPORTS 301 (1980)	Recommendation to be submitted to 1980 legislative session
128. <i>Probate Homestead</i> , 15 CAL. L. REVISION COMM'N REPORTS 401 (1980)	Recommendation to be submitted to 1980 legislative session
129. <i>Enforcement of Claims and Judgments Against Public Entities</i> (November 1979) (published as Appendix XI to this Report)	Recommendation to be submitted to 1980 legislative session
130. <i>Uniform Veterans Guardianship Act</i> (October 1979) (published as Appendix XII to this Report)	Recommendation to be submitted to 1980 legislative session
131. <i>Enforcement of Obligations After Death</i> (November 1979) (published as Appendix XIV to this Report)	Recommendation to be submitted to 1980 legislative session

APPENDIX II
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Effect of New Bankruptcy Law
on The Attachment Law**

February 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Effect of New Bankruptcy Law on the Attachment Law*, 15 CAL. L. REVISION COMM'N REPORTS 1043 (1980).

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February 9, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Attachment Law includes provisions dealing with the effect on an attachment of a bankruptcy proceeding or a general assignment for the benefit of creditors. This recommendation—made pursuant to Resolution Chapter 27 of the Statutes of 1972—proposes revisions necessary to conform The Attachment Law provisions to the recently enacted Bankruptcy Reform Act of 1978.

Respectfully submitted,

HOWARD R. WILLIAMS
Chairperson

RECOMMENDATION

relating to

EFFECT OF NEW BANKRUPTCY LAW ON THE ATTACHMENT LAW

Chapter 13 of The Attachment Law¹ deals with the effect of bankruptcy proceedings and general assignments for the benefit of creditors. The provisions of Chapter 13 are based on the Bankruptcy Act prior to its revision by the Bankruptcy Reform Act of 1978.² The Law Revision Commission, at the time it recommended enactment of Chapter 13 in 1977, recognized that revision would probably be necessary when revision of the bankruptcy laws occurred.³

The new bankruptcy law makes a number of changes that affect The Attachment Law. Among these changes are:

—a 90-day, rather than four-month, preference period for voiding liens;⁴

—automatic, rather than discretionary, preservation of liens for the benefit of the estate;⁵

—elimination of receivers and creation of interim trustees in bankruptcy;⁶

—adoption of new terminology.⁷

The Commission recommends that The Attachment Law be revised to conform to the new bankruptcy law.⁸ Failure to conform will result in confusion concerning the status of temporary protective order and attachment liens under the new law, particularly liens created in the period between four months and 90 days preceding bankruptcy. Such liens would be voided under The Attachment Law but would not be voidable in bankruptcy.

¹ Code Civ. Proc. §§ 493.010–493.060 (1977 Cal. Stats. ch. 499).

² Title 11 of the United States Code (Pub.L. No. 95–598).

³ Letter of transmittal, 14 Cal. L. Revision Comm'n Reports 63 (1977).

⁴ 11 U.S.C. § 547.

⁵ 11 U.S.C. § 551.

⁶ 11 U.S.C. §§ 105, 303, 701.

⁷ For example, the new law is no longer called the Bankruptcy Act, and filing a petition no longer initiates a proceeding but commences a case.

⁸ The provisions relating to general assignments for the benefit of creditors should remain uniform with the bankruptcy provisions. The Commission is actively reviewing the law relating to assignments.

The new bankruptcy law becomes operative on October 1, 1979. Conforming changes in The Attachment Law should be drafted so as to become operative at the same time.

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 493.030, 493.040, 493.050, and 493.060 of the Code of Civil Procedure, relating to attachment, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SECTION 1. Section 493.030 of the Code of Civil Procedure is amended to read:

493.030. (a) The making of a general assignment for the benefit of creditors terminates a lien of a temporary protective order or of attachment if the lien was created within ~~four months~~ 90 days prior to the making of the general assignment.

(b) The filing of a petition ~~initiating a proceeding under the National Bankruptcy Act by or against the defendant~~ *commencing a voluntary or involuntary case under Title 11 of the United States Code (Bankruptcy)* terminates a lien of a temporary protective order or of attachment if the lien was created within ~~four months~~ 90 days prior to the filing of the petition ~~unless the bankruptcy court orders the lien preserved for the benefit of the bankrupt estate~~.

(c) Subdivisions (a) and (b) do not apply unless all liens of attachment on the defendant's property in other states that were created within ~~four months~~ 90 days prior to the making of a general assignment for the benefit of creditors or the filing of a petition ~~initiating a proceeding under the National Bankruptcy Act~~ *commencing a case under Title 11 of the United States Code (Bankruptcy)* have terminated.

Comment. Section 493.030 is amended to conform to the 90-day preference period prescribed by the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598), 11 U.S.C. § 547. Other changes

in this section conform to the terminology of the new act. The provision relating to general assignments is made uniform with the bankruptcy provision. The reference to preservation of liens for the benefit of the estate is superseded by Section 493.060. See Comment to Section 493.060.

SEC. 2. Section 493.040 of the Code of Civil Procedure is amended to read:

493.040. (a) Where a lien of attachment terminates pursuant to Section 493.030, the assignee under a general assignment for the benefit of creditors or, in the case of a bankruptcy, the trustee, ~~receiver~~ *interim trustee*, or the debtor in possession if there is no trustee or ~~receiver~~ *interim trustee*, may secure the release of the attachment by filing with the levying officer a request for release of attachment stating the grounds for release and describing the property to be released, executed under oath, together with a copy thereof.

(b) In the case of an assignee, the request shall include two copies of the general assignment for the benefit of creditors.

(c) In the case of a trustee, ~~receiver~~ *interim trustee*, or debtor in possession, the request shall include a certified copy of the petition in bankruptcy, together with a copy thereof.

(d) If immediate release of the attachment is sought, the request shall be accompanied by an undertaking to pay the plaintiff any damages resulting from an improper release of the attachment, in the amount of the plaintiff's claim to be secured by the attachment, executed by a corporate surety possessing a certificate of authority from the Insurance Commissioner as provided by Section 1056.

(e) Within five days after the filing of the request for release of attachment, the levying officer shall mail to the plaintiff:

(1) A copy of the request for release of the attachment, including the copy of the document filed pursuant to subdivision (b) or (c).

(2) If an undertaking has not been given, a notice that the attachment will be released pursuant to the request for release of attachment unless otherwise ordered by a court within 10 days after the date of mailing the notice.

(3) If an undertaking has been given, a notice that the attachment has been released.

(f) Unless otherwise ordered by a court, if an undertaking has not been given, the levying officer shall release the attachment pursuant to the request for release of attachment after the expiration of 10 days from the date of mailing the papers referred to in subdivision (e) to the plaintiff. If an undertaking has been given, the levying officer shall immediately release the attachment pursuant to the request for release of attachment.

(g) Where the attached property has been taken into custody, it shall be released to the person making the request for release of attachment or some other person designated in the request. Where the attached property has not been taken into custody, it shall be released as provided in subdivision (c) of Section 488.560.

(h) The levying officer is not liable for releasing an attachment in accordance with this section nor is any other person liable for acting in conformity with the release.

Comment. Section 493.040 is amended to conform to the elimination of receivers and the creation of interim trustees by the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598), 11 U.S.C. §§ 105, 303, 701.

SEC. 3. Section 493.050 of the Code of Civil Procedure is amended to read:

493.050. (a) The lien of a temporary protective order or of attachment, which has terminated pursuant to Section 493.030, is reinstated with the same effect as if it had not been terminated in the following cases:

(1) Where the termination is the result of the making of a general assignment for the benefit of creditors and the general assignment for the benefit of creditors is set aside otherwise than by the filing of a ~~proceeding under the National Bankruptcy Act~~ *petition commencing a case under Title 11 of the United States Code (Bankruptcy)* .

(2) Where the termination is the result of the filing of a petition ~~initiating a proceeding under the National Bankruptcy Act and the defendant is not finally adjudged a bankrupt and no arrangement or plan is proposed and~~

~~confirmed under the National Bankruptcy Act commencing a case under Title 11 of the United States Code (Bankruptcy) and the petition is dismissed .~~

(3) ~~Where the termination is the result of the filing of a petition initiating a proceeding under the National Bankruptcy Act commencing a case under Title 11 of the United States Code (Bankruptcy) and the trustee abandons property which had been subject to the lien of the temporary protective order or of attachment.~~

(b) The period from the making of a general assignment for the benefit of creditors until reinstatement of the lien of the temporary protective order or of attachment is not counted in determining the duration of the temporary protective order or the lien of attachment.

Comment. Section 493.050 is amended to conform to the terminology of the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598), 11 U.S.C. § 303.

SEC. 4. Section 493.060 of the Code of Civil Procedure is amended to read:

493.060. (a) Upon the making of a general assignment for the benefit of creditors *that terminates a lien under this chapter* , the assignee is subrogated to the rights of the plaintiff under the temporary protective order or attachment.

(b) *Upon the filing of a petition commencing a case under Title 11 of the United States Code (Bankruptcy), a lien terminated pursuant to this chapter is preserved for the benefit of the estate.*

Comment. Subdivision (b) is added to Section 493.060 for consistency with the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598), 11 U.S.C. § 551. This subdivision supersedes the provision formerly found in Section 493.030(b) relating to a court order preserving the lien for the benefit of the bankrupt estate.

SEC. 5. (a) The operative date of this act is October 1, 1979.

(b) This act does not apply to a case commenced under the Bankruptcy Act prior to October 1, 1979, and such a case is governed by the law applicable immediately prior to the operative date of this act.

Comment. This section recognizes that the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598) does not govern cases commenced under the Bankruptcy Act prior to October 1, 1979. Pub.L. No. 95-598 § 403(a).

SEC. 6. This is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598) becomes operative on October 1, 1979. The new bankruptcy law totally revises the manner of dealing with liens of attachment and temporary protective orders on property in the debtor's estate. This act makes conforming revisions in The Attachment Law; however, confusion and problems in treatment of liens under the two laws will arise unless both become operative at the same time. It is therefore necessary that this act take immediate effect so that it may become operative on October 1, 1979.

APPENDIX III
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Confessions of Judgment

March 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Confessions of Judgment*, 15 CAL. L. REVISION COMM'N REPORTS 1053 (1980).

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Ex Officio

March 1, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In 1978 the California Supreme Court held unconstitutional the California confession of judgment procedure as applied to nonconsumer cases. To satisfy the constitutional standards announced by the Supreme Court, the Commission recommends that a confession of judgment be valid only if signed by a debtor on advice of an attorney. This study was authorized by Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

HOWARD R. WILLIAMS
Chairperson

RECOMMENDATION

relating to

CONFESSIONS OF JUDGMENT

The California confession of judgment statute¹ generally codifies the common law procedure enabling entry of judgment against a debtor without action in cases where the debtor has consented thereto.² The statute was amended in 1975³ to require that in consumer cases the confession be accompanied by a certificate of an attorney independently representing the defendant to the effect that the attorney has advised the defendant of the consequences of the confession and has advised the defendant to utilize the confession.⁴

In 1978, the California Supreme Court held in *Isbell v. County of Sonoma*⁵ that the California confession of judgment procedure, with the exception of the procedure relating to consumer cases, violates the due process clause of the federal Constitution. A procedure that denies the defendant notice and an opportunity to be heard must provide sufficient safeguards to ensure that the waiver of constitutional rights is voluntary, knowing, and intelligent.⁶

The Law Revision Commission surveyed practitioners⁷ to determine the purposes served by confessions of judgment in nonconsumer cases, the extent to which they were used prior to *Isbell*, and whether they would still be used if the procedure were amended to satisfy the constitutional standards of *Isbell*.

¹ Code Civ. Proc. §§ 1132-1134.

² For the history of the California statute, see Comment, *Confession of Judgment in California*, 8 Pac. L.J. 99 (1977). The California statute abolishes the common law "warrant of attorney." Code Civ. Proc. § 1133; *Barnes v. Hilton*, 118 Cal. App.2d 108, 110-11, 257 P.2d 98, 99-100 (1953).

³ 1975 Cal. Stats. ch. 304, § 1.

⁴ Code Civ. Proc. § 1132(b).

⁵ 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978).

⁶ *Id.* 21 Cal.3d at 68-71, 577 P.2d at 192-94, 145 Cal. Rptr. at 372-74 (1978).

⁷ The Commission distributed questionnaires widely and received approximately 50 responses. The largest number of responses was from general practitioners, followed by creditor representatives, local public entities, debtor representatives, judges, and law professors. The Commission found among the questionnaire respondents no unanimity on any aspect of confessions.

The survey responses indicated that prior to *Isbell* the confession of judgment procedure was used by debtors and creditors in commercial cases and by local agencies in collecting support and welfare obligations. The responses generally expressed the view that a valid confession of judgment procedure is needed to permit continued use of confessions in these cases.

The Commission has reviewed the possible alternatives⁸ and recommends that the advice of attorney requirement presently applicable in consumer cases be extended to all confessions of judgment. The Commission believes this change will provide a constitutional confession of judgment procedure.⁹

The survey responses indicated that the confession of judgment with an advice of attorney requirement would remain useful in some cases, particularly commercial cases.¹⁰ In such cases, the debtor may already be represented by counsel or the amount involved may be sufficiently large to warrant employment of counsel.¹¹

The Commission's recommendation would be effectuated by enactment of the following measure:

⁸ Among the alternatives considered were requiring a formula statement of rights in the confession, providing notice to the debtor of entry of judgment followed by a 30-day stay of execution during which time defenses to the judgment could be raised, confessing judgment to a judicial officer without a prior complaint or service of summons, and various combinations of alternatives.

⁹ See *Isbell v. County of Sonoma*, 21 Cal.3d 61, 70, 577 P.2d 188, 194, 145 Cal. Rptr. 368, 374 (1978) ("When the Legislature amended Code of Civil Procedure section 1132 to provide that in a consumer transaction the proposed judgment must be accompanied by the certificate of independent counsel that he has advised defendant of his rights and advised him to sign the confession, it also recognized that these requirements are impelled by predicates of due process of law.").

¹⁰ The confession in these cases appears, among other purposes, to function as a credit or security device where the debtor has defaulted on the obligation and the creditor is willing to grant an extension only if assured that in the event of further default there is available a prompt remedy and an opportunity to obtain priority over other creditors.

¹¹ In other cases, the amount involved may be relatively small or the debtor may be unable to afford counsel. In such cases, the advice of attorney requirement may make the confession of judgment procedure unavailable as a practical alternative; the parties will be relegated to other procedural devices, such as filing and serving a complaint and taking a stipulated or default judgment.

An act to amend Section 1132 of the Code of Civil Procedure, relating to confessions of judgment.

The people of the State of California do enact as follows:

SECTION 1. Section 1132 of the Code of Civil Procedure is amended to read:

1132. (a) A judgment by confession may be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

(b) ~~When the debt or liability arises out of the sale of goods or services primarily for personal, family, or household use, or a loan or other extension of credit for personal, family or household purposes, or a claim involves a promissory note which is based upon such a sale or loan or other extension of credit, such~~ A judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that ~~he~~ *the attorney* has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate shall be filed with the filing of the statement required by Section 1133.

Comment. Section 1132 of the Code of Civil Procedure is amended to require the certificate of an attorney representing the debtor in any case in which a confession of judgment is filed. This amendment is designed to satisfy the constitutional standards announced in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978).

APPENDIX IV

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS NOS. 261 AND 167

[Extract From Assembly Journal for May 9, 1979 (1978-1979 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bills Nos. 261 and 167, the Assembly Committee on Judiciary makes the following report.

Assembly Bills Nos. 261 and 167 were introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). Except for the new and revised comments set out below, the Law Revision Commission comments to the various sections of Assembly Bills Nos. 261 and 167 reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bills Nos. 261 and 167.

ASSEMBLY BILL NO. 261—NEW PROVISIONS

§ 1454. Court investigator

Comment. Subdivision (a) of Section 1454 continues the substance of a portion of the fifth and seventh paragraphs of former Section 1754. Subdivision (b) supersedes the requirement of the seventh paragraph of former Section 1754 that the court investigator be a person "trained in law."

§ 1456. Judicial Council to prescribe forms

Comment. Section 1456 is new. See also Section 1464 (form of notice of time and place of hearing).

§ 1461. Notice to Director of Mental Health or Director of Developmental Services

Comment. Subdivision (b) of Section 1461 generalizes various provisions scattered throughout the former guardianship and conservatorship statutes. Subdivision (c) continues former Section 1554.1 and supersedes former Section 1906 but adds a provision for revoking the certificate and substitutes the "director" for the "Attorney General" as the one executing the

certificate. Subdivision (d) continues the last sentence of former Section 1554 and supersedes the last sentence of former Section 1905.

The following provisions, listed in paragraph (2) of subdivision (b), require a notice in cases where the condition in paragraph (1) of subdivision (b) exists:

- Section 1510 (petition for appointment of guardian)
- Section 1820 (petition for appointment of conservator)
- Section 1861 (petition for termination of conservatorship)
- Section 2212 (petition for change of venue)
- Section 2403 (authorization and instructions or approval and confirmation by court for guardian or conservator of estate)
- Section 2421 (petition for allowance for ward or conservatee)
- Section 2422 (petition for support of ward or conservatee out of the estate notwithstanding existence of person legally obligated to provide support)
- Section 2423 (petition for payment of surplus income to relatives of conservatee)
- Article 7 (commencing with Section 2540) of Chapter 6 of Part 4 (petitions for sales)
- Section 2580 (substituted judgment)
- Section 2592 (independent exercise of powers)
- Section 2620 (presentation of account for settlement and allowance)
- Chapter 3 (commencing with Section 3100) of Part 6 (special proceeding to authorize transaction involving community or homestead property)

For other provisions concerning notice to the Director of Mental Health or the Director of Developmental Services, see Sections 2611 (inventory and appraisal) and 2621 (hearing on accounts). See also Section 1542 (notice of petition for nonrelative guardianship to Director of Social Services). Where the Director of Mental Health or the Director of Developmental Services is an interested person (Section 1424), a request for special notice may be filed under Section 2700.

§ 1462. Court may extend or shorten time for notice or require additional notice

Comment. Section 1462 supersedes a portion of former Section 2001 (conservatorship). The provision in subdivision

(a) authorizing the court to shorten the time for any notice required by this division is based on Section 1005 of the Code of Civil Procedure and broadens the court's limited authority under prior law. See W. Johnstone & G. Zillgitt, *California Conservatorships* § 2.8, at 30 (Cal. Cont. Ed. Bar 1968). The time for giving the notice required by Section 1511 (notice of hearing on petition for appointment of guardian) or Section 1822 (notice of hearing on petition for appointment of conservator) may not be shortened. Where necessary, a temporary guardian or conservator of the person or estate or both may be appointed to serve pending the determination of the petition for the appointment of the guardian or conservator. See Section 2250.

Subdivision (b) continues a portion of former Section 2001, with the addition of language adapted from Section 1204. Under subdivision (b), the court may, for example, require longer notice, an additional manner of giving notice, or notice to another person. The authority of the court to require a longer period of notice is made explicit in subdivision (b). This authority was implied under former law. See W. Johnstone & G. Zillgitt, *supra*.

The provision of former Section 2001 authorizing the court to dispense with notice is not continued in Section 1462. For provisions authorizing the court to dispense with notice in particular situations, see, *e.g.*, Sections 1460(b)(2)-(4) (notice of hearings generally), 1511(c)(2) (appointment of guardian of the estate only), 1862 (termination of conservatorship), 2250 (appointment of temporary guardian or conservator), 2257(b) (termination of powers of temporary guardian or conservator), 2570(c) (investments), and 2652(b) (removal of guardian or conservator).

§ 1464. Form of notice

Comment. Section 1464 is new and requires that the Judicial Council form of notice of hearing be used. See Section 1456 (Judicial Council may prescribe forms required by this division). Compare Section 1200.1 (form of notice for cases in which no notice is otherwise prescribed).

§ 1469. Application of Sections 1200 and 1201 to proceedings under this division

Comment. Section 1469 is new. Subdivision (a) insures that the notice provisions contained in this chapter will be used in all

proceedings under this division. Some sections of this division incorporate by reference and apply the procedures applicable to executors or administrators which include Section 1200 concerning notice. However, Section 1469 provides that notice is to be given under this chapter rather than as provided in Section 1200. For provisions of this division adopting procedures applicable to executors or administrators, see Sections 2543 (manner of sale) and 2546 (mines and mining claims). See also Section 2100 (law governing where no specific provision of this division applicable).

Subdivision (b) is an exception to the provisions of the sections listed above which incorporate provisions applicable to executors or administrators.

§ 1471. Mandatory appointment of legal counsel

Comment. Section 1471 specifies those instances where appointment of counsel is required under this division. Compensation of counsel appointed under Section 1471 is governed by Section 1472.

Paragraphs (1) and (2) of subdivision (a) continue the substance of the first paragraph of former Section 2006. Paragraph (3) of subdivision (a) continues the substance of the third paragraph of former Section 1851.1. See also Section 1852. Paragraph (4) requires appointment of legal counsel upon request of the conservatee in proceedings under Sections 1890-1901 affecting the legal capacity of the conservatee. Paragraph (5) continues the substance of a portion of the second sentence of the third paragraph of former Section 2201.

Subdivision (b) requires the appointment of legal counsel in the cases listed in subdivision (a) where the conservatee or proposed conservatee does not request the appointment of legal counsel but the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee. Although the court is given discretionary authority under Section 1470 to appoint legal counsel where the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect a person's interests, the appointment under Section 1471(b) is mandatory and makes Section 1472 applicable. Sections 1471-1472 permit appointment of the public defender, compensation of legal counsel by the county in cases where the person furnished counsel is determined by the court

to lack the ability to pay, and installment payments. These provisions are not found in Section 1470 which provides for discretionary appointment of private legal counsel. Subdivision (b) is based in part on the fourth paragraph of former Section 1851.1 (termination of conservatorship or removal of conservator), with the addition of the language authorizing the court to act on information from whatever source it may have been received.

Appointment of the public defender or private counsel under Sections 1471-1472 is also required under some circumstances in a proceeding under Section 1852 (removal of conservator, restoration of conservatee's right to register to vote, making, modification, or revocation of order affecting conservatee's legal capacity, termination of conservatorship), Chapter 3 (commencing with Section 3100) of Part 6 (transaction involving community or homestead property—Section 3140), or Part 7 (commencing with Section 3200) (authorization of medical treatment of an adult who does not have conservator of the person—Section 3205). See also Gov't Code § 27706 (duty of public defender to represent indigent person).

§ 1472. Compensation of mandatory court-appointed counsel

Comment. Section 1472 applies where legal counsel is appointed under Section 1471. The section is based on the third paragraph of former Section 2006, with the addition of paragraph (3) of subdivision (a). Section 1472 also applies when legal counsel is appointed under Section 1852 (removal of conservator, restoration of conservatee's right to register to vote, making, modification, or revocation of order affecting conservatee's legal capacity, termination of conservatorship), 3140 (transaction involving community or homestead property) or 3205 (authorization of medical treatment for adult without conservator).

Section 1472 does not refer to the person's "present" ability to pay as did former Section 2006. This omission permits the court to order payment if the person furnished counsel has ability to pay later. This change is consistent with the policy of the 1978 amendments to comparable provisions in Penal Code Section 987.8 and Government Code Section 27712. See 1978 Cal. Stats. ch. 1134.

Subdivision (b) supersedes former Section 2007 which authorized a county without a public defender to compensate court-appointed counsel. Subdivision (b) applies to all counties and requires payment by the county to the extent the court determines that the person for whom counsel was appointed is unable to pay.

§ 1481. Effect on existing guardianships and conservatorships generally

Comment. Section 1481 states the general rule that the enactment of this division and the repeal of prior law governing guardianships and conservatorships does not affect the existence of guardianships and conservatorships formed under prior law. However, on and after the operative date such guardianships and conservatorships are no longer governed by prior law but by this division. For exceptions to this general rule, see Sections 1484 (pending matters arising under prior law) and 1485 (effect on guardianships of adults and married minors). See also Section 1482 (effect on bonds and security and existing liabilities).

§ 1485. Effect on guardianships of adults and married minors

Comment. Section 1485 continues in effect as conservatorships all guardianships for adults and all guardianships of the person of married minors established under prior law. If the guardianship established under prior law was a guardianship of the estate, its continuation as a conservatorship of the estate will have the effect of continuing to deprive the conservatee of the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate. Section 1872. See also Civil Code § 40 (lack of capacity to contract). This preserves the effect of the creation of such guardianships under prior law. See *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 604-05, 275 P. 794, 799-800 (1929) (guardianship rendered adult ward incapable of making a valid contract). However, such a person is not deemed to lack capacity to give informed consent for medical treatment unless the court so orders. See Section 2354. See also Section 1880.

§ 1487. Review of certain existing conservatorships

Comment. Section 1487 requires court review of conservatorships in existence on the operative date where the conservatee has not been adjudicated to be incompetent under prior law. Where appropriate, an order may be made under Section 1873 authorizing the conservatee to enter into specified transactions or types of transactions.

§ 1511. Notice of hearing

Comment. Section 1511 supersedes former Section 1441 and substantially broadens the notice required. Subdivisions (b) and (c) of Section 1511 (1) retain the former requirement of notice to the parents, (2) clarify the former requirement that notice be given to the person having the “care” of the proposed ward by requiring notice to the person having legal custody of the proposed ward, and (3) add a requirement of notice to the proposed ward if 14 years of age or older, to the spouse of the proposed ward, and to any guardian nominated under Section 1500 or 1501. Notice is also required to be mailed to the person having the care of the proposed ward if that person is not the person having the legal custody of the proposed ward. The requirement of notice to a person nominated as guardian under Section 1500 or 1501 is designed to alert the nominee to the pending proceeding if the nominee is not the petitioner or a person joining in the petition. The former requirement of notice to “such relatives of the minor residing in the state as the court or judge deems proper” is expanded by subdivision (c) of Section 1511 to require notice to all relatives of the proposed ward within the second degree (see paragraph (3) of subdivision (c) of Section 1510) outside of as well as within California unless, in the case of a petition for a guardianship of the estate only, the court dispenses with such notice. Subdivisions (d) and (e) are included to alert the practitioner to the need to give notice to the Director of Mental Health, Director of Developmental Services, or Director of Social Services, and to the Veterans Administration in certain cases.

Subdivision (a) requires that notice be given at least 15 days before the hearing, and this time may not be shortened by the court. See Section 1462. If there is urgency, a temporary guardian may be appointed. See Section 2250.

Subdivision (f) continues the last sentence of former Section 1441, but authorizes the court to require that notice be given in

the unusual case where such notice would be appropriate. The court had no comparable authority under the former provision.

Subdivisions (g) and (h) are based on the last portion of the second sentence of former Section 1441. The court can order that notice need not be given where the person to be given notice cannot be located in the exercise of reasonable diligence or where the giving of the notice would be contrary to the interest of justice. The court might determine that the giving of the notice would be contrary to the interest of justice, for example, if the parents or relatives of the proposed ward were in a hostile country (such as Vietnam) and the giving of the notice might be dangerous to them or where a mother had abandoned the proposed ward, remarried, established a new family, and indicated in writing that she wanted to receive no further communications concerning her child because she was concealing its existence from her new family. The provision for proof of notice is generalized by subdivision (h) to apply to all notices required by Section 1511.

§ 1601. Termination by court order

Comment. Section 1601 continues the first portion of subdivision (3) of former Section 1590 except that (1) the manner of giving notice is specified and (2) a parent is added to the persons authorized to petition for termination of the guardianship. The standard for termination of the guardianship was not formerly specified in the statute. But see former Section 1580 (removal of guardian when it is “no longer necessary that the ward should be under guardianship”). The court retains jurisdiction of the guardianship proceeding despite termination of the guardianship. See Section 2630.

§ 1810. Nomination by proposed conservatee

Comment. Section 1810 continues the substance of the second sentence of former Section 1752. Like former Section 1752, but unlike former Section 1463 (guardianship), Section 1810 does not require that the writing containing the nomination be executed in the same manner as a witnessed will. The only formal requirements for a nomination under Section 1810 are that the nomination be in writing and be signed by the proposed conservatee. The nomination may be made in a writing made long before the conservatorship proceedings are commenced; but, whenever made, the proposed conservatee must have had

at the time the writing was executed sufficient capacity to form an intelligent preference. A nomination of a guardian made by an adult under prior law is deemed to be a nomination of a conservator. See Section 1488.

The proposed conservatee—whether or not the petitioner—may waive bond and, in such a case, the court may in its discretion dispense with the bond or reduce the amount of the bond. Section 2321.

§ 1820. Filing of petition

Comment. Subdivision (a) of Section 1820 continues the substance of a portion of the first sentence of former Section 1754 except that under subdivision (c) a spouse or relative of the proposed conservatee or a specified public agency or official may now petition, whether or not such person is also a creditor. See also former Section 1570 (nonresident ward).

The first sentence of subdivision (b) is new and will permit the uninterrupted continuation of protective proceedings for a minor under guardianship who is approaching majority and will need a conservator. The second sentence of subdivision (b) is based on a portion of the first sentence of former Section 1704. Under subdivision (b), however, the power of the court to appoint an existing guardian as conservator upon the minor's reaching majority is not conditioned upon settlement of the guardian's accounts. Such settlement may take place after the guardian's appointment as conservator. See Section 2630.

§ 1821. Contents of petition

Comment. Subdivision (a) of Section 1821 continues the substance of a portion of the first sentence of former Section 1754 but adds the requirement that the petition specify the proposed conservator and state the reasons for appointment. This addition is consistent with former practice. See *Petition for Appointment of Conservator* (Form Approved by the Judicial Council of California, effective July 1, 1977).

Subdivision (b) is the same in substance as the second sentence of former Section 1754. Subdivision (c) is new and conforms to the change in former law made in Section 1820 (creditor-relative permitted to file petition).

Subdivision (d) is drawn from a portion of former Section 1461.3 (guardianship) and is consistent with former practice in conservatorship proceedings. See *Petition for Appointment of*

Conservator (Form Approved by the Judicial Council of California, effective July 1, 1977). Subdivision (d) facilitates compliance with notice requirements. See Section 1822(c).

Subdivision (e) is new and is consistent with former practice. See Petition for Appointment of Conservator (Form Approved by the Judicial Council of California, effective July 1, 1977). Subdivision (e) facilitates compliance with notice requirements. See Section 1822(d).

Subdivision (f) is new. An application under this subdivision may include, for example, a request for an order authorizing independent exercise of powers (Section 2592) or an order relating to the legal capacity of the proposed conservatee (Sections 1870-1901).

Subdivision (g) is new. If the allegation provided for in this subdivision is made, it triggers an investigation and report by the court investigator (Section 1826) which may result in a determination by the court that the proposed conservatee need not attend the hearing (Section 1825).

§ 1826. Information to proposed conservatee by court investigator; investigation and report

Comment. Section 1826 continues the substance of the fifth and sixth paragraphs of former Section 1754 with the addition of (1) a provision requiring an investigation and report if the petition alleges that the proposed conservatee is not willing to attend the hearing, and (2) a requirement that the court investigator determine and report to the court the express communications of the proposed conservatee referred to in subdivision (j) (2). These additions are necessary to implement paragraph (3) of subdivision (a) of Section 1825. Subdivision (g) is new and is drawn from former Section 1461.1 (guardianship). Subdivisions (h) and (i) are added; these provisions are necessary to implement subdivision (b) of Section 1471.

The determinations referred to in subdivisions (c), (d), and (e) are relevant to whether the proposed conservatee must be produced at the hearing. See Section 1825(a) (2), (3).

§ 1827. Law and procedure applicable to hearing

Comment. Section 1827 continues the substance of the second paragraph of former Section 1606.5 (guardianship of incompetent adult) and the second paragraph of former Section 2006 (conservatorship). Under Section 1827, the proposed

conservatee is entitled to a jury trial on the question of the establishment of the conservatorship. However, the question of who is to be appointed as conservator is a matter to be determined by the court. See Sections 1452 and 1810-1813. Likewise, there is no right to a jury trial in connection with an order relating to the legal capacity of the conservatee. See Sections 1452, 1873, 1890, 1901, and 1910.

§ 1853. Failure to locate conservatee; termination of conservatorship on failure to produce conservatee

Comment. Section 1853 supersedes the penultimate paragraph of former Section 1851.1.

The conservatorship is to be terminated only if the conservator fails to show “good cause” for not making the conservatee available. What constitutes good cause depends upon the circumstances of the particular case. For example, good cause would be shown where it was established that the conservatee had disappeared from his or her place of residence and a diligent search was in progress to find the conservatee or where the conservatee was out of state to receive necessary medical treatment. Unlike the former provision, Section 1853 provides for the manner of service and provides that the conservatee is to be made available to the court investigator for the purposes of Section 1851. Section 1853 also places the duty to produce the conservatee on the conservator of the person if there is a conservator of the person.

§ 1871. Rights not limited by this article

Comment. Section 1871 lists certain rights of the conservatee that are not affected by the rules set forth in Section 1872.

Subdivision (a) recognizes that the conservatee has the sole control of the allowance paid to the conservatee under Section 2421. See Section 2421 (c).

Subdivision (b) recognizes that wages or salary of the conservatee are subject to the conservatee’s control unless the court otherwise orders. See Section 2601.

Subdivision (c) codifies the rule of *Estate of Powers*, 81 Cal. App.2d 480, 184 P.2d 319 (1947). Appointment of a conservator is not a determination that the conservatee lacks testamentary capacity. Testamentary capacity is determined by a different standard, which depends upon soundness of mind. See Sections 20 and 21.

Subdivision (d) makes clear that this article does not limit the right of the conservatee to obtain for reasonable value necessities of life for the conservatee and the conservatee's spouse and minor children. The subdivision is consistent with the requirement that the conservator pay debts incurred by the conservatee during conservatorship to provide the necessities of life to the conservatee and the spouse and minor children of the conservatee to the extent the debt is reasonable. See Section 2430(a) (2). See also Civil Code § 38 ("person entirely without understanding" is liable for "the reasonable value of things furnished to him necessary for his support or the support of his family").

§ 1872. Effect of conservatorship on legal capacity of conservatee

Comment. Section 1872 is new. See also Civil Code § 40. Section 1872 continues the rule under prior law that appointment of a guardian for an adult constituted an adjudication of incapacity under Section 40 of the Civil Code and made void any contract entered into by the ward after such determination. *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 604-05, 275 P. 794, 799-800 (1929). For a discussion of the effect on legal capacity of the appointment of a conservator under prior law, see *Board of Regents State Univs. v. Davis*, 14 Cal.3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975). Section 1872 governs any type of transaction including, but not limited to, debts, gifts, sales, encumbrances, conveyances, delegations of powers, and waivers of rights. See Section 1870 (defining "transaction"). Making a will is not covered by Section 1872. See Section 1871(c). As to contracts and debts incurred for necessities, see Section 1871(d). As to the capacity of a conservatee with respect to community property, see Section 3012.

Other consequences of appointing a conservator are that court proceedings must be conducted through the conservator or a guardian ad litem (Code Civ. Proc. §§ 372, 416.70), that the office of trustee held by a conservatee is vacated (Civil Code § 2281(1)(c)), and that many rights may be exercised by the conservator rather than by the conservatee (*e.g.*, right to vote shares of stock (Corp. Code § 702), right to disclaim testamentary and other interests (Prob. Code § 190.2)). This listing is intended as illustrative and not exclusive.

The limitation of Section 1872 does not apply to the extent that the court has so ordered under Section 1873. Section 1873 gives the court considerable flexibility in devising an order that authorizes the conservatee to enter into such transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

§ 1873. Court order broadening legal capacity of conservatee

Comment. Section 1873 permits the court to give the conservatee the right to enter into transactions affecting the conservatorship estate which, but for the order, the conservatee would not have under Section 1872. The court might, for example, permit the conservatee to enter into specified types of transactions or transactions not exceeding specified amounts (such as contracts not in excess of \$500). *Cf.* Welf. & Inst. Code § 5357 (similar court authority in Lanterman-Petris-Short Act conservatorships). See also Section 1876 (exercise by conservatee subject to principles of law otherwise applicable).

Any rights given to the conservatee under Section 1873 do not affect the powers and duties of the conservator, other than the duty to carry out a transaction validly executed by the conservatee. See, *e.g.*, Section 2430. See also Section 2404 (court order for payment of debt, expense, or charge lawfully due and payable). The conservator has the management and control of the conservatorship estate, including the duty to marshal, take possession of, and inventory the conservatee's assets. See Section 2401 and Comment thereto. A person seeking to enforce a transaction under Section 1873 will ordinarily seek compliance by the conservator, who decides in the first instance whether the transaction satisfies the requirements of this section. The conservator, conservatee, or third person may obtain a court determination and instructions to the conservator if necessary in a particular case. Section 2403.

In determining whether a transaction is one "into which a reasonably prudent person might enter" under paragraph (2) of subdivision (b), the conservator and the court should take into consideration all the circumstances of the particular conservatee and the conservatorship estate. One important circumstance to be taken into consideration is the extent to which the transaction might impair the ability to provide for the support, maintenance, and education of the conservatee and the support, maintenance, and education of the persons the conservatee is legally obligated

to support, maintain, or educate. See subdivision (b) of Section 2430 (payment of debts).

§ 1874. Petition, notice, and hearing

Comment. Section 1874 provides for a petition and notice of hearing to obtain an order broadening the legal capacity of the conservatee if the order is sought after the appointment of the conservator.

§ 1875. Good faith purchaser or encumbrancer of real property

Comment. Section 1875 is designed to protect innocent third parties who do not have notice of the existence of the conservatorship and the resulting incapacity of the conservatee. Nothing in Section 1875 validates a transaction that is invalid under Section 38 of the Civil Code or prevents rescission of a transaction under Section 39 of the Civil Code if the conservatee would lack legal capacity for the transaction absent the establishment of the conservatorship. See Section 1876 and Comment thereto. The sole effect of Section 1875 is to make the limitations on the conservatee's capacity that exist under Section 1872 or under an order made under Section 1873 inapplicable to the transaction if the notice of establishment of conservatorship has not been recorded. For a comparable provision applicable to community or homestead property, see Section 3074.

§ 1876. Applicability of other governing law

Comment. Section 1876 is included to ensure that the provisions of this article relating to the power of the conservatee to affect the conservatorship estate are not construed as the exclusive rules by which the validity of any transaction entered into by the conservatee is measured. For a comparable provision, see Com. Code § 1103 (supplementary general principles of law applicable). The ability of the conservatee to obligate the estate for such transactions as may be specified by court order pursuant to Section 1873, for example, is subject to the limitation that such a transaction may be void or voidable due to the lack of contractual capacity of the conservatee under Civil Code Section 38 or 39.

§ 1890. Time of making an order concerning capacity of conservatee to consent to medical treatment

Comment. Section 1890 permits orders under Section 1880 to be made at the time the conservatorship is established or at a subsequent time. There is no right to a jury trial in connection with an order under this article. See Section 1452.

§ 1891. Petition for order

Comment. Sections 1891 to 1896 adapt the procedure for appointment of a conservator to the situation where an order affecting the capacity of the conservatee to give informed consent to medical treatment is sought apart from the appointment of a conservator. Sections 1891 to 1896 do not, however, grant the right to a jury trial on the issue.

§ 1897. Duration of order

Comment. Section 1897 is new. For authority to make an order limited in duration, see Section 1896. For modification or revocation of the order, see Section 1898. For termination of the conservatorship, see Chapter 3 (commencing with Section 1860).

§ 1898. Modification or revocation of orders

Comment. Section 1898 makes clear that the court may modify or revoke an order relating to capacity of the conservatee to give informed consent to medical treatment.

§ 1900. Effect of appointment of conservator

Comment. Section 1900 is new. Under prior law, the court could adjudicate the conservatee to be incompetent to make binding contracts by providing in the order of appointment of a conservator that the conservatee was a person "for whom a guardian could be appointed." See *Board of Regents State Univs. v. Davis*, 14 Cal.3d 33, 38 n.6, 43, 533 P.2d 1047, 1051 n.6, 1054, 120 Cal. Rptr. 407, 411 n.6, 414 (1975). If such an adjudication was made, the conservatee may also have lacked capacity to marry, and any marriage attempted by the conservatee after such an adjudication may have been subject to annulment by the conservator. See *W. Johnstone & G. Zillgitt, California Conservatorships* §§ 1.28-1.29, at 14-16 (Cal. Cont. Ed. Bar 1968). Section 1900 eliminates the uncertainty under prior law by

making clear that the appointment of a conservator under the Probate Code does not deprive the conservatee of the capacity to marry. *Cf.* Conservatorship of Roulet, 23 Cal.3d 219, 228, 590 P.2d 1, 6, 152 Cal. Rptr. 425, 430 (1979) (one found to be gravely disabled under Lanterman-Petris-Short Act faces “possible loss” of right to marry). Whether the conservatee has the capacity to marry is to be determined by the rules of law that would be applicable had no conservatorship been established. See also Section 1901 (court determination of conservatee’s capacity to marry).

§ 1901. Court determination of conservatee’s capacity to marry

Comment. Section 1901 is new. Under prior law, a conservator in doubt about the conservatee’s capacity to marry could seek instructions from the court under former Section 1860. See *W. Johnstone & G. Zillgitt, California Conservatorships* § 1.28, at 15 (Cal. Cont. Ed. Bar 1968). Section 1901 continues the authority of the court to determine the conservatee’s capacity to marry and provides necessary procedural detail. As to procedures available after the conservatee marries, see Civil Code §§ 4212 (action to test validity of marriage), 4400-4457 (proceeding to have marriage adjudged a nullity). Under Civil Code Section 4426, the conservator is authorized to commence annulment proceedings.

§ 1910. Disqualification from voting

Comment. Section 1910 continues the substance of a portion of the first sentence of former Section 1462.

§ 2103. Effect of court authorization, approval, or confirmation

Comment. Section 2103 is based on former Section 2103 (conservatorship) except that new Section 2103 applies to inaction approved by the court as well as to action. See also Conservatorship of Harvey, 3 Cal.3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970) (protection extended to the conservator’s attorney). New Section 2103 supersedes former Section 1557.2 (guardianship) which applied only to orders authorizing purchases of real estate or investments.

Section 2103 adopts the rule that—except in the cases described in subdivision (b)—the rule of finality applies to an order settling an intermediate account. This changes the rule of former guardianship law pursuant to which an order settling an intermediate account could be reopened and reexamined under some circumstances at the behest of the ward. See, *e.g.*, *In re Estate of DiCarlo*, 3 Cal.2d 225, 44 P.2d 562 (1935); *Estate of Joslin*, 165 Cal. App.2d 330, 332 P.2d 151 (1958). The rule under former conservatorship law was unclear. *W. Johnstone & G. Zillgitt, California Conservatorships* § 2.19, at 39 (Cal. Cont. Ed. Bar 1968). Under subdivision (b), however, the guardian or conservator is not released from liability for transactions which are not fully disclosed to the court.

§ 2111. Transfer or conveyance of property pursuant to court order

Comment. Section 2111 generalizes provisions applicable to executors or administrators that were incorporated by reference and made applicable to guardianship and conservatorship proceedings under prior law.

Subdivisions (a), (b), and (c) are drawn from portions of Sections 786 (sales of real property), 832-833 (borrowing money), and 843 (leases). These provisions were made applicable to guardianship and conservatorship proceedings by former Sections 1534 (sales), 1538 (borrowing money, leases), and 1852 (conservatorship). A similar provision was also found in former Section 1530a (compromises).

Subdivision (d) is drawn from portions of Sections 786 (sales of real property), 834 (borrowing money), 843 (leases), and 853 (conveyance to complete contract or to satisfy adverse claim). Like Section 853, but unlike Section 786 (conveyance passes all estate of decedent prior to sale) or former Section 1530a (guardian's conveyance pursuant to compromise passes ward's estate at time of conveyance), subdivision (d) permits the guardian or conservator to convey or transfer the title, right, or interest to the same extent as it might have been conveyed or transferred by a person having legal capacity for the transaction. Thus, for example, in a proceeding under Sections 2520-2528, the court might order the guardian or conservator to execute a quitclaim deed to remove a cloud on the petitioner's property or the court might direct a conveyance of real property to complete a contract and order the guardian or conservator to execute a grant deed which will pass after-acquired title. See generally 3 B.

Witkin, Summary of California Law *Real Property* §§ 86, 160, at 1840, 1900-01 (8th ed. 1973).

§ 2201. Venue for residents

Comment. Section 2201 supersedes portions of former Sections 1440(a) (county in which minor resides or is temporarily domiciled), 1460 (any county in which application for guardianship of incompetent is made), and 2051 (county in which proposed conservatee resides). Subdivision (b) is new and permits the court, for example, to determine that the venue is proper even though the place of residence is in dispute. See *Hillman v. Stults*, 263 Cal. App.2d 848, 871-72, 70 Cal. Rptr. 295, 309 (1968); *Guardianship of Smith*, 147 Cal. App.2d 686, 306 P.2d 86 (1957). This avoids the need to litigate the issue of residence if the court determines that continuance of the proceeding in the county where filed is in the best interests of the ward or conservatee.

Section 2201 does not apply to a petition filed under Section 7284 of the Welfare and Institutions Code (State Department of Mental Health may petition in any county).

§ 2255. Inventory and appraisal of estate

Comment. Section 2255 continues the substance of former Sections 1643 (special guardian) and 2204 (temporary conservator) except that “within 90 days after the appointment” has been substituted for the former time limit which was three months from the entry of the order of appointment. This change conforms Section 2255 to Section 2610. See also Section 2633 (termination of relationship before filing of inventory).

§ 2321. Waiver of bond by conservatee

Comment. Section 2321 continues the first sentence of former Section 1802 except that the former requirement that the conservatee “as petitioner” waive the bond has not been continued. Under Section 2321, the conservatee may waive the bond, for example, in a prior nomination of the conservator, in the petition, or at the court hearing. The provision of Section 2321 allowing the court to reduce rather than to dispense with bond is new.

§ 2323. Small estate

Comment. Section 2323 is based on former Section 1480.3 but the former provision is expanded to cover the estate of a conservatee as well as the estate of a minor and to cover a small estate, regardless of whether consisting in its entirety of public benefit payments. See the Comment to Section 2628.

§ 2351. Care, custody, control, and education

Comment. The provision of subdivision (a) of Section 2351 for care, custody, and control continues provisions found in the first sentence of former Sections 1500 (guardianship) and 1851 (conservatorship), respectively. The words "and control" were contained in former Section 1851 but not in former Section 1500. The generalization of these words to apply to guardianships as well as to conservatorships makes no substantive change. See W. Johnstone & G. Zillgitt, *California Conservatorships* § 5.3, at 152-53 (Cal. Cont. Ed. Bar 1968).

The provision of subdivision (a) concerning the education of the ward or conservatee extends to conservators the provision of the second sentence of former Section 1500 which applied only to guardians. This extension makes clear that a conservator of the person is authorized to provide for the education of a married minor subject to conservatorship as well as of a conservatee over the age of 18.

Subdivisions (b) and (c) are new and give the court flexibility to fashion an order appropriate to the circumstances of the particular conservatee. Subdivision (b) has been added because the broad power given the conservator under subdivision (a) often will be more than is required, for example, where the conservator is appointed on a voluntary petition of a developmentally disabled adult and because subdivision (b) gives the court authority that may be useful in other types of cases where a voluntary or involuntary conservatorship is established. Under subdivision (b), for example, the court has discretion to make an order allowing the conservatee to fix his or her own residence or to make decisions concerning his or her own education.

§ 2352. Residence of ward or conservatee

Comment. Subdivision (a) of Section 2352 continues the substance of the third sentence of former Section 1500 and the last portion of the first sentence of former Section 1851. Subdivision (b) is new. Subdivision (c) supersedes subdivision (c) of former Section 1500 and subdivision (b) of former Section 1851. The word “residence” replaces the phrase “residence and domicile” which appeared in the former provisions. For the purposes of Section 2352, “residence” means domicile. The exception provided in subdivision (d) is new and conforms to subdivision (b) of Section 2351.

§ 2353. Medical treatment of ward

Comment. Section 2353 is new and is designed to provide clear guidelines as to the authority of the guardian to consent to and to require the ward to receive medical treatment.

Subdivisions (b) and (c) are drawn from a somewhat similar provision found in Section 5358 of the Welfare and Institutions Code (Lanterman-Petris-Short Act). See also *In re Roger S.*, 19 Cal.3d 921, 931, 569 P.2d 1286, 1292, 141 Cal. Rptr. 298, 304 (1977) (minor over 14 has independent right to assert protections of due process clause).

The immunity from liability provided by the second sentence of subdivision (c) does not extend to malpractice; the immunity goes only to the failure to obtain consent of the patient (the ward) to the surgery.

Subdivision (d) makes clear that Section 2353 does not override such provisions as Civil Code Sections 25.5 (blood donation by minor), 25.7 (minor on active duty with armed services), 34.5 (surgical care related to prevention or treatment of pregnancy), 34.6 (minor living apart from parent or guardian), 34.7 (surgical care related to diagnosis or treatment of contagious disease), 34.8 (surgical care related to diagnosis or treatment of rape victim), 34.9 (surgical care related to diagnosis and treatment of victim of sexual assault). Also, nothing in Section 2353 or elsewhere in this chapter overrides state quarantine regulations. See, *e.g.*, Health & Safety Code §§ 3050-3053.

Section 2353 does not deal with the question of what constitutes informed consent for the purpose of medical treatment. Concerning informed consent, see the Comment to Section 2354.

Unless the court otherwise orders, a temporary guardian of the person has the powers and duties conferred by Section 2353. See Section 2252.

§ 2401. Duty to manage estate using ordinary care and diligence

Comment. Section 2401 supplements the provision of Section 2101 that the relationship of guardian and ward and conservator and conservatee is subject to the law relating to trusts. The standard stated in subdivision (a) of Section 2401 is consistent with trust principles but recognizes specifically that what is ordinary care and diligence varies with the circumstances of each case. See Civil Code § 2259 (duty of trustee to use at least ordinary care and diligence in the execution of the trust). In determining what constitutes ordinary care and diligence a professional guardian or conservator (such as a trust company or the trust department of a bank) will be held to a greater standard of care based on its presumed expertise than a lay guardian or conservator. *Cf. Estate of Beach*, 15 Cal.3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (executor). Section 2401 applies to all powers and duties of the guardian or conservator, whether or not prior court authorization is required. But see Section 2103 (effect of court authorization or approval).

The duty of management and control stated in subdivision (a) requires that the conservator act diligently in marshaling, taking possession of, and making an inventory of the conservatee's assets. This obligation is imposed on the conservator whether or not the court makes an order under Section 1873 authorizing the conservatee to enter into certain kinds of transactions. As to community property, see Section 3051.

Subdivision (b) of Section 2401 makes clear that ordinary care and diligence may require that the guardian or conservator exercise a power. For example, the guardian or conservator may fail to exercise ordinary care and diligence under the circumstances of the particular estate if the guardian or conservator fails to secure insurance to cover the risk of loss of property of the estate. At the same time, subdivision (b) also makes clear that the extent to which a power should be exercised is limited to what is required by the exercise of ordinary care and diligence under all the circumstances. Thus, for example, in purchasing insurance covering the estate property, the guardian or conservator should not purchase an amount in excess of the

amount that would be purchased using ordinary care and diligence in the management and control of the estate. See also the discussion in the Comment to Section 2451 (collection of debts).

Section 2401 supersedes the portion of the first sentence of former Section 1502 which required every guardian of an estate to manage it frugally and without waste.

§ 2423. Payment of surplus income to relatives of conservatee

Comment. Section 2423 continues the substance of former Sections 1558 and 1856 except that “next of kin” has been changed to the spouse and relatives within the second degree. The meaning of the former terminology was ambiguous. See W. Johnstone & G. Zillgitt, *California Conservatorships* § 5.33, at 181 (Cal. Cont. Ed. Bar 1968). The right to file a petition is extended to include the conservatee, and the reference to the education of the conservatee is added to conform to Section 2420. Section 2423 also makes clear that income is not “surplus” if needed for those legally entitled to support from the conservatee.

Unlike other powers and duties in this chapter, the provisions of Section 2423 apply only to conservatorships and not to guardianships.

The second sentence of subdivision (a)—authorizing the court in making allowances to impose conditions if the court finds that the conservatee would have imposed them if the conservatee had the capacity to act—continues prior case law. See *Guardianship of Hudelson*, 18 Cal.2d 401, 115 P.2d 805 (1941). See also Sections 2580-2585 (substituted judgment) which permit gifts to persons other than the spouse and relatives and gifts of principal as well as income.

§ 2430. Payment of debts and expenses generally

Comment. Section 2430 is adapted from portions of former Sections 1501, 1501a, and 1858. The priorities given under paragraphs (1) and (2) of subdivision (a) to debts incurred before creation of the guardianship or conservatorship and to debts for necessities incurred after such creation are derived from former Section 1858.

Paragraph (1) does not include the requirement of former Section 1501 that the debts of the ward be “just.” The meaning of “just” in this context was not clear. *Compare* *Estate of Cross*,

51 Cal. App.3d 80, 86, 123 Cal. Rptr. 825, 829 (1975) ("justly due" as used in Probate Code Section 929 means unquestionably owing), *with* W. Johnstone & G. Zillgitt, California Conservatorships § 5.22, at 171 (Cal. Cont. Ed. Bar 1968) ("lawfully due and payable" as used in Probate Code Section 1859 appears to have more restricted meaning than "justly due and payable"). The reference to "debts incurred by the ward or conservatee" refers to legally enforceable debts.

The requirement of paragraph (2) that debts incurred for necessities incurred after creation be paid "to the extent the debt is reasonable" is new. Thus, the guardian or conservator may refuse to pay a debt for necessities to the extent the debt is unreasonable in amount.

Paragraph (3) is based on the third sentence of former Section 1858 but recognizes the new provisions dealing with the conservatee's power to contract. See Sections 1872 and 1873.

Paragraph (4) supersedes the last portion of the second sentence of former Section 1858. This provision is generalized to apply to guardianships as well as to conservatorships. The requirement of court authorization for payment of compensation is new and is consistent with former Sections 1556 and 1556.1. See generally Sections 2640-2642 (order fixing compensation for guardian, conservator, or attorney), 2643 (order authorizing periodic payments of compensation to guardian, conservator, or attorney).

Subdivision (b) is based on the last portion of the first sentence of former Section 1858. See also former Section 1501a (last sentence).

Subdivision (c) continues the substance of the fourth sentence of former Section 1858 (conservatorship) and extends this provision to guardianships as well as conservatorships. As to the compensation of the guardian or conservator and the attorney when court instructions are sought, see the Comment to Section 2640.

§ 2431. Priority for wage claims

Comment. Section 2431 is based on former Section 1501a. The section is restated to clarify the provisions concerning priority and proration of payments. The balance of the wage claim not given priority under Section 2431 would be payable under subdivision (a)(1) of Section 2430. Nothing in Section 2431 requires the guardian or conservator to obtain court

authorization before making the payments required by the section.

§ 2522. Continuance for preparation for hearing

Comment. Sections 2522, 2523, and 2524 are the same in substance as the sixth, seventh, and eighth sentences of Section 851.5 (decedent's estate), but the provisions are expanded in Sections 2522, 2523, and 2524 to cover the case where an order is requested to authorize or require a conveyance or transfer to complete a contract. See Section 2520. Former Sections 1537.5 and 1852 made these provisions of Section 851.5 applicable to guardianship and conservatorship proceedings.

§ 2525. Abatement of petition if civil action pending

Comment. Section 2525 is the same in substance as the last sentence of Section 851.5 (decedent's estate) except that the language "upon request of any party to the civil action" has been added and the application of the provision is expanded to include the case where an order is requested to authorize or require a conveyance or transfer to complete a contract. See Section 2520. Former Sections 1537.5 and 1852 made the last sentence of Section 851.5 applicable to guardianship and conservatorship proceedings. See also *Richer v. Superior Court*, 63 Cal. App.3d 748, 134 Cal. Rptr. 52 (1976) (petition need not be abated where civil action has been filed for the purpose of delay).

§ 2542. Terms of sales

Comment. Section 2542 continues the substance of former Section 1532 with the following changes: (1) A reference to Sections 2544 and 2545 (sales not requiring court authorization) is added, (2) the former requirement that credit shall not exceed 20 years from the date of sale is omitted, and (3) the provision is omitted that required that the interest of the ward in the note and deed of trust or mortgage be in the same tenancy and in the same proportion as the interest of the ward in the property prior to sale. This latter provision has been omitted because it is often the case that cotenants have differing cost bases or other considerations which make it advantageous for one to sell for cash and another on deferred terms. In reviewing the transaction when it is submitted to the court for approval, the court will examine the transaction to ensure that it is fair to the ward or conservatee.

§ 2551. Borrowing money and giving security therefor

Comment. The first sentence of subdivision (a) of Section 2551 continues the substance of the first portion of former Section 1533, but a reference to Sections 2541 and 2552 has been substituted for “will benefit his ward” which appeared in former Section 1533 and the types of security that may be given have been made more specific. The second sentence of subdivision (a) is new and is comparable to Section 2547 (sales). Subdivisions (b), (c), (d), and (e) are drawn from portions of Sections 831, 832, 833, and 834, respectively. Sections 831-834 relate to borrowing money by executors or administrators, and were incorporated by reference and made applicable to guardianship and conservatorship proceedings by former Sections 1538 and 1852. Subdivision (f) continues the last sentence of former Section 1533.

§ 2553. Order authorizing lease required

Comment. Subdivision (a) of Section 2553 continues the substance of a portion of the first sentence of former Section 1538. Subdivisions (b), (c), and (d) are drawn from portions of Sections 841, 842, 842.1, and 843 (leases by executors or administrators) which were incorporated by reference and made applicable to guardianship and conservatorship proceedings by former Sections 1538 and 1852.

§ 2602. Order to file inventory or account or to show cause

Comment. Section 2602 is new. The section provides a procedure for requiring an inventory and appraisal or accounting short of removing the guardian or conservator. See also Section 2650 (removal of guardian or conservator for failure to file an inventory or to render an account within the time allowed by law or by court order).

§ 2610. Filing inventory and appraisal

Comment. Subdivision (a) of Section 2610 continues the substance of the first sentence of subdivision (a) of former Section 1550 and the first sentence of subdivision (a) of former Section 1901 except that “90 days” has been substituted for “three months” to conform to subdivision (d) of Section 2610,

and it is made clear that a petition for additional time may be made ex parte. Subdivision (b) continues the oath requirement of the third sentence of subdivision (a) of former Section 1550 and the third sentence of subdivision (a) of former Section 1901, but the language of subdivision (b) is drawn from Section 604 (estate of decedent). Subdivision (c) continues the substance of the remainder of the third sentence and the fourth sentence of subdivision (a) of former Section 1550 and the comparable portion of former Section 1901. Subdivision (d) continues the substance of subdivision (b) of former Section 1550 and subdivision (b) of former Section 1901.

§ 2628. Affidavit in lieu of accounting in case of small estate

Comment. Section 2628 is designed to reduce expense of administration of small estates. In determining whether the monthly income of the estate satisfies the small estate requirements, income from public benefit payments is excluded. These payments are: (1) state aid and medical assistance (Welf. & Inst. Code §§ 11000-15520), (2) county aid and relief to indigents (Welf. & Inst. Code §§ 17000-17410), (3) federal old age, survivors, and disability insurance benefits (42 U.S.C. §§ 401-431 (1970 & Supp. V 1976)), and (4) federal supplemental security income for the aged, blind, and disabled (42 U.S.C. §§ 1381-1383c (1970)). See *Review of Selected 1976 California Legislation*, 8 Pac. L.J. 165, 188 (1977).

§ 2633. Account where relationship terminates before filing inventory

Comment. Section 2633 is new. The section authorizes the court, for example, to dispense with an inventory and appraisement where the conservatee dies a few days after the appointment of the conservator. This will permit the court, in its discretion, to waive an inventory and permit an accounting of assets actually marshalled, thereby avoiding (1) the need to inventory estate assets—such as stocks, oil rights, or real property—where the conservator has not yet taken possession or control of the asset and (2) the resulting additional fees for the conservator and an unnecessary delay in turning matters over to the executor of the deceased conservatee.

§ 2640. Petition by guardian or conservator of estate

Comment. Section 2640 is based on the second paragraph of former Section 1556. The court may also authorize periodic payments on account to the guardian or conservator or attorney. See Section 2643.

The matter of compensation for services of the guardian or conservator and the attorney in connection with obtaining instructions from the court is left to the discretion of the court. The court has discretion, for example, whether to allow compensation where instructions are sought concerning (1) a transaction that does not require court authorization or (2) a transaction covered by a previously made order granting authority for independent exercise of powers. See, *e.g.*, Sections 2450 (right to petition for instructions concerning exercise of estate management powers), 2595 (right to petition for instructions where order granting authority for independent exercise of powers made). See also the Comment to Section 2450. The court should allow compensation where instructions are sought unless the court determines that petitioning for instructions was not reasonably necessary under the circumstances.

Notwithstanding the authority of the guardian or conservator of the estate to petition under Section 2640 for an order fixing the compensation of the guardian or conservator of the person or the attorney, the guardian or conservator of the person or the attorney may petition for such an order. See Sections 2641 (guardian or conservator of person) and 2642 (attorney). As to compensation of the guardian or conservator of the person, see the Comment to Section 2641.

§ 2660. Resignation of guardian or conservator

Comment. Section 2660 is drawn in part from Section 1125.1 (resignation of trustee) and supersedes former Section 1953 and the first portion of former Section 1582. Section 2660 continues the substance of former Section 1953 except that the resignation takes effect at such time as the court fixes rather than upon settlement of the accounts of the guardian or conservator. The court may appoint a successor to the resigning guardian or conservator after notice and hearing. See Section 2110. The court may appoint a temporary guardian or conservator if necessary. See Section 2250. The court continues to have jurisdiction for the purpose of settling the guardian's and conservator's account despite the resignation. See Section 2630.

§ 2700. Request for special notice

Comment. Subdivisions (a), (c), and (d) of Section 2700 continue the substance of former Sections 1600 and 2002, with the addition of express provision for special notice of the matters listed in paragraphs (2), (3), (10), (11), (12), (13), (16), (17), and (20) of subdivision (a) and the addition of “resignation” to paragraph (8) of subdivision (a). The provision in paragraph (7) of subdivision (a) for special notice of petitions for the purchase of real property is drawn from the third sentence of former Section 1557.1.

Paragraphs (10), (11), and (12) of subdivision (a) are specific provisions that are included within the broad scope of paragraph (6) of that subdivision but are included to make clear that special notice may be requested of petitions described in those paragraphs. The inclusion of the specific paragraphs does not limit the broad scope of paragraph (6).

The first sentence of subdivision (b) continues the substance of the first sentence of former Section 2003 and supersedes that sentence and the first clause of the first sentence of Section 1601. The second sentence of subdivision (b) is new but continues existing practice. See *W. Johnstone & G. Zillgitt, California Conservatorships* § 2.10, at 31-32 (Cal. Cont. Ed. Bar 1968). The third sentence of subdivision (b) is also new.

If a petition is one listed in Section 2700 and special notice of the petition is requested, special notice must be given under this chapter even though the particular provision under which the petition is filed permits an *ex parte* petition. See, *e.g.*, Section 2463 (authorization to commence partition action). However, if the action is taken without court authorization, no notice is required. See also the Comment to Section 2702 relating to the sale of perishable property and certain other property.

The ward, if over 14 years of age, or the conservatee may request special notice under Section 2700 and must be given such notice if requested, whether or not the court has dispensed with notice to the ward or conservatee under Section 1460.

§ 2750. Appealable orders

Comment. Section 2750 supersedes former Sections 1630 (guardianship) and 2101 (conservatorship). The introductory portion of Section 2750 and subdivisions (a), (d), and (e)

continue the substance of former Section 1630 (guardianship) with the addition of the exception in subdivision (a) (drawn from Section 2101) to make clear that an appeal may not be taken from an order granting or revoking letters of temporary guardianship or temporary conservatorship and the addition of "approving and confirming acts of a guardian or conservator" in subdivision (e). Subdivisions (b), (c), and (g) through (i) are new and are adapted from Section 1240 (estates in probate). Subdivisions (f), (j), (k), (l), (m), (n), and (o) are also new.

Section 2750 has the effect of broadening appealable orders in guardianship while narrowing appealable orders in conservatorship. See generally *Guardianship of Jacobson*, 30 Cal.2d 312, 182 P.2d 537 (1947) (order for allowance of counsel fees to guardian not appealable); *Conservatorship of Smith*, 9 Cal. App.3d 324, 88 Cal. Rptr. 119 (1970) (appeals in conservatorship limited).

§ 3002. Community property

Comment. Section 3002 gives broad scope to the meaning of "community property." For the purposes of this part, community property includes community property on which a homestead has been declared. A homestead may be declared on community real property pursuant to Civil Code Sections 1237-1238. Community property also includes business property notwithstanding the fact that a spouse now lacking legal capacity formerly had sole management and control of the business. See Civil Code § 5125(d). The property may be community property notwithstanding that title is held in some other form. *W. Johnstone & G. Zillgitt, California Conservatorships* § 4.11, at 113 (Cal. Cont. Ed. Bar 1968). See also 7 B. Witkin, *Summary of California Law Community Property* §§ 49-50, at 5140-42 (8th ed. 1974).

Even though community property in a revocable trust described in Section 5113.5 of the Civil Code remains community property, it is excluded from the provisions of this part because the trust property is administered pursuant to the trust.

§ 3053. Separate property owned by both spouses subject to homestead

Comment. Subdivision (c) of Section 3053 continues the substance of the second sentence of subdivision (c) of former Section 1435.16. Subdivisions (b) and (d) are new and are

intended to add flexibility to the administration of the property in conservatorship estates. The authority given by Section 3053 to the spouse having legal capacity, or to one or both conservators where conservators have been appointed, is limited by Section 3071 which applies in any case where joinder or consent would be required for a transaction if both spouses had legal capacity.

If both spouses have conservators, the approval of only one of the courts in which the conservatorship proceedings are pending is required under subdivision (d). However, if the other conservatorship proceeding is pending in another court, that court may order that the property not be included in that conservatorship estate (Section 3054) and, if the court so orders, subdivision (c) of Section 3053 applies. Likewise, if a spouse having legal capacity consents to inclusion of property in the conservatorship estate of the other spouse, the court in which the conservatorship proceeding is pending may order that the property not be included in the conservatorship estate. See Section 3054.

For the purposes of this section, "homestead property" does not include community property subject to a homestead. See Section 3002 and the Comment to that section.

§ 3073. Manner of joinder or consent

Comment. Section 3073 is new and requires that the joinder or consent satisfy the requirements of the statute applicable to the transaction. Civil Code Section 1242 requires in part that the instrument by which a homestead is conveyed or encumbered be "executed and acknowledged" by both spouses or that each spouse "executes and acknowledges" a separate instrument so conveying or encumbering the homestead in favor of the same party or his successor in interest. Section 1243 of the Civil Code provides in part that a homestead can be abandoned (1) by a declaration of abandonment "executed and acknowledged" by husband and wife "jointly or by separate instruments," or (2) by a "conveyance or conveyances by both spouses as provided in Section 1242." Section 5125 of the Civil Code requires "written consent" of a spouse for certain dispositions of community personal property. Section 5127 of the Civil Code requires in part that "both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered." Under

Section 3073, a spouse having legal capacity must satisfy the requirements of the statute that applies to the transaction just as if both spouses had legal capacity. If one or both spouses has a conservator, the conservator or conservators must satisfy the requirements of the statute that applies to the transaction and, in addition, subdivision (b) of Section 3073 requires that the joinder or consent refer to the court order (if one is required by Section 3072) authorizing the conservator to join in or consent to the transaction. As to requirements in connection with a conveyance of real property by a conservator and the effect of the conveyance, see Section 2111.

§ 3150. Bond

Comment. Section 3150 continues the substance of former Section 1435.9, with the addition of provisions for deposit in a court-controlled account (Section 2328) and filing a “cash bond” (Section 2331). If some of the proceeds of the transaction are payable into a conservatorship estate, Section 2334 (court may require further security on petition or on its own motion) will apply.

§ 3211. Limitations on application of part

Comment. Section 3211 is new and is comparable to Section 2356 (guardianship-conservatorship).

ASSEMBLY BILL NO. 261—REPEALED PROVISIONS

§ 1480.3 (repealed). Estate consisting entirely of public benefits

Comment. Former Section 1480.3 is superseded by Section 2323.

§ 1500 (repealed). Duration of guardianship; education of minor; residence of ward; involuntary civil mental health treatment

Comment. The first portion of the first sentence of former Section 1500 (guardian has care and custody of ward’s person) and the second sentence of that section (guardian has charge of minor’s education) are superseded by Section 2351. The portion of the first sentence which provided that the guardian has the management of the ward’s estate is continued in subdivision (a)

of Section 2401. The portion of the first sentence relating to termination of the guardian's duties is superseded by Sections 1600 and 1601. See also Section 2467. The third sentence of former Section 1500 is superseded by Section 2352.

The second paragraph of former Section 1500 is continued in subdivision (a) of Section 2356.

Subdivision (a) of former Section 1500 is not continued. The subdivision related to adults, and guardianships are no longer available for adults. See Section 1510.

Subdivision (b) of former Section 1500 is not continued. Subdivision (c) is superseded by subdivision (c) of Section 2352.

§ 1751 (repealed). Reasons for appointment

Comment. The portion of the first sentence of former Section 1751 requiring that the court be satisfied as to the need for the appointment is continued in Section 1800. The portion providing for appointment of a conservator of the person for an adult who is unable to provide for his personal needs for physical health, food, clothing, or shelter is continued in subdivision (a) of Section 1801. The portion providing for appointment of a conservator of the property for an adult who is substantially unable to manage his own financial resources or resist fraud or undue influence is continued in subdivision (b) of Section 1801. The portion providing for appointment of a conservator for an adult for whom a guardian could be appointed is superseded by Section 1872. See also Section 1873. The portion providing for appointment of a conservator for an adult who voluntarily requests the appointment and establishes good cause therefor is continued in Section 1802. The portion providing for appointment of a conservator for an "absentee" is continued in Section 1803.

The second sentence of former Section 1751 is continued in subdivision (b) of Section 1801. The third sentence of former Section 1751 is continued in subdivision (a) of Section 2105.

§ 1754 (repealed). Petition to appoint conservator; contents

Comment. The first sentence of former Section 1754 is superseded by subdivision (a) of Section 1820 and by subdivision (a) of Section 1821. The requirement that the petition be verified is continued in Section 1450.

The second sentence of former Section 1754 is continued in subdivision (b) of Section 1821. The third sentence is superseded by Section 1451. The fourth sentence is superseded by subdivisions (a) and (b) of Section 1822 and by Section 1842. The fifth sentence is continued in Section 1842.

The second paragraph of former Section 1754 is superseded by Section 1823. The first sentence of the third paragraph is superseded by Section 1824. The second sentence of the third paragraph is continued in Section 1843.

The first four sentences of the fourth paragraph are continued in Section 1825. The last sentence of the fourth paragraph is superseded by Section 1844.

The portion of the fifth paragraph requiring the court to appoint the court investigator is continued in Section 1454.

The remainder of the fifth paragraph and the sixth paragraph are continued in Section 1826.

The seventh paragraph is superseded by Section 1454.

The first sentence of the eighth paragraph is superseded by subdivisions (c) and (d) of Section 1822. See the Comment to that section. The last sentence of the eighth paragraph is continued in Section 1829.

§ 1851 (repealed). Extent of care and control; place of residence of conservatee; involuntary civil mental health treatment

Comment. The first portion of the first sentence of former Section 1851 is superseded by Section 2351. The last portion of the first sentence is superseded by subdivision (a) of Section 2352. The second paragraph is continued in subdivision (a) of Section 2356.

Subdivision (a) of former Section 1851 is not continued. Subdivision (b) is superseded by subdivision (c) of Section 2352.

§ 1901 (repealed). Filing inventory and appraisal; subsequently discovered property

Comment. The first sentence of subdivision (a) of former Section 1901 is superseded by subdivision (a) of Section 2610. The second sentence is superseded by Section 2612. The substance of the first portion of the third sentence (conservator shall make oath to the inventory) is continued in subdivision (b) of Section 2610. The remainder of the third sentence and all of the fourth sentence are continued in subdivision (c) of Section 2610. The fifth sentence is superseded by Section 2611. The sixth sentence is continued in Section 2613.

Subdivision (b) of former Section 1901 is continued in subdivision (d) of Section 2610.

ASSEMBLY BILL NO. 167**Business & Professions Code § 17919
(amended). Execution of fictitious business name
statement by representative**

Comment. Section 17919 is amended to delete the reference to a guardian of an incompetent and to substitute references to appointment of a conservator, to conservatorship, and to conservatee for the former references to "incompetency" and to an "incompetent." This conforms to the revision of guardianship-conservatorship law.

**Civil Code § 40 (amended). Incapacity of person of
unsound mind**

Comment. Section 40 is amended to conform to the new guardianship-conservatorship statute. Under the new statute, the appointment of a conservator is an adjudication that the conservatee lacks the legal capacity to bind or obligate the conservatorship estate. Prob. Code § 1872. The court may, however, broaden the conservatee's capacity after notice and hearing. Prob. Code §§ 1873-1874.

The provision relating to the presumption of legal capacity of a person discharged from an insane asylum is deleted as unnecessary. It is superseded by provisions of the Lanterman-Petris-Short Act. See, *e.g.*, Welf. & Inst. Code §§ 5331, 5368.

**Health & Safety Code § 416.7 (technical amendment).
Attendance at hearing**

Comment. Section 416.7 is amended to refer to Section 1825 of the Probate Code which replaced the Probate Code provisions formerly referred to in Section 416.7.

**Health & Safety Code § 416.9 (amended). Appointment
of Director of Developmental Services as guardian or
conservator**

Comment. Section 416.9 is amended to substitute a reference to Section 1812 of the Probate Code which replaced the Probate Code section formerly referred to in Section 416.9, to make clear that an appointment of the Director of Developmental Services as conservator does not of itself render the conservatee

incompetent, and to add the last two sentences to the section. These procedures are an exception to the rule in probate conservatorships that, unless the court orders otherwise, the appointment of a conservator renders the conservatee legally incompetent. See Prob. Code §§ 1872-1873.

Health & Safety Code § 416.14 (amended). Duties of director

Comment. Section 416.14 is amended to delete former subdivision (c) which referred to guardianship for an incompetent person and to revise new subdivision (c)—formerly subdivision (b)—to eliminate the provision that the Director of Developmental Services could be appointed conservator for a developmentally disabled person not judicially determined to be legally incompetent. A developmentally disabled person may be adjudicated to be legally incompetent in such a conservatorship proceeding. Health & Safety Code § 416.9. The former provisions for appointment of a guardian for an incompetent person (Prob. Code §§ 1460-1463) have been repealed.

The last sentence of former subdivision (b) (appointment of conservator not finding of incompetency) is preserved in Section 416.9.

Labor Code § 1700.20a (amended). Estate certificate of convenience

Comment. Section 1700.20a is amended to delete the reference to a declaration of incompetence. The provisions relating to guardianship of an incompetent person (Prob. Code §§ 1460-1463) have been repealed, and under Section 1700.20a the appointment of a conservator of the estate invokes the section.

Probate Code § 202 (amended). Administration of community property

Comment. Section 202 is amended to change the reference to conservator of the “property” to conservator of the “estate.”

**Welfare & Institutions Code § 7284 (amended).
Appointment of department as guardian, conservator,
or administrator**

Comment. Section 7284 is amended to add the references to a conservator and to substitute "superior court of any county" for "court of competent jurisdiction" to permit the department to continue its practice of filing petitions in Los Angeles County or Sacramento County.

APPENDIX V

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL NO. 261

[Extract from Senate Journal for July 20, 1979 (1978-1979 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill No. 261, the Senate Committee on Judiciary makes this report.

Assembly Bill No. 261 was introduced to effectuate the "Recommendation of the California Law Revision Commission Relating to Guardianship-Conservatorship Law," 14 Cal. L. Revision Comm'n Reports 501 (1978). Except for the revised comments set out below, the Law Revision Commission comments to the various sections of Assembly Bill No. 261, as revised by the Report of the Assembly Committee on Judiciary (see Assembly Journal, May 9, 1979, at 4341), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bill No. 261. The revised comments set out below also reflect the intent of the Committee in approving this bill.

ASSEMBLY BILL NO. 261—NEW PROVISIONS

§ 1460. Notice of hearings generally

Comment. Section 1460 is based on portions of Section 1200 which under prior law was incorporated and made applicable to guardianship and conservatorship proceedings by various sections. Sections 1200 and 1201 do not apply to proceedings under this division. See Section 1469 and the Comment to that section.

The 10-day notice provision of Section 1200 is increased to 15 days in Section 1460.

Absent a request for special notice, the notice requirement under prior law apparently required notice only to the guardian or conservator. Under subdivision (b) of Section 1460, notice also is required to be given to the ward (if 14 years of age or older) or the conservatee and to the spouse of the ward or conservatee (if the ward or conservatee has a spouse). Paragraph (4) of subdivision (b) provides for notice to objectors and contestants who have already appeared in the particular matter. Any interested person may receive notice of certain specified matters by filing and serving a request for special notice under Section 2700.

The provision in Section 1200 for mailing of notice to the county seat when a mailing address is not known is not carried over into Section 1460; but, where the court determines that the notice otherwise required is insufficient under the particular circumstances, the court may require under subdivision (b) of Section 1462 that further or additional notice be given.

The court may dispense with the notice required by subdivision (b) where good cause is shown. See subdivision (e). This authority will permit the court to dispense with notice, for example, where the person specified to receive the notice is in such mental or physical condition that giving the person notice would be useless or

detrimental to the person or where, after the exercise of reasonable diligence, the whereabouts of the person is unknown. The authority for the court to dispense with notice under prior law was contained in former Section 2001.

The court may for good cause shorten or lengthen the 15-day notice required by this section. Section 1462.

The posting requirement of Section 1200 that formerly applied in guardianship and conservatorship proceedings is continued in subdivision (c) of Section 1460 only in connection with certain sales. See Section 2543(c).

Subdivision (d) is included to make clear that the provisions of this section have no effect on the requirements for notice to a person who has requested special notice. Thus, although the court may have dispensed with notice to the ward or conservatee under Section 1460, the ward or conservatee may still request special notice under Chapter 10 (commencing with Section 2700) of Part 4 and is thereafter entitled to receive special notice. See Section 2700 and the Comment thereto.

Section 1460 does not deal with the effect of giving notice or the failure to receive notice. See Section 1468(b) (conclusiveness of order concerning notice) and Comment thereto. Proof of the giving of notice must be made at or before the hearing as provided in Section 1468.

§ 1462. Court may extend or shorten time for notice or require additional notice

Comment. Section 1462 supersedes a portion of former Section 2001 (conservatorship). The provision in subdivision (a) authorizing the court to shorten the time for any notice required by this division is based on Section 1005 of the Code of Civil Procedure and broadens the court's limited authority under prior law. See W. Johnstone & G. Zillgitt, *California Conservatorships* § 2.8, at 30 (Cal. Cont. Ed. Bar 1968). The time for giving the notice required by Section 1511 (notice of hearing on petition for appointment of guardian) or Section 1822 (notice of hearing on petition for appointment of conservator) may not be shortened. Where necessary, a temporary guardian or conservator of the person or estate or both may be appointed to serve pending the determination of the petition for the appointment of the guardian or conservator. See Section 2250.

Subdivision (b) continues a portion of former Section 2001, with the addition of language adapted from Section 1204. Under subdivision (b), the court may, for example, require longer notice, an additional manner of giving notice, or notice to another person. The authority of the court to require a longer period of notice is made explicit in subdivision (b). This authority was implied under former law. See W. Johnstone & G. Zillgitt, *supra*.

For provisions authorizing the court to dispense with notice in particular situations, see, e.g., Sections 1460(e) (notice of hearings generally), 1511(c) (2) (appointment of guardian of the estate only), 1862 (termination of conservatorship), 2250 (appointment of temporary guardian or conservator), 2257(b) (termination of

powers of temporary guardian or conservator), 2570(c) (investments), and 2652(b) (removal of guardian or conservator).

§ 1826. Information to proposed conservatee by court investigator; investigation and report

Comment. Section 1826 continues the substance of the fifth and sixth paragraphs of former Section 1754 with the addition of (1) a provision requiring an investigation and report if the petition alleges that the proposed conservatee is not willing to attend the hearing, and (2) a requirement that the court investigator determine and report to the court the express communications of the proposed conservatee referred to in subdivision (j) (2). These additions are necessary to implement paragraph (3) of subdivision (a) of Section 1825. Subdivision (g) is new and is drawn from former Section 1461.1 (guardianship). Subdivisions (h) and (i) are added; these provisions are necessary to implement subdivision (b) of Section 1471. Subdivision (k) is also new.

The determinations referred to in subdivisions (c), (d), and (e) are relevant to whether the proposed conservatee must be produced at the hearing. See Section 1825(a) (2), (3).

§ 2592. Petition

Comment. Section 2592 continues the substance of the first portion of former Section 1853 and the third sentence of the third paragraph of former Section 1853 but adds the requirement of the second sentence of subdivision (b). Also, former Section 1853 required notice to be given to the conservatee; under Section 1460, this requirement is continued and notice also must be given to the ward if 14 or over.

§ 2610. Filing inventory and appraisal

Comment. Subdivision (a) of Section 2610 continues the substance of the first sentence of subdivision (a) of former Section 1550 and the first sentence of subdivision (a) of former Section 1901 except that "90 days" has been substituted for "three months" to conform to subdivision (d) of Section 2610, and it is made clear that a petition for additional time may be made ex parte. Subdivision (b) continues the oath requirement of the third sentence of subdivision (a) of former Section 1550 and the third sentence of subdivision (a) of former Section 1901, but the language of subdivision (b) is drawn from Section 604 (estate of decedent). Subdivision (c) continues the substance of the remainder of the third sentence and the fourth sentence of subdivision (a) of former Section 1550 and the comparable portion of former Section 1901. Subdivision (d) continues the substance of subdivision (b) of former Section 1550 and subdivision (b) of former Section 1901, except that the appraisal by the conservator in lieu of an inheritance tax referee is made optional rather than mandatory.

ASSEMBLY BILL NO. 261—REPEALED PROVISIONS***Probate Code § 1550 (repealed)***

Comment. The first sentence of subdivision (a) of former Section 1550 is continued in subdivision (a) of Section 2610. The second sentence is superseded by Section 2612. The substance of the requirement of the third sentence that the guardian shall “make oath to the inventory” is continued in subdivision (b) of Section 2610. The remainder of the third sentence and all of the fourth sentence are continued in subdivision (c) of Section 2610. The fifth sentence is superseded by Section 2611. The sixth sentence is superseded by Section 2613.

Subdivision (b) of former Section 1550 is superseded by subdivision (d) of Section 2610.

Probate Code § 1901 (repealed)

Comment. The first sentence of subdivision (a) of former Section 1901 is superseded by subdivision (a) of Section 2610. The second sentence is superseded by Section 2612. The substance of the first portion of the third sentence (conservator shall make oath to the inventory) is continued in subdivision (b) of Section 2610. The remainder of the third sentence and all of the fourth sentence are continued in subdivision (c) of Section 2610. The fifth sentence is superseded by Section 2611. The sixth sentence is continued in Section 2613.

Subdivision (b) of former Section 1901 is superseded by subdivision (d) of Section 2610.

APPENDIX VI
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Special Assessment Liens on Property
Acquired for Public Use

September 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Special Assessment Liens on Property Acquired for Public Use*, 15 CAL. L. REVISION COMM'N REPORTS 1101 (1980).

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
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JEAN C. LOVE
WARREN M. STANTON
BON M. GREGORY
Ex Officio

September 13, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Eminent Domain Law was enacted in 1975 on recommendation of the California Law Revision Commission. Pursuant to Resolution Chapter 130 of the Statutes of 1965, the Commission has maintained a continuing review of condemnation law and procedure to determine whether any technical or substantive changes are necessary.

As a result of this continuing review, the Commission submits this recommendation to clarify the law relating to apportionment and payment of special assessments liens on property taken by eminent domain or otherwise acquired for public use. The recommended legislation is consistent with existing case law and makes clear the rule in areas not presently addressed by case law.

The Commission wishes to express its appreciation to Mr. Robert Brunsell, Mr. Charles L. Hemmings, Ms. Peggy L. McElligott, and Professor Sho Sato for their assistance in the development of this recommendation. Each is an expert in this field and each reviewed Commission materials and made suggestions useful to the Commission in the preparation of the recommendation.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

SPECIAL ASSESSMENT LIENS ON PROPERTY ACQUIRED FOR PUBLIC USE

Introduction

Property acquired for public use, whether by eminent domain or negotiated purchase, is normally encumbered by a lien for taxes and may also be encumbered by special assessment liens. The Eminent Domain Law and property taxation provisions¹ give thorough treatment to the problems of payment and apportionment of taxes on the property,² but do not treat assessment liens specifically.³

Assessment liens are sufficiently different in character from tax liens to require different treatment. Uncertainties concerning payment and apportionment of assessment liens on property acquired for public use have presented continuing problems to practitioners and the courts. These uncertainties should be resolved by statute.⁴

Nature of Special Assessment Liens⁵

Whereas property taxes are levied for support of general governmental functions, special assessments are levied for the cost of specific local improvements such as streets, sewers, irrigation, drainage, and off-street parking. Special assessments are premised upon a special benefit received by the property assessed.

¹ Code Civ. Proc. §§ 1268.410-1268.450; Rev. & Tax. Code §§ 4986-5091.

² See *Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings*, 14 Cal. L. Revision Comm'n Reports 291 (1978).

³ General treatment of liens in eminent domain is prescribed in Code of Civil Procedure Sections 1265.210-1265.240.

⁴ See, e.g., Note, *Eminent Domain: Liability for Assessments Accruing During Proceedings*, 8 Hastings L.J. 327 (1957); Letters to California Law Revision Commission from Charles L. Hemmings (March 30, 1977) and Peggy L. McElligott (February 16, 1978) (on file in the Commission's office).

⁵ This discussion is drawn from 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 22.1-22.2 (Cal. Cont. Ed. Bar 1975) and 2 H. Miller & M. Starr, *Current Law of California Real Estate* § 11:141 (rev. 1977). For a description of the California special assessment procedures under the improvement acts commonly used, see Gaines, *The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest*, 20 U.C.L.A. L. Rev. 201, 204-12 (1972).

Since 1885, the California Legislature has enacted numerous statutes relating to special taxes and assessments and to formation of assessment districts. Special assessment acts are found in the Streets and Highways, Water, and Health and Safety Codes, supplemented by Revenue and Taxation Code and Government Code provisions.⁶

Special assessments are of two general types. Fixed lien special assessments are nonrecurring and in predetermined amounts, levied at the beginning of a project; they are designed to cover the cost of acquisition and installation of a particular local improvement. Special annual assessments are recurring and indeterminate, levied for maintenance of projects and other purposes of an improvement district as well as for capital expenditures.

Special assessments may be collected in a variety of ways, depending upon the type of assessment and the statute under which it is levied. A fixed lien special assessment may be collected in a lump sum or in installments, or bonds may be issued to represent unpaid amounts. A fixed lien special assessment or a special annual assessment may be collected and enforced by the county tax collector at the same time as and as a part of annual local taxes, or it may be collected separately in the manner specified in the law governing the improvement district.

The special assessment and any bonds issued to represent the assessment are usually secured by a lien upon the real property assessed. The procedure for imposing the lien is detailed in applicable statutes or in improvement procedure codes adopted pursuant to city charters. Special assessment liens have statutory priority.⁷

Liability for Special Assessments of Property Acquired for Public Use

Two major problems have arisen concerning assessment liens on property acquired for public use:

- (1) The allocation of liability for and payment of existing liens as between condemnor and property owner.
- (2) The imposition of liens in the future on the property acquired for public use.

⁶ See, e.g., statutes enumerated in *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts*, 12 Cal. L. Revision Comm'n Reports 1001 (1974).

⁷ See Gov't Code §§ 53930-53937.

Existing liens. Like tax liens, existing assessment liens on property acquired by eminent domain are not subject to cancellation upon acquisition of the property.⁸ If the holder of an existing assessment lien is not made a party to the eminent domain proceeding, and if the lien is not discharged by payment from the award, the existing assessment lien continues unimpaired.⁹

As a part of the judgment in an eminent domain proceeding, an existing assessment lien on the property may either be paid from the award¹⁰ or be withheld from the award and later paid by the condemnor.¹¹ If such provision is not made and the lien is neither paid from the award nor withheld from the award for later payment by the condemnor, the condemnor and not the former property owner is liable for the assessment.¹²

Whether an assessment lien imposed during pendency of eminent domain proceedings is treated as an existing lien chargeable to the property owner or as a future lien on the property acquired by the condemnor depends upon the status of the proceeding at the time the lien is imposed. Generally, a lien imposed prior to entry of judgment is an existing lien against the property owner.¹³ A lien recorded after the condemnor has taken possession of the property, even though prior to judgment, is a future lien on the property acquired by the condemnor.¹⁴

Future assessments. Whether property acquired for public use remains subject to special assessments imposed after acquisition depends upon the character of the condemnor and the statute under which the assessments are imposed. Property acquired by a private condemnor¹⁵

⁸ Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970).

⁹ Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957).

¹⁰ Code Civ. Proc. § 1260.220; Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970).

¹¹ Code Civ. Proc. § 1265.220; City of Los Angeles v. Superior Court, 2 Cal.2d 138, 39 P.2d 401 (1934); People v. Cheda, 154 Cal. App.2d 531, 317 P.2d 145 (1957).

¹² Marin Municipal Water Dist. v. North Coast Water Co., 40 Cal. App. 260, 180 P. 620 (1919).

¹³ City of Los Angeles v. Superior Court, 2 Cal.2d 138, 39 P.2d 401 (1934).

¹⁴ People v. Peninsula Title Guar. Co., 47 Cal.2d 29, 301 P.2d 1 (1956).

¹⁵ Private condemnors include such entities as nonprofit colleges (Educ. Code § 94500), nonprofit hospitals (Health & Safety Code § 1260), and public utilities (Pub. Util.

remains liable for special assessments since there is neither a constitutional nor a statutory exemption from special assessments for such property.¹⁶ Property held by a public entity other than for public use also remains subject to special assessments.¹⁷ Property held by a public entity for public use, however, is not liable for special assessments unless the statutes under which the assessments are levied expressly provide therefor.¹⁸

Statutory Treatment of Special Assessment Liens

The rules discussed above that govern the liability for special assessments of property acquired for public use are found primarily in the case law. Although these rules are generally satisfactory, they should be codified so that the statutes contain a clear statement of the law. Important aspects to be codified are discussed below.

Joinder of lienholders. Ordinarily, the holder of a lien on property must be joined as a party to an eminent domain proceeding or the lien is left unimpaired.¹⁹ In contrast, a county or other taxing agency having a lien only for ad valorem property taxes need not be made a party; a collection procedure is provided regardless whether the taxing agency is a party.²⁰ Although some special assessment liens are collected by the county tax collector with ad valorem property taxes, special assessment liens are

Code §§ 610-624).

¹⁶ Cf. Cal. Const. art. XIII, § 3 (tax-exempt properties).

¹⁷ See, e.g., *Conley v. Hawley*, 2 Cal.2d 23, 25, 38 P.2d 408, 409 (1934) ("Property acquired by the state through delinquent tax sales is held by the state in its proprietary capacity and not for governmental purposes. Lands so held are subject to general assessments and other burdens not imposed upon property impressed with a public purpose."); *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck*, 216 Cal. 730, 17 P.2d 143 (1932).

¹⁸ *City of Inglewood v. County of Los Angeles*, 207 Cal. 697, 707, 280 P. 360, 365 (1929) ("[P]ublic property of a municipality, that is, property owned by such municipality and by it devoted to public use, is liable for special assessments for public improvements only in case there is a positive legislative authority therefor."); *County of Santa Barbara v. City of Santa Barbara*, 59 Cal. App.3d 364, 130 Cal. Rptr. 615 (1976); *City of Pasadena v. Chamberlain*, 1 Cal. App.2d 125, 133, 36 P.2d 387, 390 (1934) ("The true and fundamental reason why the property remains subject to the assessments levied against it until paid, even though the city enters and devotes the land to public use, lies in the fact that the improvement acts cited expressly subject the land within the district to the assessments levied to pay installments due on improvement bonds.").

¹⁹ See Code Civ. Proc. § 1250.220 and Comment thereto.

²⁰ Code Civ. Proc. § 1250.250.

treated as general liens, rather than as liens for ad valorem property taxes, for purposes of joinder and payment in the eminent domain proceeding.²¹ The statute should make this rule clear.²²

Payment of fixed lien special assessments. General liens on property acquired by eminent domain may be either paid from the award to the lienholder²³ or withheld from the award by the condemnor and paid to the lienholder when due.²⁴ Case law has applied the same rules to special assessment liens. This treatment is appropriate for fixed lien special assessments, which are imposed for a particular capital improvement and thus are comparable to general liens on the property. The statute should make clear that the amount of the lien of a fixed lien special assessment may either be paid to the lienholder or held for payment as the obligation of the lien comes due.²⁵

Payment of special annual assessments. Special annual assessments are levied for maintenance and other purposes of the assessing entity as well as for capital expenditures. These assessments are more comparable to tax liens than general liens. Accordingly, it is appropriate that special annual assessments be treated in the same manner as tax liens in an eminent domain proceeding, and that their obligation be apportioned between property owner and condemnor on the basis of the time of acquisition of the property. The amount apportioned to the property owner should be paid from the award. The amount apportioned to the condemnor should be the responsibility of the condemnor, for which the property remains as security. Whether the amount apportioned to the condemnor is subject to cancellation will depend on the particular

²¹ See, e.g., *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957).

²² The statute should also enable the assessment lienholder to certify relevant information to the court concerning the amounts due and to become due on the lien, rather than filing an answer. This is comparable to the handling of tax liens on the property. See Code Civ. Proc. § 1260.250.

²³ Code Civ. Proc. § 1260.220.

²⁴ Code Civ. Proc. § 1265.220.

²⁵ It may be advantageous to the condemnor to permit the lien to remain on the property and withhold an amount from the award sufficient to pay off the obligation of the lien as it comes due. This option is available to the condemnor in the case of a general lien and should be available in the case of a fixed lien special assessment as well.

condemnor and the particular statute under which the assessment is levied.²⁶

Allocation of award to lienholder in partial taking. Where there is a partial taking by eminent domain of property subject to an assessment lien, the question arises whether the lien should be paid off in whole, transferred to the remainder in whole, or allocated in some manner between the part taken and the remainder. Since the lien of a fixed lien special assessment will usually secure bonds, it is essential that any allocation not impair the security of the portion of the lien not paid off. The rule for general liens on property in a partial taking is that the lienholder shares in the award to the extent determined by the court to be necessary to prevent an impairment of the security, and the lien continues on the remainder as security for the unpaid portion of the indebtedness.²⁷ This provision is appropriate for fixed lien special assessments as well, and it should be made expressly applicable to them. A provision should also be added to permit the holder of such a lien to invoke any applicable statutory procedures for segregation and apportionment of the lien.²⁸ The lien of a special annual assessment, on the other hand, being in the nature of a tax lien, should be apportioned between the part taken and the remainder on the same basis as that used for the original assessment. This will preserve the lien without impairing the security.

Acquisitions other than by eminent domain. The rules governing payment and apportionment of special assessment liens on property acquired by eminent domain are not easily applied when there is an acquisition by a public entity by negotiated purchase. There is no court involved to apportion the obligation, determine whether there is an impairment of security, or ensure that the lienholder receives appropriate amounts out of the purchase price. The statute should not attempt to regulate the payment and apportionment of special assessment liens

²⁶ This recommendation does not address the general problem of public property being removed from the assessment rolls of a special district.

²⁷ Code Civ. Proc. § 1265.225.

²⁸ See, e.g., Sts. & Hy. Code §§ 6480-6488 (Improvement Act of 1911), 8730-8734 (Improvement Bond Act of 1915), 8740-8740.5 (Improvement Bond Act of 1915).

in acquisitions other than by eminent domain, but should leave it to the parties to see that the liens are paid or apportioned pursuant to any applicable statutory procedures. A procedure for segregation and apportionment of liens should be provided for cases for which there is no other applicable statutory procedure. The statute should make clear that, to the extent this is not done, the property acquired by the public entity remains encumbered by the liens and the liens remain fully enforceable against the acquiring entity.

Proposed Legislation

The Law Revision Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 1250.250 of, and to add Section 1265.250 to, the Code of Civil Procedure, and to add Article 13.5 (commencing with Section 53938) to Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code, relating to special assessment liens and bonds on property acquired for public use.

The people of the State of California do enact as follows:

Code of Civil Procedure § 1250.250 (amended)

SECTION 1. Section 1250.250 of the Code of Civil Procedure is amended to read:

1250.250. (a) If the only interest of the county or other taxing agency in the property described in the complaint is a lien for ad valorem taxes, the county or other taxing agency need not be named as a defendant.

(b) *The holder of a lien that secures a special assessment or a bond representing the special assessment shall be named as a defendant, regardless of the nature of the special assessment and the manner of collection of the special assessment. The holder of the lien may instead of an answer certify to the court on or before the date set for trial all of the following information:*

- (1) A complete description of the lien.*
- (2) A description of the property encumbered by the lien.*
- (3) The amount remaining due on the lien as of the date of the certificate.*
- (4) The date upon which each installment payable on the lien is due, and the amount of each installment.*

Comment. Subdivision (b) is added to Section 1250.250 to ensure that special assessment and bond lienholders are included in the eminent domain proceeding, just as general lienholders are. A special assessment lienholder must be joined even though the lien may secure a special annual assessment and may be collectible with ad valorem taxes by the county tax collector. Failure to join a lienholder leaves the lien unimpaired. This codifies existing law. See Section 1250.220 and Comment thereto. The names and addresses of persons upon whom service may be made in the name of special assessment lienholders may be obtained from the "Roster of Public Agencies." See Gov't Code § 53051.

The procedure in subdivision (b) for certification of relevant information to the court in lieu of an answer is comparable to the procedure for tax liens. See Section 1260.250.

For payment of special assessment liens, see Section 1265.250.

Code of Civil Procedure § 1265.250 (added)

SEC. 2. Section 1265.250 is added to the Code of Civil Procedure, to read:

1265.250. (a) As used in this section:

(1) "Fixed lien special assessment" means a nonrecurring assessment levied on property in a fixed amount by a local public entity for the capital expenditure for a specific improvement, whether collectible in a lump sum or in installments.

(2) "Special annual assessment" means a recurring assessment levied on property annually in an indeterminate amount by a local public entity, whether for the capital expenditure for a specific improvement or for other purposes.

(b) If property acquired by eminent domain is encumbered by the lien of a fixed lien special assessment or of a bond representing the fixed lien special assessment:

(1) The amount of the lien shall be paid to the lienholder from the award or withheld from the award for payment pursuant to Section 1265.220.

(2) Where there is a partial taking of the property, the amount of the lien prescribed in Section 1265.225 shall be paid to the lienholder from the award, or at the option of the lienholder the applicable statutory procedure, if any, for segregation and apportionment of the lien may be invoked and the amount apportioned to the part taken shall be paid to the lienholder from the award.

(c) If property acquired by eminent domain is encumbered by the lien of a special annual assessment:

(1) The amount of the lien prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code, shall be paid to the lienholder from the award. As between the plaintiff and defendant, the plaintiff is liable for the amount of the lien prorated from and including the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code.

(2) Where there is a partial taking of the property, the amount of the lien, reduced by the amount for which the plaintiff is liable pursuant to this paragraph, shall be paid to the lienholder from the award. As between the plaintiff and defendant, the plaintiff is liable for the amount of the lien allocable to the part taken for the current assessment year, determined to the extent practicable in the same manner and by the same method as the amount of the assessment on the property for the current assessment year was determined, prorated from and including the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code.

Comment. Section 1265.250 clarifies the rules for payment of special assessment liens on property acquired by eminent domain, regardless whether the assessments or bonds secured by the liens are collected by the county tax collector along with ad valorem taxes or in some other manner. *Cf.* Section 1260.250 (determination and payment of property taxes). The lienholder must be made a party to the proceeding. See Section 1250.250. Priority of special assessment liens is governed by Sections 53930-53937 of the Government Code.

Subdivision (b) governs fixed lien special assessments, which are levied for the cost of acquisition and installation of a particular local improvement, and are the responsibility of the property owner. Under subdivision (b) (1) the amount of the lien must be either paid wholly from the award or at the plaintiff's option deducted from the award and paid by the plaintiff as the obligation comes due. This codifies existing law. See Sections 1260.220 and 1265.220; *Redevelopment Agency v. Penzner*, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970); *City of Los Angeles v. Superior Court*, 2 Cal.2d 138, 39 P.2d 401 (1934); *People v. Cheda*, 154 Cal. App.2d 531, 317 P.2d 145 (1957). In case of a partial taking, the lien is paid from the award only to the extent necessary to prevent an impairment of the security, and the obligation of the lien remains on the property owner. This also codifies existing law. See Section 1265.225. A provision is added to subdivision (b) (2) to permit a lienholder to invoke any applicable statutory procedure for segregation and apportionment of the lien. See, *e.g.*, Sts. & Hy. Code §§ 6480-6488 (Improvement Act of 1911), 8730-8734 (Improvement Bond Act of 1915), 8740-8740.5 (Improvement Bond Act of 1915).

Subdivision (c) governs special annual assessments, which are levied for maintenance of improvements and other general purposes of the assessing entity as well as capital expenditures. These assessments are comparable to taxes, and their obligation is apportioned between property owner and condemnor in the same manner as taxes. *Cf.* Sections 1260.250 (determination and payment of property taxes) and 1268.410 (liability for taxes). The amount apportioned to the condemnor under subdivision (c) may or may not be subject to cancellation, just as property taxes may or may not be subject to cancellation, depending upon the particular condemnor and the statute governing imposition of the assessment. See *Recommendation Relating to Special Assessment Liens on Property Acquired for Public Use*, 15 Cal. L. Revision Comm'n Reports ____ (1980).

Government Code §§ 53938-53939 (added)

SEC. 3. Article 13.5 (commencing with Section 53938) is added to Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code, to read:

Article 13.5. Payment and Apportionment of Special Assessment Liens

53938. As used in this article, "transaction" means negotiated purchase and sale, gift, or devise.

Comment. Section 53938 makes clear that the provisions of this article relating to “transactions” involve voluntary acquisitions of property and not eminent domain.

53938.5. (a) If property acquired by a public entity in a transaction is encumbered by a lien that secures a special assessment or a bond representing the special assessment, except to the extent the lien is paid out of escrow or otherwise or is apportioned pursuant to the applicable statutory procedure, the lien continues to encumber the property acquired and is enforceable against the public entity that acquired the property.

(b) If property acquired by a public entity by eminent domain is encumbered by a lien that secures a special assessment or a bond representing the special assessment, the lien shall be paid in the manner and to the extent provided in Section 1265.250 of the Code of Civil Procedure.

Comment. Section 53938.5 is new. Subdivision (a) makes clear that even though a public entity has acquired property subject to a special assessment lien, the lien continues to burden the property. The lien is enforceable by foreclosure and enforcement of the judgment to the same extent as any other lien or judgment against a public entity. This provision does not apply to the extent the lien is paid, whether out of escrow or otherwise, or to the extent the lien is apportioned between buyer and seller pursuant to an applicable statutory procedure for segregation and apportionment of the lien. See, *e.g.*, Section 53939; Sts. & Hy. Code §§ 6480-6488 (Improvement Act of 1911), 8730-8734 (Improvement Bond Act of 1915), and 8740-8740.5 (Improvement Bond Act of 1915).

Subdivision (b) cross-refers to the relevant provisions of the Eminent Domain Law in the case of property subject to a special assessment lien on property taken by eminent domain.

53939. If property acquired in a transaction is part of a larger parcel encumbered by a lien that secures a special assessment or a bond representing the special assessment and there is no applicable statutory procedure for segregation and apportionment of the lien, any party to the transaction may, within one year after completion of the transaction, apply to the superior court of the county in which the property or a portion thereof is located to, and

the court may, segregate and apportion the lien among the parties to the transaction.

Comment. Section 53939 provides authority for court segregation and apportionment of assessment liens in the absence of an applicable statutory procedure. It applies regardless whether the person acquiring the property is a public entity or other person.

APPENDIX VII
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Assignments for the Benefit of Creditors

September 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted, since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Assignments for the Benefit of Creditors*, 15 CAL. L. REVISION COMM'N REPORTS 1117 (1980).

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
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WARREN M. STANTON

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Ex Officio

September 13, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study creditors' remedies. This recommendation concerns one aspect of that topic—assignments for the benefit of creditors. The Commission recommends that the obsolete statute purporting to govern assignments for the benefit of creditors be repealed; the repeal would not affect the existing commercial practice of making common law assignments.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

An assignment for the benefit of creditors is a business liquidation device available as an alternative to bankruptcy. Its use is prevalent in the commercial credit community in the larger urban areas. Assignments are handled predominantly by large creditors' associations and by attorneys who specialize in the field. An assignment is most successful where there is cooperation among debtor, creditors, and assignee.¹

There is a statute that purports to govern assignments,² but the cases have upheld common law assignments not made pursuant to the statute.³ Statutory assignments are no longer made and common law assignments are now made exclusively.⁴

The Commission's investigation of common law assignments was prompted by reports of abuse,⁵ but the Commission has been informed by the major assignees in the state that they have received few, if any, complaints concerning the operation of assignments.⁶ The Commission has learned only of unverified isolated instances of problems; there does not appear to be widespread concern about or general dissatisfaction with the law among persons affected by assignments.

¹ See generally Shapiro, *Assignment for the Benefit of Creditors*, in California Remedies for Unsecured Creditors 429 (Cal. Cont. Ed. Bar 1957), and Greenfield, *Alternatives to Bankruptcy for the Business Debtor*, 51 L.A. Bar J. 135 (1975).

² Civil Code §§ 3448-3473.

³ See, e.g., *Bumb v. Bennett*, 51 Cal.2d 294, 333 P.2d 23 (1958); *Brainard v. Fitzgerald*, 3 Cal.2d 157, 44 P.2d 336 (1935).

⁴ See, e.g., 1 B. Witkin, *Summary of California Law Contracts* § 729, at 609 (8th ed. 1973).

⁵ See, e.g., Letters to the California Law Revision Commission from Sandor T. Boxer (January 12, 1978) and Hal L. Coskey (March 23, 1979) (on file in the Commission's office); see also *Recommendation Relating to the Attachment Law: Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors*, 14 Cal. L. Revision Comm'n Reports 61, 63 (1977) ("The Commission plans to make a study of the law relating to general assignments for the benefit of creditors, particularly in light of reports of abuses under existing law.").

⁶ The Commission's informants include the Credit Managers Associations of California, the San Francisco Board of Trade, the Credit Managers Association of Southern California, and David Blonder, Los Angeles lawyer.

The major assignees have indicated to the Commission that although the law governing common law assignments has shortcomings,⁷ the present law is preferable to a regulatory scheme that may render assignments more expensive or less effective and thereby destroy their usefulness as an alternative to bankruptcy.⁸ A creditor who is dissatisfied with the operation of an assignment has the remedy of bankruptcy.⁹

In view of this situation, the Commission has concluded that further legislation governing assignments is inadvisable. The existing statute, which is not used, should be repealed.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 7113.5 and 8657 of the Business and Professions Code, to repeal Title 3 (commencing with Section 3448) of Part 2 of Division 4 of the Civil Code, to amend Sections 690.60, 1204.5, and 1800 of the Code of Civil Procedure, to amend Section 12100 of the Financial Code, and to repeal Section 27292 of the Government Code, relating to assignments for the benefit of creditors.

⁷ A number of shortcomings have been identified in the literature. See, e.g., California Debt Collection Manual § 3.42, at 135 (Cal. Cont. Ed. Bar 1978); H. Marsh, Creditors' Rights in California 282-85 (1962); Comment, *Assignments for the Benefit of Creditors in California: A Proposed Revision of Ineffectual Statutory Provisions*, 6 U.C.L.A. L. Rev. 573 (1959); Keatinge, *Assignments for the Benefit of Creditors at California Law—Legal and Practical Aspects*, 25 L.A. Bar Bull. 99 (1949); Comment, *A Proposal for Strengthening the California Statute Concerning Assignments for the Benefit of Creditors*, 36 Calif. L. Rev. 586 (1948).

The problems have been alleviated somewhat by legislation in recent years. For example, under the Uniform Commercial Code, the assignee is deemed to be a lien creditor for the purposes of priority over unperfected security interests. Com. Code § 9301. Attachment liens obtained prior to the assignment may be terminated. Code Civ. Proc. §§ 493.010-493.060; see also *Recommendation Relating to Effect of New Bankruptcy Law on the Attachment Law*, published as Appendix II, *supra*. See also Code Civ. Proc. § 1800 (giving assignee rights of trustee in bankruptcy to avoid preferences).

⁸ See, e.g., Letters to the California Law Revision Commission from Richard Kaufman (November 11, 1977) and David Blonder (March 22, 1979) (on file in the Commission's office).

⁹ An assignment for the benefit of creditors is grounds for an involuntary case in bankruptcy and may be avoided by the trustee under the Bankruptcy Reform Act of 1978. See 11 U.S.C. §§ 303(h) (2) and 547(b) (Pub. L. No. 95-598). See also 11 U.S.C. § 543 (Pub. L. No. 95-598) (turnover of property held by assignee to trustee).

The people of the State of California do enact as follows:

Business & Professions Code § 7113.5 (amended)

SECTION 1. Section 7113.5 of the Business and Professions Code is amended to read:

7113.5. The avoidance or settlement by a licensee for less than their full amount of the lawful obligations of such licensee incurred as a contractor, whether by (a) composition, arrangement, or reorganization with creditors under state law, (b) composition, arrangement, or reorganization with creditors under any agreement or understanding, (c) receivership as provided in Chapter 5 (commencing at Section 564) of Title 7 of Part 2 of the Code of Civil Procedure, (d) ~~the making of an assignment for the benefit of creditors as provided in Title 3 (commencing at Section 3440) of Part 2 of Division 4 of the Civil Code, (e) common law~~ assignment for the benefit of creditors, ~~(f) (e)~~ trusteeship, or ~~(g) (f)~~ dissolution constitutes a cause for disciplinary action.

This section shall not apply to an individual settlement of the obligation of a licensee by such licensee with a creditor which is not a part of or in connection with a settlement with other creditors of such licensee.

No disciplinary action shall be commenced against a licensee for avoiding or settling in bankruptcy, or by composition, arrangement, or reorganization with creditors under federal law, the licensee's lawful obligations incurred as a contractor for less than the full amount of such obligations.

Comment. Section 7113.5 is amended to delete the distinction between common law and statutory assignments. Former Civil Code Sections 3448 through 3473, which provided for statutory assignments, are not continued. See Comment thereto.

Business & Professions Code § 8657 (amended)

SEC. 2. Section 8657 of the Business and Professions Code is amended to read:

8657. The appointment of a receiver of the property of a licensee as provided in Chapter 5 (commencing with

Section 564) of Title 7 of Part 2 of the Code of Civil Procedure, or the making of an assignment for the benefit of creditors ~~as provided in Title 3 (commencing with Section 3448) of Part 2 of Division 4 of the Civil Code~~, constitutes a cause for disciplinary action.

If a license is suspended or revoked upon the grounds set forth in this section, the registrar in his discretion may renew or reissue such license upon the condition that each contract undertaken by the licensee be separately covered by a bond or bonds conditioned upon the performance of, and the payment of labor and material required by, the contract.

Comment. Section 8657 is amended to delete the reference to former Civil Code Sections 3448 through 3473, which provided for statutory assignments and are not continued. See Comment thereto.

Civil Code §§ 3448-3473 (repealed)

SEC. 3. Title 3 (commencing with Section 3448) of Part 2 of Division 4 of the Civil Code is repealed.

Comment. Former Sections 3448 through 3473, inclusive, of the Civil Code, which governed statutory assignments for the benefit of creditors, are not continued. Common law assignments for the benefit of creditors are used to the exclusion of statutory assignments. See, *e.g.*, Shapiro, *Assignment for the Benefit of Creditors* § 1, in California Remedies for Unsecured Creditors 429 (Cal. Cont. Ed. Bar 1957); 1 B. Witkin, *Summary of California Law Contracts* § 729, at 609 (8th ed. 1973); Keatinge, *Assignments for the Benefit of Creditors at California Law—Legal and Practical Aspects*, 25 L.A. Bar Bull. 99, 109 (1949).

Code of Civil Procedure § 690.60 (amended)

SEC. 4. Section 690.60 of the Code of Civil Procedure is amended to read:

690.60. In any general assignment for the benefit of creditors (as defined in Section 493.010), ~~whether common law or otherwise~~, the assignor, if an individual, may choose to retain as exempt property either the property which is

otherwise exempt under this chapter and Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code or, in the alternative, the following property:

(a) The assignor's aggregate interest, not to exceed seven thousand five hundred dollars (\$7,500) in value, in real property or personal property that the assignor or a dependent of the assignor uses as a residence, in a cooperative that owns property that the assignor or a dependent of the assignor uses as a residence, or in a burial plot for the assignor or a dependent of the assignor.

(b) The assignor's interest, not to exceed one thousand two hundred dollars (\$1,200) in value, in one motor vehicle.

(c) The assignor's interest, not to exceed two hundred dollars (\$200) in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the assignor or a dependent of the assignor.

(d) The assignor's aggregate interest, not to exceed five hundred dollars (\$500) in value, in jewelry held primarily for the personal, family, or household use of the assignor or a dependent of the assignor.

(e) The assignor's aggregate interest, not to exceed in value four hundred dollars (\$400) plus any unused amount of the exemption provided under subdivision (a), in any property.

(f) The assignor's aggregate interest, not to exceed seven hundred fifty dollars (\$750) in value, in any implements, professional books, or tools, of the trade of the assignor or the trade of a dependent of the assignor.

(g) Any unmaturred life insurance contract owned by the assignor, other than a credit life insurance contract.

(h) The assignor's aggregate interest, not to exceed in value four thousand dollars (\$4,000) in any accrued dividend or interest under, or loan value of, any unmaturred life insurance contract owned by the assignor under which the insured is the assignor or an individual of whom the assignor is a dependent.

(i) Professionally prescribed health aids for the assignor or a dependent of the assignor.

(j) The assignor's right to receive—

(1) A social security benefit, unemployment compensation, or a local public assistance benefit;

(2) A veterans' benefit;

(3) A disability, illness, or unemployment benefit;

(4) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor;

(5) A payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor, unless—

(i) Such plan or contract was established by or under the auspices of an employer of which the assignor was a partner, officer, director or controlling person at the time the assignor's rights under such plan or contract arose;

(ii) Such payment is on account of age or length of service; and

(iii) Such plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(k) The assignor's right to receive, or property that is traceable to—

(1) An award under a crime victim's reparation law;

(2) A payment on account of the wrongful death of an individual of whom the assignor was a dependent, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor;

(3) A payment under a life insurance contract that insured the life of an individual of whom the assignor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor;

(4) A payment, not to exceed seven thousand five hundred dollars (\$7,500), on account of personal bodily injury, as compensation for pain and suffering or actual pecuniary loss (other than loss of future earnings), of the assignor or an individual of whom the assignor is a dependent; or

(5) A payment in compensation of loss of future earnings of the assignor or an individual of whom the assignor is or was a dependent, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor.

In this section, “dependent” includes spouse, whether or not actually dependent, “assignor” means each spouse, if the assignment is made by a married couple, and “value” means fair market value as of the date of the making of the assignment.

Comment. Section 690.60 is amended to delete the distinction between general assignments at common law “or otherwise.” Former Civil Code Sections 3448 through 3473, which prescribed a general assignment other than at common law, are not continued. See Comment thereto.

Code of Civil Procedure § 1204.5 (amended)

SEC. 5. Section 1204.5 of the Code of Civil Procedure is amended to read:

1204.5. In any general assignment for the benefit of creditors, ~~whether common law or otherwise,~~ the following claims shall have priority, subordinate to the priorities for labor claims under Section 1204, but prior to all other unsecured claims: allowed unsecured claims of individuals, to the extent of nine hundred dollars (\$900) for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided. The priority granted by this section shall be subordinate to that granted by Sections 18933 and 26312 of the Revenue and Taxation Code.

Comment. Section 1204.5 is amended to delete the distinction between general assignments at common law “or otherwise.” Former Civil Code Sections 3448 through 3473, which prescribed a general assignment other than at common law, are not continued. See Comment thereto.

Code of Civil Procedure § 1800 (amended)

SEC. 6. Section 1800 of the Code of Civil Procedure is amended to read:

1800. (a) In this section:

(1) The term “insolvent” means:

(A) With reference to a person other than a partnership, a financial condition such that the sum of such person’s debts is greater than all of such person’s property, at a fair valuation, exclusive of:

(i) Property transferred, concealed, or removed with intent to hinder, delay, or defraud such person’s creditors; and

(ii) Property that may be exempted from property of the estate under Chapter 1 (commencing with Section 681) of Title 9 of Part 2; and

(B) With reference to a partnership, financial condition such that the sum of such partnership’s debts are greater than the aggregate of, at a fair valuation—

(i) All of such partnership’s property, exclusive of property of the kind specified in subparagraph (A) (i); and

(ii) The sum of the excess of the value of each general partner’s separate property, exclusive of property of the kind specified in subparagraph (A) (ii), over such partner’s separate debts.

(2) The term “inventory” means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease.

(3) The term “judicial lien” means a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(4) The term “new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the assignor or the assignee under any applicable law, but does not include an obligation substituted for an existing obligation.

(5) The term "receivable" means a right to payment, whether or not such right has been earned by performance.

(6) The term "security agreement" means an agreement that creates or provides for a security interest.

(7) The term "security interest" means a lien created by an agreement.

(8) The term "statutory lien" means a lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

(9) The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest.

(b) Except as provided in subdivision (c), the assignee of any general assignment for the benefit of creditors (as defined in Section 493.010) ; ~~whether common law or otherwise~~, may recover any transfer of property of the assignor:

- (1) To or for the benefit of a creditor;
- (2) For or on account of an antecedent debt owed by the assignor before such transfer was made;
- (3) Made while the assignor was insolvent;
- (4) Made on or within 90 days before the date of the making of the assignment; and
- (5) That enables such creditor to receive more than another creditor of the same class.

(c) The assignee may not recover under this section a transfer:

- (1) To the extent that such transfer was:
 - (A) Intended by the assignor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the assignor; and
 - (B) In fact a substantially contemporaneous exchange;
- (2) To the extent that such transfer was:

(A) In payment of a debt incurred in the ordinary course of business or financial affairs of the assignor and the transferee;

(B) Made not later than 45 days after such debt was incurred;

(C) Made in the ordinary course of business or financial affairs of the assignor and the transferee; and

(D) Made according to ordinary business terms;

(3) Of a security interest in property acquired by the assignor:

(A) To the extent such security interest secures new value that was:

(i) Given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) Given by or on behalf of the secured party under such agreement;

(iii) Given to enable the assignor to acquire such property; and

(iv) In fact used by the assignor to acquire such property; and

(B) That is perfected within 10 days after such security interest attaches;

(4) To or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the assignor:

(A) Not secured by an otherwise unavoidable security interest; and

(B) On account of which new value the assignor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) Of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the making of the assignment and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of:

(A) Ninety days before the date of the making of the assignment; and

(B) The date on which new value was first given under the security agreement creating such security interest; or

(6) That is the fixing of a statutory lien.

(d) An assignee of any general assignment for the benefit of creditors (as defined in Section 493.010), ~~whether common law or otherwise~~, may avoid a transfer of property of the assignor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the assignee under subdivision (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the assignee or the amount paid to the assignee.

(e) (1) For the purposes of this section:

(A) A transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) A transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3), a transfer is made:

(A) At the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) At the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) Immediately before the date of the making of the assignment if such transfer is not perfected at the later of:

(i) The making of the assignment; and

(ii) Ten days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the assignor has acquired rights in the property transferred.

(f) For the purposes of this section, the assignor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the making of the assignment.

(g) An action by an assignee under this section must be commenced within one year after the making of the assignment.

Comment. Section 1800 is amended to delete the distinction between general assignments at common law “or otherwise.” Former Civil Code Sections 3448 through 3473, which prescribed a general assignment other than at common law, are not continued. See Comment thereto.

Financial Code § 12100 (amended)

SEC. 7. Section 12100 of the Financial Code, as amended by Section 6.5 of Chapter 1347 of the Statutes of 1978, is amended to read:

12100. The provisions of this division do not apply to any of the following:

(a) Persons or their authorized agents doing business under license and authority of the Superintendent of Banks of the State of California, or under any law of this state or of the United States relating to banks, trust companies, building or savings and loan associations, industrial loan companies, personal property brokers, credit unions, title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code), escrow agents subject to Division 6 of the Financial Code, or California small loan companies.

(b) (1) Any person which is licensed under Chapter 14A (commencing with Section 1851) of Division 1 of this code or any agent of such person when selling any travelers check (as defined in Section 1852 of this code) which is issued by such person.

(2) Any person which is licensed under Division 16 (commencing with Section 33000) of this code or any agent of such person, when selling any payment instrument (as defined in Section 33059 of this code) which is issued by such person.

(c) The services of a person licensed to practice law in this state, when such person renders services in the course of his practice as an attorney at law, and the fees and disbursements of such person whether paid by the debtor or other person, are not charges or costs and expenses regulated by or subject to the limitations of this chapter; provided, such fees and disbursements shall not be shared, directly or indirectly with the prorater, check seller or cashier.

(d) Any transaction in which money or other property is paid to a "joint control agent" for dispersal or use in payment of the cost of labor, materials, services, permits, fees, or other items of expense incurred in construction of improvements upon real property.

(e) A merchant-owned credit or creditors association, or a member-owned or member-controlled or -directed association whose principal functions is that of servicing the community as a reporting agency.

(f) Any person licensed under Chapter 1 of Part 6, Division 2 of the Labor Code, when acting in any capacity for which he is licensed under such part.

(g) Any person licensed under Part 1, Division 4, of the Business and Professions Code, when acting in any capacity for which he is licensed under that part.

(h) ~~A common law or statutory~~ An assignment for the benefit of creditors or the operation or liquidation of property or a business enterprise under supervision of a creditor's committee.

(i) The services of a person licensed as a certified public accountant or a public accountant in this state, when such person renders services in a course of his practice as a certified public accountant or a public accountant, and the fees and disbursements of such person whether paid by the debtor or other person, are not charges or costs and expenses regulated by or subject to the limitations of this chapter; provided, such fees and disbursements shall not be shared, directly or indirectly, with the prorater, check seller or cashier.

(j) Nonprofit community service organizations that are subject to the Nonprofit Public Benefit Corporation Law

(Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code) or are subject to the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) and whose membership consists exclusively of retailers, lenders in the consumer credit field, educators, attorneys, social service organizations, employers or employees organizations, and related groups, if the principal functions of such organizations are: (1) consumer credit education; (2) counseling on consumer credit problems and family budgets; and (3) arranging, and in certain cases administering, debt settlement plans, for which a charge for administrative services only may be made of 5 percent of the money disbursed monthly, or ten dollars (\$10) per month, whichever is the lesser, to offset expenses; provided essential records are kept in accordance with sound accounting practices, consumer funds are banked in a trust account and appropriate fidelity bond and insurance are maintained, that reports are made to debtors, and independent audits made; and further provided, however, that this subdivision shall exempt such organizations from this division only with respect to those activities described in Section 12002.1 and not with respect to those activities described in Section 12002.

(k) Any person licensed under Article 3 (commencing with Section 1800) of Chapter 14 of Division 1 or any agent of such person, when selling any check or draft which is drawn by such person and which is of the type described in subdivision (b) of Section 1800.5.

(l) Any group of banks each of which is organized under the laws of a nation other than the United States and one or more of which are licensed by the Superintendent of Banks of the State of California under Article 1 (commencing with Section 1750), Chapter 14, Division 1, or any agent of such group, when selling any foreign currency travelers check (as defined in Section 1852) issued by such group, provided that each bank which is a member of the group is jointly and severally liable to pay such foreign currency travelers check.

(m) Any transaction of the type described in Section 1854.1.

Comment. Section 12100 is amended to delete the distinction between common law and statutory assignments. Former Civil Code Sections 3448 through 3473, which provided for statutory assignments, are not continued. See Comment thereto.

Government Code § 27292 (repealed)

SEC. 8. Section 27292 of the Government Code is repealed.

~~27292. Transfers of property in trust for the benefit of creditors and transfers or liens on property by way of mortgage shall be recorded in the cases specified in the titles on the special relation of debtor and creditor and the chapter on mortgages, respectively, of the Civil Code.~~

Comment. Former Section 27292 is not continued. The reference to recordation of transfers in trust for the benefit of creditors is made obsolete by the repeal of Civil Code Section 3463, which required recordation. The reference to recordation of transfers or liens on property by way of mortgage is unnecessary; general provisions provide for recordation. See, *e.g.*, Section 27280 (recordation of instrument affecting title to or possession of real property); Civil Code § 1169 (instruments entitled to be recorded must be recorded).

APPENDIX VIII
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Vacation of Public Streets, Highways,
and Service Easements**

September 1979

**CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Vacation of Public Streets, Highways, and Service Easements*, 15 CAL. L. REVISION COMM'N REPORTS 1137 (1980).

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

September 13, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to the abandonment or vacation of public streets and highways by cities, counties, and the state should be revised. The Commission herewith submits its recommendation to consolidate the existing abandonment and vacation procedures into a single uniform statute.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

VACATION OF PUBLIC STREETS, HIGHWAYS, AND SERVICE EASEMENTS

The statutes providing procedures for abandoning and vacating public streets and highways are found in a number of places in the Streets and Highways Code.¹ One statute governs abandonment and vacation of city streets and a parallel but separate statute governs county highways, while a third provides summary vacation procedures for state highways.² A similar statute in the Government Code provides for abandoning and vacating public service easements.³ These provisions, while generally comparable, display unnecessary inconsistencies and divergencies.

The Commission recommends that the various abandonment and vacation provisions be repealed and be replaced by a single general statute governing vacation of all public streets, highways, and service easements. This will reduce the bulk of the statutes by about one third while providing a clear, uniform, and comprehensive procedure.

The Commission also recommends that, where an offer of dedication of property for a right of way has been made to a local agency pursuant to the Subdivision Map Act⁴ or general law⁵ but the offer of dedication has not been accepted, the local agency may terminate the offer by summary vacation proceedings. This would change existing law, which requires ordinary vacation proceedings.

Four general rules have been followed in preparing the recommended legislation:

(1) Only technical and minor substantive changes in the basic vacation procedures have been made.

(2) Where two related provisions conflict, that which

¹ See, e.g., Sts. & Hy. Code §§ 100.2, 100.23 (freeway interceptions); 835-838 (abandonment and vacation of state highways); 954-960.5 (county highways); 1930-1934 (summary vacation of city streets); 8300-8374 (Street Vacation Act of 1941).

² Compare Sts. & Hy. Code §§ 954-960.5 (county highways) with §§ 8300-8374 (city streets) and §§ 835-838 (state highways).

³ Gov't Code §§ 50430-50445 (Public Service Easements Vacation Law).

⁴ Gov't Code § 66477.2.

⁵ Gov't Code § 7050.

appears most consistent with the general scheme of the statute has been selected.

(3) Where a problem is addressed by one statute but not by others, the statute addressing the problem has been preserved.

(4) Where statutes are similar but are differently worded, the language of the more recently enacted statute has been preferred.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Sections 812 and 812.5 of the Civil Code, to amend Sections 7050 and 66477.2 of, and to repeal Article 5 (commencing with Section 50430) of Chapter 2 of Part 1 of Division 1 of Title 5 of, the Government Code, and to amend Sections 73, 954, 954.5, and 960.5 of, to repeal and add Part 3 (commencing with Section 8300) to Division 9 of, to repeal Sections 72, 72.5, 100.23, 955, 956, 956.8, 957, 957.5, 958, 959, 959.1, 960, 960.1, 960.2, 960.3, and 960.4 of, and to repeal Chapter 5 (commencing with Section 835) of Division 1 and Chapter 5 (commencing with Section 1930) of Division 2.5 of, the Streets and Highways Code, relating to vacation of public streets, highways, and service easements.

The people of the State of California do enact as follows:

**PROPOSED PUBLIC STREETS, HIGHWAYS, AND
SERVICE EASEMENTS VACATION LAW**

Streets & Highways Code §§ 8300-8363 (added)

SECTION 1. Part 3 (commencing with Section 8300) is added to Division 9 of the Streets and Highways Code, to read:

PART 3. PUBLIC STREETS, HIGHWAYS, AND SERVICE EASEMENTS VACATION LAW

CHAPTER 1. SHORT TITLE AND DEFINITIONS

§ 8300. Short title

8300. This part may be cited as the Public Streets, Highways, and Service Easements Vacation Law.

Comment. Section 8300 supersedes former Section 8300 (Street Vacation Act of 1941) and former Government Code Section 50430 (Public Service Easements Vacation Law).

§ 8301. Application of definitions

8301. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 8301 makes clear that this chapter provides special definitions applicable only to this part. For other definitions and rules of construction applicable to this part, see Sections 1-29. See also Section 8345 (“public body” defined).

§ 8302. Adoption of resolution

8302. “Adoption” of a resolution includes passage or enactment of a resolution.

Comment. Section 8302 relates to adoption of an ordinance as well as a resolution. See Section 8307 (“resolution” includes ordinance).

§ 8303. Clerk

8303. “Clerk” includes a person or officer who is clerk of a legislative body.

Comment. Section 8303 continues the substance of former Section 8303 (city streets) and former Government Code Section 50432(a) (public service easements).

§ 8304. Legislative body

8304. “Legislative body” means:

(a) In the case of a county or city and county, the board of supervisors.

(b) In the case of a city, the city council or other body which by law is the legislative body of the government of the city.

(c) In the case of the California Transportation Commission, the commission.

Comment. Section 8304 continues the substance of former Section 8302 (city streets) and broadens it to include the county board of supervisors and the California Transportation Commission. See also Gov't Code § 50002 (legislative body defined).

§ 8305. Local agency

8305. "Local agency" means county, city, or city and county.

Comment. Section 8305 is drawn from Government Code Section 50001 (local agency defined).

§ 8305.5. Public entity

8305.5. "Public entity" means local agency or the California Transportation Commission.

Comment. Section 8305.5 is new.

§ 8306. Public service easement

8306. "Public service easement" includes all or part of or any right in:

(a) A right of way, easement, or use restriction acquired for public use by dedication or otherwise for sewers, pipelines, polelines, electrical transmission and communication lines, pathways, storm drains, drainage, canal, water transmission lines, light and air, and other limited use public easements other than for street or highway purposes.

(b) An easement or right of a type described in Section 8340.

Comment. Subdivision (a) of Section 8306 continues the substance of former Government Code Section 50432(c) (public service easement), making clear that water transmission lines and other limited use public easements are included within the meaning of public service easements, as are use restrictions for such purposes. A public service easement acquired for public use by dedication may be dedicated or purportedly dedicated for

public use by a plat or map filed or recorded in the office of the county recorder.

Subdivision (b) is new. It is intended to enable use of standard vacation procedures for easements and rights of way reserved and excepted pursuant to Article 1 (commencing with Section 8340) (reservation of easements) of Chapter 5.

§ 8307. Resolution

8307. "Resolution" includes ordinance.

Comment. Section 8307 supersedes former Section 8305 (ordinance includes resolution).

§ 8308. Street; highway

8308. "Street" and "highway" include all or part of or any right in a state highway or other public highway, road, street, avenue, alley, lane, drive, way, place, court, trail, or other public right of way or easement, or purported public street or highway, and rights connected therewith, including but not limited to restrictions of access or abutters' rights, sloping easements, or other incidents to a street or highway.

Comment. Section 8308 continues the substance of former Section 8304 (city streets) and the provisions of Section 960.5 insofar as the provisions of Section 960.5 related to abandonment of county highways, and broadens them to include rights that are incidental to or immediately next to a street or highway.

§ 8309. Vacation

8309. "Vacation" is the complete or partial abandonment or termination of the public right to use a street or highway or public service easement.

Comment. Section 8309 continues the substance of former Section 8306 (city streets) and former Government Code Section 50432(b) (public service easements) and broadens them to include county highways and state highways.

CHAPTER 2. GENERAL PROVISIONS

§ 8310. Liberal construction

8310. This part shall be liberally construed in order to effectuate its purposes.

Comment. Section 8310 continues former Section 8301 (city streets).

§ 8311. Alternative procedure

8311. (a) The procedures provided in this part are alternative procedures for vacating streets, highways, and public service easements. The authority granted in this part is alternative to any other authority provided by law to public entities.

(b) The provisions of this part do not apply to or affect any other provision of this code. If proceedings are commenced under this part, the provisions of this part, and no other provisions of this code, apply to the proceedings.

Comment. Section 8311 continues the substance of the first two paragraphs of former Section 8308 (city streets) and former Government Code Section 50431 (public service easements) and broadens them to include county highways and state highways. This part is not the exclusive means by which a public entity may close a street or highway. See, *e.g.*, Sections 100.2, 941.2, 1801 (closure at freeway interception); *but see* Section 8332 (vacation in connection with closure at freeway interception). See also Section 942.5 (closure of county highway).

§ 8312. Allocation of authority between city and county

8312. Except as provided in Section 8315, pursuant to this part, a city legislative body may vacate all or part of a street, highway, or public service easement within the city and a board of supervisors may vacate all or part of a street, highway, or public service easement within the county but outside a city.

Comment. Section 8312 continues the substance of former Section 8320 (city streets) and the first paragraph of former Government Code Section 50436 (public service easements) and broadens them to include county highways. A state highway may not be vacated except by the California Transportation Commission. See Section 8315.

§ 8313. Applicability of general or master plan

8313. If the proposed vacation of a street, highway, or public service easement is within an area for which a general or master plan is adopted by a local agency, the legislative body of the public entity shall consider the general or master plan prior to vacating the street, highway, or public service easement. The legislative body may submit the proposed vacation to the local planning commission or planning agency and give the commission or agency an opportunity to report upon the proposed vacation.

Comment. Section 8313 supersedes former Government Code Section 50435 (public service easements) which required submission of the proposed vacation to the planning commission.

§ 8314. Limitation where right of way useful as nonmotorized transportation facility

8314. A street, highway, or public service easement shall not be vacated pursuant to this part except in compliance with Section 2381.

Comment. Section 8314 makes clear that a right of way may not be vacated unless the legislative body determines that the right of way is not useful as a nonmotorized transportation facility. See Section 2381.

§ 8315. Limitation on vacation of state highway

8315. A state highway may be vacated under this part only by the commission.

Comment. Section 8315 supersedes the last sentence of former Section 8308 (city streets), which appeared to permit vacation of a state highway by a city. A state highway may be vacated only by the California Transportation Commission pursuant to Section 8330.5.

§ 8316. Combined proceedings

8316. One or more streets, highways, and public service easements, whether or not contiguous, may be included and vacated in the same proceeding.

Comment. Section 8316 continues the substance of the second paragraph of former Section 8322 (city streets) and the

second paragraph of former Government Code Section 50436 (public service easements) and broadens them to include county highways and state highways.

§ 8317. Proof of publication and posting

8317. (a) Proof of publication of a notice shall be made by affidavit, pursuant to the Code of Civil Procedure. Proof of the posting of a notice shall be made by affidavit of the person posting it, reciting the facts of the posting.

(b) An officer required to have any notice published or posted shall file the affidavit in his or her office. Failure to do so does not invalidate proceedings under this part. An affidavit so filed is prima facie evidence of the facts stated in it.

Comment. Section 8317 continues the substance of former Section 8307 (city streets) and former Government Code Section 50433 (public service easements) and broadens them to include county highways.

CHAPTER 3. GENERAL VACATION PROCEDURE

§ 8320. Resolution of intention

8320. (a) The legislative body of a local agency may initiate a proceeding under this chapter by adopting a resolution of intention to vacate, which may be upon its own initiative or upon a petition or request of an interested person.

(b) The resolution of intention shall include all of the following:

(1) A declaration of the intention of the legislative body to vacate.

(2) A statement that the vacation proceeding is conducted under this chapter.

(3) A description of the general location and extent of the street, highway, or public service easement to be vacated and a reference to a map or plan which shows the portion or area to be vacated on file in the office of the local agency. In the case of a street or highway, the description shall include its lawful or official name or the name by which it is commonly known. In the case of a public service

easement, the description shall identify it with common certainty.

(4) The date, hour, and place for hearing all persons interested in the proposed vacation. The date shall be not less than 15 days from the adoption of the resolution.

(c) The resolution of intention shall be published or posted in the manner prescribed for the publication and posting of resolutions of the legislative body. The publication or posting of the resolution of intention shall be in addition to any publication of notice of hearing required by Section 8322 and the posting of notice of vacation required by Section 8323.

Comment. Subdivision (a) of Section 8320 indicates that a proceeding may be initiated by resolution. For initiating a proceeding upon petition, see Section 8321. Paragraphs (1) and (2) of subdivision (b) continue the substance of former Sections 956.8 (county highways) and 8321 (city streets) and former Government Code Section 50437 (public service easements). The remainder of subdivision (b) and subdivision (c) continue the substance of the first portion of the first paragraph of former Section 8322 (city streets) and former Government Code Section 50438 (public service easements) and broaden them to include county highways.

§ 8321. Requirement of proceedings upon petition

8321. (a) Ten or more freeholders may petition the board of supervisors to vacate a street or highway under this chapter. At least two of the petitioners shall be residents of the road district in which some part of the street or highway proposed to be vacated is situated and be taxable therein for street or highway purposes.

(b) Five or more freeholders may petition the board of supervisors to vacate a public service easement under this chapter. At least one of the petitioners shall be a resident of the township in which the public service easement proposed to be vacated is situated.

(c) The residence address of each petitioner shall be set forth in the petition.

(d) The board of supervisors may require the person filing the petition to deposit an amount reasonably

sufficient to defray the expenses of investigations, mailings, publications, and postings under this chapter. The deposit shall be made with the county officer designated by the board. Upon completion of the proceedings, any unused portion of the deposit shall be refunded to the person who filed the petition. If the costs exceed the deposit, the county shall bear the excess costs.

(e) Upon the filing of a petition and the making of the deposit, if any, required under this section, the board of supervisors, by order, shall fix the date, hour, and place of the hearing on the petition. At least two weeks before the day set for the hearing, the clerk of the board shall mail a notice of the date, hour, and place of the hearing to each of the petitioners at the address set forth in the petition.

(f) Nothing in this section affects the right of a legislative body to initiate a proceeding under this chapter upon its own initiative or upon petition or request of an interested person or prevents the board of supervisors from vacating a street, highway, or public service easement without charging costs if the board determines it is in the public interest to do so.

Comment. Subdivision (a) of Section 8321 continues the substance of former Section 957 (county highways). Subdivision (b) continues the substance of former Government Code Section 50439 (public service easements). Subdivision (c) is included to permit compliance with the mailing requirement of subdivision (e). Subdivisions (d) and (f) continue the substance of former Section 957.5 (county highways) and broaden it to include public service easements. The first sentence of subdivision (e) is drawn from provisions of former Section 958 (county highways) and former Government Code Section 50440 (public service easements). The second sentence of subdivision (e) is new.

§ 8322. Publication of notice of hearing

8322. (a) Except as provided in subdivisions (b) and (c), notice of the date, hour, and place of the hearing on the resolution of intention or petition to vacate shall be published for at least two successive weeks prior to the hearing in a daily, semiweekly, or weekly newspaper published and circulated in the local agency conducting the

proceeding and which is selected by the legislative body for that purpose or by the clerk or other officer responsible for the publication where the legislative body has not selected any newspaper for that purpose.

(b) If the proceeding is conducted by a city and there is no daily, semiweekly, or weekly newspaper published and circulated in the city, the notice shall be published in some newspaper published in the county in which such city is located.

(c) Notice need not be published under this section in either of the following cases:

(1) Where the resolution of intention is published in a newspaper pursuant to subdivision (c) of Section 8320.

(2) Where there is no daily, semiweekly, or weekly newspaper published and circulating in the county in which the local agency conducting the proceeding is located.

Comment. Section 8322 is adapted from Section 5061 (The Improvement Act of 1911) and supersedes portions of former Section 958 (county highways) and Government Code Section 50440 (public service easements) and broadens the publication requirement to include city streets.

§ 8323. Posting notice of vacation

8323. (a) At least two weeks before the day set for the hearing, the legislative body shall post conspicuously notices of vacation along the line of the street, highway, or public service easement proposed to be vacated. The notices shall be posted not more than 300 feet apart but at least three notices shall be posted. If the line of the street, highway, or public service easement proposed to be vacated exceeds one mile in length, the legislative body may, in lieu of posting not more than 300 feet apart, post notices at each intersection of the street, highway, or public service easement to be vacated with another street or highway and at one point approximately midway between each intersection, but at least three notices shall be posted.

(b) The notices shall state the day, hour, and place of hearing and shall refer to the adoption of the resolution of intention or to the filing of the petition.

(c) The notices shall describe the street, highway, or public service easement proposed to be vacated. In the case of a street or highway, the description shall include its lawful or official name or the name by which it is commonly known. In the case of a public service easement, the description shall identify it with common certainty. A map or plan showing the location of the street, highway, or public easement proposed to be vacated is sufficient compliance with this subdivision.

Comment. Section 8323 is based on and supersedes a portion of former Section 955 (county highways), a portion of the third sentence of former Section 958 (county highways), the last portion of the first paragraph of former Section 8322 (city streets), and former Government Code Section 50441 (public service easements). The last sentence of subdivision (c) is new.

§ 8324. Hearing; resolution of vacation

8324. (a) At the hearing, the legislative body shall hear the evidence offered by persons interested.

(b) If the legislative body finds, from all the evidence submitted, that the street, highway, or public service easement described in the resolution of intention or petition is unnecessary for present or prospective public use, the legislative body may adopt a resolution vacating the street, highway, or public service easement. The resolution of vacation may provide that the vacation occurs only after conditions required by the legislative body have been satisfied and may instruct the clerk that the resolution of vacation not be recorded until the conditions have been satisfied.

Comment. Section 8324 continues the substance of the first two sentences of former Sections 956 (county highways), 959 (county highways), and 8323 (city streets) and former Government Code Section 50442 (public service easements), with the addition of language to make clear that the legislative body may impose conditions for vacation.

§ 8325. Recordation of resolution

8325. (a) The clerk shall cause a certified copy of the resolution of vacation, attested by the clerk under seal, to be recorded without acknowledgment, certificate of acknowledgment, or further proof in the office of the recorder of the county in which the property is located. No fee shall be charged for recordation.

(b) Upon such recordation, the vacation is complete.

Comment. Subdivision (a) of Section 8325 continues the substance of the third sentence of former Section 956 (county highways), the second sentence of former Section 960 (county highways), the second paragraph of former Section 8324 (city streets), and former Government Code Section 50445 (public service easements), and is comparable to Section 8336.

Subdivision (b) supersedes the portions of former Sections 960 (county highways) and 8324 (city streets) and former Government Code Section 50444 (public service easements) that gave effect to the vacation upon the making of an order of vacation.

CHAPTER 4. SUMMARY VACATION**Article 1. Authority****§ 8330. Street or highway superseded by relocation**

8330. (a) The legislative body of a local agency may summarily vacate a street or highway that has been superseded by relocation.

(b) A street or highway shall not be summarily vacated pursuant to this section if vacation would do either of the following:

(1) Cut off all access to a person's property which, prior to relocation, adjoined the street or highway.

(2) Terminate a public service easement unless the easement satisfies the requirements of Section 8333.

Comment. Section 8330 continues the substance of subdivision (a) of former Section 960.1 (county highways) and of former Section 1930 (city streets). A public service easement includes an easement or right of a type described in Section 8340. See Section 8306.

§ 8330.5. State highway superseded by relocation

8330.5. (a) Subject to subdivisions (b) and (c), the commission may retain, relinquish to a local agency pursuant to Section 73, or summarily vacate a state highway that has been superseded by relocation.

(b) The commission shall not vacate a state highway unless the commission has first given a notice of relinquishment pursuant to Section 73 and the legislative body has protested within the prescribed 90-day period that the highway is not needed for public use and should be vacated by the commission.

(c) If vacation of a state highway would cut off all access to the property of any person which, prior to relocation, adjoined the highway, the commission shall either retain the highway or relinquish it pursuant to Section 73.

Comment. Section 8330.5 continues the substance of the first sentence of former Sections 72 and 835 and adds the requirement that prior to vacation of a state highway superseded by relocation, the California Transportation Commission must first offer to relinquish the highway to the appropriate local agency. The commission may vacate the highway only if the offer of relinquishment is rejected by the local agency for the reason that the highway is not needed for public use and should be abandoned by the commission. The authority to vacate a state highway under this section includes authority to vacate a portion of the highway or any right or interest in the highway. See Section 8308 ("highway" defined).

§ 8331. Impassable streets and highways

8331. The legislative body of a local agency may summarily vacate a street or highway if both of the following conditions exist:

(a) For a period of five consecutive years the street or highway has been impassable for vehicular travel.

(b) No public money was expended for maintenance on the street or highway during such period.

Comment. Section 8331 continues a provision formerly found in Section 954 that related to abandonment of unnecessary

county highways and broadens the provision to include city streets. A county highway that is described in Section 8331 may be designated a stock trail instead of being vacated. See Section 954.

§ 8332. Freeway interception

8332. The legislative body of a local agency may summarily vacate a street or highway pursuant to an agreement entered into with the department pursuant to Section 100.2 to close the street or highway at or near the point of its interception with a freeway.

Comment. Section 8332 supersedes subdivision (a) of former Section 100.23 (city streets and county highways) and makes clear that the action of the local agency is to be taken pursuant to this part. Nothing in this section precludes closure of a street or highway without vacation pursuant to Sections 100.2, 941.2, and 1801. See Section 8311 and Comment thereto.

§ 8333. Unused public service easements

8333. The legislative body of a local agency may summarily vacate a public service easement in any of the following cases:

(a) The easement has not been used for the purpose for which it was dedicated or acquired for five consecutive years next preceding the proposed vacation.

(b) The date of dedication or acquisition is less than five years and more than one year next preceding the proposed vacation, and the easement was not used continuously since that date.

Comment. Section 8333 continues the substance of the first paragraph of former Government Code Section 50443 (public service easements).

§ 8334. Miscellaneous grounds for vacation

8334. The legislative body of a local agency may summarily vacate any of the following:

(a) An excess right of way of a street or highway not required for street or highway purposes.

(b) A portion of a street or highway that lies within property under one ownership and that does not continue

through such ownership or end touching property of another.

Comment. Section 8334 continues the substance of subdivisions (b) and (c) of former Section 960.1 (county highways) and broadens them to include city streets, making clarifying changes.

Article 2. Procedure

§ 8335. Resolution of vacation

8335. (a) The legislative body may vacate a street, highway, or public service easement pursuant to the authority provided in this chapter by adopting a resolution of vacation.

(b) The resolution of vacation shall state all of the following:

(1) That the vacation is made under this chapter.

(2) The name or other designation of the street, highway, or public service easement, and a precise description of the portion vacated. The description of the portion vacated may be by a precise map which is recorded or to which reference is made in the resolution and which is permanently maintained by the public entity.

(3) The facts under which the summary vacation is made. If the vacation is made pursuant to Section 8332, the statement shall include the date of the agreement. The resolution is *prima facie* evidence of the facts stated.

(4) That from and after the date the resolution is recorded, the street, highway, or public service easement vacated no longer constitutes a street, highway, or public service easement.

Comment. Subdivision (a) of Section 8335 continues the substance of the second sentence of former Section 72 and the first sentence of former Section 836 (state highways), the first sentence of former Section 1931 (city streets), and the first sentence of former Section 960.2 (county highways), and broadens them to include public service easements. See also former Section 100.23(a) (city streets and county highways).

Subdivision (b) continues the substance of former Section 100.23(b) (city streets and county highways) and the second

paragraph of former Government Code Section 50443 (public service easements). Paragraph (1) of subdivision (b) and the reference to a precise description by map in paragraph (2) are new.

§ 8336. Recordation of resolution

8336. (a) The clerk shall cause a certified copy of the resolution of vacation, attested by the clerk under seal, to be recorded without acknowledgment, certificate of acknowledgment, or further proof in the office of the recorder of the county in which the property is located. No fee shall be charged for recordation.

(b) On such recordation, the vacation is complete.

Comment. Section 8336 continues the substance of the second and third sentences of former Section 836 and a portion of the second sentence of former Section 72 (state highways), the first sentence of former Section 100.23(c) (city streets and county highways), and the second, third, and fourth sentences of former Sections 960.2 (county highways) and 1931 (city streets) and broadens those provisions to include public service easements and makes revisions to conform the provisions to Section 8325.

CHAPTER 5. RESERVATION AND PRESERVATION OF EASEMENTS

Article 1. Reservation of Easements

§ 8340. Authorization to reserve easements

8340. In a proceeding to vacate a street or highway:

(a) A public entity may reserve and except from the vacation the easement and right at any time, or from time to time, to construct, maintain, operate, replace, remove, and renew sanitary sewers and storm drains and appurtenant structures in, upon, over, and across a street or highway proposed to be vacated and pursuant to any existing franchise or renewals thereof, or otherwise, to construct, maintain, operate, replace, remove, renew, and enlarge lines of pipe, conduits, cables, wires, poles, and other convenient structures, equipment, and fixtures for

the operation of gas pipelines, telegraphic and telephone lines, railroad lines, and for the transportation or distribution of electric energy, petroleum and its products, ammonia, water, and for incidental purposes, including access to protect such works from all hazards in, upon, and over the street or highway proposed to be vacated.

(b) A local agency may reserve and except from vacation an easement for a future street or highway unless the local agency finds that the street or highway is unnecessary for prospective public use.

Comment. Subdivision (a) of Section 8340 continues the substance of former Sections 72.5 and 838 (state highways), 959.1(a) (county highways), 1934 (city streets), and 8330 (city streets).

Subdivision (b) continues the substance of former Section 959.1(b) (county highways) and broadens it to include city streets, making clear that it does not apply where the vacation is pursuant to Section 8324 (finding that street or highway unnecessary for prospective public use).

§ 8341. Recitation in resolution of intention and resolution of vacation

8341. (a) In a proceeding to vacate a street or highway, if the legislative body determines that the public convenience and necessity require the reservation and exception of easements and rights of way for works enumerated in Section 8340, such reservations and exceptions shall be recited in the resolution of vacation, in addition to any other matter required to be recited therein. The recital may describe the reservations and exceptions by reference to a precise map which is recorded or to which reference is made in the resolution and which is permanently maintained by the public entity.

(b) Subsequent proceedings of the public entity in relation to the vacation, including a deed or conveyance of title to or an interest in the property, are subject to and governed by the reservations and exceptions recited in the resolution of vacation and the deed or conveyance shall contain a recital to that effect.

Comment. Section 8341 continues the substance of former Section 8331, broadens it to include county and state highways, and substitutes the requirement that the reservations and exceptions be recited in the resolution of vacation for the requirement that they be recited in the resolution of intention. The provisions for describing the reserved easements by reference to a map and requiring that deeds or conveyances recite any reserved easements are new.

Article 2. Preservation of Public Easements

§ 8345. “Public body” defined

8345. As used in this article, “public body” means a city or special district as defined in Section 54775 of the Government Code.

Comment. Section 8345 supersedes the first paragraph of former Civil Code Section 812.5.

§ 8346. Requests for notice; index of requests

8346. (a) A public body may request a local agency for notice of proceedings to vacate a street or highway.

(b) Every local agency shall maintain an index of requests for notice of vacation proceedings received pursuant to this section. The index shall be made available to the public upon request.

Comment. Section 8346 continues the substance of the fifth paragraph of former Civil Code Section 812.5.

§ 8347. Notice of vacation proceeding

8347. If a public body has requested notice of the vacation proceeding under Section 8346, the local agency shall give written notice of the vacation proceeding to the public body within 15 days after:

(a) The adoption of a resolution of intention or the filing of a petition to vacate.

(b) The adoption of the resolution of vacation in cases not covered by subdivision (a).

Comment. Section 8347 supersedes the first sentence of the third paragraph of former Civil Code Section 812.5.

§ 8348. Determination that public easement is required

8348. (a) Within 30 days after receipt of the notice of the vacation proceeding, the public body may:

(1) Determine that public convenience and necessity require a public easement to maintain, operate, replace, remove, or renew its existing works installed in the street or highway that is the subject of the vacation proceeding; and

(2) File for record in the office of the recorder in the county in which the vacated street or highway is located, a verified notice of its public easement so determined over the street or highway or part thereof that is particularly described in the notice.

(b) Failure to record the notice of public easement within 30 days after receipt of the notice of the vacation proceeding extinguishes the right of the public body to a public easement.

(c) If the local agency fails to give the required notice of the vacation proceeding, the public body may determine and record notice of its public easement at any time within 180 days after recordation of the resolution of vacation. The failure of the public body to record its notice within the 180-day period extinguishes the right of the public body to a public easement over the vacated street or highway.

Comment. Section 8348 continues the substance of a portion of the second paragraph, the second sentence of the third paragraph, and the fourth paragraph of former Civil Code Section 812.5.

§ 8349. Limitations of article

8349. Nothing in this article shall be construed to:

(a) Affect any reservation or the right to reserve easements pursuant to this chapter or any other provision of this code.

(b) Make the rights of the public in or to a street or highway subordinate to a public easement determined pursuant to this article.

Comment. Section 8349 continues the substance of the sixth paragraph of former Civil Code Section 812.5.

CHAPTER 6. EFFECT OF VACATION

Article 1. Effect on Property Rights

§ 8350. Extinction of public easements

8350. Except as provided in Chapter 5 (commencing with Section 8340), the vacation of a street, highway, or public service easement extinguishes all public easements therein.

Comment. Section 8350 continues the substance of a portion of the second paragraph of former Civil Code Section 812.5 (city streets and county highways), the first sentence of former Section 960 (county highways), a portion of the first paragraph of former Section 8324 (city streets), and former Government Code Section 50444 (public service easements), and broadens them to include state highways.

§ 8351. Reversion of easement or disposition of fee

8351. Except as otherwise provided in Chapter 5 (commencing with Section 8340) or in this chapter, on vacation of a street, highway, or public service easement:

(a) If the public entity owns only an easement, title to the property previously subject to the easement is thereafter free from the easement.

(b) If the public entity owns the title, the legislative body may dispose of the property as provided in this chapter.

Comment. Section 8351 continues the effect of the first and second sentences of former Section 837 (state highways), the third sentence of former Section 960 (county highways), former Sections 960.3 (county highways) and 1932 (city streets and reserved easements), a portion of the first paragraph of former Section 8324 (city streets), and former Government Code Section 50444 (public service easements).

§ 8352. Effect on private easements and other rights

8352. (a) Except as provided in Section 8353, vacation of a street, highway, or public service easement pursuant to this part does not affect a private easement or other right of a person (including but not limited to the state, a public corporation, or a political subdivision, other than the local agency adopting the resolution of vacation) in, to, or over the lands subject to the street, highway, or public service easement regardless of the manner in which the private easement or other right was acquired.

(b) A private easement or other right described in subdivision (a) is subject to extinguishment under the laws governing abandonment, adverse possession, waiver, and estoppel.

Comment. Section 8352 is drawn from former Government Code Section 50434 (public service easements) and continues the substance of and broadens the last sentence of former Section 100.23 (city streets and county highways) and the second paragraph of former Section 960 (county highways), and broadens them to include state highways. The conclusive presumption of abandonment by nonuse found in former Section 960 is not continued.

§ 8353. Easements claimed by reference to map or plat

8353. (a) Except as provided in subdivision (b), the vacation of a street or highway extinguishes all private easements therein claimed by reason of the purchase of a lot by reference to a map or plat upon which the street or highway is shown, other than a private easement of ingress and egress to the lot from or to the street or highway.

(b) A private easement claimed by reason of the purchase of a lot by reference to a map or plat upon which the street or highway is shown is not extinguished pursuant to subdivision (a) if, within two years after the date the vacation is complete, the claimant records a verified notice that particularly describes the private easement that is claimed in the office of the recorder of the county in which the vacated street or highway is located.

(c) Nothing in this section shall be construed to create a private easement, nor to extend a private easement now recognized by law, nor to make the rights of the public in or to a street or highway subordinate to a private easement. Nothing in this section affects the right of the owner of property that was subject to the vacated street or highway to commence an action to quiet title as against any claim of a private easement of any type, whether before or after recordation of a verified notice pursuant to this section.

Comment. Section 8353 continues the substance of former Civil Code Section 812 (city streets and county highways) and broadens them to include state highways, but eliminates “necessity” as a criterion for extinction of a private easement of ingress and egress to a lot from or to a vacated street or highway. Section 8353 also makes clear that the procedure provided in this section does not foreclose the right of the property owner to establish title against claims of private easements by a quiet title proceeding.

Article 2. Disposition of Excess Property

§ 8355. Sale or exchange of excess property

8355. If the legislative body of a public entity determines that property previously subject to a street, highway, or public service easement, title to which is owned by the public entity, is no longer needed by the public:

(a) In the case of property owned by a local agency, the legislative body may sell or exchange the property in the manner and upon the terms and conditions approved by the legislative body.

(b) In the case of property owned by the state, the department shall dispose of the property as provided in Section 118.

Comment. Subdivision (a) of Section 8355 continues the substance of portions of former Sections 960.4 (county highways) and 1933 (city streets) and broadens them to include public service easements.

Subdivision (b) continues the substance of the last sentence of former Section 837 (state highways).

§ 8356. Conveyance to adjacent or fronting owners

8356. (a) Notwithstanding Section 8311, if a street or highway is vacated by a local agency under this part or under any other law or under its charter for the purpose of opening a new street or highway in lieu of that vacated, the legislative body of the local agency may, by resolution, unless otherwise provided in its charter, convey by deed its interest in the street or highway vacated to the owners of the lands adjacent to or fronting on the street or highway in such manner as it deems that equity requires.

(b) If title to the property occupied by the vacated street or highway is owned by the local agency, the legislative body may impose any reasonable conditions, or demand compensation by exchange of lands, or otherwise, before conveying the property.

(c) The deeds provided for in this section shall not be delivered to the grantees named in the deeds until good and sufficient conveyances vesting in the local agency the title to the new street or highway opened in lieu of the street or highway vacated, are delivered to the local agency.

(d) The authority granted in this section is permissive and does not affect any authority the local agency may have to hold the property for public use, dispose of the property by public bid, or take any other action with respect to the property authorized by law.

Comment. Section 8356 continues the substance of former Sections 8370-8374 (city streets) and broadens it to include county highways, with the addition of subdivision (d) to make clear that the authority granted by this section is permissive and not mandatory. The requirement in former Section 8371 that the ordinance provide for execution of the deed in the name of the city by at least two of its officials is not continued.

§ 8357. Funds from sale of excess property

8357. The purchase price for any property sold by the legislative body of a local agency pursuant to this article shall be paid into the local agency treasury to the credit of any fund, available for the same purposes for which the property was used, that the legislative body designates.

Comment. Section 8357 continues the substance of the last sentence of former Sections 960.4 (county highways) and 1933 (city streets).

CHAPTER 7. AGREEMENTS LIMITING VACATION**§ 8360. Agreement between local agencies**

8360. A local agency may, by written contract, agree with another local agency that a street or highway running from either of the local agencies to, in, through, or across any heretofore or hereafter incorporated territory of the other local agency may only be closed or vacated by the other local agency upon the consent and agreement of both local agencies.

Comment. Section 8360 continues the substance of former Section 8350 (city streets) and broadens it to include county highways.

§ 8361. Ratification of prior agreements

8361. A written agreement between any local agencies heretofore made and heretofore ratified by the respective legislative bodies of both local agencies and providing against the closing of streets or highways mentioned in Section 8360, except in accordance with the terms of the agreement, is hereby ratified and declared valid.

Comment. Section 8361 continues the substance of former Section 8351 (city streets) and broadens it to include county highways.

§ 8362. Limitation of power to vacate streets and highways

8362. Whenever a written agreement has been heretofore made and ratified by Section 8361 or is hereafter

made as provided for in Section 8360, each contracting local agency has a public interest in the continued opening and use of any street or highway provided for in the agreement, and the legislative body of the local agency in which the street or highway is located, shall only have power to close or vacate the street or highway in accordance with the laws of this state and in accordance with the written agreement evidenced by an effective resolution carrying into effect the written agreement and passed by the legislative body of the other local agency.

Comment. Section 8362 continues the substance of former Section 8352 (city streets) and broadens it to include county highways.

§ 8363. Recordation of agreements

8363. Every agreement between local agencies heretofore or hereafter made in accordance with the provisions of this chapter, shall be recorded in the office of the county recorder of each county wherein lies any of the property through or across which the street or highway runs which is to be or heretofore has been closed or vacated.

Comment. Section 8363 continues the substance of former Section 8353 (city streets) and broadens it to include county highways.

CONFORMING CHANGES

Servitudes

Civil Code § 812 (repealed)

SEC. 2. Section 812 of the Civil Code is repealed.

812. The vacation or abandonment, pursuant to law, of streets and highways shall extinguish all private easements therein claimed by reason of the purchase of any lot by reference to a map or plat upon which such streets or highways are shown, other than a private easement necessary for the purpose of ingress and egress to any such lot from or to a public street or highway, except as to any person claiming such easement who, within two years from the effective date of such vacation or abandonment or within two years from the date of the enactment of this section, whichever is later, shall have recorded in the office of the recorder of the county in which such vacated or abandoned streets or highways are located a verified notice of his claim to such easement over all or any part of any such street or highway which is particularly described in such notice. Nothing in this section shall be construed to create any such private easement, nor to extend any such private easement now recognized by law, nor to make the rights of the public in or to any street or highway subordinate to any such private easement.

Comment. The substance of former Section 812 is continued in Streets and Highways Code Section 8353.

Civil Code § 812.5 (repealed)

SEC. 3. Section 812.5 of the Civil Code is repealed.

812.5. As used in this section, "local agency" means a city or special district as defined in Section 54775 of the Government Code and "public body" means a city, county, or city and county.

The vacation or abandonment, pursuant to law, of any street or highway shall extinguish all public easements therein, except as to a local agency which determines after receipt of notice of the vacation or abandonment

proceedings that public convenience and necessity require a public easement to maintain, operate, replace, remove, or renew its existing works installed therein.

A public body proposing vacation or abandonment of a street or highway shall, within 15 days after adoption of a resolution or ordinance of intention to vacate or abandon, give written notice of such intention to any local agency which has requested notice of such action. A local agency making a determination of public convenience and necessity for continuance of a public easement for its existing works may, within 30 days of receipt of such notice, file for record in the office of the recorder in the county in which the vacated or abandoned street or highway is located a verified notice of its public easement over all or part of any such street or highway which is particularly described in such verified notice.

Failure of a local agency to record the notice of its public easement within 30 days of receipt of the notice of intent to vacate or abandon shall extinguish its right to a public easement over all or part of the street or highway being vacated or abandoned except that where there is a failure by the public body to give the required notice of intent, such local agency may record its notice of public easement at anytime within 180 days of recordation of the instrument constituting the vacation or abandonment by the public body. In such cases the failure of the local agency to record its notice within the 180-day period shall extinguish its right to a public easement over all or part of the vacated street or highway.

Every public body shall maintain an index of requests for notice of intent to vacate or abandon which it received pursuant to the provisions of this section. Such index shall be made available to the public upon request.

Nothing in this section shall be construed to affect any reservation or the right to reserve easements pursuant to Sections 72.5, 959.1 or 8330 of the Streets and Highways Code, nor to make the rights of the public in or to any street or highway subordinate to any such public easement.

Comment. The first paragraph of former Section 812.5 is superseded by Streets and Highways Code Section 8345. The

substance of the second paragraph is continued in Streets and Highways Code Sections 8348 and 8350. The first sentence of the third paragraph is superseded by Streets and Highways Code Section 8347. The second sentence of the third paragraph and the fourth paragraph are continued in Streets and Highways Code Section 8348. The fifth paragraph is continued in Streets and Highways Code Section 8346. The sixth paragraph is continued in Streets and Highways Code Section 8349.

Dedication of Real Property for Public Purposes

Government Code § 7050 (amended)

SEC. 4. Section 7050 of the Government Code is amended to read:

7050. With the consent of the city, county, or city and county as the case may be an irrevocable offer of dedication of real property for any public purpose, including but not limited to streets, highways, paths, alleys, including access rights and abutter's rights, drainage, open space, public utility or other public easements, parks, or other public places, may be made pursuant to this section. Such offer of dedication shall be executed, acknowledged, and recorded in the same manner as a conveyance of real property. Such offer of dedication, when recorded in the office of the county recorder, shall be irrevocable and may be accepted at any time by the city council of the city within which such real property is located at the time of acceptance or, if located in unincorporated territory, by the board of supervisors of the county within which such real property is located.

Such offer of dedication may be terminated and the right to accept such offer abandoned in the same manner as is prescribed for the ~~abandonment or summary~~ vacation of streets or highways by Part 3 (*commencing with Section 8300*) of Division 9 of ~~or by Chapter 2 of Division 2 of~~ the Streets and Highways Code ; ~~whichever is applicable~~ . Such termination and abandonment may be by the city council of the city within which such real property is located, or, if located in unincorporated territory, by the board of

supervisors of the county within which such real property is located.

The procedure prescribed by this section shall be alternative to any other procedure authorized by law.

Comment. Section 7050 is amended to authorize summary vacation proceedings for unaccepted offers of dedication of property for public purposes.

Public Service Easements Vacation Law

Government Code §§ 50430-50445 (repealed)

SEC. 5. Article 5 (commencing with Section 50430) of Chapter 2 of Part 1 of Division 1 of Title 5 of the Government Code is repealed.

Comment. The substance of former Sections 50430-50445, relating to the Public Service Easements Vacation Law, is continued in new Part 3 (commencing with Section 8300) of Division 9 of the Streets and Highways Code (the Public Streets, Highways, and Service Easements Vacation Law). The disposition of the former provisions is as follows:

<i>Former Provision</i> <i>(Government Code)</i>	<i>New Section</i> <i>(Streets & Highways Code)</i>
50430	8300
50431	8311 (a)
50432 (a)	8303
50432 (b)	8309
50432 (c)	8306
50433	8317
50434	8352
50435	8313
50436 1st ¶	8312
50436 2nd ¶	8316
50437	8320 (b)
50438	8320 (b) - (c)
50439	8321 (b)
50440	8321 (e), 8322
50441	8323
50442	8324
50443 1st ¶	8333
50443 2nd ¶	8335 (b)
50444	8325 (b), 8350, 8351
50445	8325 (a)

Subdivision Map Act

Government Code § 66477.2 (amended)

SEC. 6. Section 66477.2 of the Government Code is amended to read:

66477.2. (a) If at the time the final map is approved, any streets, paths, alleys, right-of-way for local transit facilities such as bus turnouts, benches, shelters, landing pads and similar items, which directly benefit the residents of a subdivision, or storm drainage easements are rejected, the offer of dedication shall remain open and the legislative body may by resolution at any later date, and without further action by the subdivider, rescind its action and accept and open the streets, paths, alleys, right-of-way for local transit facilities such as bus turnouts, benches, shelters, landing pads and similar items, which directly benefit the residents of a subdivision, or storm drainage easements for public use, which acceptance shall be recorded in the office of the county recorder.

(b) In the case of any subdivision fronting upon the ocean coastline or bay shoreline, the offer of dedication of public access route or routes from public highways to land below the ordinary high water mark must be accepted within three years after the approval of the final map; in the case of any subdivision fronting upon any public waterway, river or stream, the offer of dedication of public access route or routes from public highways to the bank of the waterway, river or stream and the public easement along a portion of the bank of the waterway, river or stream must be accepted within three years after the approval of the final map; in the case of any subdivision fronting upon any lake or reservoir which is owned in part or entirely by any public agency including the state, the offer of dedication of public access route or routes from public highways to any water of such lake or reservoir must be accepted within five years after the approval of the final map; all other offers of dedication may be accepted at any time.

(c) Offers of dedication which are covered by ~~subsection~~ *subdivision* (a) may be terminated and abandoned in the same manner as prescribed for the ~~abandonment or~~

summary vacation of streets by Part 3 (commencing with Section 8300) of Division 9 of; ~~or by Chapter 2 (commencing with Section 940) of Division 2 of, the Streets and Highways Code; whichever is applicable.~~

(d) Offers of dedication which are not accepted within the time limits specified in subdivision (b) shall be deemed abandoned.

(e) Except as provided in Sections 66499.16, 66499.17 and 66499.18, if a resubdivision or reversion to acreage of the tract is subsequently filed for approval, any offer of dedication previously rejected shall be deemed to be terminated upon the approval of the map by the legislative body.

Comment. Section 66477.2 is amended to authorize summary vacation proceedings for unaccepted offers of dedication under the Subdivision Map Act.

California Transportation Commission

Streets & Highways Code § 72 (repealed)

SEC. 7. Section 72 of the Streets and Highways Code is repealed.

~~72. The commission may abandon any portion of a state highway which by reason of change in location of a state highway has been superseded and is no longer necessary for such purposes.~~

~~The abandonment shall be by resolution and certified copies thereof shall be filed with the board of supervisors and recorded with the county recorder in the county in which the abandoned highway is located.~~

Comment. The substance of the first sentence of former Section 72 is continued in Section 8330.5 (vacation of state highway superseded by relocation). The substance of the second sentence is continued in Sections 8335 (resolution of vacation) and 8336 (recordation of resolution).

Streets & Highways Code § 72.5 (repealed)

SEC. 8. Section 72.5 of the Streets and Highways Code is repealed.

~~72.5. In any proceeding for the abandonment of any state highway or part thereof, the commission may reserve~~

and except from the abandonment the easement and right at any time, or from time to time, to construct, maintain, operate, replace, remove and renew sanitary sewers and storm drains and appurtenant structures in, upon, over and across any highway or part thereof proposed to be abandoned and pursuant to any existing franchise or renewals thereof, or otherwise, to construct, maintain, operate, replace, remove, renew and enlarge lines of pipe, conduits, cables, wires, poles, and other convenient structures, equipment and fixtures for the operation of gas pipe lines, telegraphic and telephone lines, railroad lines and for the transportation or distribution of electric energy, petroleum, and its products, ammonia, water, and for incidental purposes, including access to protect the property from all hazards in, upon and over the highway or part thereof proposed to be abandoned.

Comment. The substance of former Section 72.5 is continued in Section 8340(a) (authorization to reserve easements).

Streets & Highways Code § 73 (amended)

SEC. 9. Section 73 of the Streets and Highways Code is amended to read:

73. The commission shall relinquish to any county or city any portion of any state highway within such county or city which has been deleted from the state highway system by legislative enactment, and such relinquishment shall become effective upon the first day of the next calendar or fiscal year, whichever first occurs after the effective date of such legislative enactment. It may likewise relinquish any portion of any state highway which has been superseded by relocation. Whenever the department and the county or city concerned have entered into an agreement providing therefor, or the legislative body of such county or city has adopted a resolution consenting thereto, the commission may relinquish, to any such county or city, any frontage or service road or outer highway, within the territorial limits of such county or city, which has a right-of-way of at least 40 feet in width and which has been constructed as a part of a state highway project, but does not constitute a part of the main traveled roadway thereof. The commission may

also relinquish, to a county or city within whose territorial limits is located, any nonmotorized transportation facility, as defined in Section 156, constructed as part of a state highway project if the county or city, as the case may be, has entered into an agreement providing therefor or its legislative body has adopted a resolution consenting thereto.

Relinquishment shall be by resolution. A certified copy of such resolution shall be filed with the board of supervisors or the city clerk, as the case may be. A certified copy of such resolution shall also be recorded in the office of the recorder of the county where such land is located and, upon such recordation, all right, title, and interest of the state in and to such portion of any state highway shall vest in the county or city, as the case may be, and such highway or portion thereof shall thereupon constitute a county road or city street, as the case may be.

The vesting of all right, title, and interest of the state in and to such portions of any state highways heretofore relinquished by the commission, in the county or city to which it was relinquished, is hereby confirmed.

Prior to relinquishing any portion of a state highway to a county or a city, except where required by legislative enactment, the department shall give 90 days' notice in writing of intention to relinquish to the board of supervisors, or the city council, as the case may be. Where the resolution of relinquishment contains a recital as to the giving of the notice, adoption of the resolution of relinquishment shall be conclusive evidence that the notice has been given.

The commission shall not relinquish to any county or city any portion of any state highway which has been superseded by relocation until the department has placed the highway, as defined in Section 23, in a state of good repair. This requirement shall not obligate the department for widening, new construction, or major reconstruction, except as the commission may direct. A state of good repair requires maintenance, as defined in Section 27, including litter removal, weed control, and tree and shrub trimming to the time of relinquishment.

Within the 90-day period, the board of supervisors or the city council may protest in writing to the commission stating the reasons therefor, including, but not limited to, objections that the highway is not in a state of good repair, or is not needed for public use and should be ~~abandoned~~ *vacated* by the commission. In the event that the commission does not comply with the requests of the protesting body, it may proceed with the relinquishment only after a public hearing given to the protesting body on 10 days written notice.

Comment. Section 73 is amended to conform to the terminology of the Public Streets, Highways, and Service Easements Vacation Law. See Section 8309 (vacation defined).

Department of Transportation

Streets & Highways Code § 100.23 (repealed)

SEC. 10. Section 100.23 of the Streets and Highways Code is repealed.

~~100.23. (a) The city council or the board of supervisors may, by ordinance or resolution, authorize the recordation of a notice that a portion of a city street or county highway, as the case may be, under its jurisdiction has been abandoned or vacated pursuant to an agreement entered into pursuant to Section 100.2.~~

~~(b) The notice shall include the date of the agreement, the name or other designation of the street or highway, a precise description of the portion abandoned or vacated, and state that that portion of the street or highway, from and after commencement of the construction of the state freeway, no longer constitute a public street or highway.~~

~~(c) The notice shall be recorded in the office of the county recorder of the county in which the street or highway is located. The notice or its recordation shall not affect any private property right which may exist in the area described in the notice.~~

Comment. Subdivision (a) of former Section 100.23 is superseded by Sections 8332 and 8335, which make clear that the action of the local agency is to be taken pursuant to the general provisions for summary vacation of public streets and highways.

The substance of subdivision (b) is continued in Section 8335(b).

The substance of the first sentence of subdivision (c) is continued in Section 8336. The substance of the second sentence is continued in Section 8352(a).

Vacation and Abandonment of State Highways

Streets & Highways Code §§ 835-838 (repealed)

SEC. 11. Chapter 5 (commencing with Section 835) of Division 1 of the Streets and Highways Code is repealed.

Comment. The substance of former Sections 835-838, relating to vacation and abandonment of state highways, is continued in new Part 3 (commencing with Section 8300) of Division 9 (the Public Streets, Highways, and Service Easements Vacation Law). The disposition of the former provisions is as follows:

<i>Former Provision</i> <i>(Streets & Highways Code)</i>	<i>New Section</i> <i>(Streets & Highways Code)</i>
835	8330.5
836	8336
837 1st & 2nd sentences	8351
837 3rd sentence	8355
838	8340

County Highways

Streets & Highways Code § 954 (amended)

SEC. 12. Section 954 of the Streets and Highways Code is amended to read:

954. All county highways which for a period of five consecutive years are impassable for vehicular travel, and on which during such period of time no public money is expended for maintenance, are unnecessary highways; ~~subject to abandonment pursuant to Section 960.2 or as herein provided.~~ The board of supervisors of any county on its own motion, or on the petition of any interested taxpayer of the county, ~~may abandon any such unnecessary highway or~~ may designate such county highway a stock trail. The board of supervisors shall cause notices to be posted upon such stock trails, and also at the entrance of

such stock trails, directing all persons to drive all untethered stock thereon.

After a stock trail has been established or designated as provided in this chapter, the county is not liable for death or injury to a vehicle owner or operator or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition of the stock trail.

Such stock trails shall not be included in the term "maintained mileage of county roads" as that term is used in Chapter 3 (commencing with Section 2100) of Division 3.

Comment. The portions of Section 954 that related to abandonment of unnecessary highways are continued in Sections 8324 and 8331.

Streets & Highways Code § 954.5 (amended)

SEC. 13. Section 954.5 of the Streets and Highways Code is amended to read:

954.5. (a) The board of supervisors may, by resolution, terminate the maintenance of any county highway if it finds that the highway is unnecessary for the public convenience.

(b) Evidence that a county highway is unnecessary for the public convenience shall be taken at a public hearing set in accordance with the procedures for ~~the abandonment of a county highway in Sections 955 and 956~~ *vacation of a public street, highway, or service easement in Sections 8323 and 8324*. Notice of such hearing shall be mailed to the owner of any property served by that portion of a county highway subject to the termination of maintenance. A county highway may be deemed unnecessary for the public convenience on the basis of any of the following:

(1) The county highway does not provide the primary access to occupied properties.

(2) Traffic on the county highway is intermittent and of low volume.

(3) The county highway is impassable for more than six months and there is no demand that it be reopened.

(c) A certified copy of the ~~order~~ *resolution* terminating maintenance shall be recorded as provided in Section ~~956~~ *8325*.

(d) If the board of supervisors resumes maintenance of a county highway on which maintenance was terminated under this section, a notice of maintenance shall be recorded in the office of the county recorder.

(e) If a determination is made that maintenance is no longer necessary, the county shall post signs clearly visible from the traveled highway at the beginning and end of the highway and at any intersection on the highway indicating that the county no longer maintains the highway. The sign shall read as follows: "This road is not maintained.

_____ County is not responsible for any loss or injury suffered by reason of its use." The county shall provide adequate maintenance to ensure that the signs remain posted in the appropriate places and the message is legible. Once such action is taken and duly recorded and the required signs are posted, the county shall not be held liable for the death of or injury to a vehicle owner, operator, or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition on such highway.

Comment. Section 954.5 is amended to reflect that the substance of former Sections 955 and 956 is continued in Sections 8323-8325.

Streets & Highways Code § 955 (repealed)

SEC. 14. Section 955 of the Streets and Highways Code is repealed.

~~955. Upon the filing of such petition, the board shall by order fix a day for the hearing of the petition, and shall post notices conspicuously along the line of the highway proposed to be abandoned at least two weeks prior to the day fixed for the hearing. Such notices shall be posted not less than five hundred feet apart, but at least three shall be posted. Such notices shall state the filing of such petition and the time and place of the hearing.~~

Comment. Former Section 955 is superseded by Section 8323.

Streets & Highways Code § 956 (repealed)

SEC. 15. Section 956 of the Streets and Highways Code is repealed.

~~956. The board shall, on the day fixed for the hearing, or on the day to which the hearing is postponed or continued,~~

hear the petition and the evidence offered in support thereof. If the board finds from such evidence that all or some part of the highway is unnecessary within the meaning of section 954, the board shall make its order abandoning all or such part of the highway. The clerk shall cause a certified copy of such order, attested by the clerk under the seal of the board, to be recorded in the office of the county recorder.

Comment. The substance of former Section 956 is continued in Sections 8324 and 8325.

Streets & Highways Code § 956.8 (repealed)

SEC. 16. Section 956.8 of the Streets and Highways Code is repealed.

956.8. The board may, by resolution, declare its intention to abandon any county highway.

Comment. The substance of former Section 956.8 is continued in Section 8320(b) (1).

Streets & Highways Code § 957 (repealed)

SEC. 17. Section 957 of the Streets and Highways Code is repealed.

957. Any ten freeholders, two of whom are residents of the road district in which some part of the highway affected is situated, and are taxable therein for highway purposes, may petition the board to abandon all or any part of any county highway.

Comment. The substance of former Section 957 is continued in subdivision (a) of Section 8321.

Streets & Highways Code § 957.5 (repealed)

SEC. 18. Section 957.5 of the Streets and Highways Code is repealed.

957.5. The board may require payment of reasonable fees for filing petitions or applications for abandonment of all or any part of a county highway to defray the expense of investigations, publications and postings. The applicant or petitioner shall deposit such estimated cost with the county officer designated by the board and upon completion of the proceedings any unused portion of the

deposit shall be refunded to the applicant or petitioner and in the event the costs exceed the deposit the county shall bear such excess costs. Nothing herein contained shall be construed to prevent the board from abandoning all or any part of a county highway without requiring the filing of an application or petition or charging such costs where the board determines it is in the public interest to do so.

Comment. The substance of former Section 957.5 is continued in subdivisions (d) and (f) of Section 8321.

Streets & Highways Code § 958 (repealed)

SEC. 19. Section 958 of the Streets and Highways Code is repealed.

958. Upon the making of such resolution of intention or filing of such petition, the board shall by order fix a day for hearing the resolution or petition and shall give notice to all freeholders in the road district of the time and place fixed for the hearing. Such notice shall be given by publication in a newspaper of general circulation published in the county and designated in the order by the board, for at least two successive weeks prior to the day fixed for the hearing. The board shall also conspicuously post a similar notice along the line of the highway proposed to be abandoned at least two weeks prior to the day fixed for the hearing.

Comment. The substance of the first sentence of former Section 958 is continued in Sections 8320(b) (4) and 8321. The second sentence is superseded by Section 8322. The substance of the last sentence is superseded by Section 8323.

Streets & Highways Code § 959 (repealed)

SEC. 20. Section 959 of the Streets and Highways Code is repealed.

959. The board shall, on the day fixed for the hearing, or on the day to which the hearing is postponed or continued, hear the evidence offered by any party interested. If the board finds, from all the evidence submitted, that any county highway described in the petition, or any part of such highway, is unnecessary for present or prospective public use, the board may make its order abandoning such highway, or part thereof.

Comment. The substance of former Section 959 is continued in Section 8324.

Streets & Highways Code § 959.1 (repealed)

SEC. 21. Section 959.1 of the Streets and Highways Code is repealed.

959.1. In any proceeding for the abandonment of any county highway or part thereof, the board may in its order:

(a) Reserve and except from the abandonment the easement and right at any time, or from time to time, to construct, maintain, operate, replace, remove and renew sanitary sewers and storm drains and appurtenant structures in, upon, over and across any highway or part thereof proposed to be abandoned and pursuant to any existing franchise or renewals thereof, or otherwise, to construct, maintain, operate, replace, remove, renew and enlarge lines of pipe, conduits, cables, wires, poles, and other convenient structures, equipment and fixtures for the operation of gas pipelines, telegraphic and telephone lines, railroad lines and for the transportation or distribution of electric energy, petroleum and its products, ammonia, water, and for incidental purposes, including access to protect the property from all hazards in, upon and over the highway or part thereof proposed to be abandoned.

(b) Reserve and except from abandonment an easement for a future public road.

Comment. The substance of former Section 959.1 is continued in Section 8340.

Streets & Highways Code § 960 (repealed)

SEC. 22. Section 960 of the Streets and Highways Code is repealed.

960. Upon the making of such order of abandonment, the public easement in the highway or part abandoned ceases except to the extent reserved in the order of abandonment or retained pursuant to Section 812.5 of the Civil Code. The clerk shall cause a certified copy of such order to be recorded in the office of the county recorder. Where the county owns in fee the property on which the abandoned highway was located, the board of supervisors

may dispose of the property as provided in Section 960.4, subject to any easements reserved in the order of abandonment or retained pursuant to Section 812.5 of the Civil Code.

No such abandonment of the highway or disposal of the highway property shall extinguish any existing private easement of access, regardless of origin, appurtenant to lands abutting the highway. Any such private easement, however, shall be subject to extinguishment under the laws of this state governing abandonment, adverse possession, waiver, and estoppel. The nonuse of any such private easement for a period of five consecutive years shall constitute a conclusive presumption of abandonment.

Comment. The substance of the first sentence of former Section 960 is continued in Section 8350. The substance of the second sentence is continued in subdivision (a) of Section 8325. The substance of the third sentence is continued in Section 8351.

The substance of the second paragraph is continued in Section 8352, with the exception of the conclusive presumption of abandonment by nonuse, which is not continued.

Streets & Highways Code § 960.1 (repealed)

SEC. 23. Section 960.1 of the Streets and Highways Code is repealed.

960.1. The board of supervisors of any county may retain or may summarily vacate and abandon:

(a) Any portion of a county highway which portion has been superseded by relocation, except in case such abandonment would cut off all access to the property of any person which, prior to such relocation, adjoined the highway.

(b) Any excess right-of-way of a county highway not required therefor.

(c) Any portion of a county highway which lies within land under one ownership and which does not end touching the land of another.

Comment. The substance of subdivision (a) of former Section 960.1 is continued in Section 8330. The substance of subdivisions (b) and (c) is continued in Section 8334.

Streets & Highways Code § 960.2 (repealed)

SEC. 24. Section 960.2 of the Streets and Highways Code is repealed.

~~960.2. The board of supervisors may act to abandon any easement or to vacate any highway, mentioned in Section 954 or 960.1, by resolution. A certified copy of such resolution shall be recorded in the office of the county recorder. No fee shall be charged for such recordation. On such recordation, the abandonment or vacation is complete.~~

Comment. The substance of the first sentence of former Section 960.2 is continued in Section 8335(a). The substance of the second, third, and fourth sentences is continued in Section 8336.

Streets & Highways Code § 960.3 (repealed)

SEC. 25. Section 960.3 of the Streets and Highways Code is repealed.

~~960.3. On abandonment of an easement or the vacation of a highway, when the county owns only an easement, title thereto reverts to the owner of the underlying fee except as otherwise provided in Section 959.1. Where the county owns the property on which the vacated highway was located in fee, the board of supervisors may dispose of the property as provided in Section 960.4.~~

Comment. The substance of former Section 960.3 is continued in Section 8351.

Streets & Highways Code § 960.4 (repealed)

SEC. 26. Section 960.4 of the Streets and Highways Code is repealed.

~~960.4. Whenever the board of supervisors determines that any real property or interest therein, heretofore or hereafter acquired by the county for highway purposes, is no longer necessary for such purposes, the county may sell or exchange such real property or interest therein in the manner and upon the terms and conditions approved by the board of supervisors. Any such conveyance shall be executed on behalf of the county by the chairman of the board of supervisors, and the purchase price shall be paid~~

~~into the county treasury to the credit of any fund, available for highway purposes, which the board of supervisors designates.~~

Comment. The substance of former Section 960.4 is continued in Sections 8355 and 8357.

Streets & Highways Code § 960.5 (amended)

SEC. 27. Section 960.5 of the Streets and Highways Code is amended to read:

960.5. The term "county highway" as used in Sections ~~954 to 960.4, inclusive, relating to abandonment, and 954.5~~ shall be deemed to include, but not be limited to, any public highway, road, street, avenue, alley, lane, drive, way, place, court or trail, or any purported county highway, public highway, road, street, avenue, alley, lane, drive, way, place, court or trail.

Comment. Section 960.5 is amended to reflect the deletion of provisions relating to abandonment from Sections 954 to 960.4, inclusive. See Section 8308 (defining "street" and "highway" for purposes of vacation and abandonment).

Summary Vacation and Abandonment of Streets

Streets & Highways Code §§ 1930-1934 (repealed)

SEC. 28. Chapter 5 (commencing with Section 1930) of Division 2.5 of the Streets and Highways Code is repealed.

Comment. The substance of former Sections 1930-1934, relating to summary vacation of city streets, is continued in new Part 3 (commencing with Section 8300) of Division 9 (the Public Streets, Highways, and Service Easements Vacation Law). The disposition of the former provisions is as follows:

<i>Former Provision (Streets & Highways Code)</i>	<i>New Section (Streets & Highways Code)</i>
1930	8330
1931 1st sentence	8335
1931 remainder	8336
1932	8351
1933 1st sentence	8355
1933 2nd sentence	8357
1934	8340(a)

Street Vacation Act of 1941

Streets & Highways Code §§ 8300-8374 (repealed)

SEC. 29. Part 3 (commencing with Section 8300) of Division 9 of the Streets and Highways Code is repealed.

Comment. The substance of former Sections 8300-8374—the Street Vacation Act of 1941—is continued in new Part 3 (commencing with Section 8300) (the Public Streets, Highways, and Service Easements Vacation Law). The disposition of the former provisions is as follows:

<i>Former Provision</i> <i>(Streets & Highways Code)</i>	<i>New Section</i> <i>(Streets & Highways Code)</i>
8300	8300
8301	8310
8302	8304
8303	8303
8304	8308
8305	8307
8306	8309
8307	8317
8308 1st & 2nd ¶	8311
8308 3rd ¶	8312, 8315
8320	8312, 8320
8321	8320(b)
8322 1st ¶	8320, 8323
8322 2nd ¶	8316
8323	8324
8324 1st ¶	8325(b), 8350, 8351
8324 2nd ¶	8325(a)
8330	8340(a)
8331	8341
8332	8306, 8333
8350	8360
8351	8361
8352	8362
8353	8363
8370	8356(a)
8371	8356(a)
8372	Not continued
8373	8356(b)
8374	8356(c)

APPENDIX IX
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Quiet Title Actions

September 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Quiet Title Actions*, 15 CAL. L. REVISION COMM'N REPORTS 1187 (1980).

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

September 13, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to quiet title should be revised. The Commission submits herewith its recommendation to revise quiet title law to enable a general in rem decree clearing title to property, thereby enhancing the marketability of property.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

QUIET TITLE ACTIONS

The California quiet title provisions¹ are descendants of the ancient procedures of chancery—the bill to remove a cloud on title, the bill of peace, and the bill quia timet—used to determine conflicting claims to real property.² These equitable writs operated in personam to resolve disputes between individuals and not to clear title to land as against the whole world.³ As a consequence of this heritage, the basic California quiet title statute provides for a quasi-in-rem determination of title as between particular parties; it does not permit a general decree having in rem effect and binding all persons.⁴

There are a number of special California statutes that enable a person to obtain an in rem quiet title decree. If the person has acquired tax-deeded property or property through a public improvement assessment foreclosure, an in rem decree is available.⁵ If the person seeks to partition property or claims title by adverse possession, an in rem decree is available.⁶ If public land records are destroyed or boundaries are disturbed by an earthquake or if property is taken by eminent domain, an in rem decree is available.⁷ But, for the ordinary property owner who acquired title by deed and who seeks to establish or clear the title, there is no general in rem quiet title relief.⁸

¹ Code Civ. Proc. §§ 738, 739.

² Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 Neb. L. Rev. 485, 486-88 (1947).

³ Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 Yale L.J. 1245, 1266-67 (1959).

⁴ Comment, *The Case for an In Rem Quiet Title Decree*, 38 So. Cal. L. Rev. 608, 609-10 (1965).

⁵ Rev. & Tax. Code §§ 3950-3972 (tax-deeded property); Code Civ. Proc. §§ 801.1-801.15 (titles affected by public improvement assessments). See also Rev. & Tax. Code §§ 3591-3617 (action by state to quiet title to tax-deeded property).

⁶ Code Civ. Proc. §§ 749-749.1 (adverse possession), 872.010-874.240 (partition).

⁷ Code Civ. Proc. §§ 751.01-751.28 (Destroyed Land Records Relief Law), 751.50-751.65 (Cullen Earthquake Act), 1230.010-1273.050 (Eminent Domain Law).

⁸ Partition proceedings are sometimes used to obtain a decree constituting essentially a judgment in rem quieting title against all persons, but this procedure is unsatisfactory since some title insurers will not insure title on this basis. See 2 A. Bowman, Ogden's Revised California Real Property Law § 27.57, at 1357-58 (Cal. Cont. Ed. Bar 1975).

There is a demonstrated need for a general quiet title statute that permits an in rem decree binding all persons to ensure full marketability of land.⁹ Public records are inadequate to locate all potential adverse claimants. Some interests may be unrecorded; other interests may be difficult to find in the records. Even if recorded and located, documents may offer little aid in discovering the identity or location of persons whose interests the document purports to create or protect. The existing quasi-in-rem decree based on a determination of title as between particular parties is insufficient to cure unmarketable titles and establish functional marketability. The California statute should be amended to provide for a general in rem quiet title decree.

There are models for an in rem quiet title action in the special statutes already enacted in California that provide an in rem decree while protecting the interests of unknown persons.¹⁰ The major features of a general in rem quiet title statute are outlined below.

The general statute should permit the holder of any interest in property to quiet title as against any or all adverse claimants, as of the time of the lawsuit or any time prior thereto. The plaintiff should name as defendants all persons unknown claiming any adverse interest, as well as known claimants and persons having interests of record. In case a known claimant or person having an interest of record is dead, the heirs and devisees should be named as defendants. To ensure the greatest likelihood of notice to unknown persons and to heirs and devisees, the plaintiff should use reasonable diligence to identify, locate, and serve them before the court authorizes service by publication. The court should be authorized to require a title report and to appoint a referee to ascertain the adequacy of efforts to notify all parties before authorizing service by publication. Where publication is authorized, recording a *lis pendens* and posting the property should

⁹ See, e.g., Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835 (1970); Comment, *The Case for an In Rem Quiet Title Decree*, 38 So. Cal. L. Rev. 608 (1965); Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 Yale L.J. 1245 (1959).

¹⁰ The first of the special statutes, the McEnerney Act (1906 Cal. Stats. Ex. Sess. ch. 59, p.78), enacted in the wake of the 1906 San Francisco earthquake and fire, set the basic statutory scheme. The constitutionality of the act was upheld in *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356 (1906).

also be required. The court should be authorized to appoint a guardian ad litem where appropriate to safeguard the interests of unknown defendants. The judgment should not be entered by default, but the plaintiff should be required to prove title. Once these requirements are satisfied, the judgment quieting title should be given in rem effect and should be binding on all persons made parties to the action. The rights of bona fide purchasers and encumbrancers under the judgment quieting title should be protected.

In addition to these features of a general in rem quiet title statute, a particular problem of the adverse possession quiet title provisions should be addressed. A person claiming title by adverse possession who satisfies the basic statutory adverse possession requirements may maintain an action under existing California statutes for a quasi-in-rem decree of title.¹¹ In addition, the California statutes offer an in rem decree to a person who has adversely possessed for an additional five to 15 years.¹² The consequence of this scheme is that, while an adverse possessor can obtain good title after five years, the title is not fully marketable until the lapse of an additional five to 15 years. There is no apparent reason for this discrepancy.¹³ An in rem decree should be authorized without a further period of delay if the basic substantive requirements for title by adverse possession are satisfied.

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 1006 and 2931a of the Civil Code, to amend the headings of Chapter 3 (commencing with Section 738) and Chapter 4A (commencing with Section 801.1) of, to add Chapter 4 (commencing with Section 760.010) to, and to add Chapter 4.5 (commencing with Section 770.010) to, Title 10 of Part 2 of, and to repeal

¹¹ Code Civ. Proc. §§ 318-328 (adverse possession), 738 (quiet title); *Mings v. Compton City School Dist.*, 129 Cal. App. 413, 418, 18 P.2d 967, 969 (1933).

¹² Code Civ. Proc. §§ 749-751.1.

¹³ *Willemsen*, *supra* note 9, at 838-44.

Sections 738, 738.5, 739, 748.5, 749, 749.1, 750, 751, 751.1, 751.3, and 751a of, the Code of Civil Procedure, relating to actions to quiet title.

The people of the State of California do enact as follows:

NEW QUIET TITLE STATUTE

Code of Civil Procedure §§ 760-764.070 (added)

SECTION 1. Chapter 4 (commencing with Section 760.010) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 4. QUIET TITLE

Article 1. General Provisions

§ 760.010. Definitions

760.010. As used in this title:

(a) “Claim” includes a legal or equitable right, title, estate, lien, or interest in property or cloud upon title.

(b) “Property” includes real property, and to the extent applicable, personal property.

Comment. Subdivision (a) of Section 760.010 makes clear that the term “claim” as used in this chapter is intended in the broadest possible sense. The definition of “property” in subdivision (b) reflects the fact that title to personal as well as real property may be determined under this chapter. See Section 760.020.

§ 760.020. Scope of chapter

760.020. An action may be brought under this chapter to establish title to and determine adverse claims to real or personal property or any interest therein.

Comment. Section 760.020 supersedes the first portions of former Sections 738, 749, and 749.1. This chapter does not limit the interests that may be determined or the persons against whom they may be quieted; it is intended to provide the broadest possible forum for clearing title to the fee or any other interest in property.

The ability to quiet title as to both real and personal property

may be useful in cases involving land and fixtures, as well as in cases involving personal property alone.

§ 760.030. Remedy cumulative

760.030. The remedy provided in this chapter is cumulative and not exclusive of any other remedy, form or right of action, or proceeding provided by law for establishing or quieting title to property.

Comment. Section 760.030 continues the substance of the third paragraph of former Section 751 and the first portion of the third paragraph of former Section 751.1. Other proceedings that may be available to clear title to property include actions concerning real property titles affected by public improvement assessments (Sections 801.1-801.15), actions under the Destroyed Land Records Relief Law and Cullen Earthquake Act (Sections 751.01-751.28 and 751.50-751.65), partition actions (Sections 872.010-874.240), actions to quiet title to tax-deeded property (Rev. & Tax. Code §§ 3591-3617 and 3950-3972), actions to remove a cloud on title (Civil Code § 3412), and declaratory relief actions (Code Civ. Proc. § 1060). For special actions and proceedings to clear title, see Sections 770.010-770.080 (identity of person in chain of title), 771.010-771.020 (land dedicated for public improvement), and 772.010-772.060 (right of entry or occupation of surface lands under oil or gas lease). See also Civil Code § 794 (quitclaim of expired oil, gas, or mineral lease).

§ 760.040. Jurisdiction of court

760.040. (a) The superior court has jurisdiction of actions under this chapter.

(b) The court has complete jurisdiction over the parties to the action and the property described in the complaint and is deemed to have obtained possession and control of the property for the purposes of the action with complete jurisdiction to render the judgment provided for in this chapter.

(c) Nothing in this chapter limits any authority the court may have to grant such equitable relief as may be proper under the circumstances of the case.

Comment. Subdivision (a) of Section 760.040 is an exception to the rule of Section 86 conferring limited jurisdiction on municipal and justice courts to determine title to personal

property. It is consistent with the general rule that determinations involving title to property are within the jurisdiction of the superior court. *See, e.g.*, Sections 872.110 (partition), 1250.010 (Eminent Domain Law).

Subdivision (b) is comparable to Sections 751.11 (Destroyed Land Records Relief Law) and 751.55 (Cullen Earthquake Act).

Subdivision (c) makes clear that the recodification of the quiet title provisions in this chapter does not impair any equitable powers of the court. *Cf.* 3 B. Witkin, *California Procedure Pleading* § 534 (2d ed. 1971) (plaintiff's offer to do equity).

§ 760.050. Venue

760.050. Subject to the power of the court to transfer actions, the proper county for the trial of an action under this chapter is:

(a) Where the subject of the action is real property or real and personal property, the county in which the real property, or some part thereof, is located.

(b) Where the subject of the action is personal property, the county in which the personal property is principally located at the commencement of the action or in which the defendants, or any of them, reside at the commencement of the action.

Comment. Section 760.050 is consistent with the general venue provisions of Section 392; it is comparable to Section 872.110 (venue in partition). See Section 872.110 and Comment thereto.

§ 760.060. Rules of practice

760.060. The statutes and rules governing practice in civil actions generally apply to actions under this chapter except where they are inconsistent with the provisions of this chapter.

Comment. Section 760.060 is comparable to Sections 751.17 (Destroyed Land Records Relief Law) and 872.030 (partition).

Article 2. Commencement of Action

§ 761.010. Commencement of action

761.010. (a) An action under this chapter is commenced by filing a complaint with the court.

(b) Immediately upon commencement of the action, the plaintiff shall file a notice of the pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located.

Comment. Subdivision (a) of Section 761.010 is comparable to Section 1250.110 (Eminent Domain Law).

Subdivision (b) supersedes the fifth paragraph of former Sections 749 and 749.1, which provided a 10-day period within which to file. The contents of the *lis pendens* are prescribed in Section 409. Failure to file the *lis pendens* may result in subsequent bona fide purchasers and encumbrancers of record at the time the judgment is recorded not being bound by the quiet title judgment. See Section 764.040 (persons not bound by judgment).

§ 761.020. Complaint

761.020. The complaint shall be verified and shall include all of the following:

(a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any.

(b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession.

(c) The adverse claims to the title of the plaintiff as to which a determination is sought.

(d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought.

(e) A prayer for the determination of the title of the plaintiff and the adverse claims.

Comment. Section 761.020 continues the substance of the second sentence of the first paragraph and supersedes a portion of the fourth paragraph of former Sections 749 and 749.1, which

required a verified complaint and a statement of facts upon which the plaintiff's title is based.

Under subdivision (a), the description of the property must be sufficiently precise to enable the defendants to identify the property. Nothing in this subdivision precludes the joinder of several properties or of real and personal property in one action, where appropriate.

Subdivision (b) does not require that the plaintiff claim a fee or other freehold interest in the property; any interest is sufficient. This is consistent with former Section 738 and the cases thereunder. *See, e.g.*, 3 B. Witkin, *California Procedure Pleading* § 522, at 2173 (2d ed. 1971). For provisions relating to title by adverse possession, *see* Sections 318-328. The 20- and 10-year limitations on establishing title by adverse possession formerly found in Sections 749 and 749.1 are not continued; they are inconsistent with the general adverse possession requirements. *See* discussion in Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 838-44 (1970).

Subdivision (c) requires the naming of specific adverse claims as to which the plaintiff seeks to quiet title. The plaintiff may also seek to give the quiet title action an in rem effect under this chapter. The plaintiff's title in such a case need not be based on adverse possession as under former Sections 749 and 749.1. This chapter includes special provisions, including pleading provisions, to effectuate the in rem aspects of the quiet title action. *See* Sections 762.060-762.070 (unknown defendants), 763.010-763.040 (service of process), 764.010-764.050 (judgment).

Subdivision (d) is intended to permit a title determination as of a date prior to the date of the action. This implements suggestions in L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* xxii (1960), and Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 853 (1970).

§ 761.030. Answer

761.030. (a) The answer shall be verified and shall set forth:

- (1) Any claim the defendant has.
- (2) Any facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true.

(b) If the defendant disclaims in the answer any claim, or suffers judgment to be taken without answer, the plaintiff shall not recover costs.

Comment. Subdivision (a) of Section 761.030 is comparable to subdivisions (a) and (b) of Section 872.410 (partition). The verification requirement is a specific application of Section 446 (when complaint is verified, answer must be verified).

Subdivision (b) continues the substance of former Section 739. It provides an express exception to Section 1032 (costs in superior court).

§ 761.040. Cross-complaint

761.040. (a) The defendant may by cross-complaint seek affirmative relief in the action.

(b) If the defendant seeks a determination of title as of a date other than the date specified in the complaint, the cross-complaint shall include the date and a statement of the reasons why a determination as of that date is sought.

Comment. Subdivision (a) of Section 761.040 codifies case law permitting a cross-complaint for affirmative relief in a quiet title action. See, *e.g.*, *Winter v. McMillan*, 87 Cal. 256, 25 P. 407 (1890).

Subdivision (b) is comparable to Section 761.020(d) (complaint).

Article 3. Defendants

§ 762.010. Necessary defendants

762.010. The plaintiff shall name as defendants in the action the persons having adverse claims to the title of the plaintiff as to which a determination is sought.

Comment. Section 762.010 states the rule for joinder of known adverse claimants. Failure to join these persons will result in a judgment that does not bind them. See Sections 764.040 and 764.050. For joinder requirements where the name or interest of the defendant is unknown or the defendant is deceased, see Sections 762.020 and 762.030. For joinder of unknown persons, see Section 762.060.

§ 762.020. Where name or interest of defendant is unknown

762.020. (a) If the name of a person required to be named as a defendant is not known to the plaintiff, the plaintiff shall so state in the complaint and shall name as parties all persons unknown in the manner provided in Section 762.060.

(b) If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff shall so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff shall also state in the complaint, so far as is known to the plaintiff, the name, age, and legal disability (if any) of the person in being who would be entitled to the claim had the contingency upon which the claim depends occurred prior to the commencement of the action.

Comment. Section 762.020 is comparable to subdivisions (a) and (b) of Section 872.520 (partition).

§ 762.030. Where defendant is deceased

762.030. (a) If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff shall join the personal representative as a defendant.

(b) If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative:

(1) The plaintiff shall state these facts in an affidavit filed with the complaint.

(2) Where it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (naming the deceased person), deceased, and all persons claiming by, through, or under such decedent," naming them in that manner.

(3) Where it is stated in the affidavit that such person is believed to be dead, the plaintiff may join the person as a defendant, and may also join “the testate and intestate successors of _____ (naming the person) believed to be deceased, and all persons claiming by, through, or under such person,” naming them in that manner.

Comment. Section 762.030 is comparable to Sections 872.530 (partition) and 1250.220(b) (Eminent Domain Law).

§ 762.040. Title report and additional defendants

762.040. The court upon its own motion may, and upon motion of any party shall, make such orders as appear appropriate:

(a) For joinder of such additional parties as are necessary or proper.

(b) Requiring the plaintiff to procure a title report and designating a place where it shall be kept for inspection, use, and copying by the parties.

Comment. Subdivision (a) of Section 762.040 is comparable to a portion of Section 872.520(c) (partition). Subdivision (b) is drawn from Section 872.220 (partition).

§ 762.050. Appearance by named and unnamed defendants

762.050. Any person who has a claim to the property described in the complaint may appear in the proceeding. Whether or not the person is named as a defendant in the complaint, the person shall appear as a defendant.

Comment. Section 762.050 is comparable to Sections 751.12 (Destroyed Land Records Relief Law) and 1250.230 (Eminent Domain Law).

§ 762.060. Joinder of “all persons unknown”

762.060. (a) In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants “all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff’s title, or any cloud upon plaintiff’s title thereto,” naming them in that manner.

(b) In an action under this section, the plaintiff shall name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property.

(c) If the plaintiff admits the validity of any adverse claim, the complaint shall so state.

Comment. Subdivision (a) of Section 762.060 continues the substance of the last portion of the second paragraph and the third paragraph of former Sections 749 and 749.1. Unlike the former provisions, Section 762.060 does not limit the availability of in rem relief to adverse possessors, but permits joinder of all persons by any plaintiff seeking clear title. See Sections 760.020 and 761.020 and Comments thereto. In addition to unknown persons, the plaintiff must also name known persons pursuant to subdivision (b) and Section 762.010.

Subdivision (b) continues the substance of the first portion of the second paragraph and supersedes a portion of the fourth paragraph of former Sections 749 and 749.1, and extends the joinder requirement to claimants reasonably apparent from an inspection of the property. This provision is drawn from Section 872.510 (partition). For the effect of failure to join holders of interests actually known to the plaintiff or reasonably apparent from an inspection of the property, see Section 764.050.

Subdivision (c) adds express authority to admit by pleadings the validity of an adverse claim, thereby enabling an action to determine title as against all persons, known and unknown, with specified exceptions. This will avoid the need to litigate interests accepted as valid to which the plaintiff's title is subject. See Section 764.010.

§ 762.070. Rights of unknown defendants

762.070. A person named and served as an unknown defendant has the same rights as are provided by law in cases of all other defendants named and served, and the action shall proceed against unknown defendants in the same manner as against other defendants named and served, and with like effect.

Comment. Section 762.070 continues the substance of a portion of former Section 750.

§ 762.080. Appointment of guardian ad litem

762.080. The court upon its own motion may, and upon motion of any party shall, make such orders for appointment of guardians ad litem as appear necessary to protect the interest of any party.

Comment. Section 762.080 is comparable to a portion of Section 872.520(c) (partition). The conditions under which a guardian ad litem should be appointed are prescribed in Sections 372, 373, and 373.5. It should be noted that a judgment in the action binds persons under legal disability. Section 764.030.

Article 4. Service of Process**§ 763.010. Summons**

763.010. (a) The form, content, and manner of service of summons shall be as in civil actions generally.

(b) If upon affidavit it appears to the satisfaction of the court that the plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants and persons joined as testate or intestate successors of a person known or believed to be dead, the court shall order service by publication pursuant to Section 415.50 and the provisions of this article. The court may, in its discretion, appoint a referee to investigate whether the plaintiff has used reasonable diligence to ascertain the identity and residence of persons sought to be served by publication, and the court may rely on the report of the referee instead of the affidavit of the plaintiff in making the order for service by publication.

(c) Nothing in this section authorizes service by publication upon any person named as an unknown defendant who is in open and actual possession of the property.

Comment. Subdivision (a) of Section 763.010 supersedes the fourth paragraph of former Sections 749 and 749.1 and the first, third, and fourth paragraphs of former Section 750. The contents of the summons is prescribed in Section 412.20. A description of the property and a statement of the object of the action are not included since the property will already be described and the

relief sought will already be stated in the complaint. See Section 761.020. Service on known defendants must be made pursuant to general service provisions; publication as to known defendants is permitted only by court order if it appears upon affidavit that the defendant cannot with reasonable diligence be served in another manner. Section 415.50.

Subdivision (b) makes clear that, where unknown parties or heirs are involved, service on such parties must be by publication. This supersedes the fourth and a portion of the fifth paragraphs of former Section 750. The affidavit contents are drawn from Section 801.9 (real property titles affected by public improvement assessments) and Revenue and Taxation Code Section 3960 (quiet title to tax-deeded property). Subdivision (b) also authorizes the court to appoint a referee to investigate the facts on behalf of the court where service by publication is sought. The authority provided is a specific instance of the general authority contained in Section 638(1). Whether the plaintiff has used reasonable diligence to ascertain the location and identity of known and unknown defendants is a matter to be determined by the trier of fact under the circumstances of the particular case. See, *e.g.*, *Gerhard v. Stephens*, 68 Cal.2d 864, 908-10, 442 P.2d 692, 725-26, 69 Cal. Rptr. 612, 645-46 (1968).

Subdivision (c) codifies case law. See, *e.g.*, *Gerhard v. Stephens*, 68 Cal.2d 864, 908, 442 P.2d 692, 725, 69 Cal. Rptr. 612, 645 (1968); *Manuel v. Kiser*, 94 Cal. App.2d 540, 545, 210 P.2d 918, 921 (1949).

§ 763.020. Requirements where service is by publication

763.020. Where the court orders service by publication, the order is subject to the following conditions:

(a) The plaintiff shall post, not later than 10 days after the date the order is made, a copy of the summons and complaint in a conspicuous place on the real property that is the subject of the action.

(b) The plaintiff shall record, if not already recorded, a notice of the pendency of the action.

(c) The publication shall describe the property that is the subject of the action. In addition to particularly describing the property, the publication shall describe the property by giving its street address, if any, or other common designation, if any; but, if a legal description of the

property is given, the validity of the publication shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

Comment. Section 763.020 supersedes the second and a portion of the fifth paragraphs of former Section 750. The manner of service by publication is prescribed in the general provisions of Section 415.50.

§ 763.030. Publication as to certain defendants

763.030. (a) Where the court orders service by publication, the publication may:

- (1) Name only the defendants to be served thereby.
- (2) Describe only the property in which the defendants to be served thereby claim interests.

(b) Judgment against a defendant who fails to appear and answer following service under this section shall be conclusive against the defendant named in respect only to property described in the publication.

Comment. Section 763.030 supersedes the seventh paragraph of former Section 750 and is comparable to Sections 872.330 (partition) and 1250.125 (Eminent Domain Law).

§ 763.040. Proof of service

763.040. The court before hearing the case shall require proof that the summons has been served, posted, published as required, and that the notice of pendency of action has been filed.

Comment. Section 763.040 continues the substance of the second sentence of the first paragraph of former Sections 751 and 751.1.

Article 5. Judgment

§ 764.010. Proof of title and judgment

764.010. The court shall examine into and determine the plaintiff's title and the claims of all the defendants. The court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of

the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law.

Comment. Section 764.010 continues the substance of the first sentence of the first paragraph of former Sections 751 and 751.1. It is consistent with Section 585(3) (default judgment).

§ 764.020. Construction of will

764.020. (a) If in an action under this chapter the validity or interpretation of a gift, devise, bequest, or trust, under a will or instrument purporting to be a will, whether admitted to probate or not, is involved:

(1) The will or instrument purporting to be a will is admissible in evidence.

(2) All questions concerning the validity of the gift, devise, bequest, or trust shall be finally determined in the action.

(3) If the will has been admitted to probate and the gift, devise, bequest, or trust has been interpreted by a final decree of the probate court, the interpretation is conclusive as to the proper construction thereof.

(b) Nothing in this section deprives a party of the right to a jury trial in any case where, by law, the right is now given.

Comment. Section 764.020 continues the substance of the last portion of former Section 738. For determination of title in probate proceedings, see Prob. Code §§ 850-854.

§ 764.030. Persons bound by judgment

764.030. The judgment in the action is binding and conclusive on all of the following persons, regardless of any legal disability:

(a) All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided.

(b) Except as provided in Section 764.050, all persons who were not parties to the action and who have any claim to the property which was not of record at the time the lis

pendens was filed or, if none was filed, at the time the judgment was recorded.

(c) All persons claiming under any of the foregoing persons.

Comment. Section 764.030 supersedes the last portion of the first sentence of the sixth paragraph of former Section 750 and the first portion of the second paragraph of former Sections 751 and 751.1. It is comparable to Sections 751.15 (Destroyed Land Records Relief Law) and 874.210 (partition).

§ 764.040. Persons not bound by judgment

764.040. The judgment does not affect the claim of any person who was not a party to the action and who had a claim of record in the property or part thereof at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

Comment. Section 764.040 is comparable to Section 874.220 (partition).

§ 764.050. Unrecorded interests known to plaintiff

764.050. If a person having an unrecorded claim in the property or part thereof was not a party to the action but the claim was actually known to the plaintiff at any time before entry of judgment or would have been reasonably apparent from an inspection of the property, the judgment does not affect the claim of the person. Nothing in this section shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value of the property.

Comment. Section 764.050 is comparable to Section 874.230 (partition). See Section 874.230 and Comment thereto.

§ 764.060. Protection of bona fide purchaser

764.060. The relief granted in an action or proceeding directly or collaterally attacking the judgment in the action, whether based on lack of actual notice to a party or otherwise, shall not impair the rights of a purchaser or encumbrancer for value of the property acting in reliance on the judgment without knowledge of any defects or irregularities in the judgment or the proceedings.

Comment. Section 764.060 is intended to enhance the marketability of property as to which an in rem quiet title decree has been rendered. An action or proceeding directly or collaterally attacking the judgment in the action may not affect the rights of bona fide purchasers of the property; the plaintiff in the action or proceeding may be relegated to a damage remedy. Section 764.060 does not prescribe limitations periods for direct or collateral attack on a quiet title judgment. Such periods are governed by other law. See, *e.g.*, Sections 473, 473.5.

§ 764.070. Effect on State of California and United States

764.070. Notwithstanding any other provision of this chapter, the judgment in the action is not binding or conclusive on the state or the United States unless individually joined as parties to the action.

Comment. Section 764.070 continues the substance of provisions formerly located in the first portion of the second paragraph of former Sections 751 and 751.1. For statutes authorizing quiet title actions against the state, see, *e.g.*, Pub. Res. Code §§ 6461-6465 (state lands administration), Rev. & Tax. Code § 3951 (tax-deeded property), Sts. & Hy. Code § 9012 (refunding of bonds).

CONFORMING CHANGES

Civil Code § 1006 (amended)

SEC. 2. Section 1006 of the Civil Code is amended to read:

1006. Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession; ~~provided, however, that~~ but the title conferred by such occupancy ~~shall not be~~ *is not* a sufficient interest in real property to enable the occupant or ~~his~~ *the occupant's* privies to commence or maintain an action to quiet title ~~under the provisions of section seven hundred thirty-eight of the Code of Civil Procedure of this state~~, unless ~~such~~ *the* occupancy ~~shall have~~ *has* ripened into title by prescription.

Comment. Section 1006 is amended to reflect the relocation of the quiet title provisions and to make nonsubstantive drafting improvements.

Civil Code § 2931a (amended)

SEC. 3. Section 2931a of the Civil Code is amended to read:

2931a. In all actions brought to determine conflicting claims to real property, or for partition of real property ~~under the provisions of Chapter 4, Title 10, Part 2 of the Code of Civil Procedure~~, or to foreclose a deed of trust, mortgage, or other lien upon real property upon which exists a lien to secure the payment of taxes or other obligations, to the State of California, other than taxes upon such real property, the State of California may be made a party, and in such action the court shall have jurisdiction to determine the priority and effect of the liens described in the complaint in or upon the property, but the jurisdiction of the court in such action shall not include a determination of the validity of the tax giving rise to the lien or claim of lien. The complaint in such action shall contain a description of the lien sufficient to enable the tax or other obligation, payment of which it secures, to be identified with certainty. Services of process in such actions shall be

made upon the Secretary of State or ~~his~~ assistant, or any of ~~his deputies~~ *deputy*, and upon the Attorney General or any of ~~his deputies~~ *deputy*, and a copy of the complaint shall be delivered to the officer, board, commission, department or division or other body charged with the collection of the tax or obligation. It shall be the duty of the Attorney General to represent the State in all such actions.

Comment. Section 2931a is amended to reflect the relocation of the partition provisions. Quiet title provisions now occupy Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure.

Code of Civil Procedure §§ 738-751a (Chapter heading)

SEC. 4. The heading of Chapter 3 (commencing with Section 738) of Title 10 of Part 2 of the Code of Civil Procedure is amended to read:

CHAPTER 3. ACTIONS TO DETERMINE CONFLICTING CLAIM TO *FOR THE RECOVERY* OF REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE PROPERTY

Comment. The heading of Chapter 3 is amended to reflect the relocation to Chapter 4 (commencing with Section 760.010) (quiet title) of provisions relating to actions to determine conflicting claims to real property.

Code of Civil Procedure § 738 (repealed)

SEC. 5. Section 738 of the Code of Civil Procedure is repealed.

738. An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim; *provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real or personal property, the validity or interpretation of any gift, devise, bequest or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all*

questions concerning the validity of any gift, devise, bequest or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; *provided*, that if the said will shall have been admitted to probate and interpreted by a decree of the superior court sitting in probate which decree has become final such interpretation shall be conclusive as to the proper construction of said will, or any part thereof, so construed, in any action under this section; *and provided, however*, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given.

Comment. The first portion of former Section 738 is superseded by Section 760.020, which does not limit the persons against whom title may be quieted, but permits an in rem action. The substance of the last portion of former Section 738 is continued in Section 764.020.

Code of Civil Procedure § 738.5 (repealed)

SEC. 6. Section 738.5 of the Code of Civil Procedure is repealed.

738.5. An action may be brought against the State of California to determine whether or not an escheat has occurred as to any real property or interest therein under the provisions of "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property of this State, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith," approved by the electorate November 2, 1920, and as amended. Such an action may be commenced by any person claiming an interest in the property. The complaint shall describe the property and shall specify the instrument or instruments in the chain of title to the property which gave rise to the possibility of such escheat. The State of California shall be the sole

defendant in such action and no other matter may be adjudicated except the issue of the occurrence of an escheat. No issue shall be raised or claim made by the plaintiff in such action based upon estoppel, or failure of the State to have commenced an escheat proceeding, nor shall any statute of limitation operate to bar an adjudication in such action that the property or any interest therein has escheated to the State. A copy of the complaint and summons shall be served upon the Attorney General or his assistant, or any of his deputies, and upon the district attorney or county counsel of the county in which the property is situated, or upon their respective assistants or deputies. Such district attorney or county counsel shall perform duties similar to those required to be performed in escheat proceedings commenced by the State under the provisions of the act mentioned in this section. The Attorney General or district attorney or county counsel shall have 180 days, as a matter of right, in which to answer or otherwise plead. If at any time during the pendency of the action the Attorney General determines that under the law or the facts or both no such escheat has occurred, he may, with the consent of the State Controller, file a disclaimer in such action and thereupon judgment shall be entered against the State.

Comment. Former Section 738.5 is not continued. The Alien Land Law, which it implemented, has been repealed for more than 20 years. See 1955 Cal. Stats. chs. 316, 1550; 1957 Cal. Stats. p. cxxxvii.

Code of Civil Procedure § 739 (repealed)

SEC. 7. Section 739 of the Code of Civil Procedure is repealed.

739. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Comment. The substance of former Section 739 is continued in Section 761.030(c).

Code of Civil Procedure § 748.5 (repealed)

SEC. 8. Section 748.5 of the Code of Civil Procedure is repealed.

748.5. Whenever a proposal to dedicate land for public improvement has been heretofore or hereafter made by map only, without any acceptance of the dedication having been made and recorded within 25 years thereafter, and the land has not been used for the purpose for which the dedication was proposed for a period of 25 years, and the property has been subsequently sold to a third person, after the filing of the map, and used as if free of the dedication, there is a conclusive presumption that the proposed dedication was not accepted, and in a suit to quiet title to such land naming the governmental agency to which the dedication was made by map as defendant, the decree in favor of the plaintiff shall clear the title of the proposed dedication and remove the cloud created by the proposed dedication.

Comment. The substance of the first portion of former Section 748.5 is continued in Section 771.010. The substance of the last portion is continued in Section 771.020.

Code of Civil Procedure § 749 (repealed)

SEC. 9. Section 749 of the Code of Civil Procedure is repealed.

749. An action may be brought, either as a separate action, or joined with an action under Section 738 of this code, to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for 20 years prior to the filing of the complaint, claiming to own the same in fee against the whole world, and who, by himself or by himself and his predecessors in interest, has paid all taxes of every kind levied or assessed against the property and which were payable during the period of five years continuously next preceding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above set forth.

The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the real property described in the complaint adverse to plaintiff's ownership, and other persons unknown claiming any right, title, estate, interest or lien in such real property, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto."

If the person or all persons having a claim or cloud on the title to said real property are unknown to plaintiff, the latter may describe them in the complaint as "all persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto."

If any known defendant named in the complaint is a person claiming any right, title, estate, lien or interest in and to the real property under the plaintiff or any predecessor in interest of the plaintiff, which claim has arisen, or has been created by the plaintiff or any predecessor in interest of the plaintiff, within 30 years prior to the filing of the complaint, then as to any such defendant the complaint shall contain allegations appropriate to an action under Section 738 of this code, and as to any such defendant the action shall be deemed and considered brought under the provisions of Section 738 and sections pertinent thereto of this code, and as to any such defendant the proceedings in the action shall be governed by the provisions of said Section 738 and said sections pertinent thereto, and the provisions of Section 750 of this code shall not apply to the proceedings as to any such defendant.

Within 10 days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a

notice of the pendency of the action, containing the matters required by Section 409 of this code.

Comment. The first sentence of the first paragraph of former Section 749 is superseded by Section 760.020, which does not limit the persons by whom title may be quieted, but permits an in rem action in any case; nor does Section 760.020 impose a 20-year waiting period before a person claiming title by adverse possession may bring an action. See also Section 761.020 and Comment thereto (complaint). The substance of the second sentence of the first paragraph, requiring a verified complaint and a statement of facts upon which the plaintiff's title is based, is continued in Section 761.020.

The substance of the first portion of the second paragraph, requiring joinder of interests of record or known to the plaintiff, is continued in Section 762.010. The substance of the last portion of the second paragraph and the third paragraph is continued in Section 762.060.

The fourth paragraph, relating to action against and service on a known defendant, is superseded by Sections 761.020 (complaint), 762.010 (necessary defendants), and 763.010(a) (service of summons).

The fifth paragraph, requiring a lis pendens, is superseded by Section 761.010(b).

Code of Civil Procedure § 749.1 (repealed)

SEC. 10. Section 749.1 of the Code of Civil Procedure is repealed.

749.1. An action may be brought, either as a separate action, or joined with an action under Section 738 of this code, to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for 10 years prior to the filing of the complaint, claiming to own the same in fee against the whole world, and who, by himself or by himself and his predecessors in interest, has paid all taxes of every kind levied or assessed against the property and which were payable during the period of 10 years continuously next preceeding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above set forth.

The said complaint may include as defendants in such action; in addition to such persons as appear of record to have; all other persons who are known to the plaintiff to have; some claim or cloud on the real property described in the complaint adverse to plaintiff's ownership; and other persons unknown claiming any right, title, estate, interest or lien in such real property; or cloud upon the title of plaintiff thereto; and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown; claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership; or any cloud upon plaintiff's title thereto."

If the person or all persons having a claim or cloud on the title to said real property are unknown to plaintiff; the latter may describe them in the complaint as "all persons unknown; claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership; or any cloud upon plaintiff's title thereto."

If any known defendant named in the complaint is a person claiming any right, title, estate, lien or interest in and to the real property under the plaintiff or any predecessor in interest of the plaintiff, which claim has arisen; or has been created by the plaintiff or any predecessor in interest of the plaintiff, within ten years prior to the filing of the complaint; then as to any such defendant the complaint shall contain allegations appropriate to an action under Section 738 of this code; and as to any such defendant the action shall be deemed and considered brought under the provisions of Section 738 and sections pertinent thereto of this code; and as to any such defendant the proceedings in the action shall be governed by the provisions of said Section 738 and said sections pertinent thereto; and the provisions of Section 750 of this code shall not apply to the proceedings as to any such defendant.

Within ten days after the filing of the complaint, plaintiff shall file; or cause to be filed in the office of the county recorder of the county where the property is situated; a

notice of the pendency of the action, containing the matters required by Section 409 of this code.

Comment. The first sentence of the first paragraph of former Section 749.1 is superseded by Section 760.020, which does not limit the persons by whom title may be quieted, but permits an in rem action in any case; nor does Section 760.020 impose a 10-year waiting period before a person claiming title by adverse possession may bring an action. See also Section 761.020 and Comment thereto (complaint). The substance of the second sentence of the first paragraph, requiring a verified complaint and a statement of facts upon which the plaintiff's title is based, is continued in Section 761.020.

The substance of the first portion of the second paragraph, requiring joinder of interests of record or known to the plaintiff, is continued in Section 762.010. The substance of the last portion of the second paragraph and the third paragraph is continued in Section 762.060.

The fourth paragraph, relating to action against and service on a known defendant, is superseded by Sections 761.020 (complaint), 762.010 (necessary defendants), and 763.010(a) (service of summons).

The fifth paragraph, requiring a lis pendens, is superseded by Section 761.010(b).

Code of Civil Procedure § 750 (repealed)

SEC. 11. Section 750 of the Code of Civil Procedure is repealed.

750. ~~Within three years after the filing of the complaint, as required by Section 749 or 749.1, a summons shall be issued, which shall contain the matters required by Section 412.20, and in addition, a description of the property and a statement of the object of the action. In the summons the unknown defendants shall be designated as in the complaint, whether they are the sole defendants or not. If as to any defendant the action is one brought under the provisions of Section 738 and sections pertinent thereto of this code, such defendant may be named in the same summons and no separate or additional summons need be issued directed to such defendant.~~

~~Within 30 days after the issuance of the summons, the plaintiff shall post or cause to be posted a copy thereof in~~

a conspicuous place on the property described in the complaint.

At any time after the issuance of the summons, the plaintiff, or his agent or attorney, shall make and file an affidavit wherein there shall be stated the following matters:

(a) The names of the defendants, if any, as to whom the action is brought under the provisions of Section 738 and sections pertinent thereto of this code, if there is no such defendant that fact shall be stated:

(b) The names of all the defendants who have been served, if any, if there is none that fact shall be stated.

(c) The names of the defendants not served whose places of residence are known to the plaintiff and their respective places of residence.

(d) The names of the defendants not served whose place of residence is unknown to the plaintiff.

All known defendants shall be served in the manner provided by law for the service of a summons in a civil action:

Except as otherwise provided, upon the making and filing of the aforesaid affidavit, the court or a judge thereof shall make an order directing the summons to be served upon all the unknown defendants as stated in the complaint and summons by publication in some daily or weekly newspaper of general circulation printed and published in the county where the property is situated, and if there be no such paper in such county, then in some adjoining county, to be designated by the court or a judge thereof, which publication shall be pursuant to Section 6064 of the Government Code.

All such unknown persons so served shall have the same rights as are provided by law in cases of all other defendants named and served, and the action shall proceed against such unknown persons in the same manner as against the defendants who are named and served, and with like effect, and any such unknown person who has or claims to have any right, title, estate, lien or interest in the property, or cloud on the title thereto, adverse to plaintiff, at the time of the commencement of the action, who has been duly

served as aforesaid, and anyone claiming under him, shall be concluded by the judgment in such action as effectually as if the action was brought against the person by his or her name and personal service of process was obtained, notwithstanding any such unknown person may be under legal disability. Service shall be deemed complete upon the completion of the publication.

In the event that service of any summons shall be required to be by publication as to any defendant, including a defendant as to whom the action is brought under the provisions of Section 738, the order for such publication, made pursuant to the provisions of Section 415.50 may be made either as a part of the order for publication of summons made as to unknown defendants, or as a separate order, as the court or a judge thereof may consider proper in the particular case.

Comment. The first, third, and fourth paragraphs of former Section 750 are superseded by Section 763.010(a), which requires the summons to have the same form and content and be served in the same manner as in civil actions generally. The three-year issuance of summons requirement is superseded by Section 581a (dismissal for lack of prosecution).

The second paragraph is superseded by Section 763.020(a), which requires posting within 10 days after the court orders service by publication.

The fifth paragraph is superseded by Sections 763.010 and 763.020(c).

The substance of the first portion of the first sentence of the sixth paragraph is continued in Section 762.070. The last portion of the first sentence is superseded by Section 764.030. The last sentence of the sixth paragraph is superseded by Section 415.50(c).

The seventh paragraph is superseded by Section 763.030.

Code of Civil Procedure § 751 (repealed)

SEC. 12. Section 751 of the Code of Civil Procedure is repealed.

751. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and

determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons; and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession; and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed.

The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication; but shall not be conclusive against the State of California or the United States. Said judgment shall have the effect of a judgment in rem except as against the State of California and the United States; and provided further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession, or lien to the property under the plaintiff or his predecessors in interest, which claim, lien, estate or right of possession has arisen or has been created by the plaintiff or his predecessors in interest within 20 years prior to the filing of the complaint, unless proceedings shall have been taken against such defendant and summons served upon him as provided with respect to actions brought under the provisions of Section 738 of this code, or unless such defendant shall have appeared voluntarily in the action.

The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding allowed by law.

Comment. The substance of the first sentence of the first paragraph of former Section 751 is continued in Section 764.010. The substance of the second sentence is continued in Section 763.040.

The first portion of the second paragraph is superseded by Sections 764.030 and 764.070. The last portion is not continued;

the general provisions governing joinder of defendants and title by adverse possession govern. See Sections 762.010 and 318-328.

The substance of the third paragraph is continued in Section 760.030.

Code of Civil Procedure § 751.1 (repealed)

SEC. 13. Section 751.1 of the Code of Civil Procedure is repealed.

751.1. When the summons has been served as provided in Section 750 of this code and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons; and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession; and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed.

The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication; but shall not be conclusive against the State of California or the United States. Said judgment shall have the effect of a judgment in rem except as against the State of California and the United States; and provided further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession, or lien to the property under the plaintiff or his predecessors in interest; which claim, lien, estate or right of possession has arisen or has been created by the plaintiff or his predecessors in interest within ten years prior to the filing of the complaint, unless proceedings shall

have been taken against such defendant and summons served upon him as provided with respect to actions brought under the provisions of Section 738 of this code, or unless such defendant shall have appeared voluntarily in the action.

The remedy provided in this section and Section 749.1 shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding allowed by law and shall be construed as an alternative remedy to the remedy provided in Sections 749, 750, 751, and 751a and not as repealing or amending those sections.

Sections 750 and 751a shall apply to and be a part of the alternative remedy provided by this section and Section 749.1.

Comment. The substance of the first sentence of the first paragraph of former Section 751.1 is continued in Section 764.010. The substance of the second sentence is continued in Section 763.040.

The first portion of the second paragraph is superseded by Sections 764.030 and 764.070. The last portion is not continued; the general provisions governing joinder of defendants and title by adverse possession govern. See Sections 762.010 and 318-328.

The substance of the first portion of the third paragraph is continued in Section 760.030.

The last portion of the third paragraph and the fourth paragraph are not continued; they are unnecessary to Chapter 4 (commencing with Section 760.010) as drafted.

Code of Civil Procedure § 751.3 (repealed)

SEC. 14. Section 751.3 of the Code of Civil Procedure is repealed.

751.3. (a) Whenever a mining rights lease, including a community lease, exists for the production of oil, gas, or other hydrocarbons, and a right of entry or occupation provided by the lease encumbers all or part of the surface or surface zone of the leasehold lands, any person who owns a fee interest in the surface of the leasehold lands may bring an action in the superior court to terminate the right of entry or occupation as to all or some described portion of the surface and surface zone of the leasehold lands in which such person owns an interest.

(b) The court may render a judgment or decree terminating such lessee's right of entry or occupation of the surface and surface zone, subject to such conditions as the court deems fair and equitable, if the evidence shows each of the following:

(1) The document which created the leasehold interest was originally executed more than 20 years prior to filing the action provided for in this section regardless of any amendments to such document. However, if any amendment was entered into expressly for the purpose of waiving, limiting, or rearranging surface rights of entry and occupation by the lessee, the 20-year period shall be computed as if the document was originally executed on the date of execution of such amendment.

(2) The subject land is not presently occupied by any of the following:

(i) A producing oil or gas well or well bore.

(ii) A well or well bore being utilized for injection of water, gas, or other substance into geologic substrata as an aid to oil or gas production or to ameliorating subsidence.

(iii) A well or well bore being utilized for the disposal injection of waste oil well brine and byproducts.

(iv) A well or well bore being utilized for the production of water for use in oil field injection, waterflood, and pressure maintenance programs.

(3) Termination of the right of entry or occupation within the subject land in the manner requested by the plaintiff, or subject to such conditions as the court may impose pursuant to this section, will not significantly interfere with the right of the lessee, under the lease, to continue to conduct operations for the continued production of oil from leasehold strata beneath the surface zone in a practical and economic manner, utilizing such production techniques as will be appropriate to the leasehold area, consistent with good oilfield practice, and to gather, transport, and market such oil.

(c) The court may qualify the decree terminating the surface and surface zone right of entry or occupation so as to provide for limited surface and surface zone easements

which the lessee may continue to enjoy within the subject land. A decree may be conditioned upon the relocation of pipelines, roadways, equipment, or lease facilities in such manner as will most effectively free the subject land for surface use while safeguarding continued oil and gas operations in a practical and economic manner. Any such condition of the decree shall require the plaintiff to pay the costs of the relocation. However, the plaintiff shall be entitled to a setoff against such costs to the extent of any benefit to the lessee resulting from the installation of new equipment or material. The plaintiff shall have the burden of proving any such benefit accruing to the lessee.

(d) It shall be against public policy for any oil or gas lease, at its inception, to provide for the waiver of any rights created by this section, or for such rights to be waived by amendment to any oil or gas lease within 20 years of the date of its execution by a plaintiff or his predecessor in interest.

(e) As used in this section:

(1) "Surface zone" means the zone which lies above a plane which is 500 feet below the surface of the land.

(2) "Subject land" means that area occupied by the particular described surface and surface zone for which plaintiff seeks to terminate the leasehold right of entry and occupation.

(3) "Lease facilities" means storage tanks, wash tanks, separators, heaters, and other facilities reasonably necessary for the production of oil or gas, including secondary recovery operations.

(f) No judgment rendered pursuant to this section shall change or affect the terms or operation of any valid unit agreement or valid operating agreement which comes within the provisions of Section 3301 or 3321 of the Public Resources Code.

(g) This section shall apply only to lands within a city in any county with a population exceeding 4,000,000 or with a population of more than 700,000 and less than 710,000 as determined by the 1960 Federal Decennial Census.

Comment. The substance of subdivision (a) of former Section 751.3 is continued in Section 772.030(a). The substance of

subdivision (b) is continued in Section 772.040. The substance of subdivision (c) is continued in Section 772.050. The substance of subdivision (d) is continued in Section 772.060. The substance of subdivision (e) is continued in Section 772.020. The substance of subdivision (f) is continued in Section 772.030(b). The substance of subdivision (g) is continued in Section 772.010.

Code of Civil Procedure § 751a (repealed)

SEC. 15. Section 751a of the Code of Civil Procedure is repealed.

~~751a. Whenever any person who by any conveyance, judgment or decree has received or taken, or who hereafter receives or takes, the title to, or any interest in, or lien upon real property in a certain name and thereafter has conveyed, or conveys, or has reconveyed, or reconveys, the same or any part thereof, or has satisfied, or satisfies, such lien in a name other than, or different from, the name under which title was received, or any interest or lien thereon was taken or where the estate of a decedent has been probated under a name different from the name in which real property of such decedent stands of record, and the decree of distribution has been entered in such estate, or when any right, title or interest of any person in real property has been divested by a judgment or decree, or otherwise, under a name other than, or different from, the name under which title was received, the identity of such person, or persons or the identity of such decedent and the person in whose name the property stands of record, may be adjudicated and determined on petition of any subsequent owner or any distributee of the estate of such decedent or the successor in interest, of said property, or any part thereof, or of any interest therein. As many such persons as appear of record in the chain of title to the land described in the petition may be joined in one petition or proceeding.~~

The petition must be filed in the superior court of the county in which the land or some part thereof is situated and shall be verified as provided in this code for verification of a complaint. The petition may be substantially entitled "In the matter of the determination of the identity

of (naming all the persons sought to be identified); and may set forth:

1. A statement of petitioner's interest in the property as owner, part owner or distributee or successor in interest or otherwise.

2. A particular description of the petitioner's property.

3. The name or names of the person or persons sought to be identified, setting out the name and a reference to the record of the conveyance, judgment or decree under which title was received; and the name and a reference to the record of the conveyance whereby the title was conveyed; or a reference to the record of the judgment or decree or conveyance whereby the title was divested; or where an estate has been distributed, setting out the name under which the estate of a decedent has been probated and the name in which real property of such decedent stands of record; and that such names were and are the names of the same person; and that such conveyances or such decrees of distribution affect the title to petitioner's property.

4. A prayer that the identity of such persons be established. The clerk must thereupon set the petition for hearing by the court and the petitioner must give notice thereof by causing notices of the time and place of hearing to be posted at the courthouse of the county where the proceeding is pending and in a conspicuous place on the property described; at least 10 days before the hearing. The special notice shall be substantially in the following form:

(Title of court and cause)

Notice is hereby given that has filed a petition herein claiming to be the owner (or distributee) of the following described lands (description) and praying that the identity of the following/named persons; in former conveyances (or judgments or decrees) to said lands or in decrees of distribution of said lands in probate be determined; to wit: (names as J. Doe and John Doe); and that the time and place of hearing said petition has been set for the day of ; 19 ; at the hour of ; m. of said day at the courtroom of said court in the city of

The substance of the first sentence of the fifth paragraph is continued in Section 770.080(a). The substance of the second sentence is continued in Section 770.080(b).

Code of Civil Procedure §§ 770.010-772.060 (added)

SEC. 16. Chapter 4.5 (commencing with Section 770.010) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

**CHAPTER 4.5. SPECIAL ACTIONS AND
PROCEEDINGS TO CLEAR TITLE****Article 1. Identity of Person
in Chain of Title****§ 770.010. Definitions**

770.010. As used in this article:

(a) “Acquired” means received or taken by conveyance, judgment, decree, or otherwise.

(b) “Property” means any right, title, or interest in or lien upon real property or part thereof.

(c) “Subsequent owner” means the person to whom property is transferred whether as owner, part owner, or otherwise, or the successors in interest of the person, and includes a distributee of the estate of a decedent.

(d) “Transfer” means voluntary or involuntary transfer and includes a conveyance, reconveyance, satisfaction of a lien, or divestment by judgment, decree, or otherwise. The probate of the estate of a decedent and entry of the decree of distribution is a transfer within the meaning of this subdivision.

Comment. Section 770.010 is drawn from the first sentence of the first paragraph of former Section 751a for simplicity of drafting.

§ 770.020. Proceeding authorized

770.020. If property is acquired or stands of record in the name of a person who heretofore or hereafter transfers the property under a name other than or different from the name in which the property is acquired or stands of record, a proceeding is authorized to adjudicate and determine the identity of the person in whose name the property is acquired or stands of record and the person who transfers the property.

Comment. Section 770.020 continues the substance of the first sentence of the first paragraph of former Section 751a. See also Section 770.010 (definitions).

§ 770.030. Jurisdiction and venue

770.030. The proceeding shall be brought in the superior court of the county in which the property or any part thereof is situated.

Comment. Section 770.030 continues the substance of the first portion of the first sentence of the second paragraph of former Section 751a.

§ 770.040. Parties and pleadings

770.040. (a) The proceeding may be brought by a subsequent owner of the property by filing a petition with the court.

(b) At any time before the date fixed for the hearing of the petition, any person interested in the property may answer the petition and deny any of the matters contained therein.

Comment. Subdivision (a) of Section 770.040 continues the substance of the last portion of the first sentence of the first paragraph of former Section 751a. See also Section 770.010 (definitions).

Subdivision (b) continues the substance of the first sentence of the third paragraph of former Section 751a.

§ 770.050. Petition

770.050. (a) The petition shall be verified in the manner provided for verification of a complaint.

(b) The petition may be substantially entitled, “In the matter of the determination of the identity of _____” (naming all the persons sought to be identified), and may set forth:

(1) A statement of petitioner’s interest in the property as subsequent owner.

(2) A particular description of the property.

(3) The name or names of the person or persons sought to be identified, setting out the name and a reference to the

record of the transaction under which the property was acquired or stands of record and the name and a reference to the record of the transaction under which the property was transferred or stands of record, that the names are the names of the same person, and that the transfers affect the petitioner's title to the real property.

(4) A prayer that the identity of such persons be established.

(c) As many persons sought to be identified as appear of record in the chain of title to the property may be joined in one petition or proceeding.

Comment. Subdivision (a) of Section 770.050 continues the substance of the last portion of the first sentence of the second paragraph of former Section 751a.

Subdivision (b) continues the substance of the second sentence of the second paragraph of former Section 751a.

Subdivision (c) continues the substance of the second sentence of the first paragraph of former Section 751a.

§ 770.060. Notice of hearing

770.060. (a) Upon the filing of the petition, the clerk shall set the petition for hearing by the court.

(b) The petitioner shall give notice of the hearing by causing notices of the time and place of hearing to be posted at the courthouse of the county where the proceeding is pending and in a conspicuous place on the real property described in the petition, at least 10 days before the hearing.

(c) The special notice shall be substantially in the following form:

(Title of court and cause)

Notice is hereby given that _____ has filed a petition herein claiming to be the owner (or distributee) of the following described lands _____ (description) and praying that the identity of the following-named persons, in former conveyances (or judgments or decrees) to said lands or in decrees of distribution of said lands in probate be determined, to wit: _____ (names as J. Doe and John Doe); and that the time and place of hearing said petition has been set for _____ the _____ day

of _____, 19____, at the hour of _____, ____m. of said day at the courtroom of said court in the city of _____, county of _____, State of California.

Clerk

Comment. Subdivisions (a) and (b) of Section 770.060 continue the substance of the first sentence of the last portion of the second paragraph of former Section 751a. Subdivision (c) continues the second sentence of the last portion of the second paragraph.

§ 770.070. Hearing and appeal

770.070. (a) At the time fixed for the hearing or such time thereafter as may be fixed by the court, the court shall hear the proofs offered by the petitioner and by any persons answering the petition, and shall make and enter a decree determining the identity of the person or persons set out in the petition in accordance with the proofs.

(b) An appeal may be taken by any party aggrieved.

Comment. Subdivision (a) of Section 770.070 continues the substance of the second sentence of the third paragraph of former Section 751a.

Subdivision (b) continues the fourth paragraph of former Section 751a.

§ 770.080. Effect of decree

770.080. (a) After the decree has become final it constitutes prima facie evidence of the matters thereby determined and it is presumed that the identity of the person or persons described in the decree is such as is stated in the decree.

(b) A certified copy of the decree shall be recorded in the office of the county recorder of every county in which any part of the property is situated.

Comment. Subdivision (a) of Section 770.080 continues the substance of the first sentence of the fifth paragraph of former Section 751a.

Subdivision (b) continues the substance of the second sentence of the fifth paragraph of former Section 751a.

Article 2. Land Dedicated for Public Improvement

§ 771.010. Presumption that dedication not accepted

771.010. If a proposal is heretofore or hereafter made to dedicate real property for public improvement, there is a conclusive presumption that the proposed dedication was not accepted if all of the following conditions are satisfied:

- (a) The proposal was made by filing a map only.
- (b) No acceptance of the dedication was made and recorded within 25 years after the map was filed.
- (c) The real property was not used for the purpose for which the dedication was proposed within 25 years after the map was filed.
- (d) The real property was sold to a third person after the map was filed and used as if free of the dedication.

Comment. Section 771.010 continues the substance of the first portion of former Section 748.5.

§ 771.020. Action to clear title authorized

771.020. (a) An action is authorized to clear title to real property of a proposal to dedicate the property for public improvement if there is a conclusive presumption pursuant to Section 771.010 that the proposed dedication was not accepted.

(b) The action shall be pursuant to Chapter 4 (commencing with Section 760.010) and shall have the following features:

- (1) The public entity to which the dedication was proposed shall be named as defendant.
- (2) The judgment in the action shall clear the title of the proposed dedication and remove the cloud created by the proposed dedication.

Comment. Section 771.020 continues the substance of the last portion of former Section 748.5.

Article 3. Right of Entry or Occupation of Surface Lands Under Oil or Gas Lease

§ 772.010. Scope of article

772.010. This article applies only to lands within a city in any county with a population exceeding 4,000,000, or with a population of more than 700,000 and less than 710,000 as determined by the 1960 Federal Decennial Census.

Comment. Section 772.010 continues the substance of former Section 751.3(g).

§ 772.020. Definitions

772.020. As used in this article:

(a) "Surface zone" means the zone which lies above a plane which is 500 feet below the surface of the land.

(b) "Subject land" means that area occupied by the particular described surface and surface zone for which plaintiff seeks to terminate the leasehold right of entry and occupation.

(c) "Lease facilities" means storage tanks, wash tanks, separators, heaters, and other facilities reasonably necessary for the production of oil or gas, including secondary recovery operations.

Comment. Section 772.020 continues the substance of former Section 751.3(e).

§ 772.030. Action to terminate right of entry or occupation authorized

772.030. (a) If a mining rights lease, including a community lease, exists for the production of oil, gas, or other hydrocarbons, and a right of entry or occupation provided by the lease encumbers all or part of the surface or surface zone of the leasehold lands, any person who owns a fee interest in the surface of the leasehold lands may bring an action in the superior court to terminate the right of entry or occupation as to all or some described portion of the surface and surface zone of the leasehold lands in which the person owns an interest.

(b) No judgment rendered pursuant to this article shall change or affect the terms or operation of any valid unit agreement or valid operating agreement which comes within the provisions of Section 3301 or 3321 of the Public Resources Code.

Comment. Subdivision (a) of Section 772.030 continues the substance of former Section 751.3(a). Subdivision (b) continues the substance of former Section 751.3(f).

§ 772.040. Requirements for termination

772.040. The court may render a judgment terminating the lessee's right of entry or occupation of the surface and surface zone, subject to such conditions as the court deems fair and equitable, if the evidence shows each of the following:

(a) The document that created the leasehold interest was originally executed more than 20 years prior to filing the action under this article regardless of any amendments to the document. However, if any amendment was entered into expressly for the purpose of waiving, limiting, or rearranging surface rights of entry and occupation by the lessee, the 20-year period shall be computed as if the document were originally executed on the date of execution of the amendment.

(b) The subject land is not presently occupied by any of the following:

- (1) A producing oil or gas well or well bore.
- (2) A well or well bore being utilized for injection of water, gas, or other substance into geologic substrata as an aid to oil or gas production or to ameliorating subsidence.
- (3) A well or well bore being utilized for the disposal injection of waste oil well brine and byproducts.
- (4) A well or well bore being utilized for the production of water for use in oil field injection, waterflood, and pressure maintenance programs.

(c) Termination of the right of entry or occupation within the subject land in the manner requested by the plaintiff, or subject to such conditions as the court may impose pursuant to this section, will not significantly interfere with the right of the lessee, under the lease, to continue to conduct operations for the continued

production of oil from leasehold strata beneath the surface zone in a practical and economic manner, utilizing such production techniques as will be appropriate to the leasehold area, consistent with good oilfield practice, and to gather, transport, and market the oil.

Comment. Section 772.040 continues the substance of former Section 751.3(b).

§ 772.050. Qualified termination

772.050. (a) The court may qualify the judgment terminating the surface and surface zone right of entry or occupation so as to provide for limited surface and surface zone easements that the lessee may continue to enjoy within the subject land.

(b) A judgment may be conditioned upon the relocation of pipelines, roadways, equipment, or lease facilities in such manner as will most effectively free the subject land for surface use while safeguarding continued oil and gas operations in a practical and economic manner. Any such condition of the judgment shall require the plaintiff to pay the costs of the relocation. However, the plaintiff shall be entitled to a setoff against the costs to the extent of any benefit to the lessee resulting from the installation of new equipment or material. The plaintiff has the burden of proving any benefit accruing to the lessee.

Comment. Section 772.050 continues the substance of former Section 751.3(c).

§ 772.060. Waiver of rights prohibited

772.060. It is against public policy for any oil or gas lease, at its inception, to provide for the waiver of any rights created by this article, or for such rights to be waived by amendment to any oil or gas lease within 20 years of the date of its execution by a plaintiff or the plaintiff's predecessor in interest.

Comment. Section 772.060 continues the substance of former Section 751.3(d).

Code of Civil Procedure §§ 801.1-801.15 (Chapter heading)

SEC. 17. The heading of Chapter 4A (commencing with Section 801.1) of Title 10 of Part 2 of the Code of Civil Procedure is amended to read:

**CHAPTER ~~4A~~ 4.6. ACTIONS CONCERNING
REAL PROPERTY TITLES AFFECTED BY
PUBLIC IMPROVEMENT ASSESSMENTS**

Comment. Former Chapter 4A is redesignated Chapter 4.6 (commencing with Section 801.1) for consistency with the numbering of the other chapters of Title 10.

Transition Provision

SEC. 18. (a) Actions commenced on or after the effective date of this act are governed by this act.

(b) Actions commenced before the effective date of this act are governed by the applicable law in effect immediately prior to the effective date of this act and for this purpose the applicable law is continued notwithstanding its repeal by this act. Where it can be done without prejudice to the parties, the court in its discretion may, by amendment of pleadings or otherwise, permit an action commenced before the effective date of this act to proceed under this act and may grant the relief provided in this act.

APPENDIX X
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Agreements for Entry of Paternity
And Support Judgments**

November 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Agreements for Entry of Paternity and Support Judgments*, 15 CAL. L. REVISION COMM'N REPORTS 1237 (1980).

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
(415) 497-1731

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Chairperson

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JEAN C. LOVE
WARREN M. STANTON
MON M. GREGORY
Ex Officio

November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Section 11476.1 of the Welfare and Institutions Code authorizes the district attorney and a noncustodial parent to enter into an agreement for the entry of a judgment determining paternity or for periodic child support payments or both. In 1979 this section was held unconstitutional by the court of appeal. The Commission recommends legislation that would provide a constitutional procedure for agreements for entry of judgment in paternity and child support cases. This study was authorized by Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

AGREEMENTS FOR ENTRY OF PATERNITY AND SUPPORT JUDGMENTS

In a case where the district attorney has undertaken enforcement of support, Section 11476.1 of the Welfare and Institutions Code¹ authorizes the district attorney and the noncustodial parent to enter into an agreement for the entry of a judgment determining paternity and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Judgment is entered by the court based on the agreement.

In *County of Ventura v. Castro*,² the Court of Appeal held Section 11476.1 unconstitutional on the ground that, on its face, the statute does not ensure that the noncustodial parent makes a valid waiver of his due process rights when executing the agreement for entry of judgment. This decision is consistent with the 1978 decision of the California Supreme Court in the *Isbell* case,³ which held the

¹ Section 11476.1 provides:

11476.1. In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to Section 11350, and to promptly file proof of service thereof.

For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

- (a) The standard of living and situation of the parties;
- (b) The relative wealth and income of the parties;
- (c) The ability of the noncustodial parent to earn;
- (d) The ability of the custodial parent to earn;
- (e) The needs of the custodial parent and any other persons dependent on such person for their support;
- (f) The age of the parties;
- (g) Any previous court order imposing an obligation of support.

² 93 Cal. App.3d 462, 156 Cal. Rptr. 66 (1979).

³ *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978).

general confession of judgment statute⁴ unconstitutional on the ground that the statute did not provide assurance of a valid waiver of due process rights.⁵

In *Castro*, the court stated:⁶

In the instant case, the statute under consideration makes no provision for protection of the due process rights of the noncustodial parent, nor does it address the issue of the manner in which defendant shall be permitted to waive those rights. The only provision with respect to information which must be provided to the defendant is the following sentence: "Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement." (Welf. & Inst. Code, § 11476.1.) Glaringly absent from the provisions is any requirement that the defendant be informed that he has a right to trial on the issues of paternity and his obligation to support the minor child.

Waiver of constitutional rights is never presumed. (*D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 186 [31 L.Ed.2d 124, 134, 92 S.Ct. 775].) Yet, in the instant case, we are called upon to presume that a defendant knowingly, intelligently, and voluntarily waived his right to notice and an opportunity to be heard when the statute contains no requirement that he even be made aware of those rights.

Nor does the document executed by defendant reflect such a knowing and voluntary waiver. The court is instructed to enter judgment based on the agreement. However, the required waiver of due process rights could not be apparent to the court on the face of the document executed herein. No mention is made in the agreement of an understanding on the part of defendant that he has a right to a trial on the

⁴ Code Civ. Proc. §§ 1132-1134.

⁵ Upon recommendation of the Law Revision Commission, the general statute relating to confession of judgment was revised in 1979 to provide that a confession of judgment is valid only if signed by a debtor on advice of an attorney. 1979 Cal. Stats. ch. 568. See *Recommendation Relating to Confessions of Judgment*, 15 Cal. L. Revision Comm'n Reports ____ (1980).

⁶ 93 Cal. App.3d at 469-71, 156 Cal. Rptr. at 69-70.

issue of paternity and child support and that he is freely giving up that right.

* * *

By the same token, the mere fact that the defendant read and executed the agreement does not demonstrate that he knowingly and intelligently waived the rights lost by that execution. Absent an express statement in the agreement setting forth the rights to which defendant is entitled and stating that he understands those rights and knowingly waives them, we must “‘indulge every reasonable presumption against waiver’ of fundamental constitutional rights.” (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357].)

The Commission recommends that an agreement for entry of judgment determining paternity or for periodic child support payments be permitted if the agreement includes a statement listing the rights the person is waiving by signing the agreement and the consequences that may follow when the judgment is entered. The content of the statement should be specified in the statute. This addition to the statute will adopt the suggestion of the court in *Castro* that such a statement is necessary for a valid waiver of due process rights.

Some persons may lack sufficient understanding of the written statement to effectively waive their due process rights. In other cases, the district attorney may wish to foreclose a possible attack on the judgment based on the claimed lack of a valid waiver of due process rights. For these reasons, the statute should also permit an agreement for entry of judgment (1) where an attorney independently representing the person signs a certificate stating that the attorney has examined the proposed judgment and has advised the person to sign the agreement or (2) where the person signing the agreement has appeared before the court in which the judgment is to be entered and the court determines that the person validly waived his due process rights.

The court in *Castro* mentioned another consideration involved in determining whether a waiver of due process

rights is voluntary in a paternity case where the support obligor is dealing with the office of the district attorney:⁷

In the instant case the agreement was entered into between a lay person and an employee of the office of the district attorney. The declaration of defendant that at the time of the discussion with Ms. Hickman he believed that he could be sent to jail for refusal to sign the agreement and believed that refusal to sign the agreement would result in "dire consequences," is, of course, uncontradicted in the record and eminently reasonable. It is common knowledge that the district attorney's office prosecutes criminal cases. We would be blinding ourselves to reality if we were to presume that an agreement such as the one in the case at bar were voluntarily executed in the absence of some express evidence of that fact. As stated in *Isbell*, at page 70, "[A] court presented only with the verified confession of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession."

The statement of rights signed by the person agreeing to entry of judgment should contain an express statement informing the person that he cannot be prosecuted for refusing to sign the agreement and advising the person that he should see an attorney if he has any question or doubt concerning the matter.

Where a criminal prosecution for failure to support a child has been commenced under Section 270 of the Penal Code and an agreement for entry of judgment determining paternity is used, the voluntariness of the agreement may be suspect; the criminal defendant may fear that, unless he signs the agreement, he will be criminally punished for his past nonsupport of the child—a child he may believe is not his own.⁸ In this situation—where there is a pending

⁷ 93 Cal. App.3d at 470-71, 156 Cal. Rptr. at 70.

⁸ The case of *Jeffrey S. II v. Jeffrey S.*, 76 Cal. App.3d 65, 142 Cal. Rptr. 625 (1977), illustrates this possibility. In that case, the alleged father made support payments only after he received a letter from the district attorney's office stating that a complaint had been filed against him charging him with failure to support the child and such failure was a violation of the Penal Code and carried a penalty of up to one year in jail and/or a \$1,000 fine. The district attorney's office further advised the alleged father that if he desired to enter into a voluntary agreement "to avoid further proceedings against" him, he should complete and return the enclosed forms (one

criminal action—the agreement for entry of judgment determining paternity should be permitted only where the criminal defendant has appeared before the court and the court approves the agreement as an alternative to continuing the criminal prosecution for nonsupport. This procedure will be useful where the attorney representing the criminal defendant or the criminal defendant himself, after being advised by the attorney or the court of the effect of the agreement and the rights that are being waived by signing the agreement, concludes that the agreement is a desirable alternative to continuance of the criminal action.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 11476.1 of, and to add Sections 11476.2 and 11476.3 to, the Welfare and Institutions Code, relating to agreements for the entry of paternity and support judgments.

The people of the State of California do enact as follows:

Welfare & Institutions Code § 11476.1 (amended)

SECTION 1. Section 11476.1 of the Welfare and Institutions Code is amended to read:

11476.1. (a) In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. ~~Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on~~

of which was an agreement to pay child support). The court noted that the alleged father returned the agreement unsigned, and included a letter stating that:

[S]ince he did not believe that he was the father of the child he could not "in all conscience sign a statement" that he was. The letter continued: "Neither do I wish to go to jail and I have been told that I really have no chance to fight this under current laws.; [sic] consequently I will make payments to avoid going to jail."

Id. at 68, 142 Cal. Rptr. at 627.

~~the agreement.~~ *An agreement for entry of a judgment under this section may be executed prior to the birth of the child and may include a provision that the judgment is not to be entered until after the birth of the child. If both parents of the child agree to the entry of a judgment under this section providing for periodic child support payments, the judgment may include provisions granting child custody and provisions granting child visitation rights to the noncustodial parent.*

(b) A judgment based on the agreement shall be entered only if one or more of the following requirements are satisfied:

(1) The noncustodial parent is represented by the public defender or private counsel and both of the following requirements are met:

(A) The attorney signs a certificate stating: "I have examined the proposed judgment and have advised my client to agree to the entry of the judgment and my client has executed the attached statement or statements in my presence."

(B) The certificate of the attorney is accompanied by a statement that satisfies the requirements of Section 11476.2 if the agreement is for the entry of judgment determining paternity and a statement that satisfies the requirements of Section 11476.3 if the agreement is for the entry of judgment for periodic child support payments.

(2) A judge of the court in which the judgment is to be entered makes a finding that the noncustodial parent has appeared before the judge and the judge has determined that under the circumstances of the particular case the noncustodial parent has willingly, knowingly, and intelligently waived his or her due process rights in agreeing to use the procedure provided by this section.

(3) The agreement is for the entry of judgment determining paternity and the agreement includes a statement that satisfies the requirements of Section 11476.2.

(4) The agreement is for the entry of judgment for periodic child support payments and the agreement includes a statement that satisfies the requirements of Section 11476.3.

(c) The clerk shall file the agreement, *together with any certificate of the attorney or finding of the court*, without the payment of any fees or charges. ~~The~~ *If the requirements of this section are satisfied, the* court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. *A judgment for support so entered may be enforced by any means by which any other judgment for support may be enforced.* ~~The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to Section 11350, and to promptly file proof of service thereof.~~

For the purposes of this section, in making a determination of the nonecustodial parent's reasonable ability to pay, the following factors shall be considered:

- (a) The standard of living and situation of the parties;
- (b) The relative wealth and income of the parties;
- (c) The ability of the nonecustodial parent to earn;
- (d) The ability of the custodial parent to earn;
- (e) The needs of the custodial parent and any other persons dependent on such person for their support;
- (f) The age of the parties;
- (g) Any previous court order imposing an obligation of support.

(d) Upon request of the district attorney in any case described in paragraph (2) of subdivision (b), the clerk shall set the matter for hearing by the court. The hearing shall be held within 10 days after the clerk receives the request. The district attorney may require the person who signed the agreement for the entry of judgment to attend the hearing by process of subpoena in the same manner as the attendance of a witness in a civil action may be required. The presence of the person who signed the agreement for entry of judgment at the hearing shall constitute the presence of the person in court at the time the order is pronounced for the purposes of Section 1209.5

of the Code of Civil Procedure if the court makes the findings required by paragraph (2) of subdivision (b).

(e) The district attorney shall cause the following to be served, in the manner specified in Section 415.10, 415.20, 415.30, or 415.40 of the Code of Civil Procedure, upon the person who signed the agreement for entry of the judgment and shall file proof of service thereof with the court:

(1) A copy of the judgment as entered.

(2) If the judgment includes an order for child support payments, a notice stating the substance of the following: "The court has continuing authority to make an order increasing or decreasing the amount of the child support payments. This can be done only after a court hearing of which notice has been given. You have the right to request that the court order the child support payments be decreased or eliminated entirely."

(f) An order for child support included in a judgment entered under this section may be modified or revoked as provided in Section 4700 of the Civil Code. The court may modify the order to make the support payments payable to a different person.

(g) For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the court shall consider any relevant circumstances set out in Section 246 of the Civil Code.

(h) After arrest and before plea or trial, or after conviction or plea of guilty, under Section 270 of the Penal Code, if the defendant appears before the court in which the criminal action is pending and the requirements of paragraph (1) or (2) of subdivision (b) are satisfied, the court may suspend proceedings or sentence in the criminal action, but this does not limit the later institution of a civil or criminal action or limit the use of any other procedures available to enforce the judgment entered pursuant to this section. If a criminal action has been commenced and is pending under Section 270 of the Penal Code, the procedure provided by this section may be used only if the requirements of this subdivision are satisfied.

(i) A judgment entered pursuant to this section does not prejudice or bar the rights of the person agreeing to the entry of the judgment to institute an action to set aside the judgment for fraud, duress, accident, mistake, or other grounds recognized at law or in equity or to make a motion pursuant to Section 473 of the Code of Civil Procedure.

Comment. Section 11476.1 is amended to provide procedures for waiver of the noncustodial parent's due process rights in an agreement for entry of judgment of paternity or for periodic child support or both. The procedures, together with provisions added by Sections 11476.2 and 11476.3, are designed to satisfy the constitutional standards announced in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and *County of Ventura v. Castro*, 93 Cal. App.3d 462, 156 Cal. Rptr. 66 (1979). See *Recommendation Relating to Agreements for Entry of Paternity and Support Judgments*, 15 Cal. L. Revision Comm'n Reports ____ (1980).

A provision has been added to Section 11476.1 making clear that an agreement for entry of judgment may be made before the birth of the child and that the agreement may be conditioned on the birth of the child. Also added is the provision for an agreement for entry of judgment containing provisions for child custody and child visitation rights.

Subdivision (e) continues the substance of a former provision of Section 11476.1. The informational notice required by paragraph (2) of subdivision (e) need not be a separate document; the informational notice may be stamped or typed on the copy of the judgment.

Subdivision (f) adopts the procedure of Civil Code Section 4700—the general provision relating to modification or revocation of a child support order. Insofar as Section 11476.1 formerly limited modification or revocation to a case of changed circumstances, Section 11476.1 was inconsistent with the general provision of Section 4700. The reference to Section 4700 also picks up the procedural provisions of that section. See Civil Code § 4700 ("Any order for child support may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. The order of modification or revocation may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto. The

order of modification or revocation may include an award of attorney fees and court costs to the prevailing party.”).

Subdivision (g) supersedes the last paragraph of Section 11476.1 as the section read prior to its amendment. The superseded paragraph was consistent with Civil Code Section 246 prior to the amendment of Section 246 in 1976. The substitution of subdivision (g) eliminates the inconsistency created by the 1976 amendment.

Subdivision (h) is drawn from Section 270b of the Penal Code, and subdivision (i) is drawn from Section 4555 of the Civil Code.

Welfare & Institutions Code § 11476.2 (added)

SEC. 2. Section 11476.2 is added to the Welfare and Institutions Code, to read:

11476.2. A judgment determining paternity based on agreement may be entered under Section 11476.1 if the agreement for entry of the judgment includes a statement signed by the noncustodial parent in substantially the following form.

AGREEMENT FOR ENTRY OF JUDGMENT DETERMINING PATERNITY—STATEMENT ACKNOWLEDGING AND WAIVING RIGHTS

I have been asked to sign an Agreement for Entry of Judgment Determining Paternity. I understand that by signing the agreement, I will be admitting I am the father of the child or children named in the agreement. []

I understand that I have the following rights in connection with this matter:

1. The right to be represented by a lawyer. []

I may hire the lawyer of my choice at my own expense. If I cannot afford a lawyer, I can ask the court to appoint a lawyer to represent me free of charge in any proceeding brought to determine whether I am the father of the child or children. I understand that the district attorney does not represent me. []

2. The right to have a trial by jury to determine if I am the father. []

If I request, I may have a jury decide whether I am the father. Or, with my consent and the consent of the person bringing a proceeding to determine whether I

am the father, a judge alone may decide whether I am the father. []

3. The right to confront and cross-examine witnesses against me. []

I understand that, in a trial, the person bringing the proceeding to determine whether I am the father must prove that I am the father. I may be present with a lawyer when that person's witnesses testify and ask them questions. I may also present evidence and witnesses in my own defense. Procedures are available prior to the trial that will permit me to determine what the witnesses against me claim are the facts concerning whether I am the father. []

4. The right to remain silent. []

I understand that I cannot be required to admit or deny that I am the father. If I refuse to sign the agreement, I cannot be prosecuted for refusing to sign. If I admit that I am the father, my statement can be used as evidence against me if I am ever prosecuted for failing to support the child or children. []

5. The right to have blood tests. []

I understand that if a trial is held to determine if I am the father, I will have the right to have the court order the mother, the child or children, and myself to submit to blood tests. Blood tests sometimes show that a person claimed to be the father of a child could not possibly be the father of the child. The court decides who pays for the blood tests. The court could order that I pay none, some, or all of the cost of the tests, depending on whether I can afford to pay. []

6. The right to have a judge decide the following matters if I am found to be the father:

- (1) The amount of child support I must pay.
- (2) How long I will have to pay child support. []

I also understand the following:

1. If I sign this agreement, I will have the duty to contribute to the support of the child or children named in this agreement and this duty of support can continue until the child reaches the age of 18. []

2. If I sign this agreement, the court can order that I make payments for the support of the child or children named in this agreement. [] If I fail to make the child support payments ordered by the court, the court order may be enforced by any of the following means:

(i) The court may order my employer to withhold the support payments from my wages and pay them to the person named by the court.

(ii) The court may find me in contempt and order me to pay a fine or be jailed or both.

(iii) The court may authorize the seizure of my property (except exempt property) and order the property sold to pay the support payments.

(iv) The district attorney may bring a criminal prosecution against me. If convicted, I can be punished by a fine of not more than \$1,000, or jailed for not more than one year and a day, or both. []

3. I understand that, if I sign this agreement, the child or children named in this agreement may have the right to inherit my property when I die and may have other rights as my child or children. []

4. Before I sign this agreement, I can have a lawyer I hire, or a court-appointed lawyer, look at the agreement and give me advice about what I should do. []

I have read and understand each item printed above. I have initialed each item I have read. Having in mind all of the rights mentioned in this statement and the consequences of admitting I am the father of the child or children named in the agreement, I willingly, knowingly, and intelligently give up those rights. It is my choice to resolve this matter by signing the agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, on _____.

STOP AND THINK. YOU ARE NOT REQUIRED TO SIGN THIS AGREEMENT. IF YOU HAVE ANY QUESTIONS OR DOUBT AS TO THIS MATTER, SEE AN ATTORNEY. IF YOU CANNOT AFFORD AN

ATTORNEY, YOU HAVE THE RIGHT TO HAVE AN ATTORNEY APPOINTED.

(Signature of person agreeing to entry of judgment)

Comment. Section 11476.2 provides for a statement of the noncustodial parent's rights and the effect of the agreement as a part of an agreement for entry of a paternity judgment. The section is intended to ensure that the agreement for entry of a paternity judgment is, on its face, a valid waiver of the noncustodial parent's due process rights. This section, together with amended Section 11476.1 and added Section 11476.3, is designed to satisfy the constitutional standards announced in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and *County of Ventura v. Castro*, 93 Cal. App.3d 462, 156 Cal. Rptr. 66 (1979). See also *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979) *cert. denied*, 48 U.S.L.W. 3235 (Oct. 9, 1979) (right to appointed counsel).

Welfare & Institutions Code § 11476.3 (added)

SEC. 3. Section 11476.3 is added to the Welfare and Institutions Code, to read:

11476.3. A judgment for periodic child support payments based on agreement may be entered under Section 11476.1 if the following requirements are met:

(a) It has been determined by adjudication, agreement for entry of a judgment determining paternity, or conclusive presumption as provided in Evidence Code Section 621, that the person agreeing to entry of the judgment for periodic child support payments is a parent of the child.

(b) The agreement for entry of judgment includes a statement signed by the noncustodial parent in substantially the following form.

AGREEMENT FOR ENTRY OF JUDGMENT REQUIRING PERIODIC CHILD SUPPORT PAYMENTS—STATEMENT ACKNOWLEDGING AND WAIVING RIGHTS

YOU ARE NOT REQUIRED TO SIGN THIS AGREEMENT. YOU ARE NOT REQUIRED TO

PARTICIPATE IN THIS PROCEDURE. YOU MAY REFUSE TO SPEAK WITH THE DISTRICT ATTORNEY AND MAY SEEK THE ASSISTANCE OF AN ATTORNEY. IF YOU HAVE ANY QUESTIONS OR DOUBT, DO NOT SIGN THIS AGREEMENT AND SEE AN ATTORNEY.

I have been asked to sign an Agreement for Entry of Judgment Requiring Periodic Child Support Payments. I understand that by signing this agreement, I am agreeing to make the child support payments for the child or children named in the agreement in the amount or amounts stated in the agreement. []

I understand I have the following rights in connection with this matter:

1. The right to be represented by a lawyer. []

I may hire a lawyer of my choice at my own expense. If I cannot afford a lawyer, I can request the assistance of a lawyer from an organization that provides legal assistance to persons who cannot afford lawyers. I understand that the district attorney does not represent me. []

2. The right to have a judge decide the following matters:

- (1) The amount of child support I must pay.
- (2) How long I will have to pay child support. []

I also understand the following:

1. If I refuse to sign the agreement, I cannot be prosecuted for refusing to sign. []

2. If I sign this agreement, I will be required to support the child or children by the amount stated in this agreement, but the court has authority, after a hearing of which notice has been given, to increase or decrease this amount. I understand that my duty to support the child or children by the amount stated in this agreement can continue until the child reaches the age of 18 or until such earlier time as is stated in this agreement. []

3. If I sign this agreement and I fail to make the payments required by this agreement, the duty to make the support payments will be enforced and may be enforced by any one or more of the following means:

(i) The court may order my employer to withhold the support payments from my wages and pay them to the person named by the court.

(ii) The court may find me in contempt and order me to pay a fine or be jailed or both.

(iii) The court may authorize the seizure of my property (except exempt property) and order the property sold to pay the support payments.

(iv) The district attorney may bring a criminal prosecution against me. If convicted, I can be punished by a fine of not more than \$1,000, or jailed for not more than one year and a day, or both. []

4. Before I sign the agreement, I can have a lawyer representing me look at the agreement and give me advice about what I should do. []

I have read and understand each item printed above. I have initialed each item I have read. Having in mind all of the rights mentioned in this statement and the consequences of signing the agreement, I willingly, knowingly, and intelligently give up those rights. It is my choice to resolve this matter by signing the agreement.

I declare under penalty of perjury the foregoing is true and correct.

Executed at _____, California, on _____.

STOP AND THINK. YOU ARE NOT REQUIRED TO SIGN THIS AGREEMENT. IF YOU HAVE ANY QUESTIONS OR DOUBT AS TO THIS MATTER, SEE AN ATTORNEY.

(Signature of person agreeing to entry of judgment)

Comment. Section 11476.3 is added to require that an agreement for entry of a judgment for periodic support payments include a statement of the noncustodial parent's rights and the effect of the agreement. This section is intended to ensure that the agreement is, on its face, a valid waiver of the noncustodial parent's due process rights. This section, together with amended Section 11476.1 and added Section 11476.2, is designed to satisfy the constitutional standards announced in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978), and *County of Ventura v. Castro*, 93 Cal. App.3d 462, 156 Cal. Rptr. 66 (1979).

APPENDIX XI
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Enforcement of Claims and Judgments
Against Public Entities**

November 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities*, 15 CAL. L. REVISION COMM'N REPORTS 1257 (1980).

CALIFORNIA LAW REVISION COMMISSION

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November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study creditors' remedies. This recommendation concerns one aspect of that topic—enforcement of claims and judgments against public entities. The Commission recommends that the existing statutory provisions be revised to impose more clearly a duty to pay an approved claim or final judgment and that express provision be made by statute that execution and other remedies ordinarily used to enforce a judgment are not available to enforce a money judgment against a public entity.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

ENFORCEMENT OF CLAIMS AND JUDGMENTS AGAINST PUBLIC ENTITIES

INTRODUCTION

Division 3.6 (commencing with Section 810) of Title 1 of the Government Code governs the presentation and payment of claims for money or damages against the state¹ and local public entities,² the payment of money judgments against the state,³ and the payment of judgments against local public entities founded on tort or inverse condemnation liability.⁴ Other statutory provisions require cities and counties,⁵ school districts,⁶ community college districts,⁷ and county water districts⁸ to pay all judgments, but there is no general requirement that other local public entities pay all judgments.⁹ The duty of a public entity to pay an allowed claim or a judgment as required by the applicable statutory provision is enforced by writ of mandate.¹⁰

¹ See generally Gov't Code §§ 900-930.6, 935.6-944, 945.4-948, 950-950.6, 965-965.4.

² See generally Gov't Code §§ 900-915.4, 930.2-935.4, 940-940.4, 942, 945.4-947, 950-950.8. See also Gov't Code §§ 989-991.2 (insurance by local public entity against liability).

³ See, e.g., Gov't Code §§ 912.8, 920-920.8, 925-926.8, 935.6, 955.5, 965-965.4. See also Gov't Code § 11007.4 (insurance by state agency against liability).

⁴ Gov't Code §§ 970-971.2. See also Gov't Code §§ 975-978.8 (funding judgments with bonds).

⁵ Gov't Code §§ 50170-50175.

⁶ Educ. Code § 35201.

⁷ Educ. Code § 72501.

⁸ Water Code §§ 31091-31096.

⁹ But see Water Code Section 74505 which requires a water conservation district to "provide for the payment, from the proper fund, of all the debts and just claims against the district." See also Code Civ. Proc. § 1268.020 (eminent domain judgment enforceable by "execution as in a civil case").

¹⁰ See, e.g., Gov't Code §§ 942, 955.5, 970.2. See also A. Van Alstyne, California Government Tort Liability § 9.14, at 423 (Cal. Cont. Ed. Bar 1964). Mandamus may be used to compel payment of a judgment when sufficient funds exist from which to make the payment. *Emeric v. Gilman*, 10 Cal. 404 (1858) (county). When sufficient funds do not exist, mandamus may be used to compel a local public entity to levy taxes required to pay the judgment. *Title Guar. & Trust Co. v. City of Long Beach*, 4 Cal.2d 56, 47 P.2d 472 (1935); *Cook v. Board of Supervisors*, 99 Cal. App. 169, 277 P. 1064 (1929). However, with respect to the State of California, the passage of an appropriation law is a legislative act which a court may not command. *Myers v. English*, 9 Cal. 341 (1858); *Veterans of Foreign Wars v. State*, 36 Cal. App.3d 688, 111 Cal. Rptr. 750 (1974); *California State Employees' Ass'n v. State*, 32 Cal. App.3d 103, 108 Cal. Rptr. 60 (1973).

The ordinary remedies of a judgment creditor under the Code of Civil Procedure are seldom resorted to and are not an effective means to collect a judgment against a public entity. Property of the state is exempt from execution¹¹ except in those rare instances where a statute expressly provides otherwise.¹² Whether property of a local public entity is subject to execution depends on the purpose for which the property is held: Property held or used for a public use is exempt from execution, but property not held or used for a public use is subject to execution.¹³ In addition, there are a number of statutory exemptions from execution for particular kinds of property owned by a public entity¹⁴ as well as blanket exemptions for property of certain public entities.¹⁵

As a part of its overall review of the law relating to creditors' remedies, the Commission has reviewed the remedies a creditor has against a public entity debtor. The Commission has concluded that the procedures for payment of claims and judgments against public entities should be revised to impose more clearly a duty to pay an approved claim or final judgment and to provide by statute that a writ of mandate is an appropriate remedy to enforce this duty. In addition, it should be expressly provided by statute that execution and other remedies ordinarily used to enforce a judgment are not available to enforce a money judgment against a public entity.

¹¹ *Westinghouse Elec. & Mfg. Co. v. Chambers*, 169 Cal. 131, 145 P. 1025 (1915); *Meyer v. State Land Settlement Bd.*, 104 Cal. App. 577, 286 P. 743 (1930). See also Gov't Code § 955.5.

¹² *E.g.*, Code Civ. Proc. § 1268.020 (eminent domain judgment enforceable by execution as in a civil case). See also *Maurice L. Bein, Inc. v. Housing Auth.*, 157 Cal. App.2d 670, 690, 321 P.2d 753, 766 (1958) (holding that the absence of a reference to the personal property of a housing authority in Section 34217 of the Health and Safety Code indicated a legislative intent to permit execution against the personal property of the Housing Authority of the City of Los Angeles, an "administrative arm" of the state).

¹³ *Marin Water & Power Co. v. Town of Sausalito*, 49 Cal. App. 78, 83, 193 P. 294, 296 (1920) (opinion of Supreme Court denying hearing and stating the governing rules); *C. J. Kubach Co. v. City of Long Beach*, 8 Cal. App.2d 567, 48 P.2d 181 (1935).

¹⁴ Code Civ. Proc. § 690.22 (exemption for courthouses, jails, fire companies, public offices, public buildings, lots, grounds, and personal property, including automotive and truck equipment, fixtures, furniture, books, papers, and the like).

¹⁵ Code Civ. Proc. §§ 690.26 (property of the Reclamation Board and the Sacramento and San Joaquin Drainage District), 690.27 (real property of housing authority), 690.29 (property of redevelopment agency); Health & Safety Code §§ 33124 (property of redevelopment agency), 34217 (real property of housing authority).

RECOMMENDATIONS

Payment of Claims and Judgments Against Local Public Entities

Payment of judgments. A local public entity is now required by statute to pay a tort or inverse condemnation judgment¹⁶ and may pay the judgment in not exceeding 10 annual installments where necessary to avoid unreasonable hardship.¹⁷ With respect to other judgments, the existing statutes do not always ensure that local public entities have the duty to pay judgments for which they are liable.¹⁸ As a result, the plaintiff in some cases may have no means to enforce a money judgment against a local public entity.¹⁹

The Commission recommends that the statutory provisions relating to payment of tort and inverse condemnation judgments by local public entities be expanded to cover all money judgments.²⁰ This will permit the judgment creditor to obtain a writ of mandate to compel the public entity to pay the judgment and will permit installment payments in appropriate cases.²¹

¹⁶ Gov't Code §§ 970-971.2.

¹⁷ A judgment may be paid in installments only if the local public entity has adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments and the court in which the judgment is entered, after hearing, has found that payment of the judgment in installments as ordered by the court is necessary to avoid an unreasonable hardship. Gov't Code § 970.6.

¹⁸ There is no general statute requiring local public entities to pay judgments. Cities, counties, school districts, community college districts, and county water districts are required by statute to pay all judgments and to raise funds sufficient to make the payment. See statutes cited notes 5-10 *supra*.

¹⁹ The use of execution against property of a local public entity is an ineffective means of collecting a judgment since all property of a local public entity used or held for public use is exempt from execution. See note 13 *supra*.

²⁰ The expansion of the coverage of the existing statute will require revision of Government Code Section 971 (relating to applicability of limitations on amount of taxes, assessments or rates and charges, amount of appropriations and payments, and amount of liability or indebtedness) to continue the rule that such limits do not apply to tort and inverse condemnation judgments and to expand the rule to include other money judgments that result from a nondiscretionary act.

²¹ The existing statutes applicable to cities and counties (Gov't Code § 50173), school districts (Educ. Code § 35201), community college districts (Educ. Code § 72501), and county water districts (Water Code § 31094) permit the governing board to provide for installment payment of judgments without the need to obtain a court order authorizing installment payments. These existing provisions do not adequately protect the judgment creditor against possible abuse of the authority to pay the judgment in installments and will be superseded by the provision of the recommended comprehensive statute which continues the more recently enacted provision that requires a court order authorizing payment in installments.

The existing statute authorizing installment payments requires that each installment include an equal amount of the principal of the judgment, together with the accrued interest.²² This requirement tends to defeat the purpose of minimizing the disruptive effect of an unusually large judgment since the installment payments required during the first few years of the 10-year period will be substantially greater in amount than the payments required in the last few years. The statute should be amended to require that each installment payment (which will consist of a portion of the principal and the accrued interest) be equal in amount. Under this new requirement, the amount of the principal paid in each installment will increase with each payment since the amount of accrued interest required to be included in each payment will decrease as the amount of the unpaid principal of the judgment decreases.

The recommended comprehensive statute will supersede existing provisions applicable to some types of local public entities and those provisions should be repealed.²³

Payment of allowed claims. Existing law provides that a writ of mandate is an appropriate remedy to compel a local public entity to pay a claim when and to the extent that it has been allowed.²⁴ The manner in which the claim is to be paid is not specified in the statute. To supply this detail, the Commission recommends that a provision be added to the statute requiring that an approved claim be paid by the local public entity in the same manner as a judgment, but that installment payments be permitted only if the claimant has agreed to that method of payment. Use of an agreement permitting payment of an approved claim in installments will avoid unreasonable hardship to the local public entity and may in some cases facilitate settlement of a claim without the need for the claimant to prosecute the claim to judgment.

²² Gov't Code § 970.6(c).

²³ The enactment of the comprehensive statute would permit repeal of Sections 35201 and 72501 of the Education Code, Sections 50170-50175 of the Government Code, and Sections 31091-31096 of the Water Code.

²⁴ See Gov't Code § 942.

Payment of Claims and Judgments Against the State

The existing statute requires payment of an approved claim or judgment against the state if the Director of Finance has certified that a sufficient appropriation exists for payment.²⁵ No such certificate is required if the claim or judgment arises out of the activities of the "Department of Public Works" (now the Department of Transportation), and it is unclear when payment of an approved claim or judgment arising out of the activities of the department can be required.²⁶ Payment of the approved claim or judgment may be compelled by writ of mandamus if there is a sufficient appropriation for its payment.²⁷ Where sufficient funds have not been appropriated to pay the claim or judgment, the State Board of Control makes a report to the Legislature containing the board's findings and recommendations concerning the claim or judgment.²⁸ This permits the Legislature to make provision for the payment of the claim or judgment.

The provisions outlined above provide a generally satisfactory procedure for enforcing payment of an approved claim or judgment against the state. However, the following technical revisions are recommended:

(1) Section 942 of the Government Code—which permits resort to a writ of mandate to compel payment of a claim "when and to the extent that it has been allowed"—should be revised to add the requirement that the claim also be one that "is required by this division to be paid." This addition will make clear that a writ of mandate cannot be used to compel payment where there is no sufficient appropriation for the payment. Instead, the claim or judgment will be reported to the Legislature so that provision can be made for its payment.

(2) Since the need no longer exists for special treatment of a claim or judgment against the Department of

²⁵ Gov't Code §§ 965 (payment of claim allowed by State Board of Control), 965.2 (Controller's duty to draw warrant for payment of final judgment or settlement). See also Gov't Code §§ 935.6 (delegation of authority to state agency to adjust and pay claims), 948 (settlement, adjustment, or compromise of pending action), 955.5 (payment of tort liability claim, settlement, or judgment).

²⁶ See provisions cited note 25 *supra*.

²⁷ See Gov't Code § 942. But see Gov't Code § 955.5.

²⁸ See Gov't Code §§ 912.8, 965, 965.4.

Transportation,²⁹ these claims and judgments should be treated the same as those against other state agencies.³⁰

Use of Execution to Enforce Judgment Against Public Entity

Execution and the other remedies provided a judgment creditor under the Code of Civil Procedure should be eliminated as a method of enforcing a money judgment against a public entity. The procedure recommended above for enforcing money judgments against public entities takes into account their special nature. Making clear that execution is not available to enforce a judgment against a public entity will protect against the possibility of seizure and sale of public property to satisfy a judgment. Litigation to determine the status of public property will be avoided. Yet the judgment creditor will not be significantly harmed because levy of execution on public property has not been an effective method of enforcing a judgment against a public entity.

The general provisions prescribing the period during which an ordinary judgment is enforceable³¹ are designed to implement the procedure for execution against property of the judgment debtor. Since execution against public property will not be permitted, the period of enforceability of a money judgment against a public entity should be separately specified in the statute: A judgment for the payment of money against the state or a local public entity should be enforceable for 10 years after the time the

²⁹ The various statutory provisions that exclude the Department of Public Works (now the Department of Transportation) from their application should be amended to delete the exclusion. These exclusions were originally included because formerly the funds of the Department of Public Works were continuously appropriated for the purposes of the department, and the department did not require specific appropriation of its funds by the Legislature. See Sts. & Hy. Code § 183, as amended by 1957 Cal. Stats. ch. 1607, § 2. This situation no longer exists; later enacted statutes prohibit expenditure of funds unless specifically appropriated by the Legislature. See Sts. & Hy. Code § 183, enacted by 1977 Cal. Stats. ch. 1106, § 49. See also Gov't Code § 13340.

³⁰ The recommended legislation includes a provision to make clear that the Regents of the University of California is not subject to the statutory provisions governing payment of claims, settlements, and judgments. This provision is consistent with Sections 905.6 and 943 and the existing practice. See Ltr. Donald L. Reidhaar, General Counsel, The Regents of the University of California, dated Oct. 5, 1979, on file in office of the California Law Revision Commission.

³¹ Code Civ. Proc. §§ 681, 685.

judgment becomes final.³² This 10-year period allows adequate time for the judgment creditor to compel payment by a writ of mandate if the public entity fails to pay the judgment as required by statute.

Interest on Allowed Claims

The existing statute does not specify whether interest is payable on a claim allowed in whole or in part. A provision should be added to the statute to provide that interest on a claim accrues at the rate provided for judgments until the claim is paid. To give the public entity time to process the payment, interest should not commence to accrue until (1) 30 days after the claim is allowed in full or (2) if the claim is allowed in part, 30 days after the claimant accepts in writing the amount allowed in full settlement of the claim. These rules should eliminate the controversies that arise under existing law when payment of a claim allowed in whole or in part is delayed.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 1268.020 of the Code of Civil Procedure, to repeal Sections 35201 and 72501 of the Education Code, to amend Sections 912.6, 935.6, 942, 948, 955.6, 965, 965.2, 970, 970.4, 970.6, 970.8, and 971 of, to add Sections 906, 965.5, 965.6, 965.7, 965.8, 965.9, 970.1, and 970.5 to, and to repeal Section 955.5 and Article 7 (commencing with Section 50170) of Chapter 1 of Part 1 of Division 1 of Title 5 of, the Government Code, and to repeal Sections 31091, 31092, 31093, 31094, 31095, and 31096 of the Water Code, relating to claims and judgments against public entities.

The people of the State of California do enact as follows:

³² If the judgment is payable in installments, the period during which the judgment is enforceable should expire 10 years after the final payment becomes due.

Code of Civil Procedure § 1268.020 (amended). Remedies if eminent domain judgment not paid

SECTION 1. Section 1268.020 of the Code of Civil Procedure is amended to read:

1268.020. (a) If the plaintiff fails to pay the full amount required by the judgment within the time specified in Section 1268.010, the defendant may ~~have execution~~ :

(1) If the plaintiff is a public entity, enforce the judgment as provided in Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

(2) If the plaintiff is not a public entity, enforce the judgment as in a civil case.

(b) Upon noticed motion of the defendant, the court shall enter judgment dismissing the eminent domain proceeding if all of the following are established:

(1) The plaintiff failed to pay the full amount required by the judgment within the time specified in Section 1268.010.

(2) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure to pay the full amount required by the judgment within the time specified in Section 1268.010.

(3) The plaintiff has failed for 20 days after service of the notice under paragraph (2) to pay the full amount required by the judgment in the manner provided in subdivision (b) of Section 1268.010.

(c) The defendant may elect to exercise the remedy provided by subdivision (b) without attempting to use the remedy provided by subdivision (a).

Comment. Section 1268.020 is amended to make clear that the eminent domain judgment is enforced against a public entity under the Government Code provisions relating to payment of judgments against public entities. See Gov't Code §§ 965-965.9 (judgment against the state), 970-971.2 (judgment against local public entity). The judgment is not enforceable against a public entity by execution or other remedies provided a judgment creditor under the Code of Civil Procedure. See Gov't Code §§ 965.5(b) (state), 970.1(b) (local public entity). See also Gov't Code §§ 965.7, 965.8, 970.2 (writ of mandate to compel payment

of money judgment). The Regents of the University of California is not subject to the applicable provisions of Division 3.6 (see Gov't Code § 965.9). Hence, the judgment is enforceable under paragraph (2) of subdivision (a) if the plaintiff is the Regents of the University of California.

Education Code § 35201 (repealed). Payment of judgment against school district

SEC. 2. Section 35201 of the Education Code is repealed.

35201. The governing board of any school district shall pay any judgment for debts, liabilities, or damages out of the school funds to the credit of the district, subject to the limitation on the use of the funds provided in the Constitution. If any judgment is not paid during the tax year in which it was recovered:

(a) And if, in the opinion of the board, the amount is not too great to be paid out of taxes for the ensuing year, the board shall include in its budget for the ensuing tax year a provision to pay the judgment, and shall pay it immediately upon the obtaining of sufficient funds for that purpose.

(b) And if, in the opinion of the board, the amount of the judgment is so great that undue hardship will arise if the entire amount is paid out of taxes for the next ensuing tax year, the board shall provide for the payment of the judgment in not exceeding 10 annual installments with interest thereon up to the date of each payment, and shall include provision for the payment in each budget for not exceeding 10 consecutive tax years next ensuing. Each payment shall be of an equal portion of the principal of the judgment, except that the board, in its discretion, may provide for the prepayment of any one or more installments or any part of an installment.

Comment. Former Section 35201 is superseded by the comprehensive statute relating to payment of money judgments against local public entities. See Gov't Code §§ 970-971.2.

Education Code § 72501 (repealed). Payment of judgment against community college district

SEC. 3. Section 72501 of the Education Code is repealed.

72501. The governing board of any community college district shall pay any judgment for debts, liabilities, or damages out of the funds to the credit of the district, subject to the limitation on the use of the funds provided in the California Constitution. If any judgment is not paid during the tax year in which it was recovered:

(a) And if, in the opinion of the board, the amount is not too great to be paid out of taxes for the ensuing year, the board shall include in its budget for the ensuing tax year a provision to pay the judgment, and shall pay it immediately upon the obtaining of sufficient funds for that purpose.

(b) And if, in the opinion of the board, the amount of the judgment is so great that undue hardship will arise if the entire amount is paid out of taxes for the next ensuing tax year, the board shall provide for the payment of the judgment in not exceeding 10 annual installments with interest thereon up to the date of each payment, and shall include provision for the payment in each budget for not exceeding 10 consecutive tax years next ensuing. Each payment shall be of an equal portion of the principal of the judgment, except that the board, in its discretion, may provide for the prepayment of any one or more installments or any part of an installment.

Comment. Former Section 72501 is superseded by the comprehensive statute relating to the payment of money judgments against local public entities. See Gov't Code §§ 970-971.2.

Government Code § 906 (added). Interest on allowed claims

SEC. 4. Section 906 is added to the Government Code, to read:

906. Unless the public entity and the claimant otherwise agree in writing:

(a) Interest on a claim allowed in full or in part accrues at the rate provided for judgments until the claim is paid.

(b) Interest on a claim allowed in full commences to accrue 30 days after the claim is allowed.

(c) Interest on a claim allowed in part commences to accrue 30 days after the claimant accepts in writing the amount allowed in full settlement of the claim.

Comment. Section 906 is added to provide rules governing when interest is payable on claims allowed in whole or in part. Section 906 recognizes that a public entity may allow a claim in whole or in part. See Sections 912.6 (local public entity), 965 (state).

Government Code § 912.6 (amended). Action on claims by local public entity; payment of approved claim

SEC. 5. Section 912.6 of the Government Code is amended to read:

912.6. (a) In the case of a claim against a local public entity, the board may act on a claim in one of the following ways:

(1) If the board finds the claim is not a proper charge against the public entity, it shall reject the claim.

(2) If the board finds the claim is a proper charge against the public entity and is for an amount justly due, it shall allow the claim.

(3) If the board finds the claim is a proper charge against the public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance.

(4) If legal liability of the public entity or the amount justly due is disputed, the board may reject the claim or may compromise the claim.

(b) In the case of a claim against a local public entity, if the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if ~~he~~ *the claimant* accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim.

(c) Subject to subdivision (b), the local public entity shall pay the amount allowed on the claim or in compromise of the claim in the same manner as if the claimant had obtained a final judgment against the local

public entity for that amount, but the claim may be paid in not exceeding 10 equal annual installments as provided in Section 970.6 only if the claimant agrees in writing to that method of payment and in such case no court order authorizing installment payments is required. If an agreement for payment of the claim in installments is made, the local public entity, in its discretion, may prepay any one or more installments or any part of an installment.

Comment. Section 912.6 is amended to add subdivision (c) which provides a means of enforcing the payment of the amount allowed on a claim or in compromise of a claim. See Section 942 (writ of mandate to compel payment). See also Sections 970-971.2 (payment of money judgments against local public entities).

Government Code § 935.6 (amended). Delegation of authority to state agency to adjust and pay claims

SEC. 6. Section 935.6 of the Government Code is amended to read:

935.6. (a) The State Board of Control, by rule, may authorize any state agency to adjust and pay claims where the settlement does not exceed one thousand dollars (\$1,000) or such lesser amount as the board may determine and; ~~except for claims arising from the activities of the Department of Public Works,~~ the Director of Finance certifies that a sufficient appropriation for ~~such~~ the payment of such claims exists.

(b) Payments shall be made only upon approval of the settlement by the board.

(c) As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

Comment. Section 935.6 is amended to eliminate the exclusion for claims arising from activities of the "Department of Public Works," now the Department of Transportation.

Government Code § 942 (amended). Writ of mandate and other remedies

SEC. 7. Section 942 of the Government Code is amended to read:

942. Nothing in this division shall be construed to deprive a claimant of the right to resort to writ of mandate or other proceeding against the public entity or the board or any employee of the public entity to compel ~~it or him to pay the payment of a claim~~ when and to the extent that it has been allowed *and is required by this division to be paid*.

Comment. Section 942 is amended to limit the application of the section to cases where a claim is required by this division to be paid. In the case of the state, a claim is required to be paid only where the Director of Finance certifies that there is a sufficient appropriation for the payment of the claim. See, e.g., Sections 935.6, 965, 965.6. See also Section 965.8 (writ of mandate to compel Director of Finance to certify that sufficient appropriation exists). A writ of mandate is not available where no such sufficient appropriation exists. See *Veterans of Foreign Wars v. State*, 36 Cal. App.3d 688, 697, 111 Cal. Rptr. 750, 756 (1974) ("judgment against the State, even when authorized by law, may be paid only out of appropriated funds"). Instead, the claim is reported to the Legislature. See Sections 912.8, 965, and 965.4. A writ of mandate is an appropriate remedy to compel a local public entity to pay an allowed claim. See Sections 912.6(c) and 970.2.

Government Code § 948 (amended). Settlement, adjustment or compromise of pending action by head of state agency

SEC. 8. Section 948 of the Government Code is amended to read:

948. (a) The head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust or compromise any pending action where; ~~except for an action arising from the activities of the Department of Public Works,~~ the Director of Finance certifies that a sufficient appropriation for the payment of claims exists.

(b) Where no funds or insufficient funds for such payment exist, the head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust or compromise any pending action with the approval of the Department of Finance, *and the State Board of*

Control shall report such settlement, adjustment or compromise to the Legislature in accordance with Section 912.8.

(c) As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

Comment. Section 948 is amended to delete the former exclusion for the "Department of Public Works" (now the Department of Transportation) and to add a provision in subdivision (b) for reporting the settlement, adjustment, or compromise to the Legislature so that provision for payment may be made. See also Sections 965-965.4.

Government Code § 955.5 (repealed). Compelling payment of tort liability claim, settlement, or judgment

SEC. 9. Section 955.5 of the Government Code is repealed.

~~955.5. Notwithstanding any other provision of law, including Section 942 of this code, neither the state, nor any of its officers or employees, can be required by any court in any proceeding to pay or offset a tort liability claim, settlement or judgment for which the state is liable unless the Legislature has authorized the payment or offset of a specific tort liability claim, settlement or judgment, or the Director of Finance has certified that a sufficient appropriation for such payment or to provide for the offset exists. No money or property belonging to, in the custody of, or owing to the state or any state agency is subject to garnishment, execution, or attachment or any other proceeding for enforcing any such claim, settlement or judgment.~~

Comment. The first sentence of Section 955.5 is superseded by Section 965.6. The second sentence is superseded by subdivision (b) of Section 965.5.

Government Code § 955.6 (amended). Actions against Department of Transportation for taking or damaging of property

SEC. 10. Section 955.6 of the Government Code is amended to read:

955.6. In actions for the taking or damaging of private property for public use within the meaning of Section ~~14~~ 19 of Article I of the Constitution on claims arising out of work done by the Department of ~~Public Works~~ *Transportation* :

(a) Service of summons shall be made on the Attorney General or the Director of ~~Public Works~~ *Transportation* .

(b) The defense shall be conducted by the attorney for the Department of ~~Public Works~~ *Transportation* .

Comment. Section 955.6 is amended to substitute references to the Director of Transportation and Department of Transportation. This reflects the fact that the Department of Transportation has replaced the Department of Public Works. See Sts. & Hy. Code § 20.

Government Code § 965 (amended). Payment of claim; report to Legislature where no sufficient appropriation

SEC. 11. Section 965 of the Government Code is amended to read:

965. Upon the allowance by the State Board of Control of all or part of a claim for which ; ~~except for a claim arising from the activities of the Department of Public Works~~, the Director of Finance certifies that a sufficient appropriation *for the payment of the claim* exists, and the execution and presentation of such documents as the board may require which discharge the state of all liability under the claim, the board shall designate the fund from which the claim is to be paid and the state agency concerned shall pay the claim from such fund. Where no sufficient appropriation for such payment is available, the board shall report to the Legislature in accordance with Section 912.8.

Comment. Section 965 is amended to make clear that the Department of Transportation (formerly the Department of Public Works) has the duty to pay a claim allowed by the Board of Control when the requirements of the section are satisfied. See Sections 965.7 and 965.8 (compelling performance by writ of mandate).

Government Code § 965.2 (amended). Drawing warrant for payment of final judgment or settlement

SEC. 12. Section 965.2 of the Government Code is amended to read:

965.2. The Controller shall draw ~~his~~ *a* warrant for the payment of any final judgment or settlement against the state whenever ; ~~except where the judgment or settlement arose out of the activities of the Department of Public Works,~~ the Director of Finance certifies that a sufficient appropriation for ~~such~~ *the payment of such judgment or settlement* exists. Claims upon such judgments and settlements are exempt from Section 925.6.

Comment. Section 965.2 is amended to eliminate the exclusion of the Department of Transportation (formerly the Department of Public Works) from the application of the section. A writ of mandate is an appropriate remedy to compel the Director of Finance to certify that a sufficient appropriation exists for the payment if such appropriation does in fact exist. See Sections 965.7 and 965.8.

Government Code § 965.5 (added). Period of enforceability of judgment; limitation on means of enforcement

SEC. 13. Section 965.5 is added to the Government Code, to read:

965.5. (a) A judgment for the payment of money against the state or a state agency is enforceable until 10 years after the time the judgment becomes final or, if the judgment is payable in installments, until 10 years after the final installment becomes due.

(b) A judgment for the payment of money against the state or a state agency is not enforceable under Title 9 (commencing with Section 681) of Part 2 of the Code of Civil Procedure but is enforceable under this chapter.

Comment. Section 965.5 is a new provision that prescribes the time within which a money judgment against the state or a state agency is enforceable and the method of enforcement.

The 10-year period provided in subdivision (a) is drawn from Code of Civil Procedure Section 681. Subdivision (a)—not Code of Civil Procedure Sections 681 and 685—prescribes the period

of enforceability of a money judgment against the state or a state agency. Where the judgment is payable in installments, the 10-year period commences to run when the last installment becomes payable.

Subdivision (b) is drawn from the second sentence of former Section 955.5 but subdivision (b) applies to all money judgments, whereas the provision of former Section 955.5 was limited to a tort liability claim, settlement, or judgment. See also Section 965.6. Subdivision (b) is consistent with the general rule under case law. See *Westinghouse Elec. & Mfg. Co. v. Chambers*, 169 Cal. 131, 145 P. 1025 (1915); *Meyer v. State Land Settlement Bd.*, 104 Cal. App. 577, 286 P. 743 (1930).

Government Code § 965.6 (added). Compelling payment of tort liability claim, settlement, or judgment

SEC. 14. Section 965.6 is added to the Government Code, to read:

965.6. Notwithstanding any other provision of law, neither the state, nor any of its officers or employees, can be required by any court in any proceeding to pay or offset a tort liability claim, settlement, or judgment for which the state is liable unless one of the following conditions exists:

(a) The Legislature has authorized the payment or offset of the specific tort liability claim, settlement, or judgment.

(b) The Director of Finance has certified that a sufficient appropriation for the payment of the claim, settlement, or judgment or to provide for such offset exists.

Comment. Section 965.6 continues the substance of the first sentence of former Section 955.5.

Government Code § 965.7 (added). Compelling performance by writ of mandate

SEC. 15. Section 965.7 is added to the Government Code, to read:

965.7. (a) A writ of mandate is an appropriate remedy to compel the state, or an officer or employee of the state, to perform any act required by this chapter.

(b) Nothing in this division affects the discretion of the Legislature in determining whether or not to:

(1) Make an appropriation for the payment of a claim, compromise, settlement, or judgment or to provide an offset for a claim, compromise, settlement, or judgment.

(2) Authorize such a payment or offset.

Comment. Section 965.7 is a new provision that makes clear that the state, or an officer or employee, can be compelled to pay an approved claim, settlement, compromise, or judgment when required by this chapter or to perform other duties under this chapter. Payment can be compelled only where there is a sufficient appropriation for the payment of the claim, settlement, compromise, or judgment. See Section 965.8. The traditional forms of enforcement of a money judgment (execution and other remedies under the Code of Civil Procedure) are not available to enforce a judgment against the state or a state agency. See Section 965.5(b). See also Sections 942 (writ of mandate to compel payment of allowed claim when payment is required to be made), 965.6 (necessity of authorization of payment of tort claims), 965.8 (writ of mandate to compel Director of Finance to certify that sufficient appropriation exists for payment). But see Section 965.9 (Regents of the University of California).

Subdivision (b) is included to make clear that a writ of mandate may not be used to compel the Legislature to make an appropriation or to authorize a payment or offset. This codifies existing law. See *Myers v. English*, 9 Cal. 341 (1858); *Veterans of Foreign Wars v. State*, 36 Cal. App.3d 688, 111 Cal. Rptr. 750 (1974); *California State Employees' Ass'n v. State*, 32 Cal. App.3d 103, 108 Cal. Rptr. 60 (1973).

Government Code § 965.8 (added). Writ of mandate to compel Director of Finance to certify that sufficient appropriation exists

SEC. 16. Section 965.8 is added to the Government Code, to read:

965.8. Where any provision of this division requires a certificate of the Director of Finance that a sufficient appropriation exists for the payment of a claim, settlement, compromise, or judgment or requires a certificate of the Director of Finance that a sufficient appropriation exists to provide for an offset, a writ of mandate is an appropriate remedy to compel the Director of Finance to so certify if a sufficient appropriation in fact exists for that purpose.

Comment. Section 965.8 is a new provision that makes clear that a writ of mandate is an appropriate remedy if the Director of Finance wrongfully fails or refuses to certify that a sufficient appropriation exists when one does in fact exist.

Government Code § 965.9 (added). Inapplicability of chapter to claims and judgments against Regents of the University of California

SEC. 17. Section 965.9 is added to the Government Code, to read:

965.9. This chapter does not apply to claims, settlements, and judgments against the Regents of the University of California.

Comment. Section 965.9 makes clear that this chapter does not apply to claims, settlements, and judgments against the University of California. The section is consistent with Sections 905.6 and 943.

Government Code § 970 (amended). Definitions

SEC. 18. Section 970 of the Government Code is amended to read:

970. As used in this article:

(a) "Fiscal year" means a year beginning on July 1 and ending on June 30 unless the local public entity has adopted a different fiscal year as authorized by law, in which case "fiscal year" means the fiscal year adopted by such local public entity.

(b) "Judgment" means a final judgment *for the payment of money rendered* against a local public entity ~~which is founded upon tort or inverse condemnation liability~~.

(c) "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the Regents of the University of California and does not include the state or any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

Comment. Section 970 is amended to expand the definition of "judgment" to include all money judgments. This change makes this article a comprehensive statute that applies to money

judgments generally without limitation. See *Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities*, 15 Cal. L. Revision Comm'n Reports ____ (1980).

The expansion of the scope of this article permits the repeal of a number of special statutes applying to particular types of local public entities: Educ. Code §§ 35201 (duty of school district to pay "any judgment for debts, liabilities, or damages"), 72501 (duty of community college district to pay "any judgment for debts, liabilities, or damages"); Gov't Code §§ 50170-50175 (duty of city or county to pay any "final judgment"); Water Code §§ 31091-31096 (duty of county water district to pay any "final judgment").

Government Code § 970.1 (added). Period of enforceability of judgment; limitation on means of enforcement

SEC. 19. Section 970.1 is added to the Government Code, to read:

970.1. (a) A judgment is enforceable until 10 years after the time the judgment becomes final or, if the judgment is payable in installments, until 10 years after the final installment becomes due.

(b) A judgment is not enforceable under Title 9 (commencing with Section 681) of Part 2 of the Code of Civil Procedure but is enforceable under this article.

Comment. Section 970.1 is a new provision that prescribes the time within which a money judgment against a local public entity is enforceable and the method of enforcement. See also Section 970(b) (defining "judgment").

Subdivision (a) is drawn from former Government Code Section 50175 and former Water Code Section 31096 and from Code of Civil Procedure Section 681. The 10-year period is drawn from Code of Civil Procedure Section 681. Subdivision (a)—not Code of Civil Procedure Sections 681 and 685—prescribes the period of enforceability of a money judgment against a local public entity. Where the judgment is payable in installments, the 10-year period does not run until the last installment becomes due. Thus, if a court order is obtained under Section 970.6 permitting the payment of the judgment in installments, the 10-year period commences to run when the last installment payment becomes due.

Subdivision (b) changes prior law to provide that execution and other remedies under the Code of Civil Procedure for enforcement of money judgments do not apply to enforcement of a money judgment against a local public entity. Such a judgment is payable under this article, and a writ of mandate is an appropriate remedy to compel payment. See Section 970.2. Under prior law, property of a local public entity was not subject to execution under the Code of Civil Procedure if the property was used or held for use for a public purpose. On the other hand, property held by a local public entity merely as a proprietor, devoted to no use of a public character, such as land acquired or held for other than public purposes and not held in trust for public use, was subject to execution unless some statutory or constitutional provision forbade it. See *Marin Water & Power Co. v. Town of Sausalito*, 49 Cal. App. 78, 83, 193 P. 294, 296 (1920) (opinion of Supreme Court denying hearing and stating the governing rules). See also *C. J. Kubach Co. v. City of Long Beach*, 8 Cal. App.2d 567, 48 P.2d 181 (1935) (no execution against property of city held for public purposes); *United Taxpayers Co. v. City & County of San Francisco*, 202 Cal. 264, 259 P. 1101 (1927) (property of local public entity retains its public character notwithstanding temporary disuse).

Government Code § 970.4 (amended). Payment of judgment in fiscal year in which it becomes final

SEC. 20. Section 970.4 of the Government Code is amended to read:

970.4. ~~The~~ *Except as provided in Section 970.6, the governing body of a local public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment, with interest thereon, out of any funds to the credit of the local public entity that are:*

(a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes; or

(b) Appropriated for the current fiscal year for the payment of judgments and not previously encumbered.

Comment. Section 970.4 is amended to add a reference to Section 970.6 (payment of judgment in installments). This addition makes clear that installment payments may be authorized under Section 970.6 as an alternative to paying the entire judgment in the fiscal year in which the judgment

becomes final. A writ of mandate is an appropriate remedy to enforce the duty imposed by this section. See Section 970.2.

Government Code § 970.5 (added). Payment of judgment during ensuing fiscal year

SEC. 21. Section 970.5 is added to the Government Code, to read:

970.5. Except as provided in Section 970.6, if a local public entity does not pay a judgment, with interest thereon, during the fiscal year in which it becomes final, the governing body shall pay the judgment, with interest thereon, during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.

Comment. Section 970.5 continues a provision formerly found in Section 970.6. A writ of mandate is an appropriate remedy to enforce the duty imposed by this section. See Section 970.2. See also Section 970.8 (duty to include in budget a provision for payment).

Government Code § 970.6 (amended). Payment of judgment in installments

SEC. 22. Section 970.6 of the Government Code is amended to read:

970.6. (a) ~~Subject to subdivision (b), if a local public entity does not pay a judgment, with interest thereon, during the fiscal year in which it becomes final, the governing body shall pay the judgment, with interest thereon, during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.~~ (b) The court which enters the judgment shall order that the governing body pay the judgment, with interest thereon, in not exceeding 10 *equal* annual installments if both of the following conditions are satisfied:

(1) The governing body of the local public entity has adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments.

(2) The court, after hearing, has found that payment of the judgment in installments as ordered by the court is necessary to avoid an unreasonable hardship.

~~(e)~~ (b) Each installment payment shall be of an equal amount, consisting of a portion of the principal of the judgment and the unpaid interest on the judgment to the date of the payment. The local public entity, in its discretion, may prepay any one or more installments or any part of an installment.

~~(d) The authority to pay a judgment in installments as provided in this section is in addition to and not in lieu of any other law permitting local public entities to pay judgments in installments.~~

Comment. Subdivision (b) of Section 970.6 is amended to require that the installment payments be equal in amount. Accordingly, the amount of the principal paid in each installment will increase with each payment since the amount of accrued interest required to be included in each payment will decrease as the amount of the unpaid principal of the judgment decreases. Formerly this section required payment of an equal amount of the principal of the judgment each year, together with the accrued interest. This requirement tended to defeat the purpose of the section since the installment payments required during the first few years of the 10-year period were substantially greater in amount than the payments required in the last few years. A writ of mandate is an appropriate remedy to enforce the duty imposed by an order under this section. See Section 970.2. Former subdivision (a) is continued in Section 970.5. Former subdivision (d) has been omitted as unnecessary in view of the repeal of the other provisions of former law which permitted local public entities to pay judgments in installments. See Comment to Section 970.

In determining whether to order installment payments under this section, the court should consider all potential sources from which funds are available. For example, insurance may cover some or all of the public entity liability or the payment of the judgment in whole or in part may be passed on to the United States or some other entity under a grant, contract, or other arrangement. Section 970.6 is not intended to permit an insurance company or other source to minimize its obligation to make payment by permitting payment in installments.

Government Code § 970.8 (amended). Budgeting for payment of judgments

SEC. 23. Section 970.8 of the Government Code is amended to read:

970.8. (a) Each local public entity ~~that derives revenue for its maintenance and operation from taxes or assessments or from rates and charges made for services or facilities provided by the local public entity~~ shall in each fiscal year ~~levy taxes or assessments or make rates and charges or both, or otherwise include in its budget a provision to provide funds;~~ in an amount sufficient to pay all judgments in accordance with this article.

(b) If all or any portion of the revenue used for the maintenance and operation of a local public entity (other than an entity created by an agreement described in Section 895) liable for a judgment is derived from appropriations of another local public entity, such other local public entity shall in each fiscal year appropriate funds equal to its pro rata share of an amount sufficient to permit the local public entity liable for the judgment to pay the judgment in accordance with this article. Such amount shall be paid to the local public entity liable for the judgment and shall be used by such entity to satisfy the judgment. The pro rata share of such other local public entity for each judgment is an amount bearing the same proportion to the total amount of the judgment as the revenue derived from such other local public entity for maintenance and operation during the fiscal year in which the cause of action on such judgment accrued bears to the total revenues used for maintenance and operation during such fiscal year of the local public entity liable for the judgment. For this purpose, such other local public entity shall ~~levy taxes or assessments, make rates and charges, or otherwise include in its budget a provision to provide funds;~~ sufficient in amount to ~~raise the amount of~~ make the appropriation and payment required by this section.

Comment. Section 970.8 is revised to substitute a requirement that the budget include a provision to provide funds for the payment of all judgments in accordance with this article for the former requirement that the local public entity levy taxes

or otherwise provide funds for such payment. This new requirement that the budget make provision for the payment of judgments is drawn from former Education Code Sections 35201 (school district) and 72501 (community college district). A writ of mandate is an appropriate remedy to enforce the duty imposed by this section that the local public entity budget for and pay all judgments in accordance with this article. See Section 970.2.

Government Code § 971 (amended). Applicability of limitations on amount of taxes, assessments or rates and charges, amount of appropriations and payments, and amount of liability or indebtedness; court mandated costs

SEC. 24. Section 971 of the Government Code is amended to read:

971. (a) *As used in this section:*

(1) *“Judgment resulting from a discretionary act” means a judgment arising from a liability which the local public entity has discretion to incur or not to incur and includes a judgment rendered in an eminent domain proceeding and a judgment requiring specific performance of a contractual obligation or awarding damages for failure to perform a contractual obligation.*

(2) *“Judgment resulting from a nondiscretionary act” means a judgment other than one described in paragraph (1) and includes a judgment founded upon tort or inverse condemnation liability.*

(b) Any limitation on the amount of taxes, assessments or rates and charges that may be levied or collected by a local public entity, and any limitation on the amount of appropriations and payments that may be made by a local public entity, and any limitation on the amount of liability or indebtedness that may be incurred by a local public entity, contained in any other statute or in any charter or ordinance, ~~is inapplicable~~ :

(1) *Applies to the taxes, assessments, rates and charges or appropriations levied, collected or made to pay pursuant to this article a judgment resulting from a discretionary act.*

(2) *Does not apply to the taxes, assessments, rates and charges or appropriations levied, collected or made to pay*

pursuant to this article a judgment resulting from a nondiscretionary act.

(c) For the purposes of Section 2271 of the Revenue and Taxation Code, taxes levied *to pay pursuant to this article a judgment resulting from a nondiscretionary act* are levied to pay costs mandated by the courts.

Comment. Section 971 is revised to reflect the expansion of Sections 970-971.2 to cover all money judgments. Revision of Section 971 is necessary because this article formerly covered only tort and inverse condemnation judgments. Formerly, Section 971 made tax and similar limitations inapplicable with respect to the payment of tort and inverse condemnation judgments; the revised section continues this rule for tort and inverse condemnation judgments and expands the rule to include other money judgments that result from a nondiscretionary act.

The standard used in subdivision (a)—which distinguishes between judgments that result from a discretionary act and those that do not—is drawn from cases interpreting constitutional limits on liabilities or indebtedness (see, *e.g.*, *Martin v. Fisher*, 108 Cal. App. 3d, 40-41, 291 P. 276, 278 (1930)) and from Section 2205 of the Revenue and Taxation Code. Section 971, however, merely makes inapplicable limitations contained in a statute, charter, or ordinance; the section does not affect the applicability of any constitutional limits.

Government Code §§ 50170-50175 (repealed). Payment of judgments by cities and counties

SEC. 25. Article 7 (commencing with Section 50170) of Chapter 1 of Part 1 of Division 1 of Title 5 of the Government Code is repealed.

Comment. Sections 50170-50175 are superseded by the comprehensive statute relating to payment of money judgments by local public entities. See Sections 970-971.2.

Water Code §§ 31091-31096 (repealed). Payment of judgments by county water districts

SEC. 26. Section 31091 of the Water Code is repealed.

~~31091. At least 15 days before a tax levy is made the county clerk shall file a list of all existing final judgments against the district with an auditor and the board.~~

Comment. Former Sections 31091-31096 are superseded by the comprehensive statute relating to the payment of money judgments by local public entities. See Gov't Code §§ 970-971.2.

SEC. 27. Section 31092 of the Water Code is repealed.

31092. ~~The auditor shall audit the judgments and certify the amount of the judgments to the board within five days after the list is filed with him. The board shall then include in the tax levy for the next fiscal year a rate sufficient to pay the judgments.~~

Comment. See the Comment to repealed Section 31091.

SEC. 28. Section 31093 of the Water Code is repealed.

31093. ~~Failure to include the amount of any existing final judgment in the tax levy for the year does not invalidate the tax levy, but the amount shall be included in the next tax levy.~~

Comment. See the Comment to repealed Section 31091.

SEC. 29. Section 31094 of the Water Code is repealed.

31094. ~~In lieu of levying a tax rate for the payment of all of the judgments in the next fiscal year, the board may provide for their payment by including in the tax levy for the next fiscal year at least 10 percent of the total amount of the judgment. The same percentage shall be levied each successive year until the whole is paid.~~

Comment. See the Comment to repealed Section 31091.

SEC. 30. Section 31095 of the Water Code is repealed.

31095. ~~The auditor of the district shall pay the judgments. If the board has provided for payment by percentages in successive years, he shall pay to each judgment creditor the percentage of the judgment fixed by the board.~~

Comment. See the Comment to repealed Section 31091.

SEC. 31. Section 31096 of the Water Code is repealed.

31096. ~~When provision for the payment of any final judgment is made by percentages in successive years, an action upon such judgment may be commenced within five years after the first tax levy which fails to include the percentage of the amount fixed by the board. An action shall not be brought or prosecuted on the judgment so long as it is being paid on such annual percentages.~~

Comment. See the Comment to repealed Section 31091.

APPENDIX XII
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Uniform Veterans Guardianship Act

October 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Uniform Veterans Guardianship Act*, 15 CAL. L. REVISION COMM'N REPORTS 1289 (1980).

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

October 26, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 27 of the Statutes of 1972 to make a study to determine whether the law relating to guardianship and related matters should be revised. A new guardianship-conservatorship law was enacted by Chapter 726 of the Statutes of 1979 upon recommendation of the Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978).

The Commission has continued to review the law relating to guardianship and conservatorship to determine whether any technical or substantive changes are necessary. As a result of this continuing review, the Commission recommends repeal of the Uniform Veterans Guardianship Act and incorporation into the general guardianship-conservatorship statute of a few of the act's provisions that continue to be useful.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

THE UNIFORM VETERANS' GUARDIANSHIP ACT

California first enacted the Uniform Veterans' Guardianship Act in 1929.¹ The Uniform Act was revised and continued in the 1979 comprehensive revision of guardianship-conservatorship law.²

The Uniform Act provides special procedures for appointment of a guardian or other fiduciary to receive payments from the Veterans Administration when one is needed as a precondition of paying benefits to a minor or incompetent person. The Uniform Act also imposes regulations on the manner of handling and disposing of the payments so received. Nevertheless, if the minor or incompetent person has estate assets derived from other sources and a guardian or conservator is needed, a guardianship or conservatorship must be established under the general law since the Uniform Act relates only to VA benefits. For this reason, the general practice³ has been to establish a guardianship or conservatorship under the general law and not under the Uniform Act. As a result, the Uniform Act has been little used.⁴

¹ 1929 Cal. Stats. ch. 663. In 1931, the Uniform Veterans' Guardianship Act was codified in the Probate Code (§§ 1650-1669). 1931 Cal. Stats. ch. 281.

² See 1979 Cal. Stats. ch. 726, enacting Prob. Code §§ 2900-2918 (operative January 1, 1981). The 1979 revision of guardianship-conservatorship law was enacted upon recommendation of the California Law Revision Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). Pursuant to the Commission's recommendation, the Uniform Veterans' Guardianship Act was continued without major substantive revision. However, two obsolete sections relating to commitment, transfer, or discharge of persons of unsound mind to or from facilities operated by the Veterans Administration or other agency of the United States government (former Sections 1663 and 1664 of the Probate Code) were not continued, since these provisions have been superseded by the Lanterman-Petris-Short Act (Welf. & Inst. Code §§ 5000-5464).

³ The Commission's understanding about the general practice where veterans' benefits are concerned is based on information furnished informally by the Veterans Administration.

⁴ Prior to the enactment of the 1979 guardianship-conservatorship law, a problem existed if a conservatorship under the general conservatorship statute was used instead of a guardianship under the Uniform Act. This problem was created by the requirement that VA benefits be paid to the adult beneficiary unless the beneficiary is incompetent. It was unclear under former law whether the appointment of a conservator was an adjudication that the conservatee was incompetent for the purposes of payment of VA benefits. See *Board of Regents State Univs. v. Davis*, 14 Cal.3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975). The new

A number of other states have repealed the Uniform Veterans' Guardianship Act and leave veterans' guardianships to be governed by general law relating to the administration of estates of persons unable to manage their own property.⁵ The Commission recommends that the Uniform Veterans' Guardianship Act be repealed as a separate part of the guardianship-conservatorship statute and that the useful provisions of the Uniform Act be continued in the general law. Since the Veterans Administration needs to be advised of proceedings taken under general law which may affect the interest of the ward or conservatee in money or other benefits from the VA, the notice provisions of the Uniform Veterans' Guardianship Act⁶ should be continued and expanded⁷ in general law. Certain other useful provisions of the Uniform Act⁸ should also be continued in general law.

guardianship-conservatorship statute makes clear that the appointment of a conservator deprives the conservatee of legal capacity with respect to estate assets. See Prob. Code § 1872 (enacted by 1979 Cal. Stats. ch. 726, operative January 1, 1981). Accordingly, the problem under former law will no longer exist when the new law becomes operative.

⁵ See 8 Uniform Laws Annotated, Estate, Probate and Related Laws 645 (master ed. 1972); *id.* at 173-74 (Supp. 1979).

⁶ See Prob. Code §§ 2906 (petition for appointment of guardian or conservator), 2908 (accounts), 2910 (extraordinary compensation), 2911 (investment or deposit of surplus funds), 2912 (support of third persons), 2913 (purchase of real property), 2915 (termination of proceeding). These sections were added by 1979 Cal. Stats. ch. 726, operative January 1, 1981.

⁷ In addition to the matters of which the Veterans Administration is required to be given notice under existing law (see note 6 *supra*), notice to the VA should be required of (1) a petition for support of the ward or conservatee out of the estate notwithstanding that a third person is liable for such support, (2) a petition relating to the sale of real or personal property of the estate, (3) a petition for authorization of a proposed action under the doctrine of substituted judgment, (4) a petition for independent exercise of powers, (5) an inventory and appraisal of the estate or a supplemental inventory and appraisal, and (6) a proceeding to authorize a transaction involving community or homestead property.

⁸ Probate Code Section 2914, which requires copies of public records needed to determine eligibility for VA benefits to be furnished to the applicant free of charge, should be continued by appropriate amendments to Section 6107 of the Government Code. And the provisions of Probate Code Section 2903(b), which require a petition for appointment of a guardian to contain certain descriptive information about the proposed ward and to set forth the amount of VA benefits then due and the amount of probable future payments, should be continued in substance by appropriate amendments to Sections 1510 (guardianship) and 1821 (conservatorship) of the Probate Code. Probate Code Sections 2914, 2903, 1510, and 1821 were added by 1979 Cal. Stats. ch. 726 (operative January 1, 1981).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 6107 of the Government Code, to amend Sections 1510, 1511, 1821, and 1822 of, to add Section 1461.5 to, and to repeal Part 5 (commencing with Section 2900) of Division 4 of, the Probate Code, relating to veterans.

The people of the State of California do enact as follows:

Government Code § 6107 (amended). Veterans' exemption from fees

SECTION 1. Section 6107 of the Government Code, as amended by Chapter 730 of the Statutes of 1979, is amended to read:

6107. ~~Neither the state nor any county, or city, nor any public officer or body acting in his official capacity on behalf of the state, any county, or city;~~ (a) No public entity, including the state, a county, city, or other political subdivision, nor any officer or employee thereof, including notaries public, shall demand or receive any fee or compensation for *doing any of the following*:

~~(a)~~ (1) Recording ~~or~~, indexing, or issuing certified copies of any discharge, certificate of service, certificate of satisfactory service, notice of separation or report of separation of any member of the armed forces of the United States.

~~(b)~~ Issuing certified copies of such discharges, certificates of service, certificates of satisfactory service, reports of separation or notices of separation.

~~(c)~~ Any service whatever rendered in the matter of a pension claim, application, affidavit, voucher, or any claim to be presented to the Administrator of Veterans' Affairs under the World War Veterans' Act, 1924.

~~(d)~~ (2) Furnishing a certified copy of, or searching for, any public record; ~~or making the search for it, when it which~~ is to be used in ~~a an~~ application or claim for a pension, ~~or a claim for~~ allotment, allowance, compensation, insurance; (including automatic insurance), or ~~otherwise under the World War Veterans' Act, 1924, or any other~~

benefits under any ~~other~~ act of Congress for service in the armed forces of the United States ; or ~~a claim for veterans' benefits~~ under any law of this state *relating to veterans' benefits*.

(3) *Furnishing a certified copy of, or searching for, any public record which is required by the Veterans Administration to be used in determining the eligibility of any person to participate in benefits made available by the Veterans Administration.*

(4) *Rendering any other service in connection with an application or claim referred to in paragraph (2) or (3).*

(b) The services ~~specified in this section~~ referred to in subdivision (a) shall be rendered on ~~the~~ request of a United States official, ~~a~~ *the claimant or applicant*, or ~~his~~ *the guardian or*, conservator, or attorney *of the claimant or applicant*, or any other person acting on behalf of the claimant or applicant. ~~An~~ *A public officer or employee* is liable on his or her official bond for ~~every~~ failure or refusal to render the services.

Comment. Section 6107 is amended to continue the substance of former Probate Code Section 2914 in paragraph (3) of subdivision (a) of Section 6107. The scope of Section 6107 has been broadened to apply to all public entities in California; former Probate Code Section 2914 had this broad scope, but formerly Section 6107 was limited to the state, cities, and counties. Other revisions have been made in Section 6107 for clarity. The former references to the World War Veterans' Act, 1924, have been deleted since that act has been substantially repealed. See Act of Sept. 2, 1958, Pub. L. No. 85-857, § 14(51), 72 Stat. 1271.

Probate Code § 1461.5 (added). Notice to Veterans Administration

SEC. 2. Section 1461.5 is added to the Probate Code, to read:

1461.5. Except for a petition filed by the Veterans Administration, notice of the time and place of hearing on a petition, report, or account, and a notice of the filing of an inventory, together with a copy of the petition, report, inventory, or account, shall be mailed to the office of the

Veterans Administration having jurisdiction over the area in which the court is located at least 15 days before the hearing, or within 15 days after the inventory is filed, if both of the following conditions exist:

(a) The guardianship or conservatorship estate consists or will consist wholly or in part of any of the following:

(1) Money received from the Veterans Administration.

(2) Revenue or profit from such money or from property acquired wholly or in part from such money.

(3) Property acquired wholly or in part with such money or from such property.

(b) The petition, report, inventory, or account is filed under any one or more of the following provisions: Section 1510, 1601, 1820, 1861, 1874, 2422, or 2423; Article 7 (commencing with Section 2540) of Chapter 6 of Part 4; Section 2570, 2571, 2580, 2592, 2610, 2613, or 2620; Chapter 8 (commencing with Section 2640) of Part 4; or Chapter 3 (commencing with Section 3100) of Part 6.

Comment. Section 1461.5 continues the provisions of the former Uniform Veterans' Guardianship Act which required notice to the Veterans Administration of certain procedures when veterans' benefits were involved. See former Sections 2906 (petition for appointment of guardian or conservator), 2908 (accounts), 2910 (extraordinary compensation), 2911 (investment or deposit of surplus funds), 2912 (support of third persons), 2913 (purchase of real property), 2915 (termination of proceeding). The requirement in Section 1461.5 that notice be given when the petition, report, inventory, or account is filed under Section 1874 (order expanding conservatee's legal capacity); Section 2422 (support of ward or conservatee notwithstanding third party liable); Article 7 (commencing with Section 2540) of Chapter 6 of Part 4 (sales); Sections 2580 (substituted judgment), 2592 (independent exercise of powers), 2610 (inventory and appraisal), and 2613 (supplemental inventory and appraisal); and Chapter 3 (commencing with Section 3100) of Part 6 (transaction involving community or homestead property) is new.

The requirement of former Sections 2906 and 2913 that the copy of the petition be a signed duplicate or be certified is not continued.

Probate Code § 1510 (amended). Petition for appointment of guardian

SEC. 3. Section 1510 of the Probate Code is amended to read:

1510. (a) A relative or other person on behalf of the minor, or the minor if 14 years of age or older, may file a petition for the appointment of a guardian of the minor.

(b) The petition shall request that a guardian of the person or estate of the minor, or both, be appointed, shall specify the name and address of the proposed guardian *and the name and date of birth of the proposed ward*, and shall state that such appointment is necessary or convenient.

(c) The petition shall set forth, so far as *is* known to the petitioner, the names and addresses of all of the following:

(1) The parents of the proposed ward.

(2) The person having legal custody of the proposed ward and, if that person does not have the care of the proposed ward, the person having the care of the proposed ward.

(3) The relatives of the proposed ward within the second degree.

(4) In the case of a guardianship of the estate, the spouse of the proposed ward.

(5) Any person nominated as guardian for the proposed ward under Section 1500 or 1501.

(d) If the proposed ward is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition shall state that fact and name the institution.

(e) The petition shall state, so far as is known to the petitioner, whether or not the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration *and the estimated amount of the monthly benefit payable by the Veterans Administration for the proposed ward*.

(f) If the petitioner has knowledge of any pending adoption, juvenile court, marriage dissolution, domestic

relations, custody, or other similar proceeding affecting the proposed ward, the petition shall disclose such pending proceeding.

Comment. Section 1510 is amended to generalize and continue the substance of the portion of subdivision (b) of former Section 2903 that required a petition under the Uniform Veterans' Guardianship Act to set forth the name and age of the proposed ward, the amount of money then due to the proposed ward from the Veterans Administration, and the amount of probable future payments. The requirement of former Section 2903 that the petition show the place of residence of the proposed ward is superseded by subdivision (c) of Section 1510 which requires the petition to show the addresses of the proposed ward's parents, the person having legal custody of the proposed ward, and the person having the care of the proposed ward.

Probate Code § 1511 (technical amendment). Notice of hearing on petition for guardianship

SEC. 4. Section 1511 of the Probate Code is amended to read:

1511. (a) Except as provided in subdivisions (f) and (g), at least 15 days before the hearing on the petition for the appointment of a guardian, notice of the time and place of the hearing shall be given as provided in subdivisions (b), (c), (d), and (e) of this section. The notice shall be accompanied by a copy of the petition.

(b) Notice shall be served in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure, or in such manner as may be authorized by the court, on all of the following (other than the petitioner or persons joining in the petition):

- (1) The proposed ward if 14 years of age or older.
- (2) The person having legal custody of the proposed ward.

- (3) The parents of the proposed ward.

- (4) Any person nominated as a guardian for the proposed ward under Section 1500 or 1501.

(c) Notice shall be given by mail sent to their addresses stated in the petition, or in such manner as may be authorized by the court, to all of the following (other than the petitioner or persons joining in the petition):

(1) The spouse named in the petition.

(2) The relatives named in the petition, except that if the petition is for the appointment of a guardian of the estate only the court may dispense with the giving of such notice to any one or more or all of such relatives.

(3) The person having the care of the proposed ward if other than the person having legal custody of the proposed ward.

(d) If notice is required by Section 1461 or Section 1542 to be given to the Director of Mental Health or the Director of Developmental Services or the Director of Social Services, notice shall be mailed as so required.

(e) If the petition states that the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration, notice shall be mailed to the office of the Veterans Administration referred to in Section ~~2908~~ 1461.5.

(f) Unless the court orders otherwise, notice shall not be given to any of the following:

(1) The parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency.

(2) The parents of a proposed ward who has been judicially declared free from their custody and control.

(g) Notice need not be given to any person if the court so orders upon a determination of either of the following:

(1) The person cannot with reasonable diligence be given the notice.

(2) The giving of the notice would be contrary to the interest of justice.

(h) Before the appointment of a guardian is made, proof shall be made to the court that each person entitled to notice under this section either:

(1) Has been given notice as required by this section; or

(2) Has not been given notice as required by this section because such person cannot with reasonable diligence be given the notice or because the giving of notice to such person would be contrary to the interest of justice.

Comment. Section 1511 is amended to revise the cross-reference in subdivision (e) in view of the repeal of former Section 2908.

Probate Code § 1821 (amended). Contents of petition for conservatorship

SEC. 5. Section 1821 of the Probate Code is amended to read:

1821. (a) The petition shall request that a conservator be appointed for the person or estate, or both, shall specify the *name and address of the proposed conservator and the name and address of the proposed conservatee*, and shall state the reasons why the appointment is required.

(b) The petition shall set forth, so far as they are known to the petitioner, the names and addresses of the spouse and of the relatives of the proposed conservatee within the second degree.

(c) If the petition is filed by one other than the proposed conservatee, the petition shall state whether or not the petitioner is a creditor or debtor of the proposed conservatee.

(d) If the proposed conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition shall state that fact and name the institution.

(e) The petition shall state, so far as is known to the petitioner, whether or not the proposed conservatee is receiving or is entitled to receive benefits from the Veterans Administration *and the estimated amount of the monthly benefit payable by the Veterans Administration for the proposed conservatee*.

(f) The petition may include an application for any order or orders authorized under this division, including, but not limited to, orders under Chapter 4 (commencing with Section 1870).

(g) The petition may include a further statement that the proposed conservatee is not willing to attend the hearing on the petition, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator.

Comment. Section 1821 is amended to generalize and continue the substance of the portion of subdivision (b) of former Section 2903 that required a petition under the Uniform Veterans' Guardianship Act to set forth the name and place of residence of the proposed conservatee, and the amount of money then due to the proposed conservatee from the Veterans Administration and the amount of probable future payments.

Probate Code § 1822 (technical amendment). Notice of hearing on petition for conservatorship

SEC. 6. Section 1822 of the Probate Code is amended to read:

1822. (a) At least 15 days before the hearing on the petition for appointment of a conservator, notice of the time and place of the hearing shall be given as provided in subdivisions (b), (c), and (d) of this section. The notice shall be accompanied by a copy of the petition.

(b) Notice shall be mailed to the following persons (other than the petitioner or persons joining in the petition):

(1) The spouse, if any, of the proposed conservatee at the address stated in the petition.

(2) The relatives named in the petition at their addresses stated in the petition.

(c) If notice is required by Section 1461 to be given to the Director of Mental Health or the Director of Developmental Services, notice shall be mailed as so required.

(d) If the petition states that the proposed conservatee is receiving or is entitled to receive benefits from the Veterans Administration, notice shall be mailed to the office of the Veterans Administration referred to in Section ~~2908~~ 1461.5.

Comment. Section 1822 is amended to revise the cross-reference in subdivision (d) in view of the repeal of former Section 2908.

Probate Code §§ 2900-2918 (repealed). Uniform Veterans' Guardianship Act

SEC. 7. Part 5 (commencing with Section 2900) of Division 4 of the Probate Code is repealed.

Comment. The Uniform Veterans' Guardianship Act (Prob. Code §§ 2900-2918) is repealed as a separate statute. Pertinent portions of the Uniform Veterans' Guardianship Act are continued elsewhere in Division 4 of the Probate Code and in the Government Code. The portions that are not continued are either obsolete or are superseded by existing provisions of general guardianship-conservatorship law. The disposition of each repealed section of the Uniform Veterans' Guardianship Act is indicated in the Comment to the repealed section set out below.

§ 2900 (repealed). Short title

Comment. Former Section 2900 is not continued.

§ 2901 (repealed). Definitions

Comment. The terms in which "income" and "estate" were defined in former Section 2901 are continued in the substantive provisions of Section 1461.5 (notice to Veterans Administration). The terms in which "benefits" was defined in former Section 2901 are continued in the substantive provisions of Sections 1510 and 1821 (contents of petition). The remaining definitions of former Section 2901 are not continued.

§ 2902 (repealed). Necessity and manner of appointment of guardian; fiduciary for adult called "conservator"

Comment. Subdivision (a) of former Section 2902 is superseded by the requirement in Section 1514 that the court may appoint a guardian if it appears "necessary or convenient," and by the requirement in Section 1800 that the court may appoint a conservator if satisfied of the "need therefor." Subdivision (b) of former Section 2902 is superseded by the provision of Section 1510 that a guardian may be appointed only for a minor. An adult in need of protective supervision may have a conservator appointed. See Section 1800.

§ 2903 (repealed). Petition; filing; authorized petitioners; contents

Comment. Subdivision (a) of former Section 2903 is superseded by Sections 1510 (guardianship), 1820 (conservatorship), and 2201 (venue). Subdivision (b) is superseded by Sections 1510 (guardianship) and 1821 (conservatorship). The requirement that the petition set forth the age of the proposed ward or conservatee is continued with respect to minor wards in Section 1510, but is not continued with respect to conservatees (see Section 1821). The substance of the requirement of subdivision (b) of allegations concerning Veterans Administration benefits is continued in Sections 1510 and 1821.

The first sentence of subdivision (c) is superseded with respect to minors by Section 1510; the requirement that the petition show the age, relationship, if any, and occupation of the proposed guardian is not continued. With respect to adults, the first sentence of subdivision (c) is not continued. The second sentence of subdivision (c) is superseded by Sections 1514 (guardianship) and 1810-1813 (conservatorship). Subdivision (d) is not continued.

§ 2904 (repealed). Evidence of necessity for guardian of minor

Comment. Former Section 2904 is not continued.

§ 2905 (repealed). Evidence of necessity for guardian for incompetent

Comment. Former Section 2905 is not continued.

§ 2906 (repealed). Notice

Comment. Former Section 2906 is continued in Section 1461.5, except that the former requirement that the copy of the petition be a signed duplicate or be certified is not continued.

§ 2907 (repealed). Fitness of appointee; bond

Comment. Subdivision (a) of former Section 2907 is superseded by Sections 1514 (guardianship) and 1810-1813 (conservatorship). Subdivision (b) is superseded by Sections 2300 and 2320-2336.

§ 2908 (repealed). Accounting by guardian

Comment. Former Section 2908 is superseded by Sections 2620-2633. The requirement of notice to the Veterans Administration is continued in Section 1461.5.

§ 2909 (repealed). Penalty for failure to account

Comment. Former Section 2909 is superseded by Sections 2602 and 2650.

§ 2910 (repealed). Compensation of guardians; allowance of bond premiums

Comment. Former Section 2910 is superseded by Sections 2640 and 2643. The limitation on compensation contained in former Section 2910 is not continued; under Section 2640, the compensation must be "just and reasonable." The requirement of notice to the Veterans Administration is continued in Section 1461.5.

§ 2911 (repealed). Investments; deposits

Comment. Former Section 2911 is superseded by Sections 2401 (duty to use ordinary care and diligence in management of estate), 2453 (deposit in bank or other financial institution), 2570-2574 (investments and purchase of property), and 2590-2595 (independent exercise of powers). The requirement of notice to the Veterans Administration is continued in Section 1461.5.

§ 2912 (repealed). Maintenance and support of person other than ward

Comment. Former Section 2912 is superseded by Section 2423. The requirement of notice to the Veterans Administration is continued in Section 1461.5, except that the requirement that the copy of the petition be a signed duplicate or be certified is not continued.

§ 2913 (repealed). Purchase of home or other real property for ward

Comment. Subdivision (a) of former Section 2913 is superseded by Section 2571. The limitation of subdivision (a) that real property may be purchased "only as a home" for the ward is not continued. The requirement of notice to the Veterans Administration is continued in Section 1461.5. Subdivision (b) is not continued. Notwithstanding the omission of the second sentence of subdivision (b) (which required that title be taken in the name of the ward), it is the accepted practice in guardianship and conservatorship proceedings to take title to real property in the name of the ward or conservatee. See *W. Johnstone & G. Zillgitt, California Conservatorships* § 4.17, at 116 (Cal. Cont. Ed. Bar 1968).

Subdivision (c) is superseded by Sections 2463 (partition), 2500-2501 (compromises affecting real property), and 2590-2591 (independent exercise of powers).

§ 2914 (repealed). Furnishing copy of public record without charge

Comment. Former Section 2914 is continued in Government Code Section 6107.

§ 2915 (repealed). Certificate of majority or competency; termination of guardianship; discharge of guardian and release of sureties

Comment. The first sentence of former Section 2915 is not continued. The second and third sentences are superseded by Sections 1600-1601 (guardianship), 1860-1863 (conservatorship), 2627 (discharge of guardian), and 2630 (accounts on termination of relationship).

§ 2916 (repealed). Application of part

Comment. Former Section 2916 is not continued.

§ 2917 (repealed). Law applicable to exercise of powers and duties of guardian

Comment. Former Section 2917 is not continued.

§ 2918 (repealed). Construction to effect uniformity

Comment. Former Section 2918 is not continued.

APPENDIX XIII
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Psychotherapist-Patient Privilege

November 1979

**CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Psychotherapist—Patient Privilege*, 15 CAL. L. REVISION COMM'N REPORTS 1307 (1980).

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
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Ex Officio

November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the California Law Revision Commission. Pursuant to legislative authority of Resolution Chapter 130 of the statutes of 1965, the Commission has maintained a continuing review of the Evidence Code to determine whether any technical or substantive changes are necessary.

As a result of this continuing review, the Commission submitted a recommendation to the 1978 Legislature relating to the psychotherapist-patient privilege. See *Recommendation Relating to Psychotherapist-Patient Privilege*, 14 Cal. L. Revision Comm'n Reports 127 (1978). The recommendation proposed to expand the scope of the privilege to cover patients of certain psychotherapists who are not now covered by the privilege, to make clear that family and group therapy are included within the privilege, to repeal the exception for "criminal proceedings" (the application of which under existing law depends on the type of psychotherapist making or receiving the confidential communication), and to make technical revisions in the provisions relating to professional corporations.

Assembly Bill No. 2517 was introduced by Assemblyman Imbrecht at the 1978 legislative session to effectuate the recommendation. The bill passed the Legislature but was vetoed by the Governor.

In preparing this new recommendation, the Commission has considered the Governor's veto message and other communications the Commission received concerning Assembly Bill No. 2517. The Commission has also reviewed the provisions

of Chapter 832 of the Statutes of 1979. Chapter 832 made significant and important improvements in the protection provided minors under the psychotherapist-patient privilege. Although these improvements deal to some extent with the problems dealt with in the Commission's earlier recommendation, the Commission has concluded that legislation is still required to remedy deficiencies in the existing psychotherapist-patient privilege provisions of the Evidence Code.

The proposed legislation contained in this new recommendation is the same as Assembly Bill No. 2517 as it passed the Legislature in 1978. This recommendation is the same as the earlier recommendation except that this recommendation adds a provision to codify the rule that the psychotherapist-patient privilege protects a parent or other third person who provides confidential information to a psychotherapist which is necessary for the diagnosis or treatment of a patient. This provision was included in Assembly Bill No. 2517 in the form in which it passed the Legislature in 1978.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Evidence Code provisions relating to the psychotherapist-patient privilege were enacted in 1965¹ upon recommendation of the California Law Revision Commission.² These provisions have been the subject of several subsequent Commission recommendations, with the result that they have been amended and supplemented a number of times.³ In the course of its continuing study of the law relating to evidence, the Commission has reviewed the psychotherapist-patient privilege in the light of recent law review articles,⁴ monographs and other communications received by the Commission,⁵ and the

¹ 1965 Cal. Stats. ch. 299. As originally enacted, the psychotherapist-patient privilege was contained in Sections 1010-1026 of the Evidence Code. Sections 1027 and 1028 were added by legislation enacted in 1970. Section 1014.5 was added by legislation enacted in 1979. Unless otherwise noted, all section references herein are to the Evidence Code.

² See *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965). For the Commission's background study on the psychotherapist-patient privilege, see *A Privilege Not Covered by the Uniform Rules—Psychotherapist-Patient Privilege*, 6 Cal. L. Revision Comm'n Reports 417 (1964).

³ See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions*, 8 Cal. L. Revision Comm'n Reports 101 (1967); *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article*, 9 Cal. L. Revision Comm'n Reports 501 (1969); *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code*, 9 Cal. L. Revision Comm'n Reports 137 (1969). See also 1967 Cal. Stats. ch. 650; 1970 Cal. Stats. chs. 1396, 1397; 1979 Cal. Stats. ch. 832. A number of other amendments have been made in these provisions to conform to other recent enactments.

⁴ See, e.g., Louisell & Sinclair, *Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 Calif. L. Rev. 30 (1971); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050 (1973); *Supreme Court of California 1972-1973, Psychotherapist-Patient Privilege*, 62 Calif. L. Rev. 406, 604 (1974); Comment, *California Evidence Code Section 771: Conflict with Privileged Communications*, 6 Pac. L.J. 612 (1975); Comment, *Tarasoff v. Regents of the University of California: Psychotherapists, Policemen and the Duty to Warn—An Unreasonable Extension of the Common Law* ? 6 Golden Gate U.L. Rev. 229 (1975); Note, *Untangling Tarasoff: Tarasoff v. Regents of The University of California*, 29 Hastings L.J. 179, 194-96 (1977); Comment, *Discovery of Psychotherapist-Patient Communications After Tarasoff*, 15 San Diego L. Rev. 265 (1978); 8 Golden Gate U.L. Rev. 55 (1977).

⁵ See, e.g., Letter, dated May 23, 1975, from Professor John Kaplan, Stanford Law School, and letter, dated February 16, 1978, from Justice Robert Kingsley, Court of Appeal, Second District, both letters on file in the Commission's offices. Professor Jack Friedenthal prepared a background study for the Commission. The coverage of the study includes the psychotherapist-patient privilege. See Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence*

Federal Rules of Evidence.⁶ The Commission has also reviewed the provisions of Chapter 832 of the Statutes of 1979, which gives the protection of the psychotherapist-patient privilege to various professionals who provide mental health treatment or counseling to a minor. As a result of this review, the Commission has determined that a number of revisions in the scope of the psychotherapist-patient privilege are desirable.

The Commission recognizes that any extension of the scope of protection afforded confidential communications necessarily handicaps the court or jury in its effort to make a correct determination of the facts. Hence, the social utility of any new privilege or of any extension of an existing privilege must be weighed against the social detriment inherent in the calculated suppression of relevant evidence. Applying this criterion to the psychotherapist-patient privilege, the Commission is persuaded that protection afforded by the psychotherapist-patient privilege is unduly limited and therefore makes the following recommendations.

Psychologists Licensed in Other Jurisdictions

Section 1010(b) of the Evidence Code includes within the psychotherapist-patient privilege psychologists licensed in California.⁷ However, a psychologist licensed or certified in another state or nation may give treatment in California.⁸ For this reason, Section 1010(b) should be broadened to include the patient of a psychologist licensed or certified in another state or nation.⁹ This expansion will

Code (mimeo 1976). The Commission has also had the benefit of an unpublished paper by Robert Plattner, *The California Psychotherapist-Patient Privilege* (Stanford Law School 1975).

⁶ The Federal Rules of Evidence do not contain a statutory psychotherapist-patient privilege. See Rule 501. However, the Supreme Court Advisory Committee's proposed rules included a statutory privilege with notes thereon. See Proposed Federal Rules of Evidence, Rule 504 (J. Schmertz ed. 1974). The Commission has consulted the proposed rules and notes in preparing this recommendation.

⁷ Section 1010(b) requires licensure under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code (psychologists).

⁸ Business and Professions Code Section 2912 provides:

2912. Nothing in this chapter shall be construed to restrict or prevent a person who is licensed or certified as a psychologist in another state or territory of the United States or in a foreign country or province from offering psychological services in this state for a period not to exceed 30 days in any calendar year.

⁹ For a comparable recommendation, see Supreme Court Advisory Committee's Note to Section 504 of the Proposed Federal Rules of Evidence (J. Schmertz ed. 1974).

conform subdivision (b) to subdivision (a) which covers a patient of a psychiatrist authorized to practice in "any state or nation."

Psychologists Employed by Nonprofit Community Agencies

Subdivision (d) of Section 2909 of the Business and Professions Code authorizes a nonprofit community agency which receives a minimum of 25 percent of its financial support from federal, state, and local governmental sources to employ unlicensed psychologists to provide psychological services to patients served by the agency. These psychologists must be registered with the Psychology Examining Committee at the time of employment¹⁰ and must possess an earned doctorate degree in psychology or in educational psychology or a doctorate degree deemed equivalent by regulation adopted by the committee.¹¹ In addition, they must have one year or more of professional experience of a type which the committee determines will competently and safely permit them to engage in rendering psychological services. In view of these stringent requirements and the need to provide protection to patients who utilize the services of nonprofit community agencies for psychotherapeutic treatment, the scope of the psychotherapist-patient privilege should be extended to include patients of the psychologists described above.

Licensed Educational Psychologists

Legislation enacted in 1970 provides for the licensure of educational psychologists.¹² A licensed educational psychologist may engage in private practice and provide substantially the same services as school psychologists who are already included within the psychotherapist-patient privilege.¹³ The qualifications for a licensed educational

¹⁰ The exemption from the licensing requirement is for a maximum of two years from the date of registration.

¹¹ The degree must be obtained from the University of California, Stanford University, the University of Southern California, or from another educational institution approved by the committee as offering a comparable program.

¹² See Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code (licensed educational psychologists), enacted by 1970 Cal. Stats. ch. 1305, § 5.

¹³ See Evid. Code § 1010(d).

psychologist are more stringent than for a school psychologist, the licensed educational psychologist being required to have three years of full-time experience as a credentialed school psychologist in the public schools or experience which the examining board deems equivalent.¹⁴ For these reasons, the psychotherapist-patient privilege should be broadened to include the licensed educational psychologist. This would be consistent with Evidence Code Section 1014.5, which was enacted in 1979¹⁵ and extends the psychotherapist-patient privilege to a licensed educational psychologist who provides mental health treatment or counseling to a minor under Civil Code Section 25.9.¹⁶

Psychiatric Social Workers

Section 1014.5 of the Evidence Code extends the psychotherapist-patient privilege to social workers having not less than two years of post-Masters experience in a mental health setting¹⁷ when providing mental health treatment or counseling to a minor under Civil Code Section 25.9. Except to this limited extent, the psychotherapist-patient privilege does not now apply to psychiatric social workers.¹⁸ The psychiatric social worker is an important source of applied psychotherapy of a nonmedical nature in public health facilities.¹⁹ By excluding psychiatric social workers, the existing privilege statute denies the protection of the privilege to those who rely on psychiatric social workers for psychotherapeutic aid. To provide equality of treatment, the Commission recommends expansion of the psychotherapist-patient privilege to include all patients receiving psychotherapy from psychiatric social workers. This would expand the existing privilege to cover not only all minors (covered to some extent under existing Section 1014.5) but also adults

¹⁴ Bus. & Prof. Code § 17862.

¹⁵ 1979 Cal. Stats. ch. 832.

¹⁶ See Civil Code § 25.9(d).

¹⁷ See Civil Code § 25.9(d) (adopting by reference Section 625 of Article 8 of Subchapter 3 of Chapter 1 of Title 9 of the California Administrative Code, defining "social worker").

¹⁸ *Belmont v. State Personnel Bd.*, 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974).

¹⁹ See Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050 (1973).

and family members treated by a psychiatric social worker. To assure adequate qualifications for the psychiatric social worker, the expanded privilege should be limited²⁰ to (1) those psychiatric social workers who are employed by the state and (2) those psychiatric social workers who have not less than the minimum qualifications required of a state psychiatric social worker²¹ and work in a city, county, or other local mental health facility that is operated as a part of the approved county Short-Doyle Plan.²²

Professional Corporations

Conforming amendments to the Moscone-Knox Professional Corporation Act made clear that the relation of physician and patient exists between a medical corporation and the patient to whom it renders services,²³ but failed to make clear that the relationship of psychotherapist and patient also exists between a medical corporation and the patient to whom it renders services.²⁴ Likewise, provisions authorizing the formation of a marriage, family, or child counseling corporation neglected to make clear that the relationship of psychotherapist and patient exists between such a corporation and its patient.²⁵ The application of the psychotherapist-patient privilege to a medical corporation and to a marriage, family, or child counseling corporation should be made clear and the provision located in an appropriate place in the psychotherapist-patient statute.

Group and Family Therapy

There is a question whether the psychotherapist-patient privilege applies in group and family therapy situations. Section 1012 of the Evidence Code defines a confidential communication between patient and psychotherapist to include information transmitted between a patient and

²⁰ These limitations would not apply to the professionals now covered by Section 1014.5.

²¹ See California State Personnel Board, Specification, Psychiatric Social Worker (rev. 1973).

²² See Welf. & Inst. Code § 5601.

²³ See 1968 Cal. Stats. ch. 1375, § 3.

²⁴ Evidence Code Section 1014 was amended in 1969 to make clear that a psychological corporation is covered and again in 1972 to cover a licensed clinical social workers corporation.

²⁵ See Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code, enacted by 1972 Cal. Stats. ch. 1318, § 1.

psychotherapist "in confidence" and by a means which, so far as the patient is aware, discloses the information to no third persons "other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." Although these statutory exceptions would seem to include other patients present at group or family therapy treatment,²⁶ the language might be narrowly construed to make information disclosed at a group or family therapy session not privileged.

In light of the frequent use of group and family therapy, it is important that these forms of treatment be covered by the psychotherapist-patient privilege. Group and family therapy are now used more and more in such important areas as marriage and family problems, juvenile delinquency, and alcoholism. It is a growing and promising form of psychotherapeutic aid and should be encouraged and protected by the privilege.²⁷ The policy considerations underlying the privilege dictate that it encompass communications made in the course of group and family therapy. Psychotherapy, including group and family therapy, requires the candid revelation of matters that may be not only intimate and embarrassing but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group or family therapy because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.²⁸

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-privilege protects against disclosure of communications made during group and family therapy. It

²⁶ *Cf. Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (privilege covers all relevant communications by intimate family members of patient to psychotherapist and to psychiatric personnel, including secretaries, who take histories for the purpose of recording statements for the use of psychotherapist).

²⁷ See, e.g., Note, *Group Therapy and Privileged Communications*, 43 Ind. L.J. 93 (1967); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609 (1964).

²⁸ See also Meyer & Smith, *A Crisis in Group Therapy*, 32 American Psychologist 638 (1977).

should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group and family therapy. Thus, communications made in the course of group or family therapy would be within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons.

Information Provided in Confidence by Third Person

The patient's parents or relatives or other persons may have information the psychotherapist needs in order to diagnose the patient's condition or to provide treatment. The needed information may be information concerning the behavior of the patient,²⁹ information concerning the person providing the information, or another kind of information. In some cases, further disclosure of the needed information would be detrimental to the person having the information, and the person may be unwilling to disclose the needed information to the psychotherapist unless the person can be protected against further disclosure.

Section 1012 of the Evidence Code should be amended to make clear that the psychotherapist-patient privilege covers information reasonably necessary to the diagnosis or treatment of the patient that is disclosed by another person to the psychotherapist in confidence. This rule is consistent with existing law.³⁰ To protect against further disclosure of the information, the person disclosing the information should be made a joint holder of the privilege.³¹ The right of the person making the disclosure to claim the privilege is, of course, subject to the various exceptions to the privilege³² and to the Evidence Code provision relating to

²⁹ See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior).

³⁰ See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior were within pervue of psychotherapist-patient privilege and therefore privileged). No judicial decision has been found indicating whether the privilege extends to nonfamily communications. See *Grosslight v. Superior Court*, *supra* at 508 n.5, 140 Cal. Rptr. at 281 n.5 ("[w]e do not here determine whether the section 1014 privilege extends to nonfamily communications").

³¹ See Evid. Code § 912(b) (waiver of the right of one joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege).

³² See Evid. Code §§ 1016 (patient-litigant exemption), 1017 (court-appointed psychotherapist), 1018 (crime or tort exception), 1019 (parties claiming through deceased patient), 1020 (breach of duty arising out of psychotherapist-patient

waiver of the privilege.³³

Application of Privilege in Criminal Proceedings

Section 1028 of the Evidence Code makes the psychotherapist-patient privilege applicable in criminal proceedings where the psychotherapist is a psychiatrist or psychologist but inapplicable in criminal proceedings where the psychotherapist is a clinical social worker, school psychologist, or marriage, family, and child counselor.³⁴ The basis for this distinction is not clear. A patient consulting a psychotherapist expects to receive the benefit of the privilege regardless of the type of psychotherapist consulted; Section 1028 frustrates this expectation in the case of criminal proceedings.

The major effect of Section 1028 is to deny the privilege to patients who consult clinical social workers and marriage, family, and child counselors while preserving the privilege for precisely the same types of communications by patients who consult psychiatrists and psychologists. Section 1028 may also discourage potential patients from seeking treatment for mental and emotional disorders for fear of disclosure of communications in criminal proceedings. This is particularly important in drug addiction cases, but it is important in other cases as well.

Society has an interest in protecting innocent victims from injury by criminal activity, but Section 1028 is not essential to protect this interest; it is adequately protected by two other exceptions to the privilege. Evidence Code Section 1027 denies the privilege where a child under 16 is the victim of a crime and disclosure would be in the best interests of the child. Evidence Code Section 1024 denies the privilege where the patient is dangerous to himself or herself or to others. In addition, the psychotherapist may be personally liable for failure to exercise due care to disclose

relationship), 1021 (intention of deceased patient concerning writing affecting property interest), 1022 (validity of writing affecting property interest), 1023 (proceeding to determine sanity of criminal defendant), 1024 (patient dangerous to himself or others), 1025 (proceeding to establish competence), 1026 (required report), 1027 (patient child under 16 who is victim of crime).

³³ See Evid. Code § 912.

³⁴ Section 1028 provides that, "[u]nless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding."

the communication where disclosure is essential to avert danger to others.³⁵

The Commission believes that the harm caused by Section 1028 far outweighs any benefits to society that it provides. The provision should be repealed.

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 1010, 1012, and 1014 of, to add Section 1010.5 to, and to repeal Section 1028 of, the Evidence Code, relating to the psychotherapist-patient privilege.

The people of the State of California do enact as follows:

Evidence Code § 1010 (amended)

SECTION 1. Section 1010 of the Evidence Code is amended to read:

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of ~~his~~ time to the practice of psychiatry ; .

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code ; , *or a person employed by a nonprofit community agency who is authorized to practice psychology under the provisions of subdivision (d) of Section 2909 of the Business and Professions Code, or a person licensed or certified as a psychologist under the laws of another state or nation.*

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professions Code, ~~when he is~~ *while* engaged in applied psychotherapy of a nonmedical nature.

³⁵ Tarasoff v. Regents of University of California, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.

(e) A person licensed as a marriage, family and child counselor under Chapter 4 (commencing with Section 17800) of Part 3, Division 5 of the Business and Professions Code.

(f) A person licensed as a licensed educational psychologist under Article 5 (commencing with Section 17860) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code.

(g) A state employee serving as a psychiatric social worker in a mental health facility of the State of California, while engaged in applied psychotherapy of a nonmedical nature.

(h) A public employee having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a city or county mental health facility operated as a part of the approved county Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.

(i) A person having not less than the minimum qualifications required of a state psychiatric social worker who is serving as a psychiatric social worker in a mental health facility operated under contract with a city or county as part of the approved county Short-Doyle Plan (as defined in Section 5601 of the Welfare and Institutions Code), while engaged in applied psychotherapy of a nonmedical nature.

Comment. Subdivision (b) of Section 1010 is amended to recognize the possibility of treatment of a patient by a psychologist employed by a nonprofit community agency (see subdivision (d) of Section 2909 of the Business and Professions Code) or a psychologist licensed or certified in another state or nation. Where the psychologist is licensed or certified in another state or nation, the treatment may take place in California (see Section 2912 of the Business and Professions Code) or in the other state or nation.

Subdivision (f) is added to include a licensed educational psychologist as a psychotherapist for the purpose of the privilege.

This addition complements subdivision (d) (school psychologist). For the qualifications for a licensed educational psychologist, see Bus. & Prof. Code § 17862. See also Section 1014.5 and Civil Code Section 25.9(d).

Subdivisions (g)-(i) are added to include a psychiatric social worker as a psychotherapist for the purpose of the privilege. The prior law had been construed in *Belmont v. State Personnel Board*, 36 Cal. App.3d 518, 111 Cal. Rptr. 607 (1974), as not including a confidential communication by a patient to a psychiatric social worker within the protection of the psychotherapist-patient privilege. The addition of subdivisions (g)-(i) is based on functional similarities between presently privileged professionals and psychiatric social workers. See generally Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050 (1973). See also Section 1014.5. Subdivisions (h) and (i) bring within the privilege patients of those psychiatric social workers who work in mental health facilities that have been approved as a part of the county Short-Doyle Plan and by the State Department of Health for funding under the Short-Doyle program. See Welf. & Inst. Code §§ 5703.1, 5705. See also Welf. & Inst. Code § 5751 (Director of Health to establish standards of education and experience for professional, administrative, and technical personnel employed in mental health services). See also Section 1014.5 and Civil Code Section 25.9(d).

Evidence Code § 1010.5 (added)

SEC. 2. Section 1010.5 is added to the Evidence Code, to read:

1010.5. The relationship of a psychotherapist and patient shall exist between the following corporations and the patients to whom they render professional services, as well as between such patients and psychotherapists employed by such corporations to render services to such patients:

(a) A medical corporation as defined in Article 17 (commencing with Section 2500) of Chapter 5 of Division 2 of the Business and Professions Code.

(b) A psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(c) A licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code.

(d) A marriage, family or child counseling corporation as defined in Article 6 (commencing with Section 17875) of Chapter 4 of Part 3 of Division 7 of the Business and Professions Code.

Comment. Section 1010.5 is added to continue the second paragraph of Section 1014(c) with the exception of the definition of “persons” which is not continued. See Section 1014 and Comment thereto. Subdivisions (a) and (d) are new; they make clear the application of the psychotherapist-patient privilege to types of professional corporations not previously covered.

Evidence Code § 1012 (amended)

SEC. 3. Section 1012 of the Evidence Code is amended to read:

1012. (a) As used in this article, “confidential communication between patient and psychotherapist” means information, including information obtained by an examination of the patient, transmitted between a patient and ~~his~~ *the* psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, *or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family*, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

(b) *As used in this article, “confidential communication between patient and psychotherapist” includes information reasonably necessary for the diagnosis or treatment of the patient by the psychotherapist that is*

disclosed by another person to the psychotherapist in confidence by a means which, so far as the person is aware, discloses the information to no third persons other than those described in subdivision (a). With respect to information so disclosed, the person disclosing the information is a joint holder of the privilege under this article.

Comment. Section 1012 is amended to make clear that the scope of the section embraces marriage counseling, family counseling, and other forms of group or family therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made in confidence and by a means which discloses the information to no other third persons. The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evid. Code § 912(c) and (d). The waiver of the privilege by one of the patients as to that patient's communications does not affect the right of any other patient in group or family therapy to claim the privilege with respect to such other patient's own confidential communications. See Evid. Code § 912(b).

Subdivision (b) is a new provision that makes clear that the psychotherapist-patient privilege protects disclosures made by parents or other third persons to the psychotherapist where made in confidence and reasonably necessary for the diagnosis or treatment of the patient by the psychotherapist. The subdivision is consistent with prior law. See *Grosslight v. Superior Court*, 72 Cal. App.3d 502, 140 Cal. Rptr. 278 (1977) (communications to psychotherapist by parents concerning their daughter's behavior were within purview of psychotherapist-patient privilege and therefore privileged). There was no judicial decision under prior law whether the privilege extended to nonfamily communications. See *Grosslight v. Superior Court*, *supra* at 508 n.5, 140 Cal. Rptr. at 281 n.5 ("[w]e do not here determine whether the section 1014 privilege extends to nonfamily communications"). The communication protected by subdivision (b) may concern the behavior of the patient as in *Grosslight*, may be information concerning the person making the communication, or may be any other relevant information. The protection provided by subdivision (b) is necessary because further disclosure of the needed information might be detrimental to the person having the information, and full

disclosure to the psychotherapist might not be made absent this protection. For this reason, the person disclosing the information is made a joint holder of the privilege. See Section 912(b) (waiver of the right of one joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege). The right of the person making the disclosure to claim the privilege is, of course, subject to the exceptions provided in this article and to subdivisions (c) and (d) of Section 912. It should be noted that protection is provided under subdivision (a) of Section 1012 for disclosures by the psychotherapist *to* the person making the communication described in subdivision (b). Moreover, disclosure to persons to whom disclosure is permitted under subdivision (a) of Section 1012 without loss of the privilege does not cause loss of the privilege provided under subdivision (b).

Evidence Code § 1014 (amended)

SEC. 4. Section 1014 of the Evidence Code is amended to read:

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if *he such person* is otherwise instructed by a person authorized to permit disclosure.

~~The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 9070) of Chapter 17 of Division 3 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between such patients and psychotherapists employed by~~

~~such corporations to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, associations and other groups and entities.~~

Comment. The last paragraph of Section 1014(a), with the exception of the definition of "persons," is continued in Section 1010.5. "Person" is defined in Section 175 to include a partnership, corporation, association, and other organizations.

Evidence Code § 1028 (repealed)

SEC. 5. Section 1028 of the Evidence Code is repealed.

~~**1028.** Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding.~~

Comment. Former Section 1028 is not continued.

APPENDIX XIV
STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Enforcement of Obligations After Death

November 1979

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Enforcement of Obligations After Death*, 15 CAL. L. REVISION COMM'N REPORTS 1327 (1980).

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

November 30, 1979

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study creditors' remedies and related matters. The Commission herewith submits its recommendation on one aspect of this matter—enforcement of obligations after death. The Commission recommends that the death of a defendant whose property has been attached not terminate the attachment. Other clarifying revisions of existing law are recommended.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

RECOMMENDATION

relating to

ENFORCEMENT OF OBLIGATIONS AFTER DEATH

Introduction

Statutory provisions that govern the enforcement of judgments after death are found in the Code of Civil Procedure and the Probate Code.¹ The rules governing the enforcement of a judgment lien after the judgment debtor's death and the enforcement of an attachment lien after the death of the defendant are found in the judicial decisions. The Commission recommends that the existing statutory provisions be clarified and consolidated in the Probate Code, that the existing rule relating to the enforcement of an attachment lien after the death of the defendant be changed, and that the judicially developed rules governing enforcement of a judgment lien after the death of the judgment debtor be codified.

Effect on Attachment of Death of Defendant

The death of the defendant destroys an attachment lien on the defendant's property. A divided California Supreme Court reached this decision in 1866 based on a construction of the statutes in effect at that time.² Since then, the cases have merely followed the Supreme Court decision.³

The existing rule operates to change the priorities of creditors upon the death of the defendant. Compare the following examples.

Example 1. Attachment creditor has priority. Plaintiff A attaches real property in an action against D. Plaintiff B then secures a judgment against D, records an abstract of judgment, and obtains a judgment lien on the attached real

¹ See Code Civ. Proc. §§ 669, 686; Prob. Code §§ 716, 730-732.

² *Myers v. Mott*, 29 Cal. 359, 367-70 (1866). But see *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928) (when property does not fall into probate estate because it has been conveyed before death of defendant, attachment lien continues and can be enforced after judgment).

³ *E.g.*, *Clary v. Rupert*, 93 Cal. App.2d 844, 210 P.2d 44 (1949).

property. Plaintiff A then obtains judgment in the action against D. Plaintiff A (the attachment creditor) has priority over Plaintiff B when levy of execution is made on the attached property.

Example 2. Judgment lien creditor has priority. Assume the same facts as in Example 1 except that D dies before Plaintiff A (the attachment creditor) obtains judgment against D. After the death of D, Plaintiff A obtains judgment against D. Both creditors present their claims against D's estate. Plaintiff B (the judgment lien creditor) is a priority creditor with respect to the real property covered by the judgment lien. Plaintiff A (the attachment creditor) is treated as a general creditor; the attachment terminated when D died.

No policy reasons have been advanced why the death of the defendant should result in a change in the priorities afforded the two judgment creditors against the estate. The only justification given in the decisions is that there is no provision in the existing statutes that makes clear that the attachment continues after the death of the defendant.

The risks⁴ and burdens of obtaining an attachment in an action against an individual defendant discourage its use except where the defendant has no substantial defense to the action.⁵ The attachment may be issued only upon a claim of an unsecured creditor⁶ which arises out of the defendant's conduct of a trade, business, or profession.⁷ The claim must be for money, based on a contract, express or implied, and the claim must be for a fixed or readily ascertainable amount and for not less than \$500 (exclusive of costs, interest, and attorney fees).⁸ The attachment may

⁴ An attachment exposes the plaintiff to the hazards of suit by the defendant or a third person for wrongful attachment, malicious attachment, or abuse of process. See Debt Collection Tort Practice § 5.7, at 115-17 (Cal. Cont. Ed. Bar 1971). Some lawyers believe that these risks outweigh the benefits of an attachment. See discussion in California Debt Collection Manual § 5.3, at 311-12 (Cal. Cont. Ed. Bar 1978).

⁵ The trial delay in civil cases may motivate the defendant to resist payment of a justly due debt. The defendant may seek to coerce the creditor to accept less than the amount justly due rather than to wait until judgment can be obtained. In addition, the defendant may resist payment until a judgment is obtained because the value to the defendant of the use of the money justly due the creditor outweighs the cost of having to pay interest on the debt.

⁶ An attachment is available only to the extent the claim is not secured. Code Civ. Proc. § 483.010(b).

⁷ Code Civ. Proc. § 483.010(c).

⁸ Code Civ. Proc. § 493.010(a). Claims may be aggregated, but the total amount claimed in the action must not be less than \$500.

be issued only if the plaintiff establishes the probable validity of the claim,⁹ and provides an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment.¹⁰

The attachment results in the levying officer seizing specific property or in the defendant being deprived of the ability to transfer or encumber specific property.¹¹ But the property of an individual defendant that may be attached is severely limited by statute. Only those types of property specifically listed in the statute may be attached.¹² The statute also exempts from attachment any property which is necessary for the support of the defendant or the defendant's family.¹³ In addition, property is exempt from attachment if it would be exempt from execution.¹⁴

Where a creditor has sustained the burdens and incurred the risks that are involved in attaching property of a defendant, it is unfair—merely because the defendant dies before the judgment can be obtained—to destroy the attaching creditor's priority over other creditors and the lien on the specific property attached. Accordingly, the Commission recommends that the law be changed to provide that the death of the defendant whose property is attached does not terminate the attachment lien.¹⁵

⁹ See Code Civ. Proc. §§ 484.090(a)(2), 485.220(a)(2). See also Code Civ. Proc. §§ 486.020(b) (temporary protective order), 492.030(a)(2) (nonresident attachment).

¹⁰ Code Civ. Proc. § 489.210.

¹¹ See, e.g., Code Civ. Proc. §§ 482.080, 488.010, 488.310-488.430, 488.500-488.550. See also discussion in California Debt Collection Manual §§ 5.68-5.71, at 361-65 (Cal. Cont. Ed. Bar 1978).

¹² Code Civ. Proc. § 487.010(c). See also Code Civ. Proc. § 487.020(d).

¹³ Code Civ. Proc. § 487.020(b).

¹⁴ Code Civ. Proc. § 487.020(a). Earnings of a defendant employee for personal services are also exempt. Code Civ. Proc. § 487.020(c).

¹⁵ There are two technical problems to be dealt with if an attachment lien is to continue after the death of the defendant or judgment debtor:

(1) The ordinary way that a judgment creditor preserves the priority of an attachment lien is to levy execution on the attached property. See Code Civ. Proc. § 684.2. The levy of execution creates an execution lien on the attached property which has the same priority as the attachment lien. See *Bank of South San Francisco v. Pike*, 53 Cal. App. 524, 200 P. 752 (1921). However, when the judgment debtor dies, levy of execution on property of the estate is generally prohibited; instead, claims must be presented in the estate proceedings. See Code Civ. Proc. § 686; Prob. Code §§ 732, 950. See also Prob. Code § 716. To preserve the effect of the attachment lien after the death of the defendant, the recommended legislation provides for the creation of a judgment lien on the attached property which has the same priority as the attachment lien if, prior to the expiration of the attachment lien, an abstract of judgment and a notice that the attachment lien has become a judgment lien is served, recorded, or filed in the same manner as is provided in Code of Civil Procedure Section 488.510(c) when an attachment lien is extended.

Effect on Judgment Lien of Death of Judgment Debtor

The death of the judgment debtor does not terminate a judgment lien on the real property of the decedent.¹⁶ However, a claim may be presented in the estate proceedings and the judgment is entitled to a priority to the extent it can be satisfied by the property subject to the judgment lien; to the extent not so satisfied, the judgment is treated as other claims of general creditors against the estate.¹⁷ Alternatively, the judgment creditor can foreclose the judgment lien without presenting a claim against the estate if the judgment creditor waives in the complaint all right to payment from any other property of the estate.¹⁸ The Commission recommends that these rules be codified in the Probate Code.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 488.510 and 669 of, to add Sections 686.010 and 686.020 to, and to repeal Section 686 of, the Code of Civil Procedure, and to amend Section 716 of, and to repeal and add Sections 730, 731, and 732 of, and to add Section 732.5 to, the Probate Code, relating to enforcement of obligations after death.

The people of the State of California do enact as follows:

(2) Code of Civil Procedure Section 482.100 permits a defendant whose property has been attached to claim an exemption notwithstanding the prior denial of an exemption, or the expiration of the time for claiming the exemption, if the right to the exemption is the result of changed circumstances. The recommended legislation makes clear that a surviving member of the defendant's family may claim exemptions after the death of the defendant. No showing of changed circumstances is required, the death of the defendant being a sufficient change in circumstances to permit the claim. This provision will permit exemption of any attached property that is "necessary for the support of . . . the defendant's family supported in whole or in part by the defendant." See Code Civ. Proc. § 487.020(b).

¹⁶ Corporation of America v. Marks, 10 Cal.2d 218, 73 P.2d 1215 (1937).

¹⁷ Prob. Code § 950.

¹⁸ Prob. Code § 716; Corporation of America v. Marks, 10 Cal.2d 218, 73 P.2d 1215 (1937).

Code of Civil Procedure § 488.510 (amended). Lien of attachment

SECTION 1. Section 488.510 of the Code of Civil Procedure is amended to read:

488.510. (a) Unless sooner released or discharged, any attachment shall cease to be of any force or effect, and the property levied upon shall be released from the operation of such attachment, at the expiration of three years from the date of issuance of the writ of attachment under which such levy was made.

(b) Notwithstanding subdivision (a), upon motion of the plaintiff, made not less than 10 or more than 60 days before the expiration of the three-year period and upon notice of not less than five days to the defendant whose property is attached, the court in which the action is pending may, by order filed prior to the expiration of the period and for good cause, extend the time of such attachment for a period not exceeding one year from the date on which the attachment would otherwise expire.

(c) The levying officer shall serve notice of such order upon any person holding property pursuant to an attachment and shall record or file such notice in any office where the writ and notice of attachment are recorded or filed prior to the expiration of the period described in subdivision (a) or any extension thereof. Where the attached property is real property, the plaintiff or ~~his~~ *the plaintiff's* attorney, instead of the levying officer, may record the required notice.

(d) Any attachment may be extended from time to time in the manner herein prescribed, but the ~~aggregate~~ *maximum* period of *the attachment, including* such extensions, shall not exceed ~~five~~ *eight* years *from the date of issuance of the writ of attachment under which the levy of attachment was made.*

(e) The death of the defendant whose property is attached does not terminate the attachment.

Comment. The amendment of subdivision (d) of Section 488.510 makes no substantive change. See subdivisions (a) (three-year duration) and (b)-(d) (one-year extensions up to five years). Under subdivision (d), as revised, the total period for

the existence of an attachment may never exceed eight years. Subject to this limitation, during the period the attachment lien continues, the plaintiff may preserve the effect of the attachment by levy of execution (after entry of judgment) on the attached property and thereby obtain an execution lien which has the same priority as the attachment lien. If the attached property is real property, the plaintiff may preserve the effect of the attachment by recording (after entry of judgment) an abstract of judgment to obtain a judgment lien which also has the same priority as the attachment lien. Subject to the maximum eight-year limitation, where good cause exists, the court has authority under Section 488.510 to extend the period of the attachment lien, before or after entry of judgment, in order to allow the plaintiff time to levy on the attached property or to record an abstract of judgment.

Subdivision (e) is added to reverse the former case law rule that the death of the defendant destroyed the lien of an attachment on the defendant's property. *Myers v. Mott*, 29 Cal. 359, 367-70 (1866); *Clary v. Rupert*, 93 Cal. App.2d 844, 210 P.2d 44 (1949). See also *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928) (when property does not fall into probate estate because it has been conveyed before death, attachment lien continues and can be enforced after judgment). If the defendant dies, the judgment becomes a lien on the attached property for the purposes of Probate Code Sections 716 (action to enforce judgment lien) and 950 (payment of claims against probate estate) and has the same priority as the attachment lien if, prior to the expiration of the attachment lien, an abstract of judgment and a notice that the attachment lien has become a judgment lien is served, recorded, or filed as required by subdivision (b) of Section 732. As to claiming exemptions after the defendant's death, see subdivision (c) of Section 732.

Code of Civil Procedure § 669 (amended). Death of party after submission of case or after verdict but before judgment

SEC. 2. Section 669 of the Code of Civil Procedure is amended to read:

669. If a party dies after trial and submission of ~~his~~ *the* case to a judge sitting without a jury for decision or after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. ~~Such judgment is not a lien on the real property of the deceased~~

~~party, but is payable in the course of administration on his estate.~~

Comment. Section 669 is amended to delete the second sentence. Enforcement of a judgment against a deceased party is governed by the Probate Code. See Section 686.020. See also Prob. Code §§ 730, 732 (enforcement of judgments after death).

Code of Civil Procedure § 686 (repealed).

SEC. 3. Section 686 of the Code of Civil Procedure is repealed.

~~686. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:~~

~~1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest;~~

~~2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.~~

Comment. Former Section 686 is superseded by Sections 686.010 and 686.020.

Code of Civil Procedure § 686.010 (added). Enforcement after death of judgment creditor

SEC. 4. Section 686.010 is added to the Code of Civil Procedure, to read:

686.010. After the death of the judgment creditor, the judgment may be enforced as provided in this title by the judgment creditor's executor or administrator or successor in interest.

Comment. Section 686.010 continues the substance of subdivision 1 of former Section 686. The judgment is enforceable by the executor or administrator or successor in interest in the same manner as by a judgment creditor.

Code of Civil Procedure § 686.020 (added). Enforcement after death of judgment debtor

SEC. 5. Section 686.020 is added to the Code of Civil Procedure, to read:

686.020. After the death of the judgment debtor, enforcement of a judgment against the judgment debtor is governed by the provisions of the Probate Code.

Comment. Section 686.020 makes clear that, although various provisions of the Probate Code permit the use of enforcement procedures provided in this title, the enforcement of a judgment against the judgment debtor after the death of the judgment debtor is governed by the Probate Code. See, *e.g.*, Prob. Code §§ 716, 730, 732, 950.

Probate Code § 716 (amended). Action against estate; action to enforce lien

SEC. 6. Section 716 of the Probate Code is amended to read:

716. ~~No~~ (a) *Except as provided in subdivision (b), no holder of a claim against an estate shall maintain an action thereon; unless the claim is first filed with the clerk or presented to the executor or administrator; except in the following case:*

(b) *An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. The action may be brought whether or not the claim was filed or presented as provided in subdivision (a); but no counsel fees shall be recovered in such the action unless the claim was filed or presented as aforesaid provided in subdivision (a).*

(c) *As used in this section, "lien" includes but is not limited to a judgment that is a lien.*

Comment. Section 716 is amended to make nonsubstantive, technical changes and to add subdivision (c). Subdivision (c) codifies prior case law with respect to a judgment lien created by the recording of an abstract or certified copy of the judgment (Code Civ. Proc. §§ 674, 674.5, 674.7). *Corporation of America v. Marks*, 10 Cal.2d 218, 73 P.2d 1215 (1937). If a judgment debtor dies after the abstract of judgment is recorded, the judgment lien is not terminated. Execution cannot issue on the judgment after death (see Section 730), but the judgment creditor can present a claim against the estate and is entitled to priority to the extent

of the judgment lien and to payment of any amount not thereby satisfied as a general creditor of the estate (Section 950). Or the judgment creditor may waive the claim against any other estate property and enforce the judgment lien under subdivision (b) of Section 716 through an action to foreclose the lien. *Corporation of America v. Marks, supra*. As to a judgment which is made a lien by Section 732 (judgment becomes a lien on attached property), see the Comment to that section.

Probate Code § 730 (repealed)

SEC. 7. Section 730 of the Probate Code is repealed.

~~730. A judgment rendered against an executor or administrator, upon any claim for money, against the estate of his testator or intestate, when it comes final, conclusively establishes the validity of the claim for the amount of the judgment; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment, if there is one, otherwise an abstract of the judgment must be filed in the administration proceedings. No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment.~~

Comment. The first sentence of former Section 730 is continued in Section 731. The substance of the second sentence is continued in Section 731, but the reference to the "certified transcript of the original docket of the judgment" has been omitted to conform to the 1927 amendment to Code of Civil Procedure Section 674 which substituted the filing of an abstract of judgment for the filing of a certified transcript of the docket of a judgment as a means of creating a judgment lien. The last sentence is superseded by Section 730 which provides that, after the death of the decedent, the judgment is generally not enforceable under the Code of Civil Procedure. The provision that the judgment does not create a lien or give the judgment creditor any priority of payment is not continued; this provision is unnecessary since the judgment does not become a lien upon property of the estate and hence has no priority except as provided in Section 732 (judgment becomes lien on property attached prior to decedent's death in action originally brought against decedent). See Section 950.

Probate Code § 730 (added). Enforcement of judgment after death of decedent

SEC. 8. Section 730 is added to the Probate Code, to read:

730. (a) Except as provided in subdivision (c), after the death of the decedent, the following judgments are not enforceable under the Code of Civil Procedure against the estate of the decedent but are payable in the due course of administration:

(1) A judgment upon a claim for money rendered against the decedent during the decedent's lifetime.

(2) A judgment upon a claim for money rendered against a decedent who died after trial and submission of the case to a judge sitting without a jury for decision or after a verdict.

(3) A judgment rendered against the executor or administrator upon a claim for money against the estate of the decedent.

(b) Except as provided in Section 731, a judgment referred to in subdivision (a) shall be filed or presented in the same manner as other claims.

(c) If any property of the decedent is levied upon under a writ of execution before the decedent dies, the property levied upon may be sold or collected to satisfy the judgment. The officer making the sale or collection shall account to the executor or administrator for any surplus. If the judgment is not so satisfied, the balance of the judgment remaining unsatisfied is payable in the due course of administration.

(d) Notwithstanding the death of the decedent, a judgment for the possession of property or a judgment that requires a sale of property may be enforced under the Code of Civil Procedure. Nothing in this subdivision authorizes enforcement under the Code of Civil Procedure against any property of the estate of the decedent other than the property described in the judgment for possession or sale. After the death of the decedent, any demand for money against the estate that is not satisfied from the property

described in the judgment for possession or sale shall be filed or presented in the same manner as other claims and is payable in the due course of administration.

Comment. Section 730 collects in one section various provisions of former law relating to enforcement of judgments after the death of the decedent.

The provision of subdivision (a) that the judgment is payable in the due course of administration is drawn from portions of former Sections 730 and 731 and from the second sentence of former Section 732. The provision of subdivision (a) that the judgment is not enforceable under the Code of Civil Procedure is drawn from the last sentence of former Section 730 and the first sentence of former Section 732. Paragraph (1) of subdivision (a) continues the substance of the first sentence of former Section 732; paragraph (2) continues the substance of former Section 731; paragraph (3) continues the substance of the last sentence of former Section 730.

Subdivision (b) is drawn from the second sentence of former Section 732. Subdivision (c) continues the substance of the third sentence of former Section 732.

Subdivision (d) continues the substance of subdivision 2 of former Section 686 of the Code of Civil Procedure. The first sentence permits the use of the Code of Civil Procedure provisions to enforce an order for sale in a judgment foreclosing a lien under Section 716 and to enforce other judgments for possession or sale of property. The remainder of the subdivision deals with claims for money in connection with a judgment for possession or sale of property. A judgment for possession of property may include damages and costs which ordinarily would be recovered by levy on other property of the judgment debtor. There may also be accrued costs, interest, and the levying officer's costs in enforcing a judgment for possession, and these also would ordinarily be recovered by the judgment creditor by levy on other property of the judgment debtor. Subdivision (d) makes clear that, after the death of the judgment debtor, these claims for money cannot be enforced by levy against other property of the decedent; instead, a claim must be filed or presented in the same manner as other claims.

Probate Code § 731 (repealed)

SEC. 9. Section 731 of the Probate Code is repealed.

~~731. A judgment against a person who dies after trial and submission of his case to a judge sitting without a jury for decision or after a verdict is not a lien on the real property of the decedent, but is payable in due course of administration.~~

Comment. Former Section 731 is superseded by Section 730. The reference to a lien on the real property of the decedent is not continued; a judgment does not become a lien on the property of the decedent except as provided in Section 732 (judgment becomes lien on attached property).

Probate Code § 731 (added). Judgment on claim against estate conclusive

SEC. 10. Section 731 is added to the Probate Code, to read:

731. When a judgment rendered against an executor or administrator upon a claim for money against the estate of the decedent becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment shall provide that it is payable in the due course of administration. An abstract of the judgment shall be filed in the administration proceedings.

Comment. Section 731 continues the substance of the first two sentences of former Section 730.

Probate Code § 732 (repealed)

SEC. 11. Section 732 of the Probate Code is repealed.

~~732. When a judgment has been rendered against the testator or intestate, no execution shall issue thereon after his death, except as provided in the Code of Civil Procedure. A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment~~

~~creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real property of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.~~

Comment. The first three sentences of former Section 732 are superseded by Section 730. The last sentence is continued in Section 732.5.

Probate Code § 732 (added). When judgment becomes lien on attached property; claiming exemption after decedent's death

SEC. 12. Section 732 is added to the Probate Code, to read:

732. (a) Pursuant to subdivision (b), an attachment lien may be converted into a judgment lien upon property of the estate subject to the attachment lien in either of the following cases:

(1) Where the judgment debtor dies after entry of judgment in an action in which the property was attached.

(2) Where a judgment is entered after the death of the defendant in an action in which the property was attached.

(b) To convert the attachment lien into a judgment lien, after entry of judgment in the action in which the property was attached and prior to the expiration of the attachment lien, the levying officer shall serve an abstract of the judgment and a notice that the attachment lien has become a judgment lien upon the person holding property pursuant to the attachment or shall record or file an abstract of the judgment and a notice that the attachment lien has become a judgment lien in any office where the writ and notice of attachment are recorded or filed. If the attached property is real property, the plaintiff or the plaintiff's attorney may record the required abstract and notice with the same effect as if recorded by the levying officer. The judgment lien has the same priority as the attachment lien.

(c) After the death of the decedent, any one or more members of the decedent's family who were supported in whole or in part by the decedent may claim an exemption provided in Section 487.020 for property levied upon

pursuant to the attachment if the right to the exemption exists at the time the exemption is claimed. The executor or administrator of the decedent's estate may claim the exemption on behalf of such member or members of the decedent's family. The claim of exemption may be made at any time prior to the time the abstract and notice have been served, recorded, or filed under subdivision (b) with respect to the property claimed to be exempt. The claim of exemption shall be made in the same manner as an exemption is claimed under Section 482.100.

Comment. Section 732 is a new provision which makes the judgment a lien on the attached property for the purpose of determining order of priority for payment of claims against the estate under Section 950 and for the purpose of permitting foreclosure of the lien under Section 716. Section 732 implements Code of Civil Procedure Section 488.510(e) which reversed the former case law rule that the death of the defendant destroyed the lien of an attachment on his property. See the Comment to Section 488.510.

Under Section 732, the judgment does not become a lien on property subject to the attachment lien which is not included in the decedent's estate because it was transferred by the decedent; the attachment lien continues on the property transferred and can be enforced after judgment notwithstanding the death of the decedent. *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928).

Subdivision (b) of Section 732 is drawn from subdivision (c) of Code of Civil Procedure Section 488.510 (extension of attachment lien).

Subdivision (c) of Section 732 makes clear that, after the death of the decedent, an exemption claim may be made by or on behalf of any one or more members of the decedent's family who were supported in whole or in part by the decedent. Subdivision (c) is consistent with Section 482.100 which permits the defendant to claim an exemption if the right to the exemption is the result of a change in circumstances occurring after (1) the denial of a claim of exemption for the property earlier in the action or (2) the expiration of the time for claiming the exemption earlier in the action. However, a showing of a change in circumstances is not required under subdivision (c), the death of the decedent whose property was attached being considered a sufficient change in circumstances to permit the claim of exemption by or on behalf of the surviving member or members of the decedent's family.

The only limit on the time within which the exemption must be claimed is that the claim must be made prior to the time the abstract and notice are served, recorded, or filed under subdivision (b). The right to the exemption is determined as of the time the claim is made by or on behalf of the surviving member or members of the decedent's family.

The primary purpose of subdivision (c) is to preserve the effect, after the death of the decedent, of the exemption provided by subdivision (b) of Section 487.020 (property "necessary for the support of . . . the defendant's family supported in whole or in part by the defendant"). However, subdivision (c) also permits the claim of any of the other exemptions provided by Section 487.020.

Probate Code § 732.5 (added). Judgment creditor's right of redemption

SEC. 13. Section 732.5 is added to the Probate Code, to read:

732.5. A judgment creditor having a judgment that was rendered against the decedent during the decedent's lifetime may redeem any real property of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Comment. Section 732.5 continues the last sentence of former Section 732 without substantive change.

Transitional Provision

SEC. 14. This act does not apply to any case where the judgment creditor or judgment debtor or defendant in an action in which property was attached dies prior to the effective date of this act, and, notwithstanding the provisions of this act, such cases are governed by the law in effect on December 31, 1980.

Comment. Section 14 makes clear that this act does not apply where the death occurs prior to the effective date. See also Prob. Code § 11 (added by 1979 Cal. Stats. ch. 165) (provisions severable if provision or application held invalid).

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[Volume expected to be available December 1981]

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