RESOLUTION 09-01-2017

DIGEST
Civil Rights: Homelessness
Adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 52.85 to provide protections and due process rights to the homeless when using public spaces, including a civil cause of action for damages.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 05-06-2016, which was disapproved.

Reasons:
This resolution adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 52.85 to provide protections and due process rights to the homeless when using public spaces, including a civil cause of action for damages. This resolution should be disapproved because the exemptions and rights created are overly expansive, would undermine the ability of others to access clean and non-threatening public spaces, jeopardize the economic vitality of local businesses, and give rise to an enormous judicial burden on the courts and municipalities.

While this resolution extensively fleshed out the rights and limitations suggested in last year's Resolution 05-06-2016, it has not addressed the concerns raised by that proposal. Under this resolution, a person need only erect a tent or cardboard box on a sidewalk or light rail platform and, unless it can be shown the locations was "unsuitable," he becomes entitled to broad rights and immunities. He or she would not be subject to criminal, civil or administrative penalties for sleeping, eating, or “resting” on public property. The municipality would not be permitted to remove people or their belongings unless it provided “adequate” housing (including room for every household member, handicap access, and no restrictions based on criminal history or substance abuse), and conducted an individual assessment of each person being removed. Prior to removal, the municipality would have to provide at least thirty days written notice, affixed to each tent or structure. If a homeless person was not present at the time of removal, the municipality would have to document that the person received actual notice. Even where removal is based on valid safety concerns, the municipality would have to make every attempt to clean up the hazard (without removal) and provide an alternative location for the homeless person to settle.

Having provided these wide-ranging rights, the resolution goes even further to provide a civil cause of action for any violation, including restitution, actual damages, compensatory damages, exemplary damages, a statutory award of $1,000 per violation, reasonable attorneys’ fees, and costs. Currently, the homeless can (and do) bring civil rights suits under 42 U.S.C. §1983 for violations of their rights, and the Ninth Circuit has been receptive to those actions. (See, e.g. *Lavan v. City of Los Angeles* (9th Cir. 2012) 693 F.3d 1022, *cert. denied* June 24, 2013.) There is no justification for so greatly expanding the liability exposure of municipalities in this one area.

Attempts to provide the homeless with protection from discrimination by law enforcement and local governments have been ongoing for many years, with a few states and municipalities passing limited "Homeless Bills of Rights." (See *City Passes Innovative "Homeless Bill of Rights,"* https://thinkprogress.org/city-passes-innovative-homeless-bill-of-rights-400dfa36773c.) There have been several legislative measures considered in California, none of which were as broad as this resolution, and none of which were successful. In 2016, the "Right to Rest Act" (Sen. Bill No. 608 (Liu) (2015-2016 Reg. Sess.)) died in the Senate, as did a more limited version (Sen. Bill No. 876 (Liu) (2015-2016 Reg. Sess.)).

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 52.85 to read as follows:

§ 52.80

(a) There is created a Homeless Person's Bill of Rights to guarantee that the rights, privacy and property of homeless persons are adequately safeguarded and protected under the laws of this state. The rights afforded homeless persons to ensure that their person, privacy and property are safeguarded and protected, as set forth in subsection Sections 52.82 and 52.83 below, are available only insofar as they are implemented in accordance with other parts of the general statutes, state rules and regulations, federal law, the state Constitution and the United States Constitution.

§ 52.81

For purposes of this part, the following definitions shall apply:

(a) "Adequate and accessible housing" means, at a minimum, living space:

(1) Where a person has both the right to reside and keep belongings on an ongoing, long-term basis at any time of day or night;

(2) That meets living standards commonly acceptable to society, and includes safety from other individuals, the elements, and exposure to disease or filth, room to move about, storage space for belongings, the ability to maintain current household composition, accommodation for physical or mental limitations, and access to hygiene facilities; and

(3) That is actually accessible to the individual who is or will be living in that space, including that the individual must not be barred as a result of criminal background, treatment status, ability to show identification, household composition, physical or mental limitations, substance use disorder, or otherwise.

(b) "Hazardous condition" means a condition that creates an imminent public health or safety harm. The public health or safety harm must be created by the presence of a particular condition and not a generalized harm common to all who are unsheltered.

(c) "Homeless person(s)" and "person(s) experiencing homelessness" mean those individuals or members of families who lack a fixed, regular, and adequate nighttime residence, including people defined as homeless using the criteria established in the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.

(d) "Impoundment" means any action by the municipality to remove or tow a vehicle used as a residence without the express approval of the vehicle's owner.

(e) “Municipality” means any local jurisdiction and any of its contractors, agents, employees or partners.

(f) “Outdoor living space” means any outdoor public space that homeless individual(s) use to live or sleep in, as evidenced by the presence of a sleeping bag, shelter, tarp, tent, bed, cardboard, metal sheeting, furniture, or other objects demonstrating an intent to live in the location for one or more days, whether or not continuously.

(g) “Personal property” means any item which an individual owns and which might have value or use to that individual, regardless of whether the item is left unattended for temporary periods of time or whether it has monetary value. This does not include weapons other than knives, contraband, items which pose an obvious health or safety risk, or are clearly contaminated in a way which a reasonable person would conclude the items should not be stored with other property. Personal property includes non-rigid materials used for shelter, such as tents and tarps, but does not include building materials, such as wood products, metal, or rigid plastic.

(h) “Public space” means any property that is owned by a government entity or any property upon which there is an easement for public use and that is held open to the public, including, but not limited to, plazas, courtyards, parking lots, sidewalks, public transportation facilities and services, public buildings, shopping centers, and parks.

(i) “Qualified outreach program” means a social service program with adequate oversight, training, and clinical supervision to conduct sufficient individualized outreach, and that the municipality contracts with or provides. Such programs shall have an established record of providing sustained, equitable, person-centered care, and staff providing services shall have training in the following areas: working with people with behavioral health issues including substance use disorder, mental disorders, or both; trauma-informed care, including people who have experienced or are experiencing gender- and gender-identity-based violence and violence based on sexuality; outreach, assessment, and engagement; harm reduction practices (including but not limited to safe needle exchange, use, and disposal, carrying and dispensing Narcan, informing individuals of rights (Good Samaritan Law) and treatment options (Buprenorphine and Methadone); cultural competence; confidentiality and grievance procedures; and may include peer coaches that include adequate oversight and clinical supervision.

(j) “Removal” means action to remove people, camps, structures, or personal property located at outdoor living spaces.

(k) “Rest” means the state of not moving, holding certain postures that include, but are not limited to, sitting, standing, leaning, kneeling, squatting, sleeping, or lying.

(l) “Sufficient individualized outreach” means individualized, person-centered outreach that responds to the unique needs of each person. Sufficient outreach involves:

(m) Making an individual assessment of each affected individual, which includes, but is not limited to, considerations of household composition; disability; mental illness or other mental or emotional capacity limitations; substance use or treatment status; geographic needs, such as proximity to personal support, healthcare, employment and other geographic considerations; and ongoing support needs;

(1) Identifying and offering adequate and accessible housing, if available, based on this individual assessment; and

(2) If an offer is accepted, providing assistance with both the administrative and logistical aspects of moving into the identified adequate and accessible housing.

(n) “Unsafe location” means a public space that poses imminent danger of harm to individuals residing in that location or to the general public. The danger of harm must be created

by the existence of the specific outdoor living space at that particular location and not generalized danger of harm common to all who are unsheltered. Unsafe locations include, but are not limited to, rights-of-way in industrial areas actively used for transporting people or goods and for providing ingress and egress to real property.

(o) “Unsuitable location” means a public space that has a specific public use that is substantially impeded as a result of an outdoor living space in that location. Improved areas of Municipality parks, including restored natural areas or natural areas actively undergoing restoration, and public sidewalks in front of houses and dwelling units are per se unsuitable.

§ 52.82

(a) Each homeless person in this state has the right to:

(1) Free movement without restraint;

(2) Have equal opportunities for employment;

(3) Receive emergency medical care;

(4) Register to vote and to vote;

(5) Have personal information protected;

(6) Have a reasonable expectation of privacy in his or her personal property; and

(7) Receive equal treatment by state and municipal agencies.

(b) Each municipality shall conspicuously post in the usual location for municipal notices a notice entitled "HOMELESS PERSON'S BILL OF RIGHTS" that contains the text set forth in subsection (a) of this section. Each municipality shall make copies of such notice available to members of the public upon request.

§ 52.83

(a) It is the intent of the Legislature that this section be interpreted broadly so as to prohibit policies or practices that are discriminatory in either their purpose or effect.

(b) Persons experiencing homelessness shall be permitted to use public space in the ways described in this section at any time that the public space is open to the public without discrimination based upon their housing status, and without being subject to criminal, civil, or administrative penalties. Permitted use of the public space include, but are not limited to, all of the following:

(1) Free movement without restraint.

(2) Sleeping or resting, and protecting oneself from the elements while sleeping or resting in a non-obstructive manner.

(3) Eating, sharing, accepting, or giving food in a space in which having food is not otherwise generally prohibited.

(4) Praying, meditating, worshiping, or practicing religion.

(c) Nothing in this section shall prevent law enforcement from enforcing laws to protect the right of people to use the sidewalk pursuant to the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(d) Nothing in this section shall prevent law enforcement from enforcing the Penal Code, except subdivision (e) of Section 647 of the Penal Code, so far as it prohibits rest.

§ 52.84

(a) A municipality may respond appropriately to emergency situations such as fires, crimes, or medical crises as it normally would outside outdoor living spaces. However, except as

specified in (b) the municipality may undertake a removal or impoundment action only when the municipality has satisfied the following conditions:

(1) Adequate and accessible housing is available beginning at least 30 days before the time of removal or impoundment, to all individuals whose persons, personal possessions and/or vehicles are being removed or impounded.

(2) The affected individuals have been engaged with sufficient outreach over a period of not less than 30 days, to allow those interested to move voluntarily to adequate and accessible housing. Sufficient outreach involves, at a minimum: (1) making an individual assessment of each affected individual, which includes, but is not limited to, considerations of household composition; disability; mental illness or other mental or emotional capacity limitations; substance use or treatment status; geographic needs, such as proximately to personal support, healthcare, employment and other geographic considerations; and ongoing support needs; (2) identifying and offering adequate and accessible housing based on this individual assessment; and (3) if an offer is accepted, providing assistance with both the administrative and logistical aspects of moving into the identified adequate and accessible housing.

(3) The Municipality has provided written notice meeting the following requirements:

(A) The specific date and time the removal or impound will take place, which must not be fewer than thirty (30) days from notice date;

(B) Explanation of the actions that will be taken during the removal or impoundment and how loss of personal property can be avoided;

(C) Information about where personal property will be safeguarded if seized during the removal or impoundment and how it can be retrieved after removal or impoundment;

(D) Contact information for the outreach organizations that will work with that site as specified in subsection (2) above; and

(E) A statement that adequate and accessible housing is available for all affected individuals.

(F) Notice must be provided in languages likely to be spoken by impacted individuals, and through methods capable of being understood by persons with physical and mental disabilities.

(G) Notice must be posted in a conspicuous location at the relevant outdoor living space or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that location.

(b) If an outdoor living space or a vehicle used as a residence is in an unsafe or unsuitable location, or creates or contains a hazardous condition, the municipality may undertake a removal or impoundment action if conducted in accordance with the procedures set forth in this Section.

(1) Prior to conducting removal or impoundment actions based on unsafe or unsuitable locations, the municipality must do the following:

(A) The municipality must inform all individuals staying at such location the reasons that it is unsafe or unsuitable at least 48 hours prior to any removal or impoundment.

(B) The municipality must identify and make available a nearby, alternative location to camp or park that is not unsafe or unsuitable to all affected individuals.

(C) The municipality must conduct sufficient individualized outreach.

(2) Prior to conducting removal or impoundment actions based on hazardous conditions, the municipality must do the following:

(A) The Municipality must provide access to basic garbage, sanitation, and harm reduction services as dictated by the nature of the hazardous condition, for at least 72 hours.

(B) The municipality must make reasonable efforts to identify the likely source of the hazardous condition and take action against only those responsible for creating the hazardous condition.

(C) The municipality must provide a meaningful opportunity to cure the hazardous condition, including:

(i) An effective cure notice of the specific conditions that create the hazardous condition and information on how that condition can be remedied; and

(ii) Provision of necessary items, such as garbage bags and bins, rodent traps, intravenous needle receptacles, and/or portable toilets, among others, that would allow the individuals to cure the hazardous condition. The municipality must allow individuals at least 72 hours to cure the hazardous condition before posting notice of removal or impoundment, and shall not conduct removal or impoundment if the hazardous conditions have been cured.

(D) The municipality must conduct direct outreach through site visits to: (a) inform all affected individuals prior to or during the cure period that the location has a hazardous condition and the actions needed to cure that condition; and (b) inform all affected individuals whether the hazardous condition has been remedied after the cure period, and if not, why not.

(3) Prior to removal or impoundment, the municipality must provide written notice meeting the following requirements:

(A) The specific date and time the removal or impound will take place;

(i) The removal or impound may not take place fewer than 48 hours from the date of notice in the case of unsafe or unsuitable location;

(ii) The removal or impound may not take place fewer than five (5) days from the date of notice in the case of a hazardous condition

(B) Explanation of how the location of the outdoor living space or vehicle is unsafe and/or unsuitable, or the hazardous condition has not been remedied;

(C) Explanation of the actions that will be taken during the removal or impoundment and how loss of personal property can be avoided;

(D) Information about where personal property will be safeguarded if seized during the removal or impoundment and how it can be retrieved after removal or impoundment;

(E) Clear directions to the alternative location;

(F) Contact information for the outreach organizations that will work with that site as described in subsection (4) below; and

(G) If available, a statement that adequate and accessible housing is available for all affected individuals;

(H) Notice must be provided in languages likely to be spoken by impacted individuals, and through methods capable of being understood by persons with physical and mental disabilities.

(I) Notice must be posted in a conspicuous location at the relevant outdoor living space or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that location.

(4) Sufficient individualized outreach must involve, at a minimum, the following actions:

(A) Informing all affected individuals of the availability of the alternative location for the outdoor living space or vehicle, or offering adequate and accessible housing; and

(B) Offering assistance with both the administrative and logistical aspects of moving into the identified alternative location or adequate and accessible housing.

(c) During a removal or impoundment, the Municipality will safeguard all personal

property free of charge according to the following requirements:

(1) For individuals present at the time of the removal or impoundment who have accepted the offer of an adequate and accessible housing but do not have the ability to transport their personal property, the Municipality shall transport all personal property to the location of the accepted housing the day of the removal or impoundment.

(2) For individuals absent at the time of the removal or impoundment, the Municipality must document that those individuals had actual notice of the removal or impoundment.

(3) For individuals absent at the time of removal or impoundment, or present but who did not accept the offer of adequate and accessible housing and do not have the ability to transport their personal property, the Municipality will safeguard all personal property as follows:

(A) Personal property must be photographed and catalogued by location and with identifying details of the personal property prior to being put into storage. Such information must be searchable by computer and by calling a Municipality agent.

(B) The location of the storage facility must be accessible by public transportation and accessible to those with disabilities.

(C) Its operating hours must extend beyond normal business hours to accommodate those who work or have other obligations during midweek during normal business hours.

(D) Photo identification shall not be required as a condition of retrieval;

(E) The Municipality must post notice for 90 days at the location of the removal or impoundment with the location of the seized personal property and instructions for reclaiming such personal property.

(F) After 90 days, the Municipality may dispose of any unclaimed personal items provided all the above requirements have been met.

§ 53.85

(a) Any person whose rights have been violated pursuant to this part may enforce those rights in a civil action.

(b) The court may award appropriate injunctive and declaratory relief, restitution for loss of property or personal effects and belongings, actual damages, compensatory damages, exemplary damages, statutory damages of one thousand dollars ($1,000) per violation, and reasonable attorney's fees and costs to a prevailing party.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law does not provide for the basic civil and human rights for homeless individuals to exist free of discrimination. Currently, several municipalities have enacted offensively anachronistic laws targeting the basic human and civil rights of homeless individuals. By the virtue of their existence, homeless individuals are subject to civil and criminal sanctions, and have restrictions on their right to use and to move freely in public spaces, to rest in public spaces, to protect themselves from the elements, to eat, or perform religious observances in public spaces.

The forced dispersal of people from encampment settings is not an appropriate solution or strategy, accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide such lasting solutions to people who have been sleeping and living in the encampment. Homeless encampments across the country, even those that have existed for years, are increasingly subject to sudden evictions or "sweeps". Often conducted with little or no notice, sweeps not only physically displace homeless people from public space, but they often result in the loss or destruction of people's few possessions. The loss of warm clothing, protective tents, and medication can become a matter of life and death. Worse yet, sweeps are often conducted by governments with no plan to house or adequately shelter the displaced encampment residents. Instead, homeless persons are made to leave their encampment communities without being offered any alternative places to live. Because this will merely disperse, rather than reduce, homelessness, new encampments inevitably reappear. And, without sanitation services, so will the public health and safety concerns that led to the sweep in the first place. Indeed, California's state transportation agency eliminated 217 homeless encampments between July 2014 and February 2015, only to have some of them reopen the very same day. The cost to taxpayers for this ineffective exercise of governmental power is significant.

The Solution: Would afford persons experiencing homelessness the right to use public spaces without discrimination based on their housing status and describe basic human and civil rights that may be exercised without being subject to criminal or civil sanctions, including the right to use and to move freely in public spaces, the right to rest in public spaces and to protect themselves from the elements, the right to eat in any public space in which having food is not prohibited, and the right to perform religious observances in public spaces, as specified. It ensures homeless persons due process rights related to their personal property are upheld and requires municipalities to provide alternative space or adequate housing as well as appropriate tailored services to people experiencing homelessness. This resolution would authorize a person whose rights have been violated pursuant to these provisions to enforce those rights in a civil action in which the court may award the prevailing party injunctive and declaratory relief, restitution, damages, statutory damages of $1,000 per violation, and fees and costs.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
This resolution uses language from Connecticut's Homeless Bill of Rights, California Senate Bill 876: Homelessness introduced by Liu in February 2016, and a proposed ordinance in Seattle, WA addressing assessment and access to housing, as well as due process rights of homeless persons.

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RESOLUTION 09-02-2017

DIGEST
Name and Gender Change: Prisons and County Jails
Amends Code of Civil Procedure section 1279.5 to eliminate current restrictions on name and gender changes for incarcerated persons.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1279.5 to eliminate current restrictions on name and gender changes for incarcerated persons. This resolution should be approved in principle with recommended amendments because current regulations restricting rights of incarcerated persons to obtain a name change and gender identity change adversely impact transgendered persons.

California recognizes a common law right to change one's name. (Code Civ. Proc., §§1276, 1279.5, subd. (a).) Current law restricts the ability of prisoners under the jurisdiction of the Department of Corrections to obtain a change of name, including gender identity changes. (Code Civ. Proc., §1279.5, subds. (b), (c); 15 Cal. Code Regs., §3294.5.)

Restrictions on the ability of state level prison offenders to change their names made complete sense in the past when city, county and state offender data bases were not always readily accessible and a change of name could result in later identification problems for law enforcement. Electronic databases have improved the ability of law enforcement agencies throughout the state to update name changes and aliases, although there will be costs and potential logistical challenges to the California Department of Corrections and Rehabilitation, and the Bureau of State and Community Corrections to change the names and genders of inmates undergoing gender identity change. However, such costs and logistical challenges are outweighed by the civil rights, and mental and emotional benefits of allowing a person who seeks a gender identity change to fully achieve that change. Current notions of individual liberty and fundamental rights to self-identity confirm the personal right of a person to gender-identify, and to change one's gender if one so chooses. A name change to reflect one's gender identity follows logically.

This resolution promotes the ability of all Californians to obtain a name change and gender identification change consistent with their gender identity by removing outdated restrictions on the ability of incarcerated persons to obtain such changes. It implements conforming changes in recognition of some prisoners now serving their sentences. It maintains registered sex offender restrictions which provide courts with the discretion to deny a name change to registered sex offenders. It is a sound change to California law.

Recommended amendment: The Resolutions Committee recommends the proposed language "imprisoned within a county jail" be changed to read "sentenced to county jail" and that additional conforming changes be made as reflected in amendments to Senate Bill No. 310 (Atkins).

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1279.5 to read as follows:

§ 1279.5

(a) Except as provided in subdivision ~~(b), (c), (d),~~ (d) or (e), ~~nothing in~~ this title ~~shall be construed to~~ does not abrogate the common law right of any person to change his or her name.

~~(b)Notwithstanding any other law, no person imprisoned in the state prison and under the jurisdiction of the Director of Corrections shall be allowed to file a petition for change of name pursuant to Section 1276, except as permitted at the discretion of the Director of Corrections.~~

~~(c)A court shall deny a petition for a name change pursuant to Section 1276 made by a person who is under the jurisdiction of the Department of Corrections, unless that person's parole agent or probation officer grants prior written approval. Before granting that approval, the parole agent or probation officer shall determine that the name change will not pose a security risk to the community.~~

(b) A person under the jurisdiction of the Department of Corrections and Rehabilitation or imprisoned within a county jail has the right to petition the court to obtain a name or gender change pursuant to Section 1276 or Section 103425 of the Health and Safety Code.

(c) In all documentation of a person under the jurisdiction of the Department of Corrections and Rehabilitation or imprisoned within a county jail, the new name of a person who obtains a name change shall be used, and prior names shall be listed as an alias.

(d) Notwithstanding any other law, a court shall deny a petition for a name change pursuant to Section 1276 made by a person who is required to register as a sex offender under Section 290 of the Penal Code, unless the court determines that it is in the best interest of justice to grant the petition and that doing so will not adversely affect the public safety. If a petition for a name change is granted for an individual required to register as a sex offender, the individual shall, within five working days, notify the chief of police of the city in which he or she is domiciled, or the sheriff of the county if he or she is domiciled in an unincorporated area, and additionally with the chief of police of a campus of a University of California or California State University if he or she is domiciled upon the campus or in any of its facilities.

(e) For the purpose of this section, the court shall use the California Law Enforcement Telecommunications System (CLETS) and Criminal Justice Information System (CJIS) to determine whether or not an applicant for a name change ~~is under the jurisdiction of the Department of Corrections or~~ is required to register as a sex offender pursuant to Section 290 of the Penal Code. Each person applying for a name change shall declare under penalty of perjury that he or she is not ~~under the jurisdiction of the Department of Corrections or is~~ required to register as a sex offender pursuant to Section 290 of the Penal Code. If a court is not equipped with CLETS or CJIS, the clerk of the court shall contact an appropriate local law enforcement agency, which shall determine whether or not the petitioner is ~~under the jurisdiction of the Department of Corrections or is~~ required to register as a sex offender pursuant to Section 290 of

the Penal Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Allows a person to apply for a change of name or gender, as specified and prohibits a person imprisoned in state prison from filing a petition for a change of name unless permitted by the Director of Corrections and Rehabilitation, which is only considered if granted by the Warden first. Existing law also requires a court to deny a petition for a name change made by a person under the jurisdiction of the Department of Corrections and Rehabilitation, unless that person's parole agent or probation officer grants prior written approval. This belabored process often results in either a denial or no response from corrections officials. There is also a common law right of any person to change their name and procedures for a person to apply to the court for an official change of name and/or gender.

People incarcerated in state prison or otherwise under CDCR jurisdiction face significant barriers accessing the courts for name and gender changes. Transgender people who identify as a gender different than the one they were assigned at birth face significant discrimination both inside and outside of prison. The paradox of their struggle is that they are often hyper-visible for their lack of conformity to gender norms and often denied formal legal recognition of who they are, placing them at great risk of discrimination and harassment. Consequently, too many transgender people are pushed out of traditional employment, housing, and healthcare and many end up incarcerated, criminalized for existing, as they must find alternative ways to survive. Transgender women of color are the most significantly impacted.

The discrimination faced by transgender people in our society is only amplified in prison. According to a 2015 national survey of 25,000 transgender individuals, 30% of incarcerated respondents were physically and/or sexually assaulted while in custody. Additionally, many transgender people imprisoned in state prisons or county jails report that custodial staff often refuse to refer to them by their preferred name and gender. This causes them emotional distress and violates their right to be free from discrimination on the basis of their gender identity and expression.

Upon their release from incarceration, transgender people face added difficulties reentering society when their gender presentation does not match their identification documents. Significant numbers of transgender people report verbal harassment, denial of benefits, services or employment, being asked to leave, or being assaulted after presenting identification documents that do not match their gender identity.

The Solution: Would establish the right of a person imprisoned within the California Department of Corrections and Rehabilitation (CDCR) or within a county jail to petition the court to obtain a name or gender change. The bill also requires CDCR and county jails to use the new name of a person who obtains a name change, and to only refer to the prior name as an alias. The resolution

will help ensure transgender people are legally recognized for who they are while incarcerated, and it will increase the likelihood of their successful reentry into society upon release from custody.

IMPACT STATEMENT
This resolution would amend or repeal Title 15 Section 3294.5. Inmate Name Change, which outlines the current process for obtaining a name change while in the custody of CDCR, as well as the limited effect such a name change has on CDCR documentation. This regulation would have to be amended or removed if this resolution were to become law.

CURRENT OR PRIOR RELATED LEGISLATION
This resolution tracks the language of SB 310 Name and gender change: prisons and county jails, as introduced by Atkins Feb. 2017.

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RESOLUTION 09-03-2017

DIGEST
Standing: Delete Obsolete References to Legitimacy in Actions for Injury to a Child
Amends Code of Civil Procedure section 376 to eliminate reference to illegitimate children.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 376 to eliminate reference to illegitimate children. This resolution should be approved in principle because it removes outdated and unnecessary distinctions of legitimacy from the statute governing standing of parents and guardians to maintain an action on behalf of an injured child.

This resolution should be approved because it treats all children, as well as the parents and guardians of all children, equally. It removes outdated distinctions of illegitimacy and makes appropriate conforming changes to Section 376.

California social norms have evolved to recognize the growing trend of non-traditional marital relationships and family units, inclusive of domestic partnerships. Likewise, California social norms no longer stigmatize children born to parents who are not legally married under California law. However, vestiges of past stigmatization of children born to unmarried parents (usually referring exclusively to the mothers) remain in California statutes. This resolution seeks to eliminate those antiquated vestiges from one important statute, Code of Civil Procedure section 376, which governs standing of parents and guardians to maintain an action on behalf of an injured child.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 376 to read as follows:

§ 376

(a) The parents of an ~~legitimate~~ unmarried minor child, acting jointly, may maintain an action for injury to the child caused by the wrongful act or neglect of another. If either parent fails on demand to join as plaintiff in the action or is dead or cannot be found, then the other parent may maintain the action. The parent, if living, who does not join as plaintiff shall be joined as a defendant and, before trial or hearing of any question of fact, shall be served with summons either in the manner provided by law for the service of a summons in a civil action or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to that parent's last known address with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee

creates a rebuttable presumption that the summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(b) A parent may maintain an action for such an injury to his or her ~~illegitimate~~ unmarried minor child if a guardian has not been appointed. Where a parent who does not have care, custody, or control of the child brings the action, the parent who has care, custody, or control of the child shall be served with the summons either in the manner provided by law for the serving of a summons in a civil action or by sending a copy of the summons and complaint by registered mail, with proper postage prepaid, addressed to the last known address of that parent, with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee creates a rebuttable presumption that the summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(c) The father of a~~n illegitimate~~ child who maintains an action under this section shall have acknowledged in writing prior to the child's injury, in the presence of a competent witness, that he is the father of the child, or, prior to the child's injury, have been judicially determined to be the father of the child.

(d) A parent of a~~n illegitimate~~ child who does not maintain an action under this section may be joined as a party thereto.

(e) A guardian may maintain an action for such an injury to his or her ward.

(f) An action under this section may be maintained against the person causing the injury. If any other person is responsible for the wrongful act or neglect, the action may also be maintained against the other person. The death of the child or ward does not abate the parents' or guardian's cause of action for the child's injury as to damages accruing before the child's death.

(g) In an action under this section, damages may be awarded that, under all of the circumstances of the case, may be just, except that:

(1) In an action maintained after the death of the child, the damages recoverable are as provided in Section 377.34.

(2) Where the person causing the injury is deceased, the damages recoverable in an action against the decedent's personal representative are as provided in Section 377.42.

(h) If an action arising out of the same wrongful act or neglect may be maintained pursuant to Section 377.60 for wrongful death of a child described in this section, the action authorized by this section may be consolidated therewith for trial as provided in Section 1048.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Currently, Code of Civil Procedure section 376, which designates persons with standing to file litigation for injuries to a child, refers to the legitimacy of the child. This characterization is archaic, and is now irrelevant, having no meaning in the context of the statute, given the provisions of the Family Code with respect to the determination of parentage.

This Resolution: Would eliminate the references in section 376 to “illegitimate” children.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None Known.

AUTHOR AND/OR PERMANENT CONTACT: K. Martin White, Esq. P.O. Box 1826 Carlsbad, CA 92018; (760) 434-6787

RESPONSIBLE FLOOR DELEGATE: K. Martin White, Esq.

RESOLUTION 09-04-2017

DIGEST
Tort Law: Numbering Subdivisions to Aid in Citation
Renumbers Civil Code section 846 to add subdivision designations.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution renumbers Civil Code section 846 to add subdivision designations. This resolution should be approved in principle because it would ease reading and citation to section 846 of the California Civil Code.

Presently, Civil Code section 846 lacks nomenclature. This resolution provides codification to match the titling scheme found in accompanying sections in chapter 2. As amended, Civil Code section 846 would comply with the code, division, part, title, chapter, section, subsection, and paragraph nomenclature found in chapter 2 of the Civil Code. Adding this logically consistent scheme will reduce confusion and waste in legal disputes involving this section, and its addition will not generate negative results.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 846 to read as follows:

§ 846

(a) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section.

(b) A "recreational purpose," as used in this section, includes activities such as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

(c) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby

~~(a)~~(1) extend any assurance that the premises are safe for that purpose, or

~~(b)~~(2) constitute the person to whom permission has been granted the legal status of an

invitee or licensee to whom a duty of care is owed, or

~~(c)~~(3) assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted except as provided in this section.

(d) This section does not limit the liability which otherwise exists

~~(a)~~(1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or

~~(b)~~(2) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or

~~(c)~~(3) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

(e) Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: As currently framed, the subparagraphs of Civil Code section 846 are unnumbered, such that an effort to cite same would require verbiage like "the third paragraph of Civil Code section 846."

The Solution: This resolution would attach numbers to all paragraphs in the section to aid in the citation of the specific subdivisions of the section to which a party wishes to refer.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: K. Martin White, Esq. P.O. Box 1826 Carlsbad, CA 92018; (760) 434-6787

RESPONSIBLE FLOOR DELEGATE: K. Martin White, Esq.

RESOLUTION 09-05-2017

DIGEST
Pre-Litigation Record Requests: Including Paramedic and Ambulance Service Providers
Amends Evidence Code section 1158 to add paramedic and ambulance service providers as "medical providers" obliged to make patient records available for inspection and copying upon signed patient authorization prior to filing a lawsuit.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Evidence Code section 1158 to add paramedic and ambulance service providers as "medical providers" obliged to make patient records available for inspection and copying upon signed patient authorization prior to filing a lawsuit. This resolution should be approved in principle because it is reasonable to allow a patient access to the records of providers of their medical services, whose records may assist in the evaluation of pertinent facts in contemplation of a possible lawsuit.

Evidence Code section 1158 provides that medical providers are required to make their records available for copying or inspection prior to filing a lawsuit upon receipt of a signed written request from the patient or patient's representative. Paramedic and ambulance service providers are not included in the definition of "medical provider." (Evid. Code, §1158, subd. (a).) When these medical professionals are privy to facts regarding the patient's medical treatment and involved in the care of a patient, their records can assist a patient or their representative in assessing the pros and cons of commencing a lawsuit. Therefore, it is reasonable to include paramedic and ambulance service providers among the other medical provider who must comply with an Evidence Code section 1158 pre-litigation patient request for records. Paramedic and ambulance service providers are required to maintain patient records, but because not every paramedic or ambulance encounter results in transport to a medical facility, if patients cannot get the paramedic's records, then the patient's medical records would be incomplete. The patient should be able to have ready access to them, particularly if those records are relevant to a care issue or probative of facts at issue in a potential litigation. The burden on these providers for complying with the reasonable requirements of Evidence Code section 1158—promptly producing records upon a patient's written request prior to filing suit—is minimal, and it may even avert litigation.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 1158 to read as follows:

§ 1158

(a) For purposes of this section, "medical provider" means physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, paramedic and ambulance service providers, or pharmacist or pharmacy, duly licensed as such under the laws of the state, or a licensed hospital.

(b) Before the filing of any action or the appearance of a defendant in an action, if an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, to a medical provider, the medical provider shall promptly make all of the patient's records under the medical provider's custody or control available for inspection and copying by the attorney at law or his or her representative.

(c) Copying of medical records shall not be performed by a medical provider, or by an agent thereof, when the requesting attorney has employed a professional photocopier or anyone identified in Section 22451 of the Business and Professions Code as his or her representative to obtain or review the records on his or her behalf. The presentation of the authorization by the agent on behalf of the attorney shall be sufficient proof that the agent is the attorney's representative.

(d) Failure to make the records available during business hours, within five days after the presentation of the written authorization, may subject the medical provider having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section.

(e) (1) All reasonable costs incurred by a medical provider in making patient records available pursuant to this section may be charged against the attorney who requested the records.

(2) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents ($0.10) per page for standard reproduction of documents of a size 81/2 by 14 inches or less; twenty cents ($0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to an authorization; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars ($16) per hour per person, computed on the basis of four dollars ($4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

(f) If the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, the only fee for complying with the authorization shall not exceed fifteen dollars ($15), plus actual costs, if any, charged to the record custodian by a third person for retrieval and return of records held offsite by the third person.

(g) If the records requested pursuant to subdivision (b) are maintained electronically and if the requesting party requests an electronic copy of such information, the medical provider shall

provide the requested medical records in the electronic form and format requested by the requesting party, if it is readily producible in such form and format, or, if not, in a readable form and format as agreed to by the medical provider and the requesting party.

(h) A medical provider shall accept a signed and completed authorization form for the disclosure of health information if both of the following conditions are satisfied:

(1) The medical provider determines that the form is valid.

(2) The form is printed in a typeface no smaller than 14-point type and is in substantially the following form:

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION PURSUANT TO EVIDENCE CODE SECTION 1158

The undersigned authorizes the medical provider designated below to disclose specified medical records to a designated recipient. The medical provider shall not condition treatment, payment, enrollment, or eligibility for benefits on the submission of this authorization.

Medical provider: _____

Patient name: _____

Medical record number: _____

Date of birth: _____

Address: _____

Telephone number: _____

Email: _____

Recipient name: _____

Recipient address: _____

Recipient telephone number: _____

Recipient email: _____

Health information requested (check all that apply):

___Records dated from _____ to _____.

___Radiology records: _____ images or films _____ reports_____digital/CD, if available.

___Laboratory results dated.

___Laboratory results regarding specific test(s) only (specify)_____.

___All records.

___Records related to a specific injury, treatment, or other purpose (specify): _____.

Note: records may include information related to mental health, alcohol or drug use, and HIV or AIDS. However, treatment records from mental health and alcohol or drug departments and results of HIV tests will not be disclosed unless specifically requested (check all that apply):

___Mental health records.

___Alcohol or drug records.

___HIV test results.

Method of delivery of requested records:

___Mail

___Pick up

___Electronic delivery, recipient email:_____

This authorization is effective for one year from the date of the signature unless a different date is specified here: _____.

This authorization may be revoked upon written request, but any revocation will not apply to information disclosed before receipt of the written request.

A copy of this authorization is as valid as the original. The undersigned has the right to receive a copy of this authorization.

Notice: Once the requested health information is disclosed, any disclosure of the information by the recipient may no longer be protected under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Patient signature*: _____

Date: _____

Print name: _____

*If not signed by the patient, please indicate relationship to the patient (check one, if applicable):

___Parent or guardian of minor patient who could not have consented to health care.

___Guardian or conservator of an incompetent patient.

___Beneficiary or personal representative of deceased patient.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Evidence Code Section 1158 currently does not list paramedic and ambulance service providers as "medical providers" that must comply with a patient's attorney's pre-litigation request for copies of treatment records.

The Solution: This resolution would amend Evidence Code Section 1158 to include paramedic and ambulance service providers as "medical providers" that must comply with a patient's attorney's pre-litigation request for copies of treatment records.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND PERMANENT CONTACT: John M. Hansen, Esq., 316 S. Melrose Drive, Suite 102, Vista, CA 92081 (760) 295-4888.

RESPONSIBLE FLOOR DELEGATE: Russell S. Kohn, Esq., Kohn Law Office, 2170 S. El Camino Real, Suite 201, Oceanside, CA 92054 (760) 721-8182.

RESOLUTION 09-06-2017

DIGEST
Small Claims: Delete Cross-Reference to Repealed Statute
Amends Code of Civil Procedure section 116.221 to delete a cross-reference to an obsolete code section.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 116.221 to delete a cross-reference to an obsolete code section. This resolution should be approved in principle because it conforms the statutory language to current law by deleting an obsolete code reference.

Code of Civil Procedure section 116.221 currently contains a cross-reference to section 116.224, which was repealed in 2015 by operation of its own terms. Since Code of Civil Procedure section 116.224 was repealed, its cross-reference in section 116.221 should be stricken. Resolution 09-06-2017 accomplishes that fix and should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 116.221 to read as follows:

§ 116.221

In addition to the jurisdiction conferred by Section 116.220, the small claims court has jurisdiction in an action brought by a natural person, if the amount of the demand does not exceed ten thousand dollars ($10,000), except ~~for actions specified in Section 116.224, or~~ as otherwise prohibited by subdivision (c) of Section 116.220 or subdivision (a) of Section 116.231.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: This statute cross-references Code of Civil Procedure section 116.224, which has been repealed.

The Solution: This resolution deletes the cross-reference to the repealed statute.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND PERMANENT CONTACT: Melissa L. Bustarde, Esq., Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 09-07-2017

DIGEST
Civil Procedure: Motion to Compel Arbitration
Amends Code of Civil Procedure section 1281.2 to clarify that a motion to compel arbitration may be filed in a pending action, and to facilitate citation to sub-sections.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 06-08-2015, which was disapproved.

Reasons:
This resolution amends Code of Civil Procedure section 1281.2 to clarify that a motion to compel arbitration may be filed in a pending action, and to facilitate citation to sub-sections. This resolution should be disapproved because there is no confusion as to whether or not compelling arbitration is possible in an existing action and, therefore, the proposed amendment is unnecessary.

The proponent correctly states that the means by which arbitration is compelled in California is by "petition," a proceeding normally, but not exclusively, used to commence an action. However, the proponent fails to identify any actual problem associated with this slightly curious nomenclature. In reality, a petition to compel arbitration is treated like a motion for all extents and purposes, and there does not seem to be any confusion among the Courts or practitioners. Indeed, the California Rules of Court set forth the requirements for such "petitions" in the same title as for motion practice in general. (See, Cal. Rules Ct., rule 3.1330.) Additionally, the Code of Civil Procedure uses the term "petition" to describe other requests for relief that do not initiate lawsuits, but are brought during pending lawsuits. (See, e.g., Code Civ. Proc., § 1263.720 [petition may be brought by any party to certain types of eminent domain proceedings to determine if hazardous waste is present on the property], and Code Civ. Proc., § 2017.320 [party to an elder abuse action can petition the court to maintain the confidentiality of certain documents filed in the proceeding].) Thus, one of the basic premises for the resolution is incorrect. This resolution is therefore unnecessary.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1281.2 to read as follows:

§ 1281.2

(a) On petition or, in a pending action, motion of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

~~(a)~~ (1) The right to compel arbitration has been waived by the petitioner; ~~or~~

~~(b)~~ (2) Grounds exist for the revocation of the agreement~~.~~; or

~~(c)~~ (3) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition or motion to compel arbitration has been filed, but on or before the date of the hearing on the petition or motion. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

(b) If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

(c) If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

(d) If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision ~~(c)~~(a)(3) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: As currently framed, Code of Civil Procedure section 1281.2 specifically provides only for a "petition to compel arbitration." In most other contexts, a "petition" is a pleading that commences an action, whereas it is frequently the case that one party or the other in a pending action seeks to obtain an order compelling arbitration through the motion process. In addition, the way the section is framed makes it difficult to make proper citations, and there are paragraphs that are not numbered.

The Solution: Would clarify that arbitration can be compelled through the motion process when it is sought in a pending action, and would attach numbers to all paragraphs in the section to aid in the citation of the specific subdivisions of the section to which a party wishes to refer.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Irene E. Stewart, Law Offices of Irene E. Stewart, 2424 Vista Way, Ste. 202, Oceanside, CA 92054; (760) 330-3320.

RESPONSIBLE FLOOR DELEGATE: Irene E. Stewart

RESOLUTION 09-08-2017

DIGEST
Enforcement of Judgments: Information Required for Sale if Homestead Exemption Exists
Amends Code of Civil Procedure section 704.760 to eliminate the requirement that the judgment creditor provide lien information in its application for sale unless a homestead exemption exists.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 704.760 to eliminate the requirement that the judgment creditor provide lien information in its application for sale unless a homestead exemption exists. This resolution should be disapproved because lien information is required each time real property is sold to satisfy a judgment.

The proponent asserts that the requirement of providing lien information is not necessary unless there is a homestead exemption, because "[i]f there is no homestead exemption claimed, there is no need for this information. . . as the court need not make any determination as to whether a sale of the property would satisfy 'all liens and encumbrances' pursuant to Code of Civil Procedure section 704.800." While the Court may not need to make any determination as to whether the liens and encumbrances would be satisfied except when a homestead exemption is claimed, lienholders are still entitled to advance notice of the sale, even absent a homestead exemption. Code of Civil Procedure section 701.540, subdivision (h), provides "not earlier than 30 days after the date of levy, the judgment creditor shall determine the names of all persons having liens on the real property on the date of levy that are of record in the office of the county recorder and shall instruct the levying officer to mail notice of sale to each lienholder at the address used by the county recorder for the return of the instrument creating the lien after recording. The levying officer shall mail notice to each lienholder, at the address given in the instructions, not less than 20 days before the date of sale." Including the lien information in the application for sale assures that the judgment creditor will meet its obligation to give the sheriff the names and addresses of lien holders in a timely manner.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 704.760 to read as follows:

§ 704.760

The judgment creditor s application shall be made under oath, shall describe the dwelling, and shall contain all of the following:

(a) A statement whether or not the records of the county tax assessor indicate that there is a current homeowner s exemption or disabled veteran s exemption for the dwelling and the person or persons who claimed any such exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.

(c) If the dwelling is a homestead, a ~~A~~ statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the address of such person used by the county recorder for the return of the instrument creating such person's lien or encumbrance after recording.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Current law requires the information in section 704.760(c) whether or not a homestead exemption is claimed. If there is no homestead exemption claimed, there is no need for this information and costs incurred by judgment creditors to provide this information in the application for sale are completely unnecessary as the court need not make any determination as to whether a sale of the property would satisfy "all liens and encumbrances" pursuant to Code of Civil Procedure § 704.800.

The Solution: This resolution only requires the information in section 704.760(c) where there is a homestead exemption.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:
None known.

AUTHOR AND PERMANENT CONTACT: Craig L. Combs, Esq., Wasserman Kornheiser, LLP, 7955 Raytheon Road, San Diego, California 92111, (858) 505-9500.

RESPONSIBLE FLOOR DELEGATE: David R. Moore, Moore & Skiljan, 7700 El Camino Real, Ste. 207, Carlsbad, CA 92009; 760-944-7700 x1

RESOLUTION 09-09-2017

DIGEST
Vexatious Litigants: Ability to File Cross-Complaints
Amends Code of Civil Procedure section 391 to include cross-complaints within the definition of "litigation" for purposes of the vexatious litigant statutes.

RESOLUTION COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 391 to include cross-complaints within the definition of "litigation" for purposes of the vexatious litigant statutes. This resolution should be disapproved because it would curtail a defendant's ability to defend his/her case, and perverts the concept of vexatious litigation.

Code of Civil Procedure 391 only includes a person who "commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained" as plaintiffs. The omission of cross-complainant is intentional and has merit. It is important that the definition and subsequent legal interpretation of "vexatious litigant" refer to starting or instituting a lawsuit, not the filing of a response to a lawsuit. The notion of vexatious litigation is tied to the idea that a plaintiff should be restricted if he/she is shown to have initiated legal action to harass, frustrate, or otherwise annoy, rather than seek justice.

The current language of section 391 allows for a defendant to be declared a vexatious litigant. Subdivision (b)(3) applies to *any* person who repeatedly files unmeritorious motions, pleadings that are frivolous or solely intended to cause unnecessary delay. Additionally, a plaintiff who files a lawsuit *against* a vexatious litigant has additional tools in their quiver. If the cross-complaint deals with an issue previously resolved by a court, the plaintiff can include any prior orders and/or decisions in their motion in opposition.

The proposed language would put a defendant in the untenable position of potentially not being able to mount a defense against a lawsuit, thus fatally undermining the defendant's ability to protect him/herself from complaints and suits. Requiring a pro per defendant to get court permission to file a cross-complaint against a plaintiff and potentially be required to place a security with the court is both contrary to justice and a massive financial burden on both the defendant and the courts and creates an advantage for the plaintiff. The proposed resolution also fails to address the circumstance when a case calls for a compulsory cross-complaint. It is not reasonable to presume that in such cases the defendant should have to seek permission before filing the cross-complaint. All of these procedural incongruities run contrary to notions of justice and to the fundamental notion that the plaintiff always bears the burden of proof.

While not completely on point, it is noteworthy that Courts have been leery of creating this type of restriction on defendants in appeals. In *Mahdavi v. Superior Court* (2008) 166 Cal.App.4th 32, the court held, "[a] defendant who appeals an adverse ruling is not filing 'new' litigation or 'maintaining' litigation, but rather, is attempting to 'undo' the results of litigation that has been instituted against him or her," and the "[p]urpose of section 391.7 would not be served by imposing its limitations on a defendant, even though that individual had previously brought frivolous claims against others." (*Mahdavi v. Superior Court* (2008) 166 Cal.App.4th 32, 37, 42.) The Courts have traditionally been leery of restricting the ability of a defendant to present their case in the proper manner and naming a party a vexatious litigant from the start when they did not initiate the litigation, because doing so would fly in the face of notions of fairness and access to justice.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 391 to read as follows:

§ 391

As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, <u>including a cross-complaint,</u> commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona <u>and a cross-complainant</u>.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained, including a cross-defendant.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Code of Civil Procedure section 391.7(a), which deals with pre-filing order requirements for vexatious litigants, contains the phrase "new litigation." Although a cross-complaint is considered to be a "civil action" under CCP sec. 22, a question exists as to whether "new litigation" includes cross-complaints. The question exists when the initial complaint was filed by someone other than the vexatious litigant, but the cross-complaint is filed by the vexatious litigant in response to the initial complaint. Thus, clerks are filing cross-complaints without first checking, pursuant to CCP section 391.7(c) if it is being presented by a vexatious litigant subject to a prefiling order.

The Courts of this state have ruled that the term "Litigation," as defined in Section 391(a), includes appeals and civil writs. See McColm v. Westwood Park Assn (1998) 62 Cal.App.4th 1211, 1216. However, no appellate court has ruled on whether a cross-complaint filed by a vexatious litigant is subject to the State's statutes regarding vexatious litigants.

The Solution: This resolution would amend Code of Civil Procedure Section 391 to include cross-complaints as "litigation" that must comply with pre-filing order requirements for vexatious litigants.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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