RESOLUTION 10-01-2020

DIGEST
Family Law: Best Interest Standard
Amends Family Code section 3044 to allow a court to consider the status quo and the preferences of the child when issuing custody orders where domestic violence has occurred.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 3044 to allow a court to consider the status quo and the preferences of the child when issuing custody orders where domestic violence has occurred. This resolution should be approved in principle because it would bring the custodial factors considered under Family Code section 3044 in parity with other Family Code sections.

Currently, Family Code section 3044 creates a rebuttable presumption that awarding joint legal and joint physical custody to a parent who has been found to have perpetuated violence against the other parent is detrimental to the best interest of the child. A Family Code section 3044 presumption typically arises in relation to a Domestic Violence Restraining Order, where a restraining order has been granted against one parent after a hearing. However, the presumption arises any time a parent is found to have perpetuated violence against the other parent within the previous five years.

The presumption arising under section 3044 may currently be rebutted by a finding by the court that the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. Some of the factors the court can currently consider include whether the perpetrator has successfully completed a batterer's treatment program, parenting class, or alcohol or drug abuse counseling.

Section 3042 does not explicitly state that the child's preferences, if communicated to the court, should be a factor which may rebut the presumption against custody set forth under section 3044. This resolution clarifies that the child's preferences should be considered as a rebuttable factor, and, by specific reference to Family Code section 3042, would require the court to consider the custodial preference of a child aged 14 or "of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation." The court is required to consider the child's stated preferences in making custody orders when domestic violence is not a factor. This resolution would bring the factors considered under section 3044 in parity with other Family Code sections.

There is currently no code section that would allow the court to consider a separate custodial agreement of the parties as rebutting the section 3044 presumption. However, the existence of a separate agreement may be demonstrative of the custodial status quo and therefore may be

considered by the court when a significant change in custody is proposed. The court is required to consider the stability of the child and the custodial status quo when making custody orders when domestic violence is not a factor.

Counter arguments have suggested that the language "an agreement" is problematic, as "an agreement" may have been reached by the parties, but never followed. Worse, such an agreement may have been coerced. The language "an agreement" could be replaced with "an order for, or significant history of" sole or joint legal custody to reflect this concern and still consider the status quo of the parties' custodial arrangement.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3044, to read as follows:

§ 3044

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence.

(b) To overcome the presumption set forth in subdivision (a), the court shall find that paragraph (1) is satisfied and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020.

(1) The perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child pursuant to Sections 3011 and 3020, including but not limited to the following considerations: (i) There exists an agreement or order for sole or joint legal or physical custody in favor of the perpetrator, and it would serve the child's best interest for stability and continuity to maintain the existing custody arrangement, and (ii) The preference of a child of sufficient age and capacity pursuant to California Rules of Court, Rule 5.250 and Section 3042 of the Family Code, when considered with the other factors in this Paragraph (b), suggests that joint or sole custody to the perpetrator is in the child's best interest. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Additional factors:

(A) The perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.

(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.

(D) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole.

(E) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions.

(F) The perpetrator of domestic violence has committed further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" when the person is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in behavior involving, but not limited to, threatening, striking, harassing, destroying personal property, or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of a crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if a court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) (1) It is the intent of the Legislature that this subdivision be interpreted consistently with the decision in Jaime G. v. H.L. (2018) 25 Cal.App.5th 794, which requires that the court, in determining that the presumption in subdivision (a) has been overcome, make specific findings on each of the factors in subdivision (b).

(2) If the court determines that the presumption in subdivision (a) has been overcome, the court shall state its reasons in writing or on the record as to why paragraph (1) of subdivision (b) is satisfied and why the factors in paragraph (2) of subdivision (b), on balance, support the legislative findings in Section 3020.

(g) In an evidentiary hearing or trial in which custody orders are sought and where there has been an allegation of domestic violence, the court shall make a determination as to whether this section applies prior to issuing a custody order, unless the court finds that a continuance is necessary to determine whether this section applies, in which case the court may issue a temporary custody order for a reasonable period of time, provided the order complies with Section 3011, including, but not limited to, subdivision (e), and Section 3020.

(h) In a custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to custody mediation in the case.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Current law has a sweeping effect on custody rights established by agreement or with the child's input. It doesn't address if 3044(a)'s presumption applies when the parties agree to joint or sole custody to the perpetrator after the alleged abuse. The law does not explicitly allow the child's preference to be considered. Although current law references 3011 and 3020, the practical application results in 3044(a)'s presumption being the overarching (or only) consideration when an allegation of abuse is presented. The best interest of the child should be the primary focus for any custody determination. All child-related and public policy considerations in 3011, 3020, 3040 should be examined through the lens of the best interest standard. This does not occur, however, because of cases like *Celia S. v. Hugo J.* (2016) 3 Cal.App.5th 655, where the court is prohibited from ordering a parenting schedule amounting to a de facto physical custody arrangement even if that order would confirm an arrangement by stipulation, requested by the child(ren), or recommended by the Court's Mediator. This undermines this state's public policy for stability and continuity in custody arrangements.

The Solution: The amendment to 3044(b) explicitly allows courts to consider child-centered information to overcome the 3044(a) presumption. The change is necessary because the best interest of the child standard is often overlooked when abuse is alleged, even if the child was not the abuse victim or the child was not a percipient witness to the abuse. Some judicial officers find the presumption has been rebutted when the parties reach an agreement for sole or joint custody to the perpetrator, while others do not, creating confusion. If an agreement of the parties was made after the incident of abuse, such an agreement of the parents presupposes that both parents entered into a custody arrangement that is in their child's best interest, yet judges often disregard an agreement and strictly apply 3044, while other judges will consider the mutual agreement as rebutting the presumption and/or being in the child's best interest. Disturbing such an agreement of the parents would undermine the child's need for stability and continuity during an already tumultuous time, e.g. dividing their time between two households, coping with parents' separation, going to new school if one or both parents relocate after separating households. If a child is of sufficient age and capacity to weigh in on the custody determination, as permitted under the CRC and Family Code, the child's voice should be considered. The court can determine the weight given to the child's stated preference.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None.

AUTHOR AND/OR PERMANENT CONTACT:
Diana R. Passadori, Passadori Family Law & Mediation, P.C., 100 Pine Street, Suite 1250, San Francisco, CA 94111, phone (415) 678-1981, fax (415) 678-1982, diana@passadoriflm.com.

RESPONSIBLE FLOOR DELEGATE: Diana R. Passadori

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This Resolution contradicts FC 3044, wherein the Legislature's concluded that it is not in the best interests of the child for a perpetrator parent to have custody. The intent of this resolution is to weaken the impact a finding of domestic violence has on making custody orders. It presupposes a custody "agreement" between the parents should be influential, without recognizing such an agreement may have been coerced. It further ignores a child's preference could also stem from coercion or concern for the victim parent. The resolution invokes "stability and continuity" which is directly contradicted in the same existing paragraph that frequent and continuing contact cannot be used to overcome the FC 3044 presumption.

SDCBA

The SDCBA Delegation recommends disapproval of resolution 10-01-2020 as written. The Delegation recommends the proposed wording be changed from "There exists an agreement or order for sole or joint legal or physical custody..." to:

"There exists an order for, or significant history of, sole or joint legal or physical custody in favor of the perpetrator, and it would serve the child's best interest for stability and continuity to maintain the existing custody arrangement."

The concern is that the parties may have "an agreement" to share custody that they never followed, and therefore have no existing custody arrangement to maintain. The child's best interest should be based on the actual history of shared custody, not just an agreement for such. The history of shared custody should be significant enough that to disrupt it would be detrimental to the child's interest for stability and continuity. Similarly, if a court previously ordered joint custody, it should be presumed correct; however, if the parties did not follow the order and have no relevant history of shared custody, the order alone may not be sufficient to overcome the Section 3044 presumption against joint custody.

FLEXCOM

FLEXCOM disapproves this resolution.

RESOLUTION 10-02-2020

DIGEST
Family Law: Completion of Treatment or Parenting Program
Amends Family Code section 3044 to exclude the completion of a batterer's treatment program or parenting class as a factor to consider in a custody determination.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 3044 to exclude the completion of a batterer's treatment program or parenting class as a factor to consider in a custody determination. This resolution should be approved in principle because it codifies and clarifies the existing case law.

Family Code section 3044 creates a rebuttable presumption that awarding joint legal and joint physical custody to a parent who has been found to have perpetuated violence against the other parent is detrimental to the best interest of the child. A Family Code section 3044 presumption typically arises in relation to a Domestic Violence Restraining Order, where a restraining order has been granted against one parent after a hearing. However, the presumption arises at any time a parent is found to have perpetuated violence against the other parent within the previous five years.

The presumption arising under section 3044 may currently be rebutted by a finding by the court that the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. Some of the factors the court can currently consider include whether the perpetrator has successfully completed a batterer's treatment program, parenting class, or alcohol or drug abuse counseling. (Fam. Code, § 3042.)

Though section 3042 specifically states that the completion of a parenting program, or batterer's treatment program are factors to be considered, the court in *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 335, found that whether the perpetrator had actually completed the programs at the time of the custodial hearing was not dispositive because "the factors must be considered, but they are not mandatory requirements for rebuttal of the presumption." The court was therefore required to consider whether these programs were completed, but a failure to complete the programs was not fatal to a finding that awarding joint custody to the perpetrator was in the child's best interests. Other cases have been silent on whether the completion of the program is a finding that must be explicitly made prior to making custody orders.

The requirement that a perpetrator of domestic violence must complete a 52-week batterer intervention program, as opposed to any other type of treatment program, is printed onto the forms adopted for mandatory use for Restraining Orders and is not discretionary. However, a

52-week batterer intervention plan may not be the most helpful or appropriate program for the perpetrator. For example, where substance abuse appears to be the underlying cause of domestic violence, the perpetrator may be better served by completing drug and alcohol counseling. This resolution would allow the court to consider a perpetrator's progress toward addressing other factors that may have played a part in creating the abusive situation, which may or may not mean the completion of a batterer intervention program. Further, this resolution allows the court to make custody decisions within the 52-week time period while the perpetrator is making progress toward completion but has not yet completed the mandatory program.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3044, to read as follows:

§ 3044

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence.

(b) To overcome the presumption set forth in subdivision (a), the court shall find that paragraph (1) is satisfied and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020.

(1) The perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child pursuant to Sections 3011 and 3020. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Additional factors:

(A) The perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.

(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.

(D) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole.

(E) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions.

(F) The perpetrator of domestic violence has committed further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" when the person is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in behavior involving, but not limited to, threatening, striking, harassing, destroying personal property, or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of a crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if a court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) (1) It is the intent of the Legislature that this subdivision be interpreted consistently with the decision in Jaime G. v. H.L. (2018) 25 Cal.App.5th 794, which requires that the court, in determining that the presumption in subdivision (a) has been overcome, make specific findings on each of the factors in subdivision (b), and interpreted consistently with the decision in S.Y. v. Superior Court (2018) 29 Cal.App.5th 324, which states that a parent is not required to [i] complete a parenting class or batterer's treatment program in every case or [ii] have all of the factors in subdivision (b) completed at the time of the custody determination in order to rebut the presumption in subdivision (a).

(2) If the court determines that the presumption in subdivision (a) has been overcome, the court shall state its reasons in writing or on the record as to why paragraph (1) of subdivision (b) is satisfied and why the factors in paragraph (2) of subdivision (b), on balance, support the legislative findings in Section 3020.

(g) In an evidentiary hearing or trial in which custody orders are sought and where there has been an allegation of domestic violence, the court shall make a determination as to whether this section applies prior to issuing a custody order, unless the court finds that a continuance is necessary to determine whether this section applies, in which case the court may issue a temporary custody order for a reasonable period of time, provided the order complies with Section 3011, including, but not limited to, subdivision (e), and Section 3020.

(h) In a custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to custody mediation in the case.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Although the current version of 3044 references Family Code §§ 3011, 3020, the practical application results in 3044(a)'s presumption being the overarching (or only) consideration when an allegation of abuse is presented. The best interest of the child should be the primary focus for any custody determination. All child-related and public policy considerations in 3011, 3020, 3040 should be examined through the lens of the best interest standard. There is confusion in application given the case, *Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794 referenced in subdivision (f), is a Second Appellate District case, and the case *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324 in the proposed language of subdivision (f), is a First Appellate District case. These cases each address the proper analysis of the subdivision (b) factors when determining if the presumption in subdivision (a) has been overcome or not by the perpetrator of abuse. Referencing only one of the District Court cases of 2018 in the current version of subdivision (f) has resulted in confusion in the various trial courts and even amongst the various judges in the trial departments of the same county.

The Solution:
To effectuate more consistent decisions from county to county and from judge to judge in the same county, the proposed revision gives the court explicit direction on how to correctly analyze the subdivision (b) factors in conjunction with determining if the presumption in subdivision (a) against joint or sole custody to a perpetrator of abuse has been overcome. The addition to 3044(f) explicitly references a second appellate case, *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, that should be adopted as the policy of this state. The revision explicitly allows evidence to rebut the 3044(a) presumption if the perpetrator has partially or mostly completed the any of the factors in subdivision (b) at the time of the custody determination, e.g. batterer's intervention course or parenting class has nearly been completed. The revision also clarifies that not every factor in 3044(b) must be completed by the perpetrator, e.g. if substance abuse or parenting classes were never ordered or would not be appropriate given the facts of the case. The revision reflects the holding of *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324. Both 2018 appellate cases should be referenced in subdivision (f) to avoid confusion and inconsistent decisions.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None.

AUTHOR AND/OR PERMANENT CONTACT:
Diana R. Passadori, Passadori Family Law & Mediation, P.C., 100 Pine Street, Suite 1250, San Francisco, CA 94111, phone (415) 678-1981, fax (415) 678-1982, diana@passadoriflm.com.

RESPONSIBLE FLOOR DELEGATE: Diana R. Passadori

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

OCBA

The Orange County Bar Association (OCBA) opposes this Resolution.

The proponent proposes an exception that swallows the rule. Specifically, the proponent wants an exception stated in the code section that a perpetrator of domestic violence does not have to complete a parenting class or batterer's treatment program before the court will consider awarding joint legal or joint physical custody.

However, that is exactly what the code section states must occur. The code section states the batterer must complete the program. It does not state the batterer must complete part of it or the court has discretion to consider a partial completion.

The proponent cites to two cases.

In *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, the trial court ordered the father to complete a parenting class and a 12-week domestic violence treatment program, but completion was not required as a condition of custody. There was not a permanent restraining order in that case.

In *Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794, the court stated it may be appropriate in a matter not to require the batter's treatment program. The issue on appeal was the statement of decision did not address this factor at all. The court did not order the batterer's treatment program. Thus, there was no requirement to complete the class in order to rebut the presumption as stated in the code section.

The proponent claims there is disagreement between the districts. This is correct to some extent, but perhaps not for the reason the proponent addresses. Section (f)(1) of the proposal reference both *S.Y. v. Superior Court* (Second Appellate District Case) and *Jaime G v. H.L* (First Appellate District case). These cases do not agree, in large part, over the issue of whether a statement of decision must specifically state each factor under subdivision (b).

We understand the concern the proponent raises but the OCBA does not believe carving an exception that eliminates the rule is a good practice. If the legislature wishes to make wholesale modifications to section 3044, it should do so by striking or modifying those specific sections at issue.

FLEXCOM

FLEXCOM disapproves this resolution**.** It is FLEXCOM's position that citation to caselaw in this manner is unnecessary and can be problematic in interpretation.

RESOLUTION 10-03-2020

DIGEST
Marriage: Time Limits for Consideration of Unsound Mind as Basis for Annulment
Amends Family Code section 2211 to establish a time limit on considering unsound mind as a basis for annulment.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 2211 to establish a time limit on considering unsound mind as a basis for annulment. This resolution should be disapproved because this resolution would alter the existing statutory termination of a marriage upon the death of a party.

Under current law, a party to the marriage, or a relative or conservator of a party of unsound mind can seek to annul a marriage at any time before the death of either party. A marriage is dissolved by the death of one of the parties. (Fam. Code, § 310.) This resolution would expand the right to annul a marriage beyond the death of a party to the marriage and would conflict with the long-recognized, fundamental principle that marriage ends at death.

This resolution would limit the time period during which an annulment may be sought on the basis of unsound mind to a four-year period after the discovery of the facts constituting the unsound mind, but does not address whether this four-year time period would also apply after the death of a party. The proposed language would leave open to litigation the validity of a marriage after the death of one of the parties to the marriage, which could result in lingering uncertainty regarding administration of the decedent's estate, interfere with property rights of the surviving spouse or heirs established by the Probate Code, and have significant tax consequences, such as impacting spousal exclusions for property tax reassessments.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2211, to read as follows:

§ 2211

A proceeding to obtain a judgment of nullity of marriage, for causes set forth in Section 2210 , must be commenced within the periods and by the parties, as follows:

(a) For causes mentioned in subdivision (a) of Section 2210, by any of the following:

(1) The party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent.

(2) A parent, guardian, conservator, or other person having charge of the minor, at any time before the married minor has arrived at the age of legal consent.

(b) For causes mentioned in subdivision (b) of Section 2210, by either of the following:

(1) Either party during the life of the other.

(2) The former spouse.

(c) For causes mentioned in subdivision (c) of Section 2210, by the party injured, or by a relative or conservator of the party of unsound mind, ~~at any time before the death of either party,~~ within four years after the discovery of the facts constituting the unsound mind.

(d) For causes mentioned in subdivision (d) of Section 2210, by the party whose consent was obtained by fraud, within four years after the discovery of the facts constituting the fraud.

(e) For causes mentioned in subdivision (e) of Section 2210, by the party whose consent was obtained by force, within four years after the marriage.

(f) For causes mentioned in subdivision (f) of Section 2210, by the injured party, within four years after the marriage.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Family Code section 2211 requires that proceedings for annulment of marriage based on unsound mind commence at any time prior to the death of either party. This is a problem because incapacity to marry often immediately precedes death, and marriages based on unsound mind are only discovered after death. In addition, this is a problem because an annulment based on fraud may be commenced within four years after the discovery of facts constituting the fraud, which creates an ambiguity as to which statute of limitations is applicable in situations where the basis for annulment may be both fraud and unsound mind..

The Solution: The solution is to amend Family Code section 2211 to allow proceedings for annulment of marriage based on unsound mind to commence within four years within four years after the discovery of the facts constituting the unsound mind. This solution is consistent with the statutory period to commence annulments based on fraud.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

D. Robert Dieringer, 402 West Broadway, Suite 1950, San Diego, CA 92101; phone: 619-831-6984; fax: 619-239-7800; email: rdieringer@gbflawyers.com

RESPONSIBLE FLOOR DELEGATE: D. Robert Dieringer

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

OCBA

The Orange County Bar Association opposes this Resolution.

The Family Code sets forth the statute of limitations for an annulment action. The statute of limitations is different depending on the basis for the annulment. This proposed Resolution adds a statute of limitations when a person seeks an annulment based on a party's unsound mind. The current code requires the action to commence before the death of either party. The problem with the Resolution is it allows this action to commence after the death of the party, by the spouse who allegedly married his or her (and now deceased) spouse due to unsound mind, or a relative or conservator of the party of unsound mind. This is inconsistent not only with the long-recognized, fundamental principle that marriage ends at death, but also with Family Code Section 310 which provides, "[m]arriage is dissolved only by one of the following: (a) The death of one of the parties …."

If the proposed revision set forth a statute of limitations of four years but only before the death of the party, the OCBA may not oppose the modification. However, beyond Section 310 noted above, allowing a post death action may conflict with other California law.

FLEXCOM

FLEXCOM disapproves this resolution.

TEXCOM

DISAPPROVE

This Resolution proposes to set the time period during which annulment of a marriage may be sought by a relative or conservator of a party to the marriage to four years from the date of discovery of the facts constituting the unsound mind. Under existing law, a third party such as a relative or conservator can seek to annul a marriage of a person who marries when they are of unsound mind, any time up until the date of death of that person (See Family Code section 2210). The Resolution would have the effect of expanding the right of family members to seek annulment of a marriage beyond the death of a party to the marriage.

TEXCOM disapproves this Resolution because it would leave open to litigation the validity of a marriage after the death of one of the parties to the marriage, which would result in lingering uncertainty regarding administration of the decedent's estate. Under the Resolution, for example, if a family member discovered facts indicating unsound mind three years after the elder's passing, the marriage could be challenged up to seven years after the decedent's death. Allowing family members to wait four years after discovering the decedent's unsound mind results in loss of evidence. The Resolution would invite family members of a decedent who disapproved of the decedent's choice in a spouse (or simply do not want to share their estate) to bring a claim against the surviving spouse that the decedent may not have wanted to bring. Also, there are

potentially significant tax implications arising from invalidating a marriage post-death that would need to be explored further, including the availability of the marital deduction for federal estate tax purposes, the spousal exclusion for property tax reassessment purposes, etc. The litigation challenging the validity of the marriage could occur well after property rights of the surviving spouse (e.g., inheritance pursuant to the laws of intestate succession) have already been adjudicated, further confusing the respective rights of the parties.