BANSDC Counterargument to Resolution 04-01-2021

This Resolution attempts to adjust the legal rate of interest which has been in effect for nearly twenty years. There are three reasons why this Resolution should be disapproved. First, Proponent argues that because interest rates are currently low, judgment creditors receive a significant windfall due to a 10% interest rate. But there is no windfall where the judgment debtor simply pays the judgment. The higher rate operates as a disincentive to judgment debtors to ignore paying a valid judgment. This disincentive is particularly important with respect to Family Law judgments, to which Section 685.010 equally applies. Second, the Proponent does not recognize that when the 10% rate was selected, interest rates were far in excess of 10% and there is no guarantee that those rates will not rise rapidly once again. Third, and perhaps most important, the term "prime rate" is not defined anywhere in statute. Whereas prejudgment interest is tied to " the weekly average one year constant maturity United States Treasury yield" under CCP 3287(c), "prime rate" is variable between banks and fluctuates daily. This fluctuation will make it virtually impossible to calculate "prime rate" on any given day. Either "prime rate" should be defined, or a lower number selected so that there will be certainty in how to calculate post-judgment interest.

SUBMITTED BY: Bar Association of Northern San Diego County

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TO: Conference of California Bar Associations

FROM: The Executive Committee of the Trusts and Estates Section of the California Lawyers Association

DATE: May 7, 2021

RE: 2021 Resolutions

The Executive Committee of the Trusts and Estates Section of the California Lawyers Association (TEXCOM) submits the following report.

1. 04-01-2021 – Amend Code of Civil Procedure section 685.010, to provide that interest accrues on the principal amount of an outstanding money judgment at the rate of one percent plus the prime interest rate on the date judgment is entered.

TEXCOM takes no position on the policy question of what the proper rate of interest should be on outstanding monetary judgments. However, other statutes make reference to CCP § 685.010, and therefore this proposal may have some unintended consequences that should be more fully considered. As an example, Probate Code sections 12001 and 16340 provide that interest is payable on certain gifts made by will or trust that are not paid within one year at the rate of "three percentage points less than the legal rate on judgments in effect one year after the date of the testator's death…." Thus, under current law, certain beneficiaries of wills and trusts whose gifts are not timely distributed to them are entitled to interest at the rate of 7% per annum. Given the current prime rate of 3.25%, the proposed amendment to CCP § 685.010 would result in only 1.25% per annum being paid on gifts not paid within one year. 1.25% per annum being far less than the actual cost of money, this seems inadequate to compensate a decedent's beneficiaries for the loss of use of the gifted funds resulting from a fiduciary's delay in making a required distribution. Given the potentially far-reaching effects of proposed amendments to CCP § 685.010, any such proposed amendment should be supported by an analysis of the effects that such an amendment would have on other provisions of California statutory law, including in the Probate Code.

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Counterargument on 08-01-2021

The SDCBA Delegation recommends disapproval of Resolution 08-01-2021 as written. SDCBA supports the objective, but a couple of changes should be made. SDCBA recommends the proposed wording of subsection (e) of proposed Education Code Section 6271.4 be changed as stated below and the provisions under the heading "SEC.2" relating to costs be modified as stated below.

§ 6271.4.

(e) Commencing with the 2023–24 graduating class, an institution shall provide an option for a graduating student to request that the diploma to be conferred by the institution list the student's chosen name, if the~~. Commencing with the 2023–24 graduating class, an institution shall not require a~~ graduating student ~~to~~ can provide government-issued documentation, as described in subdivision (c), demonstrating ~~legal documentation sufficient to demonstrate~~ a legal name ~~or gender~~ change in order to have the student's chosen name listed on the student's diploma.

Regarding the modification of subsection (e) of proposed Education Code Section 6271.4; the concern is that the language of subsection (e) as proposed would allow any student to ask for a diploma in a name other than the student's given name at birth with no showing that the name belongs to the requesting student. It leaves the door open to many types of fraud: requesting that diplomas be issued in names belonging to those who are not graduates of the institution. It is not unthinkable to imagine nefarious actors who might pay a student handsomely to have a diploma issued in the name of someone other than the student. The subsection as written should not be so permissive, and there is no justification for not requiring government-issued evidence of a legitimate name change.

SEC. 2.

Each postsecondary institution may charge any former student or any student requesting a name change or a gender change a reasonable fee approximating the costs incurred by the institution to fulfill this act, subject to the availability to such students of fee waivers upon showing need by the student. If the Commission on State Mandates determines that this act contains costs mandated by the state not offset by the fees paid by students for the services contemplated by this act, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government 34 Code.

Regarding the modification of SEC. 2, almost every administrative service provided by a postsecondary educational institution comes with a fee, subject to waiver based on economic need. This service should be no different. The costs of changing the names or genders of students should be modest, but still should be borne by the student and not the institution or the taxpayers.

SUBMITTED BY: San Diego County Bar Association

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COUNTERARGUMENT TO RESOLUTION 11-01-21

The Orange County Bar Association and the undersigned submits this counterargument with great respect to the authors and proponents of this resolution.

We respectfully submit what they propose is not a viable solution for a State-Wide change to the Family Code.

Courts manage requests for order (RFO) differently from one county to another. For example, San Diego's local procedures differ significantly from other counties. Orange County and Los Angeles also differ.

If a party files an RFO with a witness list, they communicate they want live testimony. It may be reversible error for the court to refuse this request unless the court sets forth good cause. Per Family Code section 217(a) and (b), absent a finding of good cause stated in writing or on the record, "the court shall receive any live, competent testimony…"

The proposed resolution uses the word "shall" related to the Court's obligation to grant the continuance if a party requests an evidentiary hearing. This creates an automatic continuance.

Los Angeles, due to its number of courts and judges, may be in a superior position to set evidentiary hearings faster than other California courts with less resources.

This built-in first continuance can be a statutorily authorized delay tactic. This may adversely affect children when there is a need for immediate custody or support orders. This is especially true in counties that may not "reset" a hearing for months.

For example, assume the initial RFO is set 5 months after it is filed. This resolution allows a party to cause *another* 5 + months of delays by requesting an evidentiary hearing.

The proponent's subsection (a)(3) does not fix this problem. The subsection authorizes the court to make orders before hearing the evidence. It authorizes the court to use its initial impressions based on what may be hearsay and foundation-lacking riddled moving and opposing papers, and perhaps quick oral argument to make interim orders that may last months until an evidentiary hearing.

Such interim orders may do more harm, be prejudicial on custody RFOs by creating a new status quo inconsistent with the children's best interest or support orders out of line with guideline. These may be harder to later unwind.

Another factor is self-represented parties. It is estimated 75% of family law parties are self-represented. This proposal complicates the process for them by creating mandatory case management orders to prepare for a special setting and additional judicial council forms. Creating more procedural hurdles is not a solution, especially when they arguably make up 3/4th of family law litigants.

We respect the intent. However, we do not think this proposal addresses the problem. This proposal may be better suited for a Los Angeles Local Rule.

SUBMITTED BY: Orange County Bar Association

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Counterargument--Resolution 11-07-2021—to amendment to Family Code §3110, to abrogate the holding in *People v. Sanchez* (2016) 63 Cal.4th 665 for court-appointed investigators, including child custody evaluators.

Contrary to what the Orange County Bar suggests in its Statement of Reasons, the trier of fact is not limited in its "consideration of all circumstances bearing on the child custody decision before them," merely because an expert does not and cannot rely on case-specific hearsay.

Hearsay is not admissible in other civil actions and should not be admissible just because the case is a family law matter. What the Court should consider, as in all civil litigation, is only admissible evidence which either or both parties may present to the Court.

Judges, not psychologist are the trier of fact. All too often in family law cases judges incorrectly delegate their authority to psychologists under the guise of a 730 evaluation. They then rely on psychologist to make custody and visitation recommendations without a full and complete review of the evidence.

Instead, the reports contain layers of hearsay gathered by the appointed expert from the parties, their friends, relatives, children's teachers, therapists, etc. and by reading depositions and court pleadings (containing inadmissible evidence and arguments that lack foundation) as each party advocates for the custodial plan he or she wants.

Those same experts often lack knowledge of the law or training to determine credibility. They then rely on the hearsay and arguments to make recommendations on what custodial plan they believe will be in the children's best interest.

The evaluator can and often does lose objectivity and is persuaded by information that is incomplete. unreliable and inadmissible in a court of law.

The Court then, all too often, adopt the recommendations without giving a party/parent his or her day in court. The results can be wrong and leave one or both parties feeling not only robbed of their day in court, but of their children.

It is extremely challenging, time consuming and expensive to convince a judge that the evaluator relied on incorrect information, unreliable witnesses or flawed descriptions of events and the only way to do that is by calling all of the hearsay witnesses into Court for cross-examination.

Allowing evaluators in custody case to rely on case-specific hearsay puts the emphasis and burden in the wrong place. It is the proponent of the evidence that is required to establish its admissibility in court. By allowing an evaluator to rely on inadmissible evidence, the burden of coming forward is incorrectly shifted to the objecting party to disprove or challenge hearsay evidence that should not have been considered in the first place. The California Supreme Court agreed, and that is the holding in *People v. Sanchez*. It is a good decision and it respects the

law. There is no valid reason for abrogating the hearsay rule in Family Law proceedings. Judges, not psychologists still need to decide cases.

SUBMITTED BY: Presented by Vicki J. Greene (LABCA delegate); Paula Kane 77012; Kia Kiaresh Kamran 185501; Shaahin Jafari Moafi 327826; James Kilkowski 105909; Jeffrey P. Silberman 11671; Joseph Carlone 192499; Marjorie Garcia 240373; Howard King 77012; Emi Ouchi 265685.

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BANSDC Counterargument to Resolution 13-01-2021

This Resolution proposes to require paid time off for jury duty for employers with 100 or more employees. However, the resolution limits the paid time to employees who receive a California state juror summons. Although our delegation is not necessarily opposed to the resolution in concept, why are we not including federal jury summons as well?

SUBMITTED BY: Bar Association of Northern San Diego County

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