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Family

University of the Pacific; McGeorge School of Law

Family; adoption—commencement of proceedings

Family Code § 9102 (amended).
AB 898 (Knight); 1995 STAT. Ch. 567

Existing law creates a legally binding relationship between parent and adopted child after an adoption order has been decreed by the court.[1] Existing law also provides for the severance of the birth parents'[2] rights concerning the adopted child.[3]

Prior law required a petition to be filed within five years after entry of an order of adoption in order to set aside the adoption on the grounds that the adopted child showed evidence of a developmental disability or mental illness as a result of conditions existing before the adoption.[4]

Chapter 567 requires the petition to set aside an adoption, based on any grounds—including those due to developmental disability or mental illness of the child—to be filed within one year after the entry of the adoption order.[5]

Under prior law any attempt to vacate, set aside, or nullify an order of adoption, based on the grounds of a procedural defect such as lack of notice or lack of jurisdiction, must have commenced within three years after the entry of the order.[6] Prior law also required that any attempt to vacate, set aside, or nullify an order of adoption based on a non-procedural defect must have been commenced within five years after the entry of the order.[7]

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1. CAL. FAM. CODE § 8616 (West 1994); *see id.* (declaring that after adoption the relationship between the adopted child and the adoptive parents is identical to a biological parent and child relationship, and this new adopted child relationship carries with it all rights and duties given by law to the parent-child relationship); *see also In re* Jodi B., 227 Cal. App. 3d 1322, 1328, 278 Cal. Rptr. 242, 246 (1991) (holding that adopted children and adoptive parents are considered to have the legal relationship of parent and child, and thus all the rights and duties of such a relationship).

2. *See* CAL. FAM. CODE § 8512 (West 1994) (defining "birth parents" as biological parents or, if a person has been adopted before, the previous adoptive parents).

3. *Id.* § 8617 (West 1994); *see id.* (providing that responsibility and rights of birth parents are terminated after the completion of an adoption); *cf.* Secretary of Social & Rehab. Serv. v. Clear, 804 P.2d 961, 966-67 (Kan. 1991) (explaining that adoption laws contemplate complete severance of the adopted child's ties and relationships with its natural parents, and the natural parents are relieved of all duties and obligations to the child).

4. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 591 (enacting CAL. FAM. CODE § 9100).

5. CAL. FAM. CODE § 9102(a) (amended by Chapter 567).

6. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 591 (enacting CAL. FAM. CODE § 9102(a)); *cf. In re* Adoption of Hadrath, 592 P.2d 1262, 1264 (Ariz. 1979) (stating that procedural challenges should only be based upon lack of subject matter jurisdiction, lack of personal jurisdiction, or lack of jurisdiction to render the particular order entered). *See generally* Elizabeth N. Carroll, Note, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L. Q. 155, 159-60 (1985) (discussing the wide variety of time limits imposed by different states, ranging from six months to five years).

7. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 591 (enacting CAL. FAM. CODE § 9102(b)); *see* Adoption of Kay C., 228 Cal. App. 3d 741, 757, 278 Cal. Rptr. 907, 917 (1991) (holding that California's five year period for nullification of adoptions based on non-procedural defects was constitutional because adopted parents were allowed to nullify adoption based on the child's emotional and mental problems). *But see* Tyler

Chapter 567 changes prior law by requiring any action to vacate, set aside, or nullify an order of adoption, except an action based on fraud, to be commenced within one year after entry of the adoption order.[8]

COMMENT

The one year standard set forth in Chapter 567 rejects the standard established by the California Appellate court case *Adoption of Kay C.*[9] Also, the author of Chapter 567 believed that children were being taken out of homes in which they had good living conditions and stable environments, solely on the whims of parents who had changed their minds regarding the adoption.[10] Chapter 567 limits the time for nullifying an adoption, by any party, to one year after the entry of an

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v. Children's Home Soc'y, 29 Cal. App. 4th 511, 538, 35 Cal. Rptr. 2d 291, 305 (1994) (stating that the five year limit set by the Family Code is not to protect birth parents, but to provide the prospective adopting parents with the necessary information which may influence their decision whether to adopt the child).

8. CAL. FAM. CODE § 9102(a) (amended by Chapter 567); *see id.* § 9102(b) (amended by Chapter 567) (providing when there is a claim of fraud in an adoption, the person claiming he or she was defrauded has five years from the date of the adoption order to vacate the adoption order); *see also* UNIF. ADOPTION ACT § 15(b), 9 U.L.A. 11, 62 (West 1988) (stating that, after one year has passed, no one may challenge the adoption order on any grounds, including fraud, misrepresentation, inadequate notice, or lack of jurisdiction); Anne Harlan Howard, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 554 (1984) (noting that the trend in the law is to adopt the Uniform Adoption Act as the model for adoption proceedings); *cf.* ALASKA STAT. § 25.23.140(b) (1991) (enacting legislation identical to Uniform Adoption Act, namely a one year, absolute limit on nullification of adoption orders); HAW. REV. STAT. § 578-12 (1985) (allowing a court to set aside or modify the adoption decree within one year and providing that, after this time period, the adoption decree is not subject to any collateral attack or revocation attempts); Hurt v. Noble, 817 P.2d 744, 746 (Okla. 1991) (holding that the one year limitation on adoption cases bars all challenges brought after the time limit has expired, except for cases involving fraud or violation of constitutional rights). *But cf.* MISS. CODE ANN. § 93-17-15 (1994) (setting the time limit for attempted nullification of an adoption decree at six months); VA. CODE ANN. § 63.1-237 (Michie 1991) (barring a collateral attack or any other attempt to nullify an adoption decree after six months). *See generally* Carroll, *supra* note 6, at 167 (discussing how allowing one year within which to bring an attack may seem a reasonable time, but yet to a child who has been in the care of adoptive parents, such a time limit may even be too long).

9. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 898, at 2-3 (May 10, 1995); *see Adoption of Kay C.*, 228 Cal. App. 3d at 745-46, 278 Cal. Rptr. at 909 (holding that adopted parents of an adopted child could nullify the adoption order even after four years have passed due to the child's emotional and mental problems); *see also* ASSEMBLY JUDICIARY COMMITTEE, *supra* (stating adoptive parents, such as those in *Kay C.*, must accept that the child they have accepted into their hearts and homes is theirs in the same sense as that of a biological child, and thus they cannot simply release the child to the state or to its birth parents). *See generally* Dianne Klein, *'Special' Children; Dark Past Can Haunt Adoptions*, L.A. TIMES, May 29, 1988, at B1 (detailing one family's horrible experiences with an emotionally damaged adopted child and the great cost to the family involved with treating this illness).

10. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 898, at 2 (May 10, 1995); *see id.* (stating the author's belief that children were being taken out of homes because of the length of time that birth parents and adoptive parents have to contest the adoption).

order for adoption, except in cases of fraud, and thus shifts the focus of the nullification proceedings from the adults to the well-being of the child.[11]

Ralph J. Barry

Family; attempted murder of a spouse—exemplary damages

Family Code §§ 274, 782.5, 4324 (new).
AB 16 (Rainey); 1995 STAT. Ch. 364

Existing law provides that when a married person is injured by a negligent or wrongful act or omission caused by his or her spouse,[1] the community property[2] may not be used to discharge the liability of the tortfeasor spouse until the separate property,[3] not exempt from enforcement of a money judgment, of the wrongdoer is exhausted.[4]

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11. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 898, at 2 (May 10, 1995); *see id.* (stating that adoption laws should not be focused on the parents, but rather on the children and on their emotional well-being); *cf.* Coonradt v. Sailors, 209 S.W.2d 859, 861 (Tenn. 1948) (holding that courts can set aside adoptions based on equity principles if it would be in the best interests of the child, no matter how the parents feel or what they wish). *But see* Adoption of Katherine A., 135 Cal. App. 3d 200, 204, 185 Cal. Rptr. 101, 103 (1982) (finding adoptive parents would be able to vacate adoption based on high medical expenses for a child, if a petition was filed within the five year statutory limit; thus the court was not concerned with the interest of the child which needed medical attention, but rather the interests of the adults outweighed the interests of the child). *See generally* Carroll, *supra* note 6, at 174 (discussing the need for all states to have adoption statutes which create a best-interests standard for adopted children—one in which the interests of the child outweigh the interests of the parent); Howard, *supra* note 8, at 562 (suggesting that the ultimate concern in adoption proceedings should be the child's best interests); Sanford N. Katz, *Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 14 (1964) (stating that children are usually without adequate representation in adoption proceedings, and that their wishes usually go unheard by the court).

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1. *See* CAL. FAM. CODE § 11 (West 1994) (specifying that a reference to "husband," "wife," "spouses," "married persons," or a comparable term includes persons who are lawfully married to each other and persons who were previously lawfully married to each other, as is appropriate under the circumstances of the particular case).

2. *See id.* § 760 (West 1994) (defining "community property" as all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in California).

3. *See id.* § 770 (West 1994) (defining "separate property" to include all of the following: (1) all property owned by the person before marriage; (2) all property acquired by the person after the marriage by gift, bequest, devise or descent; and (3) the rents, issues, and profits of the property described in California Family Code § 770); *id.* § 770(b) (West 1994) (specifying that one spouse can convey property without the consent of the other in a separate property jurisdiction).

4. CAL. FAM. CODE § 782(a) (West 1994); *see id.* § 782(b) (West 1994) (noting that California Family Code § 770 does not prevent the use of community property to discharge a liability referred to in California Family Code § 782(a), if the injured spouse gives written consent thereto after the occurrence of the injury); *id.* § 782(c) (West 1994) (specifying that California Family Code § 782 does not affect the right to indemnity provided by an insurance or other contract to discharge the tortfeasor spouse's liability, whether or not the consideration given for the contract consisted of community property). *See generally* Barbara Woodhouse, *Symposium on Divorce and Feminist Legal Theory: Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2533-41 (1994) (providing a background on the effect of fault in the

Existing law also sets forth specific remedies for the victim when the victim is injured by his or her spouse.[5] Under existing law, a spouse may bring a claim for breach of fiduciary duty in the management and control of the community property, if the breach results in an impairment of the spouse's undivided one-half interest in the community estate.[6]

Existing law further specifies that when a breach of fiduciary duty by one spouse is oppressive,[7] malicious,[8] or fraudulent[9] the remedy may include, but is not limited to, awarding the other spouse one hundred percent, or an amount equivalent to one hundred percent, of any asset undisclosed or transferred in the breach of fiduciary duty.[10]

Existing law provides that a joint tenant who feloniously or intentionally kills another joint tenant loses all rights of survivorship held to property which was held in joint tenancy.[11]

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distribution of marital property).

5. CAL. FAM. CODE § 1101 (West 1994); *see id.* § 1101(g) (West 1994) (enumerating the remedies for breach of fiduciary duty, such as an award to the other spouse of 50%, or an amount equal to 50%, of any asset undisclosed or transferred in breach of the fiduciary duty, plus attorney's fees and court costs).

6. *Id.* § 1101(a) (West 1994); *see* Russell I. Marnell, *Marital Fault in New York: Its Appropriate Role in Financial Issues*, N.Y. L. J., June 16, 1994, at 1, 3 (stating that marital fault was historically not considered in an action for marital dissolution because previous policy held fault was inconsistent with the underlying assumption that a marriage is, in part, an economic relationship and that upon its dissolution the parties are entitled to their fair share of the marital estate); *id.* (specifying that in New York, fault is only considered where serious violence or attempted murder has been committed); *cf.* MO. ANN. STAT. § 452.330.1(4) (Vernon Supp. 1995) (specifying that in Missouri, marital fault is a consideration in the distribution of marital assets); W. VA. CODE § 48-2-15(i) (1995) (specifying that courts are allowed to consider and compare the fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship); *id.* (noting that alimony cannot be awarded when both parties prove grounds for divorce and are denied a divorce, nor can an award of alimony under the provisions of this section be ordered which directs the payment of alimony to a party determined to be at fault, when, as a grounds for granting the divorce, the court determines that the party at fault has: (1) committed adultery; (2) been convicted for the commission of a crime which is a felony, subsequent to the marriage, if such conviction has become final; or (3) actually abandoned or deserted his or her spouse for six months); Smith v. Smith, 836 S.W. 2d 688, 692 (Tex. 1992) (listing factors to be considered in the distribution of marital property in Texas). *But see* MONT. CODE ANN. §40-4-202(1) (1993) (stating that in a dissolution of marriage the Montana courts are to divide the marital property at divorce without regard to marital fault). *See generally* 27B C.J.S. *Divorce* § 535 (1986) (stating that one of the factors generally considered in the distribution of marital assets, in many states, is the conduct of the parties during the marriage, but authorities are split on whether marital misconduct should be an appropriate consideration)

7. *See* CAL. CIV. CODE § 3294(c)(2) (West Supp. 1995) (defining "oppression" as despicable conduct that subjects a person to cruel or unjust hardship in conscious disregard of that person's rights).

8. *See id.* § 3294(c)(1) (West Supp. 1995) (defining "malice" as conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others).

9. *See id.* § 3294(c)(3) (West Supp. 1995) (defining "fraud" as an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant to deprive a person of property or legal rights or otherwise cause injury).

10. CAL. FAM. CODE § 1101(h) (West 1994).

11. CAL. PROB. CODE § 251 (West 1991); *see* 41 AM. JUR. 2D *Husband and Wife* § 73 (1968) (stating that where land is held by a husband and wife, in a tenancy by the entireties, courts have held survivorship rights stay unchanged even if one spouse willfully murders the other because the murdering spouse's estate vests by operation of law and not by will or inheritance; however, some courts have not been willing to allow this and have only allowed the murdering spouse to retain a one-half interest or some interest less than the

Existing law further prohibits any person who is a beneficiary of any bond, life insurance policy, or other contractual relationship, who feloniously and intentionally kills the principal or the person whose life is insured, from receiving any benefit from such contract, policy, or bond.[12]

Existing law also provides that a person who feloniously and intentionally kills another person is prohibited from inheriting from the estate of the decedent.[13]

Chapter 364 sets forth an additional remedy when a spouse is convicted of attempting to murder[14] the other spouse.[15] Chapter 364 provides that in addition

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whole); Jonathan M. Purver, Annotation, *Felonious Killing of One Cotenant or Tenant by the Entireties by the Other as Affecting the Latter's Right in the Property*, 42 A.L.R. 3D 1116, 1119-20 (1994) (noting that a beneficiary on a life insurance policy who feloniously kills the insured forfeits all rights which he or she may have in or under the policy; the rule is based on public policy, in that no one should be allowed to benefit from his or her own wrong).

12. CAL. PROB. CODE § 252 (West 1991); *see* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 520 (1985) (stating that when a beneficiary owns a life insurance policy and feloniously and intentionally kills the insured, the law in Iowa is reasonably clear that the slayer-beneficiary should not obtain the proceeds); F.S. Tinio, Annotation, *Killing of Insured by Beneficiary as Affecting Life Insurance or Its Proceeds*, 27 A.L.R. 3D 794, 798 (1994) (stating that, in general, when a beneficiary of a life insurance policy causes the death of the insured, or where one of the insureds under a joint policy kills the other, the rights of the killer depend on whether the killing was intentionally or feloniously done).

13. CAL. PROB. CODE § 250 (West Supp. 1995); *see id.* § 258 (West Supp. 1995) (specifying that persons who may bring an action for wrongful death of the decedent are determined as if the killer had predeceased the decedent); *see also* Estate of Kramme, 20 Cal. 3d 567, 577, 573 P.2d 1369, 1374, 143 Cal. Rptr. 542, 548 (1978) (holding that only those who intended to cause a decedent's death or caused a decedent's death in the commission of one of the enumerated felonies are disqualified from inheritance rights). *See generally* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, Chapter 2, § C, at 114-21 (4th ed. 1990) (enumerating the three different lines of decision-making courts have followed, in cases regarding the inheritance of an estate, when an individual has been convicted of killing his or her spouse: (1) the legal title passes to the slayer and may be retained by him in spite of his crime because the devolution of property of a decedent is controlled solely by the laws of descent and distribution; (2) the legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit from his or her own fraud, or take advantage and profit as a result of his or her wrong or crime; (3) the legal title passes to the slayer but equity holds him or her to be a constructive trustee for the heirs or next of kin of the decedent; Justice Cardozo explained that the reasoning behind this type of treatment is that equity, to express its disapproval of the slayer's conduct, converts him or her into a trustee); *id.* (specifying that under the Uniform Probate Code § 2-803 (1983), a surviving spouse, heir, or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will, and the estate passes as if the killer predeceased the decedent). *Compare* Michael G. Walsh, Annotation, *Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R. 4TH 787, 826-31 (1995) (discussing the right of a slayer to inherit from a victim under the laws of descent and distribution in the absence of a statutory provision expressly excluding the slayer from inheriting) *and* Annotation, *Constitutionality of Statute Precluding Inheritance by One Who Killed Decedent*, 6 A.L.R. 1408 (1920) (commenting that in the absence of a statutory provision to the contrary, a murderer is generally not precluded from inheriting from the estate of his decedent) *with* Annotation, *Misconduct of Surviving Spouse as Affecting Marital Rights in Other's Estate*, 139 A.L.R. 486, 501 (1942) (noting that in the absence of an express statutory provision, the trend in cases has been to bar a spouse from sharing in the decedent's estate when that spouse kills the decedent). *But see In re* Estate of Mahoney, 220 A.2d 475, 478 (Vt. 1966) (declaring that "It is the intent to kill, which when accomplished, leads to the profit of the slayer that brings into play the contructive trust to prevent the unjust enrichment of the slayer by reason of his intentional killing.").

14. *See* CAL. PENAL CODE § 187(a) (West 1988) (defining "murder" as the unlawful killing of a human being or a fetus, with malice aforethought); *id.* § 664 (West Supp. 1995) (specifying that every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable); *id.* § 664(a) (West. Supp. 1995) (specifying that if the crime attempted is willful, deliberate, and

to any other remedy provided by law, in subsequent marriage dissolution proceedings, the injured spouse[16] is entitled to one hundred percent of the community property interest in the retirement and pension benefits of the injured spouse.[17] In addition to any other remedy authorized by law, when a spouse is convicted of attempting to murder the other spouse, Chapter 364 prohibits any awards of any temporary or permanent spousal awards for support or medical, life, or other insurance benefits or payments from the injured spouse to the other spouse.[18] Chapter 364 also allows a court to award attorney's fees and costs as a sanction.[19]

COMMENT

Chapter 364 was enacted out of concern for individuals who are nearly murdered by their spouses in order to receive insurance money or other financial gain.[20] One of the author's constituents brought this issue to the author's attention after her ex-spouse tried to murder her by ether asphyxiation, in an apparent effort to recover a large insurance policy on her life.[21] In addition, after the introduction

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premeditated murder, the person guilty of that attempt may be punished by imprisonment in the state prison for life with the possibility of parole).

15. CAL. FAM. CODE § 782.5 (enacted by Chapter 364).

16. *See id.* § 4324 (enacted by Chapter 364) (defining "injured spouse" as a spouse who has been the subject of an attempted murder for which the other spouse was convicted, whether or not actual physical injury occurred).

17. *Id.* § 782.5 (enacted by Chapter 364).

18. *Id.* § 4324 (enacted by Chapter 364). *See generally* William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 78 (1969) (specifying that the single most important asset involved in intrafamilial homicide is life insurance); *id.* (examining the progression of precedent involving whether or not a murderer may be allowed to receive the insurance money from killing a spouse).

19. CAL. FAM. CODE § 274(a) (enacted by Chapter 364); *id.* (specifying that notwithstanding any other provision of law, when an injured spouse is entitled to a remedy pursuant to California Probate Code § 4324(a), the injured spouse will be entitled to an award of reasonable attorney's fees and costs as a sanction); *id.* § 274(b) (enacted by Chapter 364) (noting that an award of attorney's fees and costs as a sanction pursuant to California Probate Code § 274 may be imposed only after the party has been notified and an opportunity has been furnished for that party to be heard); *id.* § 274(c) (making an award of attorney's fees and costs as a sanction pursuant to California Probate Code § 274 payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property); *id.* (noting that the party requesting the award of attorney's fees and costs does not have to demonstrate any financial need for the award); *cf.* R.I. GEN. LAWS § 15-5-16(2) (1988) (providing that in Rhode Island, in the award of attorneys fees, the courts are to consider the conduct of the parties).

20. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 16, at 2 (May 3, 1995); *see id.* (specifying that the author of AB 16 believes that it offends morality to allow a person who attempts to murder a spouse to have the ability to benefit from the fact that the person was unsuccessful in the attempt). *See generally* New York Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886) (declaring, "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken.").

21. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 16, at 2 (May 18, 1995); *see id.* (specifying that Mrs. Bentley learned that her ex-spouse had deceived her for more than eight years and that he was a con artist with a lengthy criminal record; she eventually lost her home to foreclosure because of debts her ex-spouse incurred); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 16, at 4 (June 20, 1995) (specifying that Mrs. Bentley's husband was convicted of first degree attempted murder and sent to

of Chapter 364, the author of the bill was contacted by a Hayward man whose wife had tried to kill him, and upon her subsequent conviction, she received one-half of their community property.[22]

Before Chapter 364, individuals who were convicted for attempting to murder their spouses were still entitled to receive fifty percent of everything obtained during the marriage, as well as alimony and attorney's fees.[23] Chapter 364 disallows a spouse who tries to kill the other spouse recovery of half of the injured spouse's retirement, pension, and/or insurance benefits.[24]

Molly J. Mrowka

Family; child support—drivers license privileges

Welfare and Institutions Code § 11350.8 (new); §§ 11350.6,[1] 15200.1, 15200.2, 15200.3, 15200.7, 15200.8, 15200.85, 15200.9, 15200.95 (amended).
AB 257 (Speier); 1995 STAT. Ch. 481

Under existing law, a parent may be ordered by the court to provide child support for the care and education of his or her child.[2] Upon the failure to provide

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prison; however, in the subsequent divorce proceedings, her husband received one-half the community property, including the injured spouse's retirement benefits; in addition, Mrs. Bentley was ordered to pay her husband spousal support as well as medical and car insurance payments).

22. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 16, at 2 (May 18, 1995); *see id.* (specifying that the constituent stopped to help what he thought was a stranded motorist, but it was a trap; he was shot three to four times—twice in the head—and managed to save his own life by driving to the police station in San Leandro); *id.* (stating that the constituent's wife was convicted and imprisoned, but in subsequent divorce proceedings, his ex-wife received one-half of the community property); *id.* at 5 (specifying that in the divorce proceedings, the retirement benefits were not divided because no one expected the constituent to live that long; now he has taken early retirement, only to discover that his ex-wife is entitled to one-half the community property share of his retirement benefits); *id.* (elaborating that the constituent's retirement benefits are being held until the issue of her rights can be settled).

23. *Id.* at 2.

24. CAL. FAM. CODE §§ 274, 782.5, 4324 (enacted by Chapter 364).

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1. California Welfare and Institutions Code § 11350.6 was amended by SB 523 due to SB 523 following AB 257 in order of enactment. However, because both bills amend the section in an identical manner, a discussion of the provisions of SB 523 is beyond the scope of this piece. *Compare* 1995 Cal. Legis. Serv. ch. 938, sec. 95.5, at 5586-92 (amending CAL. WELF. & INST. CODE § 11350.6) *with* 1995 Cal. Legis. Serv. ch. 481, sec. 2914-19 (amending CAL. WELF. & INST. CODE § 11350.6); *see also* CAL. GOV'T CODE § 9605 (West 1992) (explaining the effect of an amendment of a section by two or more acts during the same session of the Legislature).

2. CAL. FAM. CODE § 4001 (West 1994); *see id.* (stating that the responsibility for supporting an unmarried child continues until high school graduation or until the child attains 19 years of age, depending upon which occurs first); *see also id.* § 3900 (West 1994) (providing that a father and mother share equal responsibility for supporting their child); *id.* § 4053(a)(1) (West 1994) (declaring that a parent's primary obligation is to provide support to minor children consistent with a parent's financial ability); *In re* Marriage of Ames, 59 Cal. App. 3d 234, 238, 130 Cal. Rptr. 435, 438 (1976) (reiterating that a parent's duty of support

such support, an action may be brought to recover the court ordered child-support.[3]

Existing law precludes a person in non-compliance with a judgment or order for support[4] from being issued or from renewing a license from a state professional licensing agency.[5] Under Chapter 481, the ability to obtain or renew a non-commercial drivers license or notary commission is now subject to compliance with a judgment or order for support.[6]

Under existing law, the district attorney is charged with maintaining a list of those in non-compliance with a child support order.[7] In addition, existing law also requires the district attorney to submit this list to the Department of Social Services on a monthly basis.[8] The State Department of Social Services must then

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extends beyond the furnishing of mere necessities to maintaining the child's economic status to that comparable with the parents); Lufkin v. Lufkin, 209 Cal. 710, 714, 290 P. 8, 10 (1930) (providing that an agreement between parents to equally share the expenses relating to a child's support was not void for uncertainty). *See generally* C.P. Jhong, Annotation, *Change in Financial Condition or Needs of Parents or Children as Ground for Modification of Decree for Child Support Payments*, 89 A.L.R. 2d 7 (1963 & Supp. 1993).

3. CAL. FAM. CODE § 4000 (West 1994); *see id.* (declaring that upon breach of the duty to provide support by one parent, the other parent or a guardian ad litem representing the child's interest is permitted to bring an action); *id.* § 4002 (West 1994) (granting a county the right to bring an action to enforce the child's right of support from the parent); *see also* County of Santa Barbara v. Flanders, 63 Cal. App. 3d 486, 492, 133 Cal. Rptr. 798, 801(1976) (noting that a county may sue either on its own behalf or on behalf of the obligee); Daniels v. Daniels, 143 Cal. App. 2d 430, 435, 300 P.2d 335, 338 (1956) (recognizing that although the child is the real party in interest, an award of support may be made payable to a parent). *But see* Ackerman v. Superior Court, 221 Cal. App. 2d 94, 97, 34 Cal. Rptr. 182, 183 (1963) (declaring that parents cannot bargain away the right of their child to receive adequate support by an agreement between themselves). *See generally* Annotation, *Right of Child to Enforce Provisions for His Benefit in Parents' Separation or Property Settlement Agreement*, 34 A.L.R. 3d 1357 (1970 & Supp. 1995) (discussing a child's substantive rights in enforcing provisions relating to support for the child in either separation or property settlement agreements).

4. *See* CAL. WELF. & INST. CODE § 11350.6(a)(4) (amended by Chapter 938) (defining "compliance with a judgment or order for support" as being no more than 30 calendar days in arrears on child support payments or having obtained a judicial determination that enforcement of the judgment is precluded due to principles of equitable estoppel).

5. *Id.* § 11350.6 (amended by Chapter 938). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 325C (9th ed. Supp. 1994) (outlining the procedures for refusing to issue or denying renewal of a professional license based upon non-compliance with child support orders); Luke Foster, *Review of Selected 1991 California Legislation*, 23 PAC. L.J. 512, 616 (1992) (describing the requirements for withholding the issuance or renewal of a professional license in response to failure to pay child support).

6. CAL. WELF. & INST. CODE § 13350.6(e)(1) (amended by Chapter 938); *see id.* § 11350.6(a)(4) (amended by Chapter 938) (authorizing a district attorney to use the provisions of Chapter 481 to enforce orders for spousal support only when the district attorney is simulanteously enforcing child support orders). *See generally* CAL. VEH. CODE § 14607.4(a) (West Supp. 1995) (expressly stating that driving a vehicle is a privilege, not a right).

7. CAL. WELF. & INST. CODE § 11350.6(b) (amended by Chapter 938).

8. *Id.* § 11350.6(b) (amended by Chapter 938); *see id.* (mandating that the list provided to the Department of Social Services include the names, social security numbers, and the last known address of persons in non-compliance, as well as the name, address and telephone number of the District Attorney submitting the list); *id.* (requiring the District Attorney to verify, under penalty of perjury, that the persons listed on the monthly list are subject to an order or judgment for support and that such persons are in non-compliance).

consolidate the certified lists[9] and forward a copy of the compiled list to each board[10] responsible for the regulation of licenses.[11]

Existing law requires the board to immediately notify any applicant who appears on the certified list of the board's intent to withhold the issuance or renewal of the license, and of its intent to issue a temporary license valid for 150 days if the applicant is otherwise eligible for the license.[12] In addition, existing law prohibits the extension of a temporary license, other than a driver's license, beyond the 150-day time limit.[13]

If precluded from renewing or being issued a driver's license because of delinquent child support payments, Chapter 481 allows for the issuance of a 150 day temporary drivers license which may be extended once upon request of the district attorney or if good cause exists.[14]

Existing law establishes the procedures for challenging the inclusion of a person's name on the certified list.[15] Under existing law, the district attorney is

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9. *See id.* § 11350.6(a)(3) (amended by Chapter 938) (defining "certified list" as a list, prepared by the district attorney and verified under penalty of perjury, of persons who are support obligors determined to be in non-compliance with a judgement or order for support).

10. *See id.* § 11350.6(a)(2) (amended by Chapter 938) (defining "board" as the State Bar, the Department of Real Estate, Department of Motor Vehicles, the Secretary of State, entities listed in California Business and Professions Code §§ 101, 1000, and 3600, or any other state office which authorizes a person to engage in a business or operation or profession); *see also* CAL. BUS. & PROF. CODE § 101 (West Supp. 1995) (listing the boards, bureaus, committees and divisions which constitute the Department of Consumer Affairs); id. § 1000 (West 1990) (referring to the State Board of Chiropractic Examiners); *id.* § 3600 (West Supp. 1995) (referring to the Osteopathic Medical Board of California).

11. CAL. WELF. & INST. CODE § 11350.6(c) (amended by Chapter 938). *Compare* 1992 Cal. Legis. Serv. ch. 50, sec. 5, at 155 (amending CAL. WELF. & INST. CODE § 11350.6(a)(3)) (defining "license" as either membership in the State Bar or a certificate, permit or registration to engage in a business or occupation, including a commercial driver's license) *with* CAL. WELF. & INST. CODE § 11350.6(a)(5) (amended by Chapter 481) (defining "license" as either a driver's license issued by the Department of Motor Vehicles, membership in the State Bar, an appointment or commission as a notary public or a certificate or other authorization allowing a person to engage in a business or to operate a commercial vehicle).

12. CAL. WELF. & INST. CODE § 11350.6(e)(1) (amended by Chapter 938); *id.* § 11350.6(e)(2) (amended by Chapter 938); *id.* § 11350.6(e)(2)(A) (amended by Chapter 938); *see id.* § 11350.6(e)(2) (amended by Chapter 938) (requiring that service of notice must be made either in person or by mail to the applicant's most current address); *id.* (stating that service by mail is deemed complete so long as California Code of Civil Procedure § 1013 is satisfied); *see also* CAL. CIV. PROC. CODE § 1013 (West Supp. 1995) (discussing the requirements of service by mail, Express Mail, or facsimile).

13. CAL. WELF. & INST. CODE § 11350.6(e)(3)(C) (amended by Chapter 938); *see id.* § 11350.6(e)(2)(D) (amended by Chapter 938) (providing that a driver's license may be extended for an addititional 150-day period beyond the 150-day period upon the request of the district attorney or by order of the court upon a showing of good cause).

14. *Id.* § 11350.6(e)(2)(D) (amended by Chapter 938); *see also* BLACK'S LAW DICTIONARY 692 (6th ed. 1990) (defining "good cause" as a substantial reason, synonymous with a legal reason, for failing to perform an act required by law); *cf.* 1995 Va. Acts 595 § 46.2-320 (allowing a person whose license has been revoked or suspended because of delinquent child support payments to petition the court for a restricted license to permit the operation of a motor vehicle in four circumstances: (1) commuting to and from work; (2) traveling to or from school, if a student; (3) driving to visit with a child; and (4) traveling because medically necessary). *But cf.* ME. REV. STAT. ANN. tit. 29A, § 2459(4) (West Supp. 1994) (providing for a 120-day temporary driver's license without the possibility of extension).

15. CAL. WELF. & INST. CODE § 11350.6(h) (amended by Chapter 938); *see id.* (requiring the applicant to file a request with the district attorney who certified the applicant's name); *id.* (mandating that the district attorney must inform the applicant of his or her findings within 75 days of the receipt of the written request).

required to send a release to the appropriate board and the applicant in certain circumstances.[16] The district attorney will not, under existing law, issue a release so long as the applicant is in non-compliance with the judgment or order for support.[17]

Upon notification that the district attorney will not issue a release, existing law proscribes the applicant's available options.[18] Further, existing law provides that the State Department of Social Services may provide to each board a supplemental list of obligors who have been out of compliance with a judgment or order for support for more than four months.[19] Under existing law, the board has the authority to suspend the license of any licensee[20] on this supplemental list.[21] Existing law also establishes the procedures for the suspension process.[22]

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16. *Id.*; *see id.* (providing the circumstances where an applicant is entitled to a release to include the following: (1) the applicant is either determined to be in compliance or has negotiated an agreement with the district attorney for a payment schedule on arrearage or reimbursement; (2) the district attorney is unable to complete the review and send notice of his or her findings to the applicant within 75 days where the delay is not the result of the applicant's failure to act in a reasonable, timely, and diligent manner upon receiving notice from the board; (3) the applicant filed and served a request for judicial review under the provisions of Chapter 938 and resolution of that review was not made within 150 days of the date of service where the delay is not due to the applicant's failure to act in a reasonable, timely, and diligent manner upon receiving the findings of the district attorney; and (4) the applicant has obtained a judicial finding of compliance); *see also* id. § 11350.6(i) (amended by Chapter 938) (requiring an applicant to act diligently in responding to notices from the board and the district attorney); *id.* (noting that a delay in acting, on the applicant's part, without good cause, which prevents either the district attorney or the court to hear the judicial review within their individual time limit, would prevent the issuance of a release).

17. *Id.* § 11350.6(j) (amended by Chapter 938).

18. *Id.*; *see id.* (providing that the district attorney must provide notice to the applicant that the applicant may request, by filing an order to show cause or notice of motion, any or all of the following: (1) judicial review of the district attorney's decision, (2) judicial determination of compliance, or (3) modification of the support judgment or order); *see also id.* § 11350(j) (amended by Chapter 938) (specifying additional requirements to be contained in the notice to include: (1) the name and address of the court in which the applicant must file, (2) notice that the applicant's name will remain on the certified list in the absence of a timely request for judicial review, and (3) a statement that the applicant must comply with all applicable statutes and rules of court controlling orders to show cause and notices of motion); *id.* § 11350.6(k) (amended by Chapter 938) (setting forth the requirements for a request for judicial review and requiring the request to be served upon the district attorney within seven calendar days of the filing of the petition); *id.* (noting that the judicial review may result in the court determining that the obligor is in compliance, and therefore, is entitled to a release, or a conditional release); *id.* (declaring that judicial review will be limited to a determination of four issues: (1) the existence of a support judgment, order, or payment schedule on arrearage or reimbursement; (2) whether the petitioner is the obligor under such orders; (3) whether the support obligor is in compliance with such orders; and (4) the extent to which the needs of the obligor, considering the obligor's payment history and current circumstances of both the obligor and obligee, demand a conditional release).

19. *Id.* § 11350.6(e)(3)(A) (amended by Chapter 938).

20. *See id.* § 11350.6(a)(6) (amended by Chapter 938) (defining "licensee" as any person who holds a license, certificate, permit, registration, or authorization which is issued by a board or a driver's license issued by the Department of Motor Vehicles or a commission as a notary public).

21. *Id.* § 11350.6(e)(3)(A) (amended by Chapter 938); *see id.* (noting that the State Department of Social Services is obligated to provide this supplemental list to those boards with whom the department has an interagency implementation agreement); *id.* (providing that persons named on the supplemental list are subject to suspension of their licenses if their licenses would not otherwise be eligible for renewal within six months of the date of the request by the State Department of Social Services); *cf.* 1995 Ariz. Sess. Laws 270 sec. 10, at 10 (enacting ARIZ. REV. STAT. §12-2464) (permitting the suspension of the driver's license of any parent who is more than two months in arrears in child support payments); 1995 Colo. Sess. Laws 1093, sec. 2, at 7 (amending COLO. REV. STAT. § 42-2-127.5) (mandating the suspension of the license of any driver in

Chapter 481 provides that if an obligor or obligee requests, the District Attorney must review, within thirty days, the amount of arrearage alleged by considering all evidence and defenses concerning the amount of support paid or owed which is presented by both parents.[23] Under Chapter 481, the District Attorney may suspend enforcement or distribution of arrearage upon the belief that there is a substantial probability that the finding of the administrative review will be that there are no arrearanges.[24] In addition, any party in an action involving child support enforcement services of the District Attorney is entitled to request a judicial determination of arrearage.[25]

Driving a vehicle without a valid driver's license has severe penalties under existing law, including the possible impoundment of the car being driven.[26] Chapter 481 expressly provides that a person whose driver's license is revoked or suspended because of non-compliance with a child support order will not be

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non-compliance with a child support order); 1995 Md. Laws 491, sec. 2, at 2 (enacting MD. CODE ANN. FAM. LAW. § 10-110) (stating that the Motor Vehicle Administration is empowered to suspend the driver's license of a parent who is in arrears on child support payments); ME. REV. STAT. ANN. tit. 29A, § 2459 (West Supp. 1994) (allowing for the suspension of a driver's license upon failure to provide court ordered family support); 1995 Va. Acts 595, sec. 1, at 1 (amending VA. CODE ANN. § 46.2-320) (declaring that any person who either is 90 days delinquent or is more than $5000 in arrears in the payment of child support may be subject to driver's license suspension).

22. CAL. WELF. & INST. CODE. § 11350.6(e)(3)(B)-(E) (amended by Chapter 938); *id.* § 11350.6(f) (amended by Chapter 938); *see id.* § 11350.6(e)(3)(B) (amended by Chapter 938) (requiring a board to serve notice immediately upon any person, whose name appears on the supplemental list, that his or her license will be automatically suspended 150 days after service of notice unless the person complies with the judgment or order of support); *id.* § 11350.6(e)(3)(C) (amended by Chapter 938) (declaring that the 150-day notice period will not be extended); *id.* § 11350.6(e)(3)(D) (amended by Chapter 938) (noting that if a license is suspended, any funds paid by the licensee will not be reimbursed); *id.* § 11350.6(e)(3)(E) (amended by Chapter 938) (recognizing that California Welfare and Institutions Code § 11350.6(e)(3) does not apply to licenses which are subject to an annual renewal or annual fee); *id.* § 11350.6(f) (amended by Chapter 938) (providing that the notice must include the person's name and also emphasize the necessity of obtaining a release from the district attorney's office for the issuance, renewal, or continued valid status of a license or licenses); *id.* § 11350.6(f)(1) (amended by Chapter 938) (noting that any person whose non-commercial driver's license is suspended may be eligible for a 150-day temporary license); *id.* § 11350.6(f)(2) (amended by Chapter 938) (stating that any license which is suspended under Chapter 938 is subject to suspension through the expiration of the remaining license term, unless the board receives a release and the appropriate applications and fees needed for reinstatement); *id.* § 11350.6(f)(3) (amended by Chapter 938) (requiring the State Department of Social Services to develop a form for an applicant to use in order to effectuate a review by the district attorney). *See generally* Daniel E. Feld, Annotation, *Sufficency of Notice and Hearing Before Revocation or Suspension of Motor Vehicle Driver's License*, 60 A.L.R. 3D 427 (1974 & Supp. 1995) (discussing the appropriate notice required prior to revoking or suspending a driver's license).

23. CAL. WELF. & INST. CODE. § 11350.8(a) (enacted by Chapter 481); *see id.* (allowing the District Attorney to continue the administrative review, if necessary, to obtain additional information).

24. *Id.* § 11350.8(b) (enacted by Chapter 481); *see id.* (noting that this duty is discretionary).

25. *Id.* § 11350.8(c) (enacted by Chapter 481); *see id.* (permitting a party to request an administrative review of the alleged arrearage prior to requesting a judicial determination); *id.* (requiring that any motion which is filed with the court include a monthly breakdown which shows the amounts paid, the amount owed, and any other relevant information).

26. CAL. VEH. CODE § 12500 (West Supp. 1995); *see id.* (providing that driving a vehicle without a valid driver's license is unlawful); *id.* § 14602.6(a) (West Supp. 1995) (declaring that a person driving a vehicle without a valid license is subject to arrest as well as the mandatory 30-day impounding of the vehicle the person was driving).

subject to automobile impoundment.[27]

Chapter 481 also extends the operative date of sections 15200.1, 15200.2, 15200.3, 15200.7, 15200.8, 15200.95 of the California Welfare and Institutions Code from January 1, 1996 to July 1, 1997.[28] Finally, Chapter 481 provides that sections 15200.8 and 15200.85 of the California Welfare and Institutions Code will become inoperative on June 30, 1997, and will be repealed effective January 1, 1998, if no later enacted statute either deletes or extends these dates.[29]

COMMENT

Collecting court-ordered child support has proven to be a difficult task.[30] The Legislature has repeatedly made clear that public policy dictates that a parent provide appropriate support for his or her child.[31] Other states have found success in the collection of back child support through the ability to revoke the driver's license of a parent in arrears.[32] The ability to withhold the issuance or renewal of

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27. CAL. WELF. & INST. CODE § 11350.6(w) (enacted by Chapter 938); *see id.* (excepting from the provisions of California Vehicle Code § 14602.6, any person whose driver's license was suspended or revoked under Chapter 481).

28. *Compare* 1990 Cal. Stat. ch. 1647, sec. 2.5, at 7876, 7877 (enacting CAL. WEL. & INST. CODE § 15200.1(e)), 1990 Cal. Stat. ch. 1647, sec. 3.5, at 7878 (enacting CAL. WELF. & INST. CODE § 15200.1(d)), 1990 Cal. Stat. ch. 1647, sec. 4.5, at 7879, 7880 (enacting CAL. WELF & INST. CODE § 15200.3(e)), 1990 Cal. Stat. ch. 1647, sec. 6.5, at 7881, (enacting CAL. WELF & INST. CODE § 15200.7(c)), 1990 Cal. Stat. ch. 1647, sec. 9.5, at 7884, 7885 (enacting CAL. WELF. & INST. CODE § 15200.95(c)) *with* CAL. WELF. & INST. CODE §§ 15200.1(e), 15200.2(d), 15200.3(e), 15200.7(c), 15200.95(c) (amended by Chapter 481).

29. *Compare* 1990 Cal. Stat. ch. 1647, sec. 7, at 7881, 7882-83 (enacting CAL. WELF. & INST. CODE § 15200.8) and 1990 Cal. Stat. ch. 1647, sec. 7.5, at 7883 (enacting CAL. WELF. & INST. CODE § 15200.85) (stating that the inoperative date is June 30, 1996 and will be repealed as of January 1, 1997, unless legislation deletes or extends the inoperative or repeal dates) *with* CAL. WELF. & INST. CODE §§ 15200.8, 15200.85 (amended by Chapter 481) (setting the inoperative date as June 30, 1997, with a repeal date of January 1, 1998).

30. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 257, at 1-2 (Apr. 19, 1995) (noting that out of 909,000 existing child support orders in California, more than 600,000 are delinquent); *California's Dismal Child-Support Record*, S.F. CHRON., Apr. 2, 1995, at 6 (stating that only 12.5% of families received the appropriate court ordered child support in fiscal year 1993); Teresa Moore, *Study Slams State 'Crackdown' on Deadbeat Parents*, S.F. CHRON., Mar. 23, 1995, at A15 (noting that over the past 20 years, over $5 billion in child support went uncollected); *see also id.* (quoting a study by the Legal Services of Northern California finding that California ranks 44th in the United States in collecting child support); *id.* (recognizing that court orders frequently set child support at zero because the other parent is unemployed, in prison, or too poor).

31. *See* CAL. FAM. CODE § 4053(a)(1) (West 1994) (enumerating that the primary obligation of a parent is to ensure adequate support for his or her child's education and well-being); *see also County Going After Deadbeat Parents; New Campaign to Collect Millions in Back Child and Spousal Support*, S.F. EXAMINER, Mar. 24, 1995, at P1 (quoting Assemblymember Jackie Speier as saying that "supporting one's child is a fundamental parental responsibility").

32. *See* Fred Bayles, *Deadbeat Parents Often Skirt License Revocation*, AUSTIN AM.-STATESMAN, Mar. 31, 1995, at A21 (stating that the threat of the loss of a driver's license resulted in 2,500 parents executing promissory notes for back child support in South Dakota); *id.* (noting that the publicity surrounding the revocation of 40 driver's licenses in Maine, due to failure to pay child support, resulted in over 13,000 parents paying $24 million in back child support); *see, e.g.*, S.D. CODIFIED LAWS ANN. § 32-12-116 (permitting the South Dakota Department of Commerce and Regulation to refuse to issue or renew the driver's license of a person more than $1,000 in arrears on child support payments).

a professional license is one tool provided by the Legislature which has been effective in collecting child support.[33] By expanding the definition of license to encompass a driver's license, the Legislature provides an additional tool to ensure that child support is paid and has also made clear that failure to pay child support will not be tolerated.[34]

Opponents charge that Chapter 481 will lead to a vicious cycle in which parents denied a driver's license because of non-payment of child support will be unable to work due to lack of transportation; therefore this will lead to further inability to make payments.[35] In response to this argument and the additional argument that denying a driver's license or refusing to renew an existing one interferes with a non-custodial parent's ability to visit with his or her children, Chapter 481 allows for the possibility of a one-time extension upon the expiration of the 150-day temporary license.[36]

Pamela J. Keeler

Family; community property—waiver of declaration of disclosure

Family Code §§ 2105, 2106 (amended).
AB 806 (Ducheny); 1995 STAT. Ch. 233

Existing law requires each party to a dissolution of marriage or legal separation proceeding to serve on the other party a preliminary declaration of disclosure[1] within sixty days of filing the petition for dissolution or legal

33. *See* CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE FUTURE OF CHILD SUPPORT ENFORCEMENT IN CALIFORNIA 40 (1995) (explaining that license revocation is intended not to deny work opportunities, but instead to compel absent parents to financially responsible for their children's support); Tim Miller & Debra Jasper, *Capital Corridors*, DAYTON DAILY NEWS, June 4, 1995, at 4B (stating that California has collected an additional $10 million in child support due to the ability to withhold the issuance or renewal of a professional license); *Prepared Testimony of Leslie L. Frye, Chief, Office of Child Support, California Deparment of Social Services before the Senate Finance Committee*, FED. NEWS SERV., Mar. 29, 1995, at 1 (recognizing that linking the issuance or renewal of a professional license to compliance with court ordered child support aids helps ensure compliance by self employed persons as their wages cannot easily be attached).

34. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 257, at 2 (May 25, 1995); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 257, at 2-3, (June 20, 1995) (recognizing that the added availability of the Department of Motor Vehicles database as a tool in the search for locating parents who are delinquent with child support payments is likely to alleviate some of the difficulty in locating these parents); CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, *supra* note 33, at 40 (stating that license revocation is not intended to deny work opportunities, but rather to encourage parents to comply with parental responsibilities).

35. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 257, at 2 (May 25, 1995).

36. *Id.*; *see* CAL. WELF. & INST. CODE § 11350.6(e)(2)(D) (amended by Chapter 938) (providing that a one time extension of a 150-day temporary driver's license must be granted if requested by the district attorney or if good cause exists).

1. *See* CAL. FAM. CODE § 2104(a) (West 1994) (requiring that the preliminary declaration of disclosure be signed under penalty of perjury and that the commission of perjury on the document may be grounds for setting aside the judgment of dissolution or legal separation, in addition to any and all other remedies, civil or criminal, that are available for committing perjury); *id.* (allowing parties to accelerate or delay the service of

separation.[2]

Existing law further requires that each party serve on the other party a final declaration of disclosure[3] before or at the time the parties enter into an agreement, or no later than forty-five days before the first assigned trial date.[4]

Chapter 233 permits parties to stipulate to a mutual waiver,[5] concerning the final declaration of disclosure by executing a waiver in a marital settlement agreement or stipulated judgment or by stipulation in open court.[6]

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the preliminary document of disclosure); *id.* § 2104(b) (West 1984) (specifying that the preliminary declaration of disclosure is not to be filed with the court, except upon court order); *id.* § 2104(c) (West 1994) (defining a "preliminary declaration of disclosure" as a declaration which must set forth with sufficient particularity, and which a reasonably prudent person can ascertain, all of the following: (1) the identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community or separate; (2) the declarant's percentage of ownership in each asset and percentage of obligation for each liability where property is not solely owned by one or both of the parties; the preliminary disclosure may also set forth the declarant's characterization of each asset or liability); *id.* § 2104(d) (West 1994) (specifying that the "declarant may amend his or her preliminary declaration of disclosure without leave of the court"); *id.* § 2104(e) (West 1994) (stating that "along with the preliminary declaration of disclosure, each party shall provide the other party with a completed income and expense declaration unless an income and expense declaration has already been provided and is current and valid").

2. *Id.* §§ 2103-2104(a) (West 1994); *see id.* § 2330(a) (West 1994) (providing that a proceeding for petition for dissolution of marriage or for legal separation of the parties is commenced by filing a petition entitled "In re the marriage of _____ and _____", which must state whether it is a petition for dissolution of marriage or legal separation); *id.* § 2330(b) (West 1994) (specifying that the petition must include the following information: (1) the state or country in which the parties were married; (2) the date of the marriage; (3) the date of separation; (4) the number of years from marriage to separation; (5) the number of children of the marriage, if any, and if none, a statement of that fact; (6) the age and birth date of each minor child of the marriage; and (7) the social security numbers of the husband and wife, if available, and if not, a statement to that effect); *cf.* KY. REV. STAT. ANN. § 403.150 (Banks-Baldwin Supp. 1994); MINN. STAT. ANN. § 518.10 (West Supp. 1995); MONT. CODE ANN. § 40-4-105 (1993).

3. *See* CAL. FAM. CODE § 2105(b) (amended by Chapter 233) (defining "final declaration of disclosure" as a document that must include all of the following: (1) all material facts and information regarding the characterization of all assets and liabilities; (2) all material facts and information regarding the valuation of all assets that are contended to be community assets or in which it is contended the community has an interest; (3) all material facts and information regarding the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability; and (4) all material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration).

4. *Id.* § 2105(a) (amended by Chapter 233).

5. *See* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 178(b) (9th ed. 1990) (defining a "waiver" as the intentional relinquishment of a known right).

6. CAL. FAM. CODE § 2105(c) (amended by Chapter 322); *see id.* (requiring the waiver to include all of the following representations: (1) that both parties have complied with California Family Code § 2104, and that the preliminary declarations of disclosure have been completed and exchanged; (2) that both parties have completed and exchanged a current income and expense declaration; (3) that the waiver must have been knowingly, intelligently, and voluntarily entered into by each of the parties; and (4) that each party understands that by signing the waiver, he or she may be affecting his or her ability to have the judgement set aside as provided by law); *id.* § 2105(d) (amended by Chapter 322) (specifying that a court may decide, based on the law and the facts of each particular case, whether the execution of a mutual waiver of the final declaration of disclosure requirements pursuant to California Family Code § 2105(c) will affect the rights of either party to have the judgment set aside or will affect the fiduciary obligations of each to the other); *id.* (clarifying that the authority to execute a mutual waiver provided by California Family Code § 2105 is not intended, in and of itself, to affect the law regarding the fiduciary obligations owed by the parties, the parties' rights with respect to setting aside a judgment, or any other rights or responsibilities of the parties as provided by law).

Under existing law, absent good cause,[7] no judgment may be entered with respect to the parties' property rights without each party having executed and served a copy of the final declaration of disclosure and current income and expense declaration.[8] Chapter 233 adds an exception to this requirement when parties have stipulated to a mutual waiver.[9]

Chapter 233 further provides that if the parties stipulate to a mutual waiver, a judgment may be entered with respect to the parties' property rights without each party having filed and served a copy of the final declaration of disclosure and current income and expense declaration.[10]

COMMENT

Chapter 233 was enacted because the requirement of preparing and exchanging a final declaration of disclosure was an unnecessary burden in most cases.[11] Proponents believe that parties generally reach agreement after being adequately informed of the circumstances involved, and a significant majority of the parties would prefer to waive the preparation of the disclosure declarations.[12] The sponsors argue that because the pre-trial statement requires the same information as the final disclosure statement, the waiver is not a waiver of the information, but merely a waiver of the requirement to complete and exchange the final declaration.[13] Proponents further believe that many family attorneys have experienced complaints from their clients who believe that the legal process is too time consuming and expensive.[14] By allowing parties to waive the final

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7. *See* BLACK'S LAW DICTIONARY 692 (6th ed. 1990) (defining "good cause" as meaning a substantial reason amounting in law to a legal excuse for failing to perform an act required by law).

8. CAL. FAM. CODE § 2106 (amended by Chapter 233).

9. *Id.*

10. *Id.*; *see id.* (requiring that each party execute and file with the court a declaration, signed under penalty of perjury, stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party or that service of the final declaration of disclosure has been waived pursuant to California Family Code § 2105(c)).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 806, at 5 (June 20, 1995).

12. *Id.*; *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 806, at 3 (May 10, 1995) (reporting that the State Bar, Family Law section, supports AB 806 because they believe that it is the exception rather than the rule that a party is "pressured" or "tricked" into a settlement).

13. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 806, at 6 (June 30, 1995); *see* ASSEMBLY FLOOR, COMMITTEE ANAYSIS OF AB 806, at 2 (July 13, 1995) (explaining that AB 806 allows for the mutual waiver of the final declaration of disclosure as long as the preliminary declaration of disclosure and the most recently filed income and expense declaration are complete; in cases where a final declaration of disclosure may benefit the finder of fact, or in the case where there is an unrepresented litigant, there need not be a waiver); *id.* (specifying that the San Diego Bar Association states that the requirement of completing a final declaration of disclosure is burdensome and almost impossible in the 75% of family law cases where the litigants are unrepresented).

14. *Id.*; *see* Kurt W. Andersen, *A Conversation with Judge Michael J. Kane, Bucks County Common Pleas Court*, PA. L. WKLY., May 22, 1995, at 7 (suggesting that divorce litigation costs too much; for example, the cost of a divorce for a dual-income middle-class family forced to litigate, may reach more than $ 30,000); Susan Edelman, *Law Without Any Lawyers*, THE RECORD (New Jersey), Feb. 10, 1994, at A3 (reporting that in New Jersey, a simple, uncontested divorce, involving little more than "paper pushing," costs about $ 1000,

declaration of disclosure, Chapter 233 saves litigants both time and money.[15]

Molly J. Mrowka

Family; domestic violence—protective orders and arrest policies

Family Code §§ 2047, 6305, 7720 (amended); Penal Code § 13701 (amended).
SB 591 (Solis); 1995 STAT. Ch. 246

Existing law governs the issuance of protective orders,[1] as well as other

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plus filing fees); *id.* (further reporting that commercial divorce kits are a far less costly option, for the largest expense in using the kits is the filing fees); Elizabeth Gleick, *Should This Marriage Be Saved?; Many Americans Are Trying to Make Marriages More Permanent—and Divorce More Difficult*, TIME, Feb. 27, 1995, at 48 (specifying that in 1993, 2.3 million couples got married, and 1.2 million couples got divorced); Laura Mansnerus, *The Divorce Backlash: For Professional Women, the Price of Getting Out of a Marriage—and Keeping the Children—Is Getting Higher*, WORKING WOMAN, Feb. 1995, at 40 (discussing the divorce costs of several couples and reporting that a divorce for one woman who was earning only about $35,000-40,000 a year cost almost $70,000); Mike McCloy, *Divorce Costs: Vital to Life?*, PHOENIX GAZETTE, Feb. 10, 1995, at B1 (stating that many lawyers will not take divorce cases because the respondent spouse often does not have the money to pay the legal fees, and specifying that the reason the respondent does not have the money to hire a lawyer is because the money in the bank account is community property and many times the court will freeze the bank account until after the community property has been divided); Peggy O'Crowley, *An Offer They Can't Refuse; Is Court-Ordered Mediation Effective in Divorce Cases?*, THE RECORD (New Jersey), Mar. 2, 1995, at D1 (discussing the advantages of voluntary mediation, but stating that mediators, lawyers and others are divided on whether it works when couples are ordered to go through it); Robin C. Sher & Michael L. Leshin, *Expanding the Frontiers of Divorce Mediation*, MASS. L. WKLY., May 29, 1995, at B5 (analyzing several typical divorce conflicts in the context of mediation and illustrating what actually happens in mediation). *See generally* Andrew S. Morrison, *Is Divorce Mediation the Practice of Law?*, 75 CAL. L. REV. 1093, 1093 (1987) (specifying that since 1975, the number of divorces has been at least 45% of the number of marriages; it is estimated that over half of the civil cases pending in the United States are divorce cases whose dispositions are often delayed as long as three years).

15. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 806, at 5 (June 20, 1995); *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 806, at 1 (May 10, 1995) (estimating that the cost of preparing a final declaration of disclosure ranges from $1000 to $1500, even in a modest family law case).

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1. *See* CAL. FAM. CODE § 6218 (West 1994) (defining a protective order as any order that (1) enjoins specific acts of abuse, (2) excludes an individual from a dwelling, or (3) enjoins specified behavior, issued ex parte, after notice and a hearing, or in a judgment); *see also id.* § 6320 (West 1994) (stating that the court can issue an order enjoining an individual from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, harassing by mail, or disturbing another individual's peace); *id.* § 6321(a) (West 1994) (permitting the court to issue orders excluding an individual from the family dwelling, the dwelling of another individual, the common dwelling of the individual and another, or the dwelling of an individual who is charged with the care, custody, and control of a child, regardless of who has legal or equitable title or is the lessee of the dwelling); *id.* § 6322 (West 1994) (authorizing the court to issue any order enjoining behavior that is necessary to effectuate other orders). *See generally* Kathleen A. Orchik, *Review of Selected 1989 California Legislation*, 21 PAC. L.J. 333, 465 (1990) (explaining ex parte orders protecting children); *Review of Selected 1987 California Legislation*, 19 PAC. L.J. 427, 528 (1988) (reviewing California's law regarding emergency restraining orders); *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 513, 675 (1982) (reviewing California's law regarding temporary restraining orders); *Review of Selected 1980*

domestic violence prevention orders.[2] Additionally, existing law prohibits a court from issuing a mutual restraining order unless both parties personally appear in court and each presents written evidence of domestic violence or abuse.[3] Under prior law, written evidence was not required to issue a mutual restraining order if both parties agreed to waive that requirement.[4] Chapter 246 eliminates this waiver provision and requires, in addition to both parties personally appearing and presenting written evidence of violence or abuse, the court to find that both parties acted as aggressors and that neither acted in self-defense before a mutual restraining order is issued.[5]

California Legislation, 12 PAC. L.J. 235, 383 (1981) (reviewing California's laws regarding domestic violence); *Review of Selected 1979 California Legislation*, 11 PAC. L.J. 259, 465 (1980) (reviewing California's laws regarding domestic violence).

2. CAL. FAM. CODE §§ 2047(a), 7720(a) (amended by Chapter 246); *see id.* § 6340 (West 1994) (establishing court procedures for attaining protective orders pursuant to California Penal Code §§ 6320 and 6321); *see also* CAL. CIV. PROC. CODE § 527.6(a) (West Supp. 1995) (providing that a person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment); CAL. FAM. CODE § 6250 (West 1994) (permitting a judicial officer to issue an ex parte emergency protective order if there are reasonable grounds to believe that an individual is in immediate danger of domestic violence or a child is in immediate danger of abuse by a family or household member); *id.* § 6251 (West 1994) (stating that emergency protective orders require a reasonable ground to believe an individual is in immediate danger of violence and the protective order is necessary to prevent an occurrence or reoccurrence of violence); *id.* § 6252 (West 1994) (stating that emergency protective orders may include a protective order as defined in California Family Code § 6218, an order determining temporary care and control of any minor children involved, or an order authorized under California Welfare and Institutions Code § 213.5); *id.* § 6256 (West 1994) (providing that an emergency protective order expires on the close of judicial business on the fifth day following its issuance or on the seventh calendar day following its issuance); Schraer v. Berkeley Property Owners' Ass'n, 207 Cal. App. 3d 719, 730, 255 Cal. Rptr. 453, 460 (1989) (noting that although the procedures to obtain an injunction against harassment are expedited, the alleged harasser is given a full opportunity to present his or her case); Marquez-Luque v. Marquez, 192 Cal. App. 3d 1513, 1517, 238 Cal. Rptr. 172, 175 (1987) (concluding that the Legislature has provided for summary removal of a person from his or her home to prevent domestic violence, but only when the person for whose protection the order is made is actually residing with the person against whom the order is directed); Smith v. Silvey, 149 Cal. App. 3d 400, 405, 197 Cal. Rptr. 15, 18 (1983) (finding that the purpose of California Civil Procedure Code § 527(a) is to establish an expedited procedure for enjoining acts of harassment); *cf.* ALA. CODE § 30-5-7(a) (1989) (empowering the court to grant any protection order necessary to bring about cessation of abuse); ARIZ. REV. STAT. ANN. § 13-3602(A) (Supp. 1994) (providing that individuals can petition the court for a protective order for the purpose of restraining an individual from committing domestic violence); *see generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* § 28 (9th ed. 1990 & Supp. 1995) (outlining the various legal remedies available to victims of domestic violence); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1040 n.11 (1992) (commenting that all but two States, Arkansas and Delaware, have enacted legislation providing for protective orders for victims of abuse and listing the various states' statutes).

3. CAL. FAM. CODE § 6305 (amended by Chapter 246); *see* Kobey v. Morton, 228 Cal. App. 3d 1055, 1059, 278 Cal. Rptr. 530, 532 (1991) (ruling that the court does not have the power to issue a mutual restraining order without affording the parties notice and a hearing); *see also* Marco v. Superior Court, 496 P.2d 636, 638 (Ariz. Ct. App. 1972) (holding that a mutual protective order violated the victim's due process rights). *See generally* Topliffe, *supra* note 2, at 1053-64 (discussing the advantages and disadvantages of mutual protective orders).

4. 1993 Cal. Legis. Serv. ch. 219, sec. 154, at 1387 (enacting CAL. FAM. CODE § 6305).

5. CAL. FAM. CODE § 6305 (amended by Chapter 246); *cf.* COLO. REV. STAT. § 14-4-102(13) (Supp. 1994) (requiring that a court not grant a mutual restraining order to prevent domestic violence unless each party has met their burden of proof and the court makes separate findings to support the issuance of the mutual restraining order for the protection of the opposing parties, and that neither party can waive any requirements);

Under existing law, all law enforcement agencies in California are required to develop, adopt, and implement written policies and standards for peace officers to utilize while responding to domestic violence calls.[6] These policies are to reflect that domestic violence calls are equivalent to all other requests for assistance involving violence.[7] Chapter 246 requires these written policies to encourage the arrest of domestic violence offenders when there is probable cause[8] that an offense has been committed or a protective order has been violated.[9]

MASS. GEN. LAWS ANN. ch. 209A, § 3(i) (West Supp. 1995) (authorizing a court to issue a mutual restraining order only after the court has made specific written findings of fact). *Compare* 1993 Cal. Legis. Serv. ch. 219, sec. 154, at 1387 (enacting CAL. FAM. CODE § 6305) (permitting both parties to waive the requirement of written evidence of abuse) *with* CAL. FAM. CODE § 6305 (amended by Chapter 246) (eliminating the waiver provision).

6. CAL. PENAL CODE § 13701(a) (amended by Chapter 246); *see id.* (stating that the written domestic violence policies and standards were to be implemented by January 1, 1986); *see also id.* §13701(c)(1)-(9) (amended by Chapter 246) (mandating that the written policies be made available to the public upon request and to include standards for felony, misdemeanor, and citizen arrests; verification and enforcement of orders; cite and release policies; emergency assistance to victims; assistance to victims relating to criminal prosecution options; furnishing victims written notice at the scene; and writing reports).

7. *Id.* § 13701(a) (amended by Chapter 246); *see id.* (stating that the policies should reflect that domestic violence is alleged criminal conduct); *see also* Casey G. Gwinn, *DOMESTIC VIOLENCE at the Tormented Heart of the Simpson Case, an All-Too-Familiar Pattern*, SAN DIEGO UNION-TRIB., June 26, 1994, at G6 (providing the opinion of the supervisor of San Diego City Attorney's Domestic Violence Unit, Casey G. Gwinn, that abusers need to be held accountable, treated as criminals, and arrested each time they commit a domestic violence crime).

8. *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) (concluding that "probable cause is a fluid concept—turning on an assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."); *see also* Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (holding that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."); People v. Price, 1 Cal. 4th 324, 409, 821 P.2d 610, 656, 3 Cal. Rptr. 2d 106, 152 (1991) (explaining that the determination of whether an officer has cause to make an arrest requires application of a two pronged test consisting of (1) a determination if the arrest occurred and what the arresting officer then knew, and (2) whether the officer's knowledge at the time of arrest constituted adequate cause).

9. CAL. PENAL CODE § 13701(b) (amended by Chapter 246); *see id.* § 836(b), (c)(1) (West Supp. 1995) (authorizing a peace officer to arrest, without a warrant, any person who is believed to have violated a protective order and requiring peace officers to instruct victims of domestic violence how to make a citizen's arrest); *see also* People v. Hernandez, 47 Cal. 3d 315, 341, 763 P.2d 1289, 1303, 253 Cal. Rptr. 199, 213 (1988) (holding that although each warrantless arrest must be decided on its individual facts, the arresting officer must possess more than a mere hunch); People v. Campa, 36 Cal. 3d 870, 878, 686 P.2d 634, 637, 206 Cal. Rptr. 114, 117 (1984) (concluding that the federal and California Constitutions prohibit warrantless arrests within the home, even if there is probable cause, unless exigent circumstances exist); *cf.* ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1994) (stating that a peace officer is to arrest an individual, with or without a warrant, if the officer has probable cause to believe that the individual committed an offense); COLO. REV. STAT. § 16-3-105(1.5) (Supp. 1994) (stating that no person arrested for domestic violence shall be released at the scene of the alleged crime); D.C. CODE ANN. § 16-1031(a)(1) (Supp. 1994) (providing that a law enforcement officer must arrest an individual if the officer has probable cause to believe that the individual committed an intrafamily offense); FLA. STAT. ANN. § 901.15(7) (West Supp. 1995) (authorizing a law enforcement officer to arrest an individual without a warrant when there is probable cause to believe that the individual committed an act of domestic violence or child abuse); HAW. REV. STAT. § 709-906(2) (Supp. 1992) (stating that a police officer may, with or without a warrant, arrest an individual if the officer has reasonable grounds to believe that the individual is abusing a family or household member). *See generally* Joel E. Sannes-Pond, *Review of Selected 1992 Legislation*, 24 PAC. L.J. 593, 778 (1993) (reviewing California's domestic violence citizen's arrests procedures).

Additionally, Chapter 246 requires peace officers to make reasonable efforts to identify and arrest only the primary aggressor,[10] thus limiting dual arrests.[11] Moreover, Chapter 246 specifies that these arrest policies are to be developed with input from local domestic violence agencies, and that they must be adopted and implemented by July 1, 1996.[12]

COMMENT

The purpose of Chapter 246 is not only to strengthen domestic violence laws, but also to conform these laws to federal standards.[13] Ensuring that California's domestic violence laws include policies that encourage mandatory arrests, discourage dual arrests, prohibit issuing mutual restraining orders except upon detailed findings, will allow California's public and non-profit agencies to be eligible for federal funding under the Violence Against Women Act.[14]

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10. *See* CAL. PENAL CODE § 13701(b) (amended by Chapter 246) (specifying that the primary aggressor is the most significant aggressor, not necessarily the first aggressor); *id.* (providing that when identifying the primary aggressor, officers must consider (1) the intent of the law which is to protect victims of domestic violence from continuing violence, (2) whether any threats created fear of physical injury, (3) whether there has been a history of domestic violence between the individuals involved, and (4) whether the individuals acted in self-defense).

11. *Id.*; *see id.* (stating that written arrest policies are to discourage, but not prohibit, dual arrests); *cf.* MINN. STAT. ANN. § 629.342(2)(a) (West Supp. 1995) (requiring each law enforcement agency to develop, adopt, and implement a written policy regarding procedures for arrests during domestic violence incidents and that the policy is to discourage dual arrests).

12. CAL. PENAL CODE § 13701(b) (amended by Chapter 246); *see id.* (stating that local law enforcement agencies are encouraged to consult domestic violence experts, such as staff of local battered women shelters).

13. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 591, at 1, 2 (June 28, 1995); *see* Letter from Lily Ring Balian, Chairperson, Commission of the Status of Women, to Members of the California Assembly (June 12, 1995) (copy on file with the *Pacific Law Journal*) (stating that the provision of SB 591 would not only provide more protection for victims of domestic violence, but would help to ease California's share of the financial burden by making California eligible for federal funding); *see also* Letter from Karen Elcaness, San Francisco Violence Consortium, to Senator Patrick Johnston (Apr. 17, 1995) (copy on file with the *Pacific Law Journal*) (asserting that SB 591 will put California in compliance with the Violence Against Women Act, thereby releasing federal funds to help eradicate domestic violence). *But see* Susan Sward, *Arrests Soar in Domestic Abuse Cases Vast Change in Police Attitudes in Past 10 Years*, S.F. CHRON., Mar. 29, 1993, at A1 (citing University of Maryland criminology professor Lawrence Sherman's research which found that mandatory arrest policies backfire in poor communities, because often more violence occurs after families are reunited).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 591, at 2 (June 6, 1995); *see* 42 U.S.C.A. 3796hh(c) (West 1994) (providing that states are eligible for grants if their laws encourage mandatory arrest of domestic violence offenders based on probable cause or violations of protective orders, discourage dual arrests, and prohibit issuance of a mutual restraining order, except upon detailed findings); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 591, at 2 (May 4, 1995) (stating that the Federal Violent Crime Control and Law Enforcement Act of 1994 authorizes $120 million in grant money to states, local governments and indian tribes to encourage arrest of domestic violence offenders); Sarah Hausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215-16 (1988) (providing evidence that arrests reduce incidents of domestic violence); Genaro C. Armas, *State Granted Aid to Combat Domestic Violence*, STS. NEWS SERV., June 20, 1995, *available in* LEXIS, Nexis Library, Curnws File (reporting that Pennsylvania was awarded $426,000 under the Violence Against Women Act); *Grant to Aid Victims of Domestic Violence*, CHARLESTON DAILY MAIL, June 13, 1995, at P2A (stating that West Virginia was awarded $426,000 under the Violence Against Women Act); *Maine Awarded $426,000 to Curb Problem of Violence Against Women About $100,000 Will Go to State's Nonprofit Groups Serving Victims of Crimes*,

Additionally, Chapter 246 ensures that protective orders issued in California meet the necessary requirements that enable them to be honored by other states under the full faith provisions of the Violence Against Women Act.[15]

Timothy J. Moroney

Family; false allegations of child abuse

Family Code § 3022.5 (new).
SB 558 (Campbell); 1995 STAT. Ch. 406

Under existing law, if a court determines that an accusation of child abuse[1] or neglect,[2] made during a child custody proceeding, is false and the person making the accusation knew it to be false at the time, the court may impose reasonable monetary sanctions and reasonable attorneys' fees incurred in recovering the sanctions against the person making the accusation.[3]

BANGOR DAILY NEWS, June 9, 1995, *available in* LEXIS, Nexis Library, Cumws File (stating that Maine was awarded $426,000 under the Violence Against Women Act); Letter from Minouche Kandel, Chair, County of Santa Clara Legislation Committee, Domestic Violence Council, to Senator Hilda Solis (June 20, 1995) (copy on file with the *Pacific Law Journal*) (stating that SB 591 makes California state and local governments eligible for $120 million in federal funding to help local law enforcement agencies improve their response to domestic violence incidents). *But see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 591, at 3 (June 6, 1995) (opining that forcing peace officers to make arrests will lead to confusion regarding who should be arrested); Elizabeth Fernandez, *How S.F. Police Handle Domestic Violence; City's Model Program Criticized for Falling Short*, S.F. EXAMINER, Mar. 22, 1995, at A1 (asserting that many police officers do not know much about domestic violence, so it is hard for them to use discretion).

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 591, at 2 (June 6, 1995); *see* 18 U.S.C.A. § 2265(b)(2) (West Supp. 1995) (providing that a protective order issued after reasonable notice and an opportunity to be heard is to be accorded full faith and credit); *id.* (stating that for ex parte orders, notice and the opportunity to be heard must be in accordance with state or tribal law, and in all cases within a reasonable time); *cf.* Linda M. Demelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1329, 1329-30 (1994) (stating that prior to the 1970's, child custody determinations were not accorded full faith and credit by the courts of other states, and thus the Parental Kidnapping Prevention Act, enacted by Congress in 1980, mandates that child custody determinations are entitled to full faith and credit in other states).

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1. *See* CAL. PENAL CODE § 11165.6 (West Supp. 1995) (defining "child abuse" as the following: (1) a physical injury inflicted by other than accidental means on a child by another person, (2) sexual abuse of a child or any act or omission proscribed by Penal Code §§ 273a or 273d, or (3) neglect of a child or abuse in out-of-home care); *id.* (providing that child abuse does not include a mutual affray between minors nor an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a "peace officer").

2. *See id.* § 11165.2 (West 1992) (defining "neglect" as "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare"); *id.* (noting that the term includes both acts and omissions of the responsible person).

3. CAL. FAM. CODE § 3027(a) (West Supp. 1995); *see id.* (specifying that a "person" under this section includes a witness, a party, or a party's attorney); *id.* (providing that the sanctions the court may impose are not to exceed the total of all costs incurred by the party accused as a result of defending the accusation); *see*

Existing law additionally provides that a person who commits perjury is guilty of a felony, punishable by imprisonment in the state prison for two, three, or four years.[4]

Chapter 406 adds to existing law by providing that a motion by a parent for reconsideration of an existing child custody order must be granted if the motion is based on the fact that the other parent was convicted of a crime in connection with falsely accusing the moving parent of child abuse.[5]

COMMENT

Currently, cases of child abuse tend to fall into three categories: (1) those in which there is clearly no abuse,[6] (2) those in which the abuse is obvious,[7] and (3) those numerous cases in which it is very difficult to evaluate whether or not any abuse occurred.[8]

While accusations of child abuse are apparent, research involving the question of the truthfulness of accusations of abuse reveal that false accusations

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also id. § 3027(b) (West Supp. 1995) (stating that on motion by any person requesting sanctions, the court must issue an order to show cause why the requested sanctions should not be imposed); *id.* (providing that the order to show cause must be served on the person against whom the sanctions are sought, and a hearing must be scheduled by the court to be conducted at least 15 days after the order is served); *id.* § 3027(c) (West Supp. 1995) (noting that the sanction provided is in addition to any other remedy provided by law); *cf.* 1995 Okla. Sess. Laws 846(D)(2) (providing that once a court determines that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose a fine not exceeding $5000, and reasonable attorney fees incurred in recovering the sanctions, against the person making the accusation); TENN. CODE ANN. § 37-1-413 (1991) (providing that any person who knowingly and maliciously reports, or causes, encourages, aids, counsels, or procures another to report, a false accusation of child abuse is guilty of a felony).

4. CAL. PENAL CODE § 126 (West 1988).

5. CAL. FAM. CODE § 3022.5 (enacted by Chapter 406); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 558, at 1-2 (June 27, 1995) (stating that the rehearing will be automatic by a motion from one parent demonstrating that the other had been convicted of making a false accusation of child abuse against him or her); *cf.* GA. CODE ANN. § 19-9-4(a) (Michie 1991) (allowing the court to direct the appropriate family and children services agency to investigate the home life and home environment of each of the parents upon motion of either party in an action involving the award of child custody between parents of the child, when the motion contains a specific recitation of actual abuse, neglect, or other overt acts which have adversely affected the health and welfare of the child).

6. *See In re* A.L.W., 590 So. 2d 984, 985 (Fla. Dist. Ct. App. 1991) (holding, as a matter of law, that because the parents had substantially complied with a performance agreement and continued their parental involvement with their child, no one could reasonably have found the evidence of child abuse to be clear and convincing).

7. *See* People v. Mills, 1 Cal. App. 4th 898, 910-11, 2 Cal. Rptr. 2d 614, 622 (1991) (holding that the bruises found on the victim's nose, eyes, and groin were clear indications of child abuse).

8. Jim Phillips, *Meeting Explores Complex Nature of Child Sexual Abuse,* AUSTIN AM.-STATESMAN, Mar. 28, 1994, at B1; *see* State v. Reidhead, 705 P.2d 1365, 1371 (Ariz. Ct. App. 1985) (stating that research regarding the truthfulness of accusations of sexual abuse demonstrates that false accusations are rare). *See generally* Diana Younts, *Constitutional Perspectives: Note: Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions,* 41 DUKE L.J. 691, 693 (1991) (discussing how child abuse was once a largely ignored and unrecognized crime; however, since the 1970's there has been a continual growing awareness of child sexual abuse, and reports have greatly increased).

are rare.[9] However, the repercussions of false accusations may leave an impact on the child as severe as if the abuse truly has occurred.[10]

Chapter 406 was enacted in order to discourage false accusations of child abuse in family law disputes.[11]

Laura J. Roopenian

Family; foster care

Welfare and Institutions Code § 11404.2 (new).
SB 321 (Russell); 1995 STAT. Ch. 418

Existing law provides for the Aid to Families with Dependent Children-Foster Care (AFDC-FC) program under which each county provides payments on behalf of low-income children in foster care.[1]

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9. *Reidhead*, 705 P.2d at 1371; *see id.* (setting forth the following research examples regarding false accusations of child abuse: (1) in a study of 46 family sexual abuse victims, only one case of a false accusation by a child was found; (2) children commonly do not make up stories about having been sexually molested because it is not in their interests to do so, and children do not usually have the sexual knowledge to create such an accusation).

10. Phillips, *supra* note 8; *see id.* (describing how some children who were not victimized may become convinced that the charges against the other parent are true and will show signs of post traumatic stress syndrome); *see also* Bird v. W.C.W., 868 S.W.2d 767, 772 (Tex. 1994) (explaining how false accusations of child abuse can be devastating in that they destroy reputations, relationships, and lives).

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 558, at 2 (June 27, 1995); *see In re* Marriage of Dreesbach, 875 P.2d 1018, 1020 (Mont. 1994) (holding that the trial court properly found the mother in contempt when she levied false accusations of sexual and physical abuse against the children by their father without reasonable justification in a calculated attempt to deprive him of contact with his children); *see also In re* Anne P., 199 Cal. App. 3d 183, 195, 244 Cal. Rptr. 490, 497 (1988) (discussing a custody case in which the father was requesting sole custody on the ground that the original shared custody agreement had not worked out, that the mother was unwilling to share custody with the father, and that the mother had made false accusations against the father which had caused their daughter to be exposed to the trauma of litigation); *id.* at 191, 244 Cal. Rptr. at 494 (discussing how, as the trial progressed, it became evident that the child was severely depressed and more contact with her parents was desperately needed); *id.* at 192, 244 Cal. Rptr. at 495 (noting how the child's psychological disturbance was primarily caused by the ongoing and unrelenting struggle between her parents). *See generally* David Behrens, *Incest Author Sees New Peril; Do Mothers Who Accuse Spouses Risk Custody?*, NEWSDAY, Nov. 22, 1994, at 2 (noting that the National Center for Child Abuse and Neglect shows the number of child abuse cases rising from 6000 in 1976 to 74,000 in 1983 and more than 130,000 in 1991); Jerry Dubrowski, *Michigan Custody Case Focuses on Child Abuse Charges*, REUTERS, LTD., Aug. 9, 1994, at 1 (discussing a continuing custody battle in which the father has accused the daughter's mother of abuse and neglect in order to get custody); Phillips, *supra* note 8 (revealing that young children who were not victimized may often become convinced that the charges against the other parent are true and may suffer the same lifelong effects as actual victims); Younts, *supra* note 8, at 707 (discussing how inappropriate interviewing techniques and improper investigations such as the use of anatomically detailed dolls, when investigating child abuse, can lead to false allegations); *id.* (revealing that even small material and psychological rewards are effective enough to motivate a child to lie about abuse).

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1. 42 U.S.C.A. §§ 601-617 (West 1991 & Supp. 1995); CAL. WELF. & INST. CODE §§ 11200-11517.2 (West Supp. 1995); *see id.* § 11400(f) (West Supp. 1995) (defining "foster care" as the 24-hour out-of-home care provided to children whose own families are unable or unwilling to care for them, and who are in need

Existing law provides that a qualified child[2] must be placed in one of several specified housing environments in order to be eligible for AFDC-FC payments.[3] For instance, a child will be eligible for AFDC-FC if placed in the home of a relative, provided the home has been documented by the social worker or probation officer as being suited to the needs of the child and the child is otherwise eligible for federal financial participation in the AFDC-FC payments.[4]

Chapter 418 provides that when a dependant child[5] resides with a relative

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of temporary or long-term substitute parenting); *see also* John F. Gillespie, Annotation, *Status and Rights of Foster Children and Foster Parents Under Federal Constitution*, 53 L. Ed. 2d 1116, 1117 (1978 & Supp. 1994) (specifying that foster care has been more strictly defined as a child welfare service which provides substitute family care for a child when the child's family can not care for the child, and when adoption is neither desirable nor possible). *See generally* Martin Guggenheim, *State Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bernstein, 56 BROOK. L. REV. 603, 605-10 (1990) (outlining the history of New York's Child Welfare System); Marla Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 344 (1993) (reporting that though kinship foster care was practically non-existent in prior decades, over 22,000 foster children were being cared for by relatives in New York City by 1990); *id.* (noting that 45.8% of the total number of children in New York City in foster care were being cared for by relatives); *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 359, 667, 675 (1982) (discussing the use of foster care as a permanent placement for children).

2. *See* CAL. WELF. & INST. CODE § 11401 (West Supp. 1995) (providing the conditions for which children are eligible for aid).

3. *Id.* § 11402 (West Supp. 1995).

4. *Id.* § 11402(a) (West Supp. 1995); *see id.* § 11402(b)-(g) (West Supp. 1995) (adding that a child may also be eligible for AFDC-FC if placed in one of the following housing environments: (1) the licensed family home of a non-relative; (2) a licensed group home, pursuant to California Health and Welfare Code § 11400(h), so long as : (a) the placement worker has documented that the placement is necessary to meet the treatment needs of the child and (b) the facility offers the appropriate treatment services; (3) the home of a former or current non-related legal guardian when the guardian of a child who is otherwise eligible for AFDC-FC has been dismissed due to the child's reaching the age of 18 years old; (4) a home certified by a social worker or probation officer to satisfy licensing standards, provided that a family home license has been applied for and has not been denied; (5) an exclusive-use home; (6) a licensed transitional housing placement facility pursuant to California Health and Safety Code §§ 1559.110, 11400); *see also* CAL. HEALTH & SAFETY CODE § 1559.110 (West Supp. 1995) (specifying the criteria of licensed transitional housing placement facility programs); *id.* § 11400(h) (West Supp. 1995) (defining a "group home" as a nondetention privately operated residential home, organized and operated on a nonprofit basis only, of any capacity, that provides services in a group setting to children in need of care and supervision).

5. *See* 42 U.S.C.A. § 606(a) (West 1991) (defining "dependent child" as a needy child who meets the following criteria: (1) the child has been deprived of parental support or care because of the death, or continued absence from the home or physical or mental incapacity of a parent; and (2) the child is living with either the child's father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepsister, stepbrother, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives at either the child's or the relative's home); *id.* (specifying that the child must also meet the following requirements: (1) the child must not have reached the age of 18 years, or (2) at the option of the state, under 19 years and a full-time secondary school student (or the equivalent level vocational or technical training school), if, before he attains 19 years of age, he may reasonably be expected to complete the program of such secondary school (or such training)); *cf.* COLO. REV. STAT. § 26-2-103(4)(a) (1994) (describing a "dependant child" as a needy child under the age of 18 years who has been deprived of parental support or care by reason of the death, the continued absence from the home, the physical or mental incapacity, or the unemployment of a parent, as determined under standards prescribed by the state department through rules and regulations, and who is living with a person related to such child within the fifth degree in a place of residence maintained by one or more of such relatives as his, her, or their own home, and whose relatives or other person liable under the law for the child's support are not able to provide adequate care and support of such child without assistance payments under a program for aid to families with dependant children); MASS. GEN. LAWS ANN. ch.

caretaker who applies to adopt the child, the caretaker is, notwithstanding state law or regulation, eligible to receive foster care payments.[6] This period of eligibility extends from the point at which the child's parental rights have been terminated and until the adoption of the child is finalized.[7] The finalization or denial of the adoption terminates this payment.[8]

COMMENT

Chapter 418 was enacted to remove a financial impediment to adoptions of foster care children by a relative.[9] Under prior law, during the foster care adoption process, relatives became ineligible for continued foster care grants when parental rights were terminated, even if they were trying to adopt a child, unless their

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118, § 1 (West 1993) (defining "dependant child" as either: (1) a needy child, deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity or the unemployment of a parent, and who is living with a parent in the parent's place of residence and who is under the age of 18 years or (2) a person who is 18 years old and a full-time secondary school student and who is reasonably expected to complete such program before reaching age 19); N.M. STAT. ANN. § 27-2-6(a) (Michie 1992) (specifying that public assistance is provided to a person who meets the following criteria: (1) the child must be under the age of 18 years, or under the age of 19 years and a full-time student who will graduate prior to turning 19; (2) the child must be deprived of parental support or care by the death, continued absence from the home, or physical or mental incapacity of a parent; (3) the child must be living with a relative, whether natural or adopted, in a place or residence maintained by the relative; or the child must have lived with a relative within the six months prior to the month in which court-ordered foster care proceedings were initiated and the child must have also been eligible for A.F.D.C. at any time during the six-month period).

6. CAL. WELF. & INST. CODE § 11404.2 (enacted by Chapter 418).

7. *Id.*; *see id.* (providing that parental rights may be terminated by relinquishment of court order).

8. *Id.*

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 321, at 2 (July 10, 1995); *see id.* (specifying that in California, many grandparents are taking care of their grandchildren because the children have been removed from their parents' homes due to parental abuse or neglect); *id.* (indicating that many caregiver relatives wished to adopt the child, but due to regulations, care payments were terminated during the interim between the termination of parental rights and the completion of the adoption); Vivien Kellerman, *Idea of 'Grandparents Rights' Is Gaining Wider Attention*, N.Y. TIMES, Dec. 18, 1994, at 8 (reporting that in 1990 there were 41,929 children living with their grandparents in Long Island, New York); Lawrence Kutner, *Grandparents Often Raising Grandchildren*, SUNDAY GAZETTE MAIL (Charleston, W. Va.), Apr. 17, 1994, at P (Life) (reporting that according to 1990 Census reports, approximately 3.2 million children in the United States were living with their grandparents or other relatives, an increase of 40% since 1980); *id.* (specifying that drug abuse is the single greatest factor in forcing grandparents to care for their grandchildren); Sandra L. Lee, *Children Separated from Their Natural Parents, Sometimes by Cruelty of Fate, Are Finding New Homes with . . . Grandparents*, LEWISTON MORNING TRIB., Feb. 13, 1994, at 1A (noting that one couple spent $40,000 fighting the state of Idaho for the right to adopt their own grandchildren); Kevin McDermott, *Foster Care by Relatives Scrutinized*, STATE J.-REG. (Springfield, Ill.), Mar. 2, 1995, at 9 (discussing a proposed plan in Illinois to reduce foster care payments for relatives providing foster care, as a result of strong suspicions that many people were abusing the foster care system to gain additional income); Kay Miller, *Raising Their Children's Children*, STAR TRIB. (Minneapolis), Dec. 5, 1993, at 1E (reporting that in many inner cities that have problems with drugs, violence, and AIDS, 30-50% of school children are in the care of their grandparents). *See generally* Abigail English, *The HIV-AIDs Epidemic and the Child Welfare System: Protecting the Rights of Infants, Young Children, and Adolescents*, 77 IOWA L. REV. 1509, 1549 (1992) (reporting that although placement with an extended family member is the first choice for many children with HIV infection, the financial benefits are limited for children placed with relatives acting as foster parents); *id.* at n.211 (noting that a federal study of children with HIV infection in foster care found that between 20-40% of children were placed with an extended family member).

home qualified for certification as a licensed foster care home.[10] Chapter 418 removes this obstacle by allowing the continuation of foster care payments during the period between the termination of parental rights and the final adoption—even though the home is not certified as a licensed foster care home.[11]

Molly J. Mrowka

Family; guardians and convervators—removal of the two-year requirement of pending death or terminal condition

Probate Code § 2105 (amended).
AB 1104 (Sher); 1995 STAT. Ch. 278

Under existing law, the court in its discretion may appoint two or more joint guardians or conservators for a ward or conservatee.[1] Additionally when joint guardians or conservators are appointed, each will qualify in the same manner as a sole guardian or conservator.[2]

Existing law provides that if one of the joint guardians or conservators dies, is removed, or resigns, the powers and duties continue in the remaining joint

10. CAL. WELF. & INST. CODE § 11404 (West 1991). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 20 (9th ed. 1985 & Supp. Pamphlet 1994) (differentiating between foster family homes and certified family homes); *id.* (specifying that foster family homes are considered to be private residences subject to separate regulations from those governing community care facilities).

11. CAL. WELF. & INST. CODE § 11404.2 (enacted by Chapter 418); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 321, at 1 (May 8, 1995). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* § 20(a) (9th ed. 1989 & Supp. Pamphlet 1995) (declaring that the policy of the Legislature is that the state has a responsibility to attempt to ensure children a chance to have a healthy and happy life); *id.* (noting that an alternate permanent living situation such as adoption or guardianship is more suitable to a child's well-being than foster care).

1. CAL. PROB. CODE § 2105(a) (amended by Chapter 278); *see id.* (noting that the court may appoint for a ward or conservatee two or more joint guardians or conservators of the person, estate, or both); *cf.* ALA. CODE § 26-2A-76 (1992) (authorizing the court to appoint as guardian any person whose appointment would be in the best interest of the minor); VT. STAT. ANN. tit. 14, § 2645 (1990) (providing that at the request of a minor or person interested in the welfare of the minor, the probate court may appoint a guardian for the minor in the following cases: (1) when the minor has no living parent authorized to act as guardian; (2) when the parent is under guardianship or shown to be incompetent or unsuitable to have the custody of the minor; (3) when the parent of the minor has resided outside the state for three years and has not contributed to the minor's support during such time, provided the minor has resided in the state three years when the appointment is made; (4) when no parent objects and transfer of custody is in the best interest of the minor and is not solely to establish a residence for school purposes; or (5) when the minor has a living parent and the minor is the owner of real or personal property). *See generally* 35 CAL. JUR. 3D *Guardianship and Conservatorship* § 10 (1988) (discussing the appointment of guardians); 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 893 (9th ed. 1990) (discussing California Probate Code § 2105).

2. CAL. PROB. CODE § 2105(b) (amended by Chapter 278).

guardians or conservators until further appointment is made by the court.[3] Additionally, where joint guardians or conservators have been appointed and one or more meets specified conditions, the court may, by order with or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.[4]

Moreover, under existing law if a custodial parent has been diagnosed as having a terminal condition, the court, in its discretion, may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the minor.[5] Existing law provides, however, that the appointment will not be made over the objection of a noncustodial parent without a finding that the noncustodial parent's custody would be detrimental to the minor.[6]

Under prior law a "terminal condition" was defined as an incurable and irreversible condition that, without the administration of life-sustaining treatment, would, within reasonable medical judgment, result in death within two years.[7]

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3. *Id.* § 2105(d) (amended by Chapter 278); *cf.* OKLA. STAT. ANN. tit. 30, §4-503 (West 1991) (noting that on the death of one of two or more joint guardians, the survivor retains power until further appointment is made by the court).

4. CAL. PROB. CODE § 2105(e) (amended by Chapter 278); *see id.* (stating that the specified conditions occur where joint guardians or conservators have been appointed and one or more are: (1) out of state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving); *see also id.* § 2105(c) (amended by Chapter 278) (providing that subject to Probate Code § 2105(d), (e) a majority of guardians or conservators must concur to exercise a power; this means both must concur if there are only two); *cf.* S.D. CODIFIED LAWS ANN. § 29A-5-416 (Supp. 1995) (providing that if there is more than one guardian or conservator, a majority must concur to exercise a power unless one of them delegated powers to another guardian or conservator or the court has authorized the exercise of powers by less than a majority). *See generally* 39 AM. JUR. 2D, *Guardian and Ward* § 218 (1968) (providing that where two or more persons are appointed guardians, their authority is joint and several; if one of them dies, resigns, or refuses to act, then all rights and powers vest in the others; where two are appointed jointly, either may qualify independently, and will have full power as guardian if the other does not qualify).

5. CAL. PROB. CODE § 2105(f) (amended by Chapter 278); *see id.* (noting that the terminal condition must be evidenced by a declaration executed by a licensed physician).

6. *Id.*; *see id.* (citing California Family Code § 3041 as the standard for determining when a noncustodial parent's custody would be detrimental to the minor); *see also* CAL. FAM. CODE § 3041 (West 1994) (instructing that before making an order granting custody to anyone other than a parent, without the consent of the parents, the court must find that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the child's best interests); *id.* (providing that any allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, will not appear in the pleadings); *id.* (granting the court discretion to exclude the public from the hearing on the custody issue); Steven L. v. Dawn J., 561 N.Y.S.2d 322, 324 (N.Y. Fam. Ct. 1990) (expressing that it would not be in the child's best interest to be exposed to any person who had an easily contagious disease nor would it be in the best interest of the child to be left in the sole care of a person who was seriously incapacitated because of an illness or disease).

7. 1993 Cal. Legis. Serv. ch. 978, sec. 2, at 4518 (amending CAL. PROB. CODE § 2105(f)); *see* CAL. PROB. CODE § 2105(f) (amended by Chapter 278) (providing that Probate Code § 2105 is not to be construed to broaden or narrow the definition of the term "terminal condition," as defined in Health and Safety Code § 7186(j)); *cf.* LA. REV. STAT. ANN. §1299.58.2(10) (West 1992) (defining a "terminal and irreversible condition" as "a continual profound comatose state with no reasonable chance of recovery" or "a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death"); ME. REV. STAT. ANN. tit. 18-A, § 5-701(b)(9) (West Supp. 1994) (defining "terminal condition" as an incurable and irreversible condition that, in the opinion of the attending physician, will result in death wihtin a relatively short time without the administration of life-sustaining treatment); S.C. CODE ANN. § 44-77-20(4) (Law. Co-op. Supp.

Chapter 278 modifies the definition of a "terminal condition" by removing the requirement that death must result within two years.[8]

COMMENT

Experience has shown that joint guardianship is an important tool used in securing the stability of families who are affected by HIV.[9] As both the adult and juvenile AIDS populations grow it is anticipated that petitions for guardianships and conservatorships will increase.[10] Unfortunately, in those instances where no guardian has been appointed prior to the death of a terminally ill parent, the court will be making a decision which should have been made by the biological parents.[11] Often times families who have been affected by AIDS do not want to relinquish their parental rights simply by appointing a guardian.[12]

Prior to Chapter 278, one of the greatest obstacles with which parents were

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Pamphlet 1994) (defining a "terminal condition" similarly to that of Maine).

8. CAL. PROB. CODE § 2105(f) (amended by Chapter 278).

9. Letter from Jeffrey Selbin, Project Coordinator, HIV/AIDS Law Project, to Assemblymember Philip Isenberg (Apr. 17, 1995) (copy on file with the *Pacific Law Journal*); *see id.* (suggesting that family stability has been achieved by ensuring that if a "terminally ill" parent dies, a third party has already been appointed and is now ready to care for the parent's child); *see also* Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2027 (1993) (noting that California continues to be an epicenter for AIDS and leads the nation in addressing and attempting to resolve AIDS-related ethical and political issues, such as developing services for people with HIV infection or AIDS).

10. *See* Steve Adubato, Jr., *AIDS Families Need a Standby Guardian Law*, THE RECORD, Aug. 23, 1994, at B7 (expressing how there is a growing number of women with AIDS who must think about who will take care of their kids when they become sick or die); *see also* Dara N. Sharif, *AIDS a Low-Key Issue in 94, Activists Say Public Apathy Threatens Funding, Raises Risk*, THE RECORD, Dec. 27, 1994, at A3 (providing the following statistics regarding the AIDS epidemic in New Jersey: (1) New Jersey ranks fifth in the country for reported cases of AIDS and third in the nation, behind New York and Florida, in AIDS reported in children under age 13; (2) the total number of new cases in 1994 was 4,273; (3) 24,015 cases of AIDS have been reported in New Jersey since 1980; and (4) only New York, California, Florida, and Texas have more reported cases of AIDS than New Jersey).

11. Beth Frerking, *Too Scary for Words; Few Parents Plan for Disaster by Designating Guardians for Their Children*, ST. LOUIS POST-DISPATCH, Jan. 18, 1995, at F1; *see id.* (expressing how one judge believes that the court will be making the decision that should have been made by the biological parents); *see also id.* (reporting that the estimates of how many parents actually designate guardians is from 5% to 25%); *id.* (stating how the wealthy have always addressed guardianship issues as part of their complicated estates); *id.* (discussing how the passage of a New York state law, which allowed AIDS-infected patients and other terminally ill single parents to choose "standby" guardians for their children, was provoked by the increase in the number of babies being born to single mothers with AIDS); Lawrence Van Gelder, *New Jersey Daily Briefing; Governor Signs Health Bills*, N.Y. TIMES, April 12, 1995, at B1 (stating that Governor Christine Todd Whitman signed a bill into law which allows parents who are terminally ill or facing a disability to appoint guardians for their children without giving up parental rights); *id.* (specifying that the new law was enacted with the goal of preventing AIDS from tearing families apart). *See generally* Alice Herb, *The Hospital-Based Attorney as Patient Advocate*, HASTINGS CENTER REPORT, Mar. 1995, at 13 (discussing how AIDS has both medical and legal complications for patients); *id.* (explaining how it is difficult for parents who are ill to consider planning their children's future because concerns about the children being left at home and conflicts with other family members often leave AIDS patients uncommunicative).

12. *See* Sarah Talalay, *AIDS Patients Make Plans for Their Children's Lives*, TIMES-PICAYUNE (New Orleans), Sept. 4, 1994, at A16 (expressing how one AIDS parent, because of her desire to be with her child as much as possible while she was still healthy, looked to a standby guardian provision which would allow her to appoint a guardian without immediately severing her parental rights).

faced when planning for the future care of their children was the requirement that a terminally ill parent had to establish that he or she had two years or less to live by way of medical declaration.[13] Additionally, many women have struggled when trying to establish homes for their children once they discovered that they were infected with the AIDS virus.[14]

Chapter 278 addresses a parent's concern for his or her children by allowing an earlier appearance of a joint guardian in a child's life and thus promoting certainty at a time when the child is faced with the loss of a parent with a terminal condition.[15] The enactment of Chapter 278 also promotes early custody planning and eliminates the difficult medical speculation in anticipating when death will occur.[16]

Laura J. Roopenian

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13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1104, at 2 (July 21, 1995); *see id.* (stating that the sponsor of AB 1104, Legal Services for Children, Inc., believes that the two-year requirement was counter to the underlying goal of promoting early planning by families who were already faced with the trauma of a terminally ill parent).

14. *See All Things Considered: Chicago Woman with AIDS Fights for a Home for Her Child* (NPR, Nov. 10, 1993) (transcript on file with the *Pacific Law Journal)* (discussing the struggle one woman experienced when she was diagnosed as having AIDS and was searching for a means of appointing a standby guardian for her son); Herb, *supra* note 11 (explaining the various struggles and complications which an AIDS patient experienced while trying to plan for the custody of her four children; for instance, avoiding the placement of her children with their father whom she believed to be a drug dealer, having to deal with her youngest son also having AIDS, or her attempt to keep all four of her children together upon her death).

15. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1104, at 2 (May 3, 1995); *see* CAL. PROB. CODE § 2105(f) (amended by Chapter 278) (noting the Legislature's intent that a parent with a terminal condition be able to make arrangements for the joint care, custody, and control of his or her minor children in order to minimize the emotional stress of, and disruption for, the children whenever the parent is incapacitated or upon the parent's death, and to avoid the need to provide a temporary guardian or place the minor children in foster care, pending appointment of a guardian, as might otherwise be required).

16. *See* Letter from Kristin Neil, Standby Guardianship Working Group to Assemblymember Phillip Isenberg (Apr. 14, 1995) (copy on file with the *Pacific Law Journal*) (stating that the period of time before a person dies of HIV or AIDS is an uncertain prognosis given the continual change in knowledge about the progression of HIV disease); *id.* (explaining how the statutory two-year time limit on the lives of terminally ill parents creates unnecessary barriers and delays in formalizing a custody plan); *see also In re Adoption of Johnson*, 612 N.E. 2d 569, 574 (Ind. Ct. App. 1993) (Sharpnack, dissenting) (discussing how an "adoption/custody specialist" noted that both parents were HIV-positive, and although the average time is about 10 years before a person develops full blown AIDS, no one can predict exactly when this will occur); Diana Sugg, *AIDS Czar Wants to Erase Disease's Stigma*, SACRAMENTO BEE, Oct. 26, 1993, at B5 (discussing how many women are not diagnosed with the AIDS virus until they are very sick because of a lack of information among doctors about certain AIDS symptoms specific to women).

Family; mobilehomes—immediate family

Civil Code § 798.35 (amended).
AB 283 (Cortese); 1995 STAT. Ch. 24

Existing law regulates mobilehomes[1] and mobilehome parks[2] under the Mobilehome Residency Law.[3] Under existing law, the management[4] of a mobilehome park cannot assess a fee upon a homeowner[5] based on the number of immediate family members living in the home.[6] Prior law defined immediate family members to include the homeowner, his or her spouse, their parents and their children.[7] Chapter 24 redefines immediate family to include the grandchildren of the homeowner who are under eighteen.[8]

COMMENT

Existing law permits the management of a mobilehome park to charge a guest fee to a homeowner who has another person staying with him or her for more than twenty consecutive days or more than thirty days in a one year period.[9] There are, however, a few exceptions to this rule. A homeowner who lives alone

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1. *See* CAL. CIV. CODE § 798.3(a), (b) (West Supp. 1995) (defining a "mobilehome" as a structure designed for both human habitation and being moved on streets or highways, including manufactured homes, trailers, and certain types of recreational vehicles); *cf.* NEV. REV. STAT. ANN. § 118B.015 (Michie 1993) (defining "mobile home" as a vehicular structure without independent motor power but capable of being transported by a motor vehicle and designed for year-round residence when connected to utilities).

2. *See* CAL. CIV. CODE § 798.4 (West 1982) (defining a "mobilehome park" as a tract of land designed to accomodate mobilehomes and where more than one mobilehome site is located for human habitation); *cf.* NEV. REV. STAT. ANN. § 118B.017 (Michie 1993) (defining "mobile home park" as a tract of land where lots are rented or held out for rent to more than one mobile home except for areas where more than half of the lots are rented overnight or to recreational vehicles for less than three months, or where the mobile homes are used for recreational purposes rather than a permanent residence).

3. CAL CIV. CODE. § 798.88 (West Supp. 1995).

4. *See id.* § 798.2 (West 1982) (defining "management" as the owner, or authorized agent or representative, of a mobilehome park).

5. *See id.* § 798.9 (West Supp.1995) (defining a "homeowner" as one who holds a tenancy in a mobilehome park under a rental agreement).

6. *Id.* § 798.35 (amended by Chapter 24).

7. 1982 Cal. Stat. ch. 1397, sec. 17, at 5322 (amending CAL. CIV. CODE § 798.35); *cf.* CAL. FIN. CODE § 15100(c) (West 1989) (defining "family" as a marital couple or any head of a household and any dependents living with them or away at school but maintaining a principal residence with the household). *See generally* City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 131-34, 610 P.2d 436, 440-42, 164 Cal. Rptr. 539, 543-44 (1980) (invalidating a zoning ordinance which limited households to no more than five unrelated individuals because there was no evidence that such a dwelling would inhibit the city's goals of guarding the public's health, safety, comfort, convenience, and general welfare any more than a house of more than five biologically related people).

8. CAL. CIV. CODE § 798.35 (amended by Chapter 24); *see id.* (adding language which limits the classification of immediate family members to those listed in the statute).

9. *Id.* § 798.34(a) (West Supp. 1995); *cf.* ARIZ. REV. STAT. ANN. § 33-1414(A)(5) (1994) (permitting the landlord of a mobile home park to charge a guest fee for any person who stays with a tenant for over 14 days in any calendar month); WASH. REV. CODE ANN. § 59.20.060(2)(f) (West 1990) (allowing guest fees to be charged only for the guests of tenants who stay for over 15 days in any 60-day period).

may share the mobilehome with one other person without being subject to a guest fee.[10] A senior homeowner[11] also cannot be assessed a guest fee for a live-in health care provider.[12] The other exemption is for members of a homeowner's immediate family.[13]

Chapter 24 was drafted after a homeowner was charged a $300 per month guest fee when he allowed his daughter and her child to stay with him while the mother recovered from surgery.[14] The amendments made by Chapter 24 would prevent such situations in the future.

Legislative regulation of family relations may raise constitutional concerns regarding substantive due process rights. In *Village of Belle Terre v. Borass*,[15] the United States Supreme Court upheld a zoning ordinance which restricted the types of people who could live together in certain kinds of housing when it regulated unrelated people.[16] Justice Douglas stated that it is within a state's police powers to regulate private property where the validity of the legislation's purpose is "fairly debatable."[17] Zoning ordinances which are created to prevent disasters, overcrowding, or nuisances are examples of valid regulations of private property.[18]

In *Moore v. City of East Cleveland*,[19] however, the Court struck down an ordinance which narrowly defined those family members who could occupy a single-family dwelling.[20] The Court held that when the living arrangements of a family are at issue, the purposes of the state's statute are subject to greater scrutiny.[21] By expanding the definition of immediate family to include grandchildren, Chapter 24 directs the California Mobilehome Residency Law

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10. CAL. CIV. CODE § 798.34(b) (West Supp. 1995).

11. *See id.* §798.34(c) (West Supp. 1995) (defining "senior homeowner" as a homeowner who is age 55 or over).

12. *Id.*; *see id.* (requiring that the health care provider be over 18 years old and acting according to a physician's written treatment plan); *cf.* WASH. REV. CODE ANN. § 59.20.145 (West Supp. 1995) (providing that any tenant of a mobilehome park, regardless of his or her age, may have a live-in care provider without being subject to a guest fee); United States v. California Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1418 (9th Cir. 1994) (holding that where a mother's infant daughter's respiratory condition required a home health care aide, under the Fair Housing Amendments Act of 1988, a guest fee would have to be waived if necessary to give a handicapped person an equal opportunity to use and enjoy the premises and if it would not impose an undue burden on the landlord).

13. CAL. CIV. CODE § 798.35 (amended by Chapter 24); *cf.* NEV. REV. STAT. ANN. § 118B.140(2)(c) (Michie 1993) (prohibiting the landlord of a mobile home park from charging a fee to a tenant for his or her spouse or children).

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 283, at 1 (Apr. 24, 1995).

15. 416 U.S. 1 (1974).

16. *Id.* at 9; *see id.* (holding that it is permissible for a city to set housing regulations which further community goals).

17. *Id.* at 4 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

18. *Id.*; *see id.* at 5 (mentioning other valid purposes such as decreasing noise and traffic, and keeping open spaces for children to enjoy).

19. 431 U.S. 494 (1977).

20. *Id.* at 506; *see id.* at 498 (distinguishing *Moore* from *Belle Terre* on the ground that *Belle Terre* concerned unrelated individuals, while the instant case pertained to blood relations).

21. *Id.* at 499.

toward greater harmony with the holding in *Moore*.[22]

Existing law prohibits a landlord from denying housing to a person based upon his or her age.[23] A landlord may, however, limit residency to senior citizens[24] when providing special accommodations for them.[25] While this provision specifically excepts mobilehomes, the Mobilehome Residency Act permits mobilehome park management to establish rules which limit tenancy to elderly people.[26]

Christopher P. Blake

Family; support—enforcement

Code of Civil Procedure §§ 708.730, 708.780 (amended).
AB 1515 (Kuehl); 1995 STAT. Ch. 459

Provisions of the law that were operative until January 1, 1994, provided that when a judgment debtor[1] in a support[2] action was owed a tax refund from the Franchise Tax Board[3] or lottery winnings from the California State Lottery,[4] and

22. *Compare id.* at 505-06 (discussing the importance of grandparents in raising children and that the State cannot deny their right to live together) *with* CAL. CIV. CODE § 798.35 (amended by Chapter 24) (including grandchildren within its definition of "immediate family members").

23. CAL. CIV. CODE § 51.2(a) (West Supp. 1995); *see id.* § 51.2(b) (West Supp. 1995) (indicating that it was the Legislature's intent to codify the holdings of O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983), and Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982)); Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 740-43, 640 P.2d 115, 126-28 180 Cal. Rptr. 496, 508-10 (1982) (finding that children are a protected class under the Unruh Act and that no socially compelling interest is furthered by permitting landlords to exclude children from apartment housing); *see also* O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 797, 662 P.2d 427, 431, 191 Cal. Rptr. 320, 324 (1983) (applying the holding of *Marina Point* to condominiums as well).

24. *See* CAL. CIV. CODE § 51.3(c)(1) (West Supp. 1995) (defining "senior citizen" as a person who is at least 62 years old or 55 years of age or more and living in a senior citizen housing development).

25. *Id.* § 51.3(a) (West Supp. 1995); *see id.* (declaring the Legislature's finding that senior citizens have a need for special housing accommodations created exclusively for them).

26. *Id.* § 798.76 (West Supp. 1995); *see id.* (allowing management to set age requirements where they are in compliance with the federal Fair Housing Amendments Act of 1988); *id.* § 51.3(c)(4) (West Supp. 1995) (exempting mobilehomes from the specialized housing provisions for senior citizens).

1. *See* CAL. CIV. PROC. CODE § 680.250 (West 1987) (defining "judgment debtor" as the person against whom a judgment is rendered).

2. *See id.* § 708.780(e) (amended by Chapter 459) (defining "support" as an obligation owing on behalf of a child, spouse, or family, or combination thereof).

3. *See generally* CAL. GOV'T CODE §§ 15700-15704 (West 1992) (describing the office, powers, and duties of the Franchise Tax Board); CAL. REV. & TAX. CODE §§ 19501-19531 (West 1994) (setting forth the powers and duties of the Franchise Tax Board).

4. *See generally* CAL. GOV'T CODE §§ 8880-8880.72 (West 1992 & Supp. 1995) (setting forth the California State Lottery Act of 1984).

the district attorney[5] was enforcing a support obligation, the district attorney could file an affidavit stating that an abstract of judgment could be obtained.[6] Furthermore, judgment creditors[7] could file an abstract of judgment or a certified copy of the money judgment[8] and an affidavit stating the exact amount of money owed, together with a specified request, affidavit and proof of service with the court.[9]

The law which Chapter 459 revives also provided for a Notice of Support Arrearage to be issued thirty days after the request was filed, during which time the judgment debtor had an opportunity to object and set a hearing.[10] After the thirty days, or after the hearing, the Notice of Support Arrearage was forwarded to the Controller.[11] The Controller was then authorized to deduct the amount of support due from a California state tax refund and/or lottery winnings.[12] This "intercept" program had a sunset date of January 1, 1994.[13]

Chapter 459 reinstates and slightly revises these procedures allowing a judgment creditor in a support action to access the judgment debtor's tax return or state lottery winnings through the Controller, and provides that these procedures will again be operative on January 1, 1996, but will become inoperative on December 31, 2000.[14] Chapter 459 allows the obligee to submit an

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5. *See generally id.* §§ 26500-26530 (West 1988 & Supp. 1995) (describing the duties of district attorneys).

6. CAL. CIV. PROC. CODE § 708.730(c) (amended by Chapter 459); *see id.* § 674 (West Supp. 1995) (stating that except as otherwise provided in California Family Code § 4506, an abstract of judgment or decree requiring the payment of money must be certified by the clerk of the court where the judgment or decree was entered); *id.* (setting forth the required information that must be contained in the abstract of judgment or decree); *see also* CAL. FAM. CODE § 4002 (West 1994) (authorizing the county to proceed on behalf of a child to enforce the child's right of support against a parent); *id.* § 4506 (West 1994) (declaring that an abstract of a judgment ordering a party to pay spousal, child, or family support to the other party must be certified by the clerk of the court where the judgment was entered and must contain certain information). *See generally Tot Support Nabs Lottery Winnings*, S.F. EXAMINER, May 19, 1995, at A27 (discussing how the chief of the Bureau of Family Support, inside the Sacramento County District Attorney's Office, intercepted the annual lottery checks of a father who was $72,500 past due in child support payments).

7. *See* CAL. CIV. PROC. CODE § 680.240 (West 1987) (defining a "judgment creditor" as the person in whose favor a judgment is rendered or, if there is an assignee of record, the assignee of record; unless the context otherwise requires, the term also includes the guardian or conservator of the estate, personal representative, or other successor in interest of the judgment creditor or assignee of record).

8. *See id.* § 680.270 (West 1987) (defining "money judgment" as that part of a judgment that requires the payment of money).

9. *Id.* § 708.730(d) (amended by Chapter 459). *See generally* CAL. GOV'T CODE §§ 12400-12481 (West 1992 & Supp. 1995) (setting forth the office and the duties of the State Controller).

10. CAL. CIV. PROC. CODE § 708.780(c) (amended by Chapter 459).

11. *Id.*

12. *Id.*

13. 1992 Cal. Legis. Serv. ch. 163, sec. 52, at 619-21 (amending CAL. CIV. PROC. CODE § 708.730); 1990 Cal. Legis. Serv. ch. 1493. sec. 31, at 5946-5947 (amending CAL. CIV. PROC. CODE § 708.780).

14. CAL. CIV. PROC. CODE §§ 708.730(d), 708.780(c) (amended by Chapter 459); *cf.* CAL. GOV'T CODE § 12419.8 (West Supp. 1995) (authorizing the Controller to offset any amount due a city or county from a person or entity against any amount owing the person or entity by a state agency on a claim for a refund from the Franchise Tax Board under the Personal Income Tax Law or the Bank and Corporation Tax Law, a claim for refund from the State Board of Equalization under the Sales and Use Tax Law, or from winnings in the California State Lottery). *See generally* Wendy Gerzog Shaller, *On Public Policy Grounds, A Limited Tax*

abstract or certified copy of the judgment to the District Attorney, along with an affidavit signed under penalty of perjury.[15] The affidavit must state the following: (1) that the judgment creditor desires relief; (2) the exact amount required to satisfy the judgment; (3) the beginning and ending dates of all periods during which the arrearage for support occurred, along with the arrearage for each month; (4) that the obligor has arrearages that have been delinquent for at least ninety days or is overdue in an amount equal to ninety days; (5) that the child is not a recipient of AFDC, and was not a recipient during the period for which arrearage is claimed; (6) that there was no assignment to a state or a county agency of support; and (7) that there is not a current or past action by a District Attorney with regard to the case.[16]

Lastly, Chapter 459 requires the State Department of Social Services,[17] upon request, to report to the Legislature regarding the use and effect of these provisions on or before December 31, 2000.[18]

COMMENT

Although child support enforcement services are provided free of charge by the district attorneys' offices in California, there are an enormous number of cases being handled.[19] Chapter 459 was enacted to extend some of the methods

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Credit for Child Support and Alimony, 11 AM. J. OF TAX POL'Y 321, 333 n.51 (1994) (suggesting that tougher child support enforcement laws would help cut welfare, get single parents out of poverty, control government expenditures, and reduce the debt); *Tax Effort Aids Child Support*, SACRAMENTO BEE, Feb. 22, 1995, at A8 (noting that according to the Department of Health and Human Services, the federal government collected $703 million in delinquent child support by taking the money out of the income tax refunds of parents who were not paying).

15. CAL. CIV. PROC. CODE § 708.730(d) (amended by Chapter 459).

16. *Id.*

17. *See generally* CAL. WELF. & INST. CODE §§ 10550-10618 (West 1991 & Supp. 1995) (describing the organization, powers, and duties of the State Department of Social Services).

18. CAL. CIV. PROC. CODE § 708.730(c) (amended by Chapter 459); *id.* § 708.780(c) (amended by Chapter 459).

19. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1515, at 2 (May 18, 1995); *see id.* (reporting that the district attorney's offices statewide have 2.1 million cases and also have a serious backlog of cases); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1515, at 2 (July 30, 1995) (commenting that the author of Chapter 459 states that according to Children NOW, nearly $5 billion in child support goes uncollected every year). *See generally* Mary Curran-Downey, *More Cash May Be Pried From Deadbeat Parents*, SAN DIEGO UNION-TRIB., Apr. 3, 1995, at B1 (noting that in San Diego County, the District Attorney's office gets 5000 new support collection cases each month, which are added to the 50,000 backlogged cases); Gary Libman, *If Support Isn't Paid, Kids Feel the Effects*, L.A. TIMES, Apr. 21, 1994, at E1 (noting that in L.A. county, the district attorney's office enforces payments by wage garnishments, property liens, and other techniques in only 150,000 cases and tries to find missing non-custodial parents in 330,000 cases); Teresa Moore, *Study Slams State 'Crackdown' on Deadbeat Parents*, S.F. CHRON., Mar. 23, 1995, at A15 (commenting that according to Legal Services of Northern California, California ranks 44th in the U.S. for overall performance in collecting child support payments); *id.* (citing a study conducted by Legal Services of Northern California which showed that in more than half of California's two million child support cases, there are no court orders for collection; furthermore, California only collects child support in one of every eight cases and the average amount collected is less than one dollar for every three dollars ordered by the courts); Carol Ness, *State Losing the Fight to Collect Child Support*, S.F. CHRON., Mar. 28, 1995, at A4 (stating that although

available to district attorneys for support enforcement, to parties proceeding on their own behalf, as well as those represented by private attorneys.[20] Supporters of Chapter 459 believe that by extending the enforcement tools available in non-district attorney collection cases, the children of California will be benefitted.[21]

Michelle M. Sheidenberger

California's 58 counties collected $861 million in support payments in 1994, they could have gotten another $2 billion, according to Leora Gershenzon, director of Legal Services' child-support project); *id.* (suggesting that child support collections are rising quickly from $709 million in 1992 to $861 million in 1994; however, the number of cases is growing even faster from 1.5 million in 1992 to 2.2 million in 1994, an average of 1.5 children per case); Nancy Weaver, *Grim Look at Efforts on Behalf of Children*, SACRAMENTO BEE, Mar. 16, 1995, at B1 (noting that in the past six years, the Sacramento county's AFDC caseload has risen from 27,008 in 1988 to 99,400 in 1994; the district attorney's office gets 1700 new cases each month in which support payments are owed).

20. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1515, at 2 (May 18, 1995); *see id.* (commenting that the author of AB 1515 states that good public policy should provide the same enforcement tools to those representing themselves as well as to those who are represented by attorneys; furthermore, good public policy should protect the rights of payors as well). *See generally* Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1366 (1992) (suggesting that fathers do not pay their child support obligations because the legal system has treated the duty to collect child support payments as discretionary; furthermore, the attitudes of judges, district attorneys, and even divorced women's counsel has been unsympathetic to divorced women needing child support).

21. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1515, at 2 (May 18, 1995); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1515, at 2 (July 23, 1995) (noting the supporters of Chapter 459 as the Coalition for Family Equity, Legal Services of Northern California, California Women's Law Center, and the California District Attorney Association). *See generally* Lee Bowman, *Fewer Than Half of Absent Parents Pay Child Support*, S.F. EXAMINER, May 13, 1995, at A2 (commenting that fewer than half of absent parents pay anything toward their children's support, and only about a quarter pay the full amount awarded by courts, according to a Census Bureau report issued in May 1995); Libman, *supra* note 19 (stating that approximately two-thirds of the 12.4 million custodial parents in the U.S., mostly women, receive no child support); *Orange County Perspective*, L.A. TIMES, May 16, 1995, at B8 (commenting that approximately 80% of recipients on AFDC are receiving assistance only because people are not meeting their child support obligations); Weaver, *supra* note 19 (quoting Leora Gershenzon, directing attorney of the Child Support Project for Legal Services of Northern California, as saying that poor collection rates of child support means that more families end up on welfare).