ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS

Government Code Sections 27521, 27521.1
Health and Safety Code Section 102870, Penal Code Section 14202
Statutes 2000, Chapter 284

Postmortem Examinations: Unidentified Bodies, Human Remains (00-TC-18)

Filed by County of Los Angeles, Claimant

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EXECUTIVE SUMMARY

Background

Claimant, County of Los Angeles, submitted this test claim in June 2001 alleging a reimbursable state mandate for counties and local law enforcement in new activities and costs related to post mortem examinations or autopsies by coroners, and reporting requirements for law enforcement. Claimant attempted to amend this claim in its comments on the draft staff analysis to add Penal Code section 14250, subdivisions (b) and (c)(1), as added by Statutes 2000, chapter 822, and amended by Statutes 2001, chapter 467. Commission staff accepted the amendment, but severed it from the claim pursuant to the Executive Director's authority to expedite claims in Government Code section 17530 and consolidated it with claim 00-TC-27, *DNA Database,* which was previously filed on the same code sections.

The Department of Finance (DOF) states that pursuant to Government Code section 27491, the decision by a coroner to examine unidentified remains (other than DNA sampling) is a discretionary act not required by the State, nor was it required prior to the test claim legislation. According to DOF, any subsequent requirements regarding autopsy procedures are only initiated when a coroner chooses to examine unidentified remains. DOF also argues that the investigating law enforcement agency's report to the Department of Justice (DOJ) is discretionary because the report is initiated after the local agency exercises discretion to investigate the case. Thus, DOF concludes that this test claim has not resulted in a new program or higher level of service.

Conclusion

For reasons in the analysis, staff finds that Government Code section 27521.1 imposes a reimbursable state-mandated program on local law enforcement within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The mandate is for local law enforcement investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered. The exception is for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213.

Staff finds that Government Code section 27521, Penal Code section 14202 and Health and Safety Code section 102870, as added or amended by Statutes 2000, chapter 284, do not constitute a reimbursable state-mandated program because they are not subject to article XIII B, section 6.

Recommendation

Staff recommends that the Commission adopt the staff analysis and approve the test claim for the law enforcement reporting activity in Government Code section 27521.1.

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

6/29/01	Claimant County of Los Angeles files test claim with the Commission
8/8/01	DOF files comments on the test claim
9/6/01	Claimant County of Los Angeles files declaration in response to DOF comments
6/4/03	Commission staff issues draft staff analysis
6/24/03	Claimant files comments on the draft staff analysis
6/25/03	Claimant files amendment to test claim to add Penal Code section 14250, subdivisions (b) and (c)(1), as added by Statutes 2000, chapter 822, and amended by Statutes 2001, chapter 467.
7/7/03	Commission staff deems claimant's amendment complete, and notifies claimant that it will sever amendment from the claim and consolidate amendment with claim 00-TC-27, *DNA Database.*
7/10/03	Commission staff issues final staff analysis

BACKGROUND

Test claim legislation: The test claim legislation[1] states that a postmortem examination or autopsy[2] conducted at the discretion of the coroner on an unidentified body or human remains shall include the following activities:

(1) taking all available fingerprints and palm prints;
(2) a dental exam consisting of dental charts and dental X-rays;
(3) collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary;
(4) frontal and lateral facial photographs with the scale indicated;
(5) notation and photos, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body;
(6) notations of observations pertinent to the estimation of the time of death; and
(7) precise documentation of the location of the remains.

The test claim legislation authorizes the examination or autopsy to include full body X-rays, and requires the coroner to prepare a final report of investigation in a format established by the DOJ.

In addition, the jaws and other tissue samples must be removed and retained for one year after identification of the deceased, and no civil or criminal challenges are pending, or indefinitely. If

[1] Statutes 2000, chapter 284; Government Code sections 27521, 27521.1, Health and Safety Code section 102870, Penal Code section 14202.

[2] The terms "autopsy" and "postmortem exam," both in the test claim statute, are synonymous. "Autopsy" is primarily used hereafter.

the coroner is unable to establish the identity of the deceased, the coroner must (1) submit dental charts and dental X-rays of the unidentified body to the DOJ on forms supplied by the DOJ within 45 days of the date the body or human remains were discovered; and (2) submit the final report of investigation to the DOJ within 180 days of the date the body or remains were discovered. If the coroner cannot establish the identity of the body or remains, a dentist may examine the body or remains, and if the body still cannot be identified, the coroner must prepare and forward the dental examination record to DOJ. Law enforcement must report the death of an unidentified person to DOJ no later than 10 calendar days after the date the body or remains are discovered.

The test claim legislation was sponsored by the California Society of Forensic Dentistry in response to years of volunteer consultant work by members of the Society helping DOJ identify more than 2,200 unidentified dead persons in California. The sponsors argued that the ways in which evidence was collected or retained was inconsistent, and that information reported to the DOJ varied from very inadequate to extremely detailed. The sponsors also indicated that unidentified bodies had been buried or cremated without retaining evidence that could later assist in identifying them.[3]

Coroner duties: Each county in California performs the coroner's functions as defined in the California Government Code, the Health and Safety Code, the Penal Code and various other codes and regulations. The office of coroner may be elective or appointive,[4] or may be abolished and replaced by the office of medical examiner,[5] or may be consolidated with the duties of the public administrator, district attorney or sheriff.[6] Coroners and deputy coroners are peace officers.[7]

Pre-1975 statutes require coroners to inquire into and determine the circumstances, manner and causes of certain types of deaths. The coroner's duty is to investigate these deaths and ascertain the cause and time of death, which must be stated on the death certificate.[8] The types of death over which the coroner has jurisdiction, as listed in Government Code section 27491 and Health and Safety Code section 102850, are those that are:

- Violent, sudden or unusual;
- Unattended;
- Where the deceased has not been attended by a physician in the 20 days before death;
- Self-induced or criminal abortion;
- Known or suspected homicide, suicide or accidental poisoning;
- By recent or old injury or accident;

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[3] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading analysis of Senate Bill No. 1736 (1999-2000 Reg. Sess.) as amended August 8, 2000, page 4.

[4] Government Code section 24009.

[5] Government Code section 24010. Any reference to "coroners" in this analysis includes medical examiners, deputy coroners, or positions that perform the same duties.

[6] Government Code section 24300.

[7] Penal Code section 830.35, subdivision (c).

[8] Health and Safety Code sections 102855 and 102860.

- Drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration;
- Suspected sudden infant death syndrome;
- By criminal means;
- Associated with known or alleged rape or crime against nature;
- In prison or while under sentence;
- By known or suspected contagious disease constituting a public hazard;
- By occupational disease or hazard;
- Of state mental hospital patient;
- Of developmentally disabled patient in state developmental services hospital.
- Under circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another.
- Where the attending physician and surgeon or physician assistant is unable to state the cause of death.[9]

When the coroner investigates one of these types of deaths, he or she signs the death certificate.[10] In deaths where it is reasonable to suspect criminal means, the coroner must report the death to local law enforcement, along with all information received by the coroner relating to the death.[11]

In order to carry out the duties of office in investigating death in accordance with applicable statutes, it is necessary that the coroner have wide discretion in ordering an autopsy when, in the coroner's judgment, it is the appropriate means of ascertaining the cause of death.[12] This is still true as evidenced by the express discretion granted the coroner in the statutory scheme. For example, the coroner has "discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances" and falling within Government Code section 27491 (the types of death over which the coroner has jurisdiction).[13] The coroner also "may, in his or her discretion, take possession of the body..."[14] and "allow removal of parts of the body by a licensed physician and surgeon or trained transplant technician" for transplant or scientific purposes, under certain conditions.[15] Currently, the only instances in which an autopsy is required by law, i.e., outside the coroner's discretion, is if a spouse (or if none, surviving child or parent or next of kin) requests it in writing,[16] or if the suspected cause of death is Sudden Infant

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[9] Government Code section 27491 and Health and Safety Code section 102850.

[10] Government Code section 27491.

[11] Government Code section 27491.1.

[12] *Huntley v. Zurich General Acc. & Liability Ins. Co.* (1929) 100 Cal. App. 201, 213-214; 20 Opinions of the California Attorney General 145 (1952).

[13] Government Code section 27491.

[14] Government Code section 27491.4.

[15] Government Code section 27491.45, subdivision (b).

[16] Government Code section 27520. This section states that the requestor pays the autopsy costs.

Death Syndrome (SIDS).[17] Even in SIDS cases, the coroner has discretion in deciding whether to autopsy if the physician desires to certify the cause of death is SIDS.[18]

For unidentified bodies, existing law states that coroners shall forward dental examination records to the DOJ if all of the following apply: (1) the coroner investigates the death, (2) the coroner is unable to establish the identity of the body or remains by visual means, fingerprints or other identifying data, and (3) the coroner has a dentist conduct a dental examination of the body or remains and still cannot identify the deceased.[19] Preexisting law authorizes but does not require law enforcement to submit dental or skeletal X-rays to DOJ for missing persons.[20]

A coroner may be liable for "omission of an official duty."[21] In *Davila v. County of Los Angeles*,[22] the county was found negligent for cremating a body without notifying kin. The court held the that a coroner has a duty to act with reasonable diligence to locate a family member of a body placed in the coroner's custody before disposing of it. In *Davila*, the court started by restating and examining Government Code section 815.6:

> "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered. [citation.]

In finding the mandatory duty to notify the family, the *Davila* court stated:

> [T]he existence of a mandatory duty is established by Government Code section 27471 subdivision (a): "Whenever the coroner takes custody of a dead body pursuant to law, he or she *shall make a reasonable attempt to locate the family*." [FN1] (Italics added.) The same duty is reflected in Health and Safety Code sections 7104 (when the person with the duty of interment "cannot *after reasonable diligence* be found ... the coroner shall inter the remains ....") and 7104.1 (if within "30 days after the coroner notifies *or diligently attempts to notify the person responsible for the interment* ... the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains"). (Italics added.) Quite clearly, the coroner had a mandatory duty to make a reasonable attempt to locate decedent's family. [citation.][23]

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[17] Government Code sections 27491, subdivision (a) and 27491.41; subdivision (c).

[18] Government Code sections 27491.41, subdivision (c) (2).

[19] Health and Safety Code section 102870.

[20] Penal Code section 14206, subdivisions (a)(2) and (b).

[21] Code of Civil Procedure section 339 states the statute of limitations is two years. The duties are outlined in Government Code section 27491 and Health and Safety Code section 102850.

[22] *Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137, 143.

[23] *Id.* at page 140.

Davila implies a coroner also has a duty of reasonable diligence to identify a body because it is necessary to identify the deceased in order to locate the deceased's family.

Related programs: In 1979, California became the first state to implement a statewide Dental Identification Program to process dental records submitted by law enforcement agencies and coroners in California and other states. The DOJ classifies, indexes, and compares dental records of missing and unidentified persons against each other for matches.[24]

In 1998, the Legislature enacted the DNA and Forensic Identification Data Base and Data Bank Act to assist in prosecuting crimes and identifying missing persons. This database consists of DNA samples of those convicted of specified felonies.[25]

The DOJ administers the Violent Crime Information Center to assist in identifying and apprehending persons responsible for specific violent crimes, and for the disappearance and exploitation of persons, particularly children and dependent adults.[26]

The DOJ also keeps a DNA database in which law enforcement collects samples for DNA analysis voluntarily submitted by family members or relatives of a missing person, and the coroner collects samples from the unidentified deceased. Those samples are sent to DOJ for DNA analysis and comparison.[27]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the activities related to postmortem examinations of unidentified bodies and human remains and reporting the death of unidentified persons to the DOJ. Specifically, claimant alleges the following activities are now required relating to a postmortem examination or autopsy:

- Develop policies and procedures for the initial and continuing implementation of the subject law;
- Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, X-ray notation at the time of death, location of the death, dental examination, and preparing the final report to the DOJ;
- Storage and autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol;

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[24] California Department of Justice, Office of the Attorney General's website <http://www.ag.ca.gov/missing/content/dental.htm> [as of April 18, 2003]. Former Health and Safety Code section 10254 (Stats. 1978, ch. 462) was repealed in 1995 (Stats. 1995, ch. 415).

[25] Penal Code section 295 et. seq. The list of felonies is in Penal Code section 296.

[26] Penal Code section 14200 et. seq.

[27] Penal Code section 14250. California Department of Justice, Office of the Attorney General's website <http://www.ag.ca.gov/missing/content/dna.htm> [as of April 18, 2003]. This program is the subject of the DNA database test claim filed by the County of San Bernardino (00-TC-27).

- Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy;
- Train departmental personnel to prepare the final report to the DOJ;
- Participation in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law.

Claimant notes that similar duties to those above were found reimbursable, as evidenced by the State Controller's Office Claiming Instructions for the "Sudden Infant Death Syndrome (SIDS) Autopsy Protocol Program."[28]

Claimant also responds to the DOF's contention (stated below) that the activities of the test claim legislation are discretionary by arguing that the coroner, under Government Code section 27491, has a statutory duty to "inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual," "unattended," and if the deceased had "not been attended by a physician in the 20 days before death." Claimant contends that this mandatory inquiry has been supplemented, pursuant to Government Code section 27521 of the test claim statute, to determine the identity of the deceased. Claimant states that prior to the test claim legislation certain activities, such as taking palm prints and hair samples, had been limited to homicide victims.

Claimant, in its 6/23/03 amendment to this test claim, comments that the coroner's duties are mandatory, not discretionary. Claimant states that irrespective of the type of postmortem inquiry, examination or autopsy employed by the coroner to complete the mandatory determination of the circumstances, manner and cause of death of an unidentified body or human remains pursuant to Government Code section 27491, further mandatory duties to identify the deceased were added by Government Code section 27521. Those duties include:

1. Taking all available fingerprints and palm prints;
2. A dental examination consisting of dental charts and dental X-rays of the deceased's teeth;
3. Collection of tissue, including a hair sample, or body fluid samples for future DNA tests;
4. Frontal and lateral facial photos with scale indicated;
5. Notation and photos, with a scale, of significant scars, marks, tattoos, clothing, or personal effects found with or near the body;
6. Notations of observations pertinent to estimating the time of death;
7. Precise documentation of location of the remains.

Claimant further commented that the remaining provisions of section 27521, as discussed below, are mandatory. Government Code section 27521, subdivision (b), which lists the seven activities above, is explicit in what a postmortem examination, for purposes of determining identity, shall include. According to claimant, before the test claim legislation, the following activities were not mandated: (1) frontal and lateral facial photos with scale indicated; (2) retention of jaws and

[28] Claimant refers to CSM# 4393, a test claim on Statutes 1989, chapter 955, entitled *Sudden Infant Death Syndrome Autopsies*, which was found to be a reimbursable mandate.

other tissue samples for future possible use (as now required by subdivision (e) of section 27521); (3) storage of material used in positive identification of the body.

State Agency Position

In its comments on the test claim, DOF states that pursuant to Government Code section 27491, the decision by a coroner to examine unidentified remains (other than DNA sampling) is a discretionary act that is not required by the State, nor was it required prior to the test claim legislation. Any subsequent requirements, according to DOF, regarding autopsy procedures are only initiated when a coroner chooses to examine unidentified remains.

DOF argues that the investigating law enforcement agency's report to DOJ is discretionary because it is only initiated after the local agency exercises discretion to investigate a case. Thus, DOF concludes that this test claim does not contain a state mandate that has resulted in a new program or higher level of service and a reimbursable cost.

DOF did not comment on the draft staff analysis.

DISCUSSION

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must mandate a new program or an increased or higher level of service over the former required level of service. "Mandates" as used in article XIII B, section 6, is defined to mean "orders" or "commands."[29] The California Supreme Court has defined "program" subject to article XIII B, section 6 of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[30] To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[31] Finally, the new program or increased level of service must impose "costs mandated by the state."[32]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service on local officials within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

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[29] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[30] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[31] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[32] Government Code section 17514.

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Does the test claim legislation impose state-mandated duties?

Article XIII B, section 6 of the California Constitution provides, with exceptions not relevant here, that "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." This constitutional provision was specifically intended to prevent the state from forcing programs on local government that require expenditure by local governments of their tax revenues.[33] In this respect, the California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts to reimbursement for all costs resulting from legislative enactments, but only those costs "mandated" by a new program or higher level of service imposed upon them by the state.[34]

To implement article XIII B, section 6, the Legislature enacted section 17500 and following. Section 17514 defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur . . . as a result of any statute. . . .which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Mandate is defined as "orders" or "commands."[35] Thus, in order for a statute to be subject to article XIII B, section 6, the statutory language must command or order an activity or task on local governmental agencies. If the statutory language does not mandate coroners to perform a task, then compliance with the test claim statute is at the option of the coroner and a reimbursable state mandated program does not exist.

The question whether a test claim statute is a state-mandated program within the meaning of article XIII B, section 6 is purely a question of law.[36] Thus, based on the principles outlined below, when making the determination on this issue, the Commission, like the court, is bound by the rules of statutory construction.

Health and Safety Code section 102870: This section, enacted in 1995, requires coroners to forward dental examination records to the DOJ if all of the following apply: (1) the coroner investigates the death, (2) the coroner is unable to establish the identity of the body or remains by visual means, fingerprints or other identifying data, and (3) the coroner has a dentist conduct a dental examination of the body or remains and still cannot identify the deceased.

The test claim statute (Stats. 2000, ch. 284) technically amended subdivision (b) of section 102870 to refer to Government Code section 27521 and to the Violent Crime Information

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[33] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles,* (1987) 43 Cal.3d 46, 56. *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284.

[34] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 834; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[35] *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, 174.

[36] *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1810.

Center.[37] This amendment to the test claim statute does not impose any state-mandated duties on local agencies. Because this amendment to section 102870 imposes no state-mandated duty, staff finds that section 102870, as amended by Statutes 2000, chapter 284, is not subject to article XIII B, section 6.

Penal Code section 14202: This section, operative since 1989, requires the Attorney General to maintain the Violent Crime Information Center. The test claim statute (Stats. 2000, ch. 284) technically amended Penal Code section 14202 by adding a reference to Government Code section 27521. This amendment to the test claim statute does not impose any state-mandated duties on local agencies. Therefore, because this amendment imposes no state-mandated duty, staff finds that Penal Code section 14202, as amended by Statutes 2000, chapter 284, is not subject to article XIII B, section 6.

Government Code section 27521: This section specifies that autopsies conducted at the discretion of the coroner shall include collecting identifying data on the unidentified body or human remains and reporting the data to DOJ. Subdivision (a) states that any autopsy conducted "at the discretion" of a coroner on an unidentified body or human remains shall be subject to section 27521.

Subdivision (b) states that county coroners are to include the following data in the discretionary autopsies:

1. All available fingerprints and palm prints;
2. A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner;
3. The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary;
4. Frontal and lateral facial photographs with the scale indicated;
5. Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body;
6. Notations of observations pertinent to the estimation of the time of death;
7. Precise documentation of the location of the remains.

Subdivision (c) states that the examination or autopsy "may include full body X-rays."

Subdivision (d) states the coroner shall prepare a final report of investigation in a format established by DOJ, to include the autopsy information in subdivision (b).

Subdivision (e) states:

> The body of an unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner

[37] As stated above under related programs, the Violent Crime Information Center is administered by DOJ to assist in identifying and apprehending persons responsible for specific violent crimes, and for the disappearance and exploitation of persons. (Pen. Code, § 14200 et. seq.).

shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

Subdivision (f) states:

> If the coroner with the aid of the dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

Subdivision (g) states:

> If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered.

As noted above, the DOF argues that pursuant to Government Code section 27491 (a pre-1975 statute that states the types of death over which the coroner has jurisdiction) the coroner's decision to examine unidentified remains (other than DNA sampling) is a discretionary act that is not required by the State, nor was it required prior to the test claim legislation. Any subsequent requirements, according to DOF, regarding autopsy procedures are only initiated when a coroner chooses to examine unidentified remains.

Claimant responds to DOF by arguing that the coroner, under Government Code section 27491, has a statutory duty to "inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual," "unattended," and if the deceased had "not been attended by a physician in the 20 days before death." Claimant contends that these requirements have been supplemented, pursuant to Government Code section 27521 of the test claim statute, to determine the identity of the deceased.

Pursuant to the rules of statutory construction, courts and administrative agencies are required, when the statutory language is plain, to enforce the statute according to its terms. The California Supreme Court explained:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted][38]

Subdivision (a) of Government Code section 27521 states, "[a]ny postmortem examination or autopsy conducted *at the discretion* of a coroner upon an unidentified body or human remains shall be subject to this section." (Emphasis added.) The plain language of subdivision (a) is unambiguous in making the coroner's autopsy activities discretionary rather than mandatory.

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[38] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

If a local agency decision is discretionary, no state-mandated costs will be found. In *City of Merced v. State of California,*[39] in which the court determined that the city's decision to exercise eminent domain was discretionary so that no state reimbursement was required for loss of goodwill to businesses over which eminent domain was exercised, the court reasoned as follows:

> We agree that the Legislature intended for payment of goodwill to be discretionary. The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.* [Emphasis added.] [40]

The California Supreme Court has explained the *City of Merced* case as follows:

> [T]he core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds – even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[41]

The legislative history of Government Code section 27521 also indicates that its autopsy activities are not mandatory.

As introduced, the test claim legislation expressly required an autopsy in cases where the coroner could not otherwise identify the body. The original version of Senate Bill No. 1736 (Stats. 2000, ch. 284) amended Health and Safety Code section 102870, stating in relevant part:

> SECTION 1. Section 102870 of the Health and Safety Code is amended to read:
> 102870. *(a)* In deaths investigated by the coroner or medical examiner where he or she is unable to establish the identity of the body or human remains by visual means, fingerprints, or other identifying data, the coroner or medical examiner ~~may have a qualified dentist, as determined by the coroner or medical examiner, carry out a dental examination of the body or human remains.~~ *shall conduct a medical examination on the body or human remains that includes, but is not limited to, all the following procedures:...*

The May 23, 2000 version amended the bill to move these unidentified body autopsy procedures to Government Code sections 27521, and to make the procedures discretionary.

Rejection of a specific provision contained in an act as originally introduced is most persuasive that the act should not be interpreted to include what was left out.[42] Since the bill originally

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[39] *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777, 783.

[40] *Ibid.*

[41] *Department of Finance v. Commission on State Mandates* (May 22, 2003, S109219) __ Cal. 4th __.

[42] *Bollinger v. San Diego Civil Service Comm.* (1999) 71 Cal. App. 4th 568, 575. Also see *Robert Woodbury v. Patricia Brown-Dempsy* (June 3, 2003, E031001) ___ Cal. App. 4th. __ <http://www.courtinfo.ca.gov/opinions/documents/E031001.PDF>

required an autopsy for unidentified decedents, but was amended to make the decision to perform an autopsy discretionary (keeping consistent with the statutory scheme), the autopsy should not be interpreted to be a required activity.

Therefore, because Government Code section 27521 does not constitute a state mandate, staff finds that it is not subject to article XIII B, section 6. This includes all the activities of section 27521 because they are based on the coroner's discretion to autopsy, such as submitting autopsy data, submitting the final report of investigation, retention of jaws, and submitting dental records to DOJ.

Government Code section 27521.1: This section requires a local law enforcement agency investigating the death of an unidentified person to report the death to the DOJ no later than 10 calendar days after the date the body or human remains are discovered. Because this section imposes a reporting requirement on a local agency, staff finds that Government Code section 27521.1 imposes a state-mandated duty and is therefore subject to article XIII B, section 6. Therefore, this statute is further discussed below.

B. Does Government Code section 27521.1 qualify as a "program"?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[43] Only one of these findings is necessary to trigger article XIII B, section 6.[44]

Government Code section 27521.1 involves the duty of law enforcement agencies investigating the death of an unidentified person to report the death to DOJ no later than 10 days after the body or human remains are discovered. This is a program that provides governmental functions in the areas of public safety, criminal justice, crime and vital statistics, and location of missing persons.

Moreover, Government Code section 27521.1 imposes unique data collecting and reporting duties on local law enforcement agencies that do not apply generally to all residents and entities in the state. Therefore, staff finds that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Does Government Code section 27521.1 impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[45]

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[43] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[44] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

[45] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

Government Code section 27521.1, law enforcement agency report: This section requires a law enforcement agency investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 days of discovery.

DOF stated that the investigating law enforcement agency's report to DOJ is discretionary because the local law enforcement agency first must choose to go forward with a criminal investigation. According to DOF, DOJ's report is only initiated after the local agency exercises discretion to investigate a case.

Staff disagrees. Failure of peace officers to investigate criminal activities would be a dereliction of duty.[46] California law imposes on sheriffs the duty to "preserve peace,"[47] arrest "all persons who attempt to commit or who have committed a public offense,"[48] and "prevent and suppress any affrays, breaches of the peace, riots, and insurrections, and investigate public offenses which have been committed."[49] Police have the same duties.[50] These are mandatory duties, as evidenced by use of the word "shall" in the statutes.[51]

Preexisting law requires law enforcement to report immediately to DOJ when a person reported missing has been found.[52] Also, for found children under 12 or found persons with evidence that they were at risk,[53] a report must be filed within 24 hours after the person is found. And if a missing person is found alive or dead within 24 hours and local law enforcement has reason to believe the person was abducted, local law enforcement must also report that information to the DOJ.[54] These statutes do not require the person to be found alive.

Given that law enforcement already had to report to DOJ findings of missing persons, the new activities for finding a deceased person are limited to those in which the deceased is over 12 and not a missing person with evidence of being at risk, as defined.

Thus, staff finds that it is a new program or higher level of service for local law enforcement investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered.

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[46] *People v. Mejia* (1969) 272 Cal. App. 2d 486, 490.

[47] Government Code section 26600.

[48] Government Code section 26601.

[49] Government Code section 26602.

[50] Government Code section 41601.

[51] Government Code section 14.

[52] Penal Code section 14207.

[53] Evidence that the person is at risk includes, but is not limited to, (1) The person missing is the victim of a crime or foul play. 2) The person missing is in need of medical attention. 3) The person missing has no pattern of running away or disappearing. (4) The person missing may be the victim of parental abduction. (5) The person missing is mentally impaired. (Pen. Code, § 14213, subd. (b).)

[54] Penal Code section 14207.

The exceptions is for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213.

Issue 3: Does Government Code section 27521.1 impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[55] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

> ...any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In its test claim, the claimant stated it would incur costs of over $200 per annum,[56] which was the standard under Government Code section 17564, subdivision (a) at the time the claim was filed.[57] There is no evidence in the record to rebut this declaration. In addition, staff finds that the exceptions to reimbursement in section 17556 do not apply here.

In summary, staff finds that Government Code section 27521.1 imposes costs mandated by the state pursuant to Government Code section 17514.

CONCLUSION

Staff finds that Government Code section 27521.1 imposes a reimbursable state-mandated program on local law enforcement within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The mandate is for local law enforcement investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered. The exception is for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213.

Staff finds that Government Code section 27521, Penal Code section 14202 and Health and Safety Code section 102870, as added or amended by Statutes 2000, chapter 284, do not constitute a reimbursable state-mandated program because they are not subject to article XIII B, section 6.

RECOMMENDATION

Staff recommends that the Commission adopt the staff analysis and approve the test claim for the law enforcement reporting activity in Government Code section 27521.1.

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[55] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835. Government Code section 17514.

[56] Declaration of David Campbell, County of Los Angeles Coroner's Office.

[57] Currently the claim must exceed $1000 in costs. (Gov. Code, § 17564, subd. (a).)

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COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

June 26, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains

The County of Los Angeles submits and encloses herewith a test claim to obtain timely and complete reimbursement for the State-mandated local program, in the captioned law.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

For J. Tyler McCauley
Auditor-Controller

JTM:JN:LK-HY
Enclosures

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains

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State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916)323-3562
CSM 1 (12/89)

TEST CLAIM FORM

For Official Use Only

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STATE MANDATES
10:15am

Claim No. 00-TC-18

Local Agency or School District Submitting Claim

Los Angeles County

Contact Person | **Telephone No.**

Leonard Kaye | (213) 974-8564

Address

500 West Temple Street, Room 603
Los Angeles, CA 90012

Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of " costs mandated by the state" within the meaning of section 17514 of the Government Code and section 6, article, XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

See page a

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative | **Telephone No.**

J. Tyler McCauley
Auditor-Controller | (213) 974-8301

Signature of Authorized Representative | **Date**

Maria Quan for J.T. McCauley | 6/27/01

County of Los Angeles Test Claim

Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains

Notice of Filing

The County of Los Angeles filed the reference test claim on June 28, 2001 with the Commission on State Mandates of the State of California at the Commission's Office, 980 Ninth Street, Suite 300, Sacramento, California 95814.

Los Angeles County does herein claim full and prompt payment from the State in implementing the State-mandated local program found in the subject law.

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code:
Postmortem Examinations: Unidentified Bodies, Human Remains

Brief

The test claim legislation, Chapter 284, Statutes of 2000, adding Sections 27521 & 27521.1 of the Government Code, amending Section 102870 of the Health & Safety Code, amending Section 14202 of the Penal Code, sets forth requirements for postmortem examinations of unidentified bodies and human remains and for reporting the death of an unidentified person to the State Department of Justice. Such requirements are not found in prior law.

With regard to postmortem examinations of unidentified bodies and human remains, the Los Angeles County [County] Department of Coroner is now required to comply with Government Code Section 27521, added by Chapter 284, Statutes of 2000 which specifies that:

> ".....a postmortem examination or autopsy shall include, but shall not be limited to, the following:
>
> 1) Taking all available fingerprints and palms prints.
>
> 2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.
>
> 3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.
>
> 4) Frontal and lateral facial photographs with the scale indicated.

5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

6) Notations of observations pertinent to the estimation of the time of death.

7) Precise documentation of the location of the remains.

c) The postmortem examination or autopsy of the unidentified body or remains may include full body x-rays.

d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

e) The body of unidentified deceased person may not cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

f) If the corner with the aid of the dental identity of dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation

to the Department of Justice within 180 days of the date the body or human remains were discovered."

With regard to dental examinations, Health & Safety Code Section 102870(a) further specifies that:

> "In deaths investigated by the coroner or medical examiner where he or she is unable to establish the identity of the body or human remains by visual means, fingerprints, or other identifying data, the coroner or medical examiner may have a qualified dentist, as determined by the coroner or medical examiner, carry out a dental examination of the body or human remains. If the coroner or medical examiner with the aid of the dental examination and other identifying findings is still unable to establish the identity of the body or human remains, he or she shall prepare and forward the dental examination records to the Department of Justice on forms supplied by the Department of Justice for that purpose.

Sheriff's New Duties

The Los Angeles County Sheriff's Department has incurred new duties as a result of Government Code Section 27521.1 as amended by Chapter 284, Statutes of 2000.

Section 27521.1, as amended by Chapter 284, Statutes of 2000, requires the Sheriff's Department to report the death of an unidentified person to the Department of Justice, in a format acceptable to the Department of justice, no later than 10 calendar days after the date the body or human remains were discovered.

Before the enactment of the subject law, there was no requirement for the Sheriff's Department to report the death of an unidentified person to the Department of Justice. In this regard, the Legislative Counsel, in their Digest to Chapter 284, Statutes of 2000 note:

> "This bill would also require any law enforcement agency investigating the death of an unidentified person to report the death to the department no later than 10 days after the body or human remains were discovered. The imposition of this requirement on local agencies would create a state-mandated local program."

Legislative Intent

The Legislature's intent in passing the test claim legislation is described at length in the Senate Judiciary Committee Report on SB 1736 [Chapter 284/84] for the April 11, 2000 hearing [attached as Exhibit E]. On page 1 of this report, the Committee notes:

> "This bill would prohibit the cremation of an unidentified deceased person unless specified samples are retained for possible future identification. The samples would be retained by the coroner or medical examiner indefinitely.
>
> This bill would require a coroner or medical examiner, where a deceased person cannot be identified, to conduct a medical examination with specified procedures, prepare a final report of the investigation, and forward this final report to the Attorney General if the deceased person remains unidentified 180 days after discovery.
>
> The bill would require an agency investigating the death of an unidentified person to report the death to the Attorney General no later than 10 days after the investigation began. It would require a coroner or medical examiner to forward the deceased person's dental examination records to the Department of Justice within 45 days if the deceased person remains unidentified.
>
> Lastly, the bill would require the Attorney General to develop and provide the format of the reports (notice of investigation and final report of investigation) to be submitted regarding an unidentified deceased person."

Need

The Legislature, in Chapter 284, Statutes of 2000, addressed the problem that there was no consistent manner by which evidence form unidentified bodies and human remains was collected or retained by local jurisdictions and reported to the Attorney General. In the [above cited] report, the Senate Judiciary Committee report, on page 2, that:

"Sponsored by the California Society of Forensic Dentistry, this bill is the aftermath of years of volunteer consultant work done by members of the Society, helping the Department of Justice Missing/Unidentified Persons Unit track down identities of some 2,200 unidentified dead persons in California. From their work, they say it has become clear that there is no consistent manner by which evidence is collected or retained, and that information reported to the Attorney General varies from grossly inadequate to extremely detailed. Further, unidentified bodies have been buried or cremated without the retention of evidence that could assist in the identification of the deceased at a future date."

Changes to Prior Law

The Senate Judiciary Committee Report on SB 1736 [Chapter 284/84] for the April 11, 2000 hearing [attached as Exhibit E], indicates on pages 2-3 changes the test claim legislation, when passed, would make to then existing, now prior, law:

" CHANGES TO EXISTING LAW

Existing law permits the coroner or medical examiner to engage the services of a dentist to carry out a dental examination if the coroner or medical examiner is unable to identify a deceased person by visual means, fingerprints or other identifying data.

Existing law requires the coroner or medical examiner to forward the dental examination records of the unidentified deceased person to the Department of Justice (DOJ) on forms supplied by the DOJ, if the identity of the person still could not be established. Under current law, the DOJ acts as the repository or computer center for the dental examination records forwarded to it by coroners and medical examiners in the state.

This bill would expand the efforts to identify deceased persons by:

Requiring the coroner/medical examiner to conduct a specific medical examination of the unidentified deceased person, including body x-

rays and a dental examination conducted by a "qualified forensic dentist";

Requiring the agency investigating the death of an unidentified person to notify the Attorney General within 10 days of the date the investigation began;

Requiring the coroner/medical examiner to forward the dental examination records to the Department of Justice if the body remains unidentified within 45 days of discovery of the body, even after the medical and dental examination;

Requiring the coroner/medical examiner to prepare a final report of the investigation, and to submit the final report to the Department of Justice, in a format acceptable to the Attorney General, if the deceased person remains unidentified after 180 days;

Requiring the coroner/medical examiner to retain and store the jaws (maxilla and mandible with teeth) of the unidentified deceased person indefinitely. No cremation would be allowed unless the jaws are retained."

Accordingly, when SB 1736 was enacted as Chapter 284, Statutes of 2000, the County's Sheriff and Coroner Departments were required to perform new State-mandated duties.

Coroner's New Duties

The County Coroner's new State mandated duties are described in the declaration of David Campbell, Supervising Coroner Investigator II with the Coroner's Operations Bureau, Forensic Services Division, attached as Exhibit A. Attached to Mr. Campbell's declaration is description of some of reimbursable activities necessary to comply with the test claim legislation:

"1. Develop policies and procedures for the initial and continuing implementation of the subject law.

2. Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, x-ray, notation of the time of the death, location of the death, dental examination, and preparing the final report to the Department of Justice.

3. Storage of autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

4. Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy.

5. Train departmental personnel to prepare the final report to the Department of Justice.

6. Participation in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law."

It should be noted that similar duties have been found to be reimbursable as explained below.

Similar Reimbursable Duties

Similar duties to the ones claimed herein have been found to be reimbursable. Specifically, the State Controller's Office Claiming Instructions for the "Sudden Infant Death Syndrome [SIDS] Autopsy Protocol Program", attached as Exhibit F, indicates on page 1 that "Chapter 955, Statutes of 1989, added Section 27491.41 to the Government Code to require counties" to:

"A. Perform an autopsy within 24 hours or as soon thereafter as feasible in any case where an infant has died suddenly and unexpectedly.

B. Follow autopsy protocols established by the State Department of Health Services (DHS) pursuant to Government Code Section 27491.41. Protocols established under Section 27491.41 currently includes two DHS protocols:

(1) "Autopsy Protocol for Sudden Unexpected Infant Death" (DHS Form 4437 (9/91) in 27 pages).

(2) "Death Scene and Deputy Coroner Investigation Protocol" (DHS Form 4439 (9/92) in 23 pages).

On July 25, 1991, the Commission on State Mandates determined that Government Code Section 27491.41, added by Chapter 955, Statutes of 1989, resulted in state mandated costs which are reimbursable pursuant to Government Code Section 17561."

The State Controller's Office Claiming Instructions for the "Sudden Infant Death Syndrome [SIDS] Autopsy Protocol Program", attached as Exhibit F, indicates, on page 2, "reimbursable components", similar to the ones claimed herein, as follows:

"A. Develop policies and procedures for the initial and continuing implementation of the DHS protocol requirements.

B. Perform autopsies including any required microscopic, toxicology, and microbiological testing, photographs, x-rays, and neuropathology.

C. Storage of autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

D. Transportation of the body to another county if a coroner is unavailable to perform the autopsy within the 24 hour requirement

E. Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the protocol duties, including travel to pickup a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy.

F. Preparation and filing of SIDS protocol forms with the state.

G. Participation in workshops within the state for ongoing professional training as necessary to satisfy standards of the DHS autopsy protocols."

New Reporting Activities

The County Sheriff's new State mandated duties are described in the declaration of Frank Merriman, Captain, Los Angeles County Sheriff's Homicide Bureau, Detective Division, attached as Exhibit B. Attached to Captain Merriman's declaration is description of some of reimbursable activities necessary to comply with the test claim legislation:

"1. Develop policies and procedures for implementing the subject reporting requirement.

2. Preparing and filing of the DOJ reports.

3. Train departmental personnel on pertinent DOJ reporting requirement."

Redirected Effort is Prohibited

When Chapter 284, Statutes of 2000, adding Sections 27521 & 27521.1 of the Government Code, amending Section 102870 of the Health & Safety Code, amending Section 14202 of the Penal Code, was enacted and set forth requirements for postmortem examinations of unidentified bodies and human remains and for reporting the death of an unidentified person to the State Department of Justice, the County's and local governments' funds were redirected to pay for the State's program.

The State has not been allowed to circumvent restrictions on shifting its burden to localities by directing them to shift their efforts to comply with State mandates however noble they may be.

This prohibition of substituting the work agenda of the state for that of local government, without compensation, has been found by many in the California Constitution. On December 13, 1988, Elizabeth G. Hill, Legislative Analyst, Joint Legislative (California) Budget Committee wrote to Jesse Huff, Commission on State Mandates (Exhibit G) and indicated on page 6 that the State may not redirect local governments' effort to avoid reimbursement of local costs mandated by the State:

"Article XIII B, Section 6 of the State Constitution requires the state to reimburse local entities for new programs and higher levels of service. It does not require counties to reduce services in one area to pay for a higher level of service in another."

Therefore, reimbursement for the subject program is required as claimed herein.

State Funding Disclaimers Are Not Applicable

There are seven disclaimers specified in GC Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in GC Section 17514. These seven disclaimers do not apply to the instant claim, as shown, in seriatim, for pertinent sections of GC Section 17556.

(a) "The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency to implement a given program shall constitute a request within the meaning of this paragraph."

(a) is not applicable as the subject law was not requested by the County claimant or any local agency or school district.

(b) "The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts."

(b) is not applicable because the subject law did not affirm what had been declared existing law or regulation by action of the courts.

(c) "The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

(c) is not applicable as no federal law or regulation is implemented in the subject law.

(d) "The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service."

(d) is not applicable because the subject law did not provide or include any authority to levy any service charges, fees, or assessments.

(e) "The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate."

(e) is not applicable as no offsetting savings are provided in the subject law and no revenue to fund the subject law was provided by the legislature.

(f) "The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election."

(f) is not applicable as the duties imposed in the subject law were not included in a ballot measure.

(g) "The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

(g) is not applicable as the subject law did not create or eliminate a crime or infraction and did not change that portion of the statute not relating directly to the penalty enforcement of the crime or infraction.

Therefore, the above seven disclaimers will not bar local governments' reimbursement of its costs in implementing the requirements set forth in the captioned test claim legislation as these disclaimers are all not applicable to the subject claim.

Costs Mandated by the State

The County has incurred costs in complying with Chapter 284, Statutes of 2000, adding Sections 27521 & 27521.1 of the Government Code, amending Section 102870 of the Health & Safety Code, amending Section 14202 of the Penal Code, the test claim legislation.

The County's costs in performing specified postmortem examinations of unidentified bodies and human remains and reporting deaths of unidentified persons to the State Department of Justice are reimbursable "costs mandated by the State" under Section 6 of Article XIII B of the California Constitution and Section 17500 et seq of the Government Code.

The County was required to provide a new State-mandated program and thus incur reimbursable "costs mandated by the State", as defined in Government Code section 17514:

" ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

Accordingly, for the County's costs to be reimbursable "costs mandated by the State", three requirements must be met:

1. There are "increased costs which a local agency is required to incur after July 1, 1980"; and

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975"; and

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution".

All three of above requirements for finding cost mandated by the State are met herein.

First, local government is incurring increased postmortem examination and reporting costs, detailed above, under the test claim legislation in 2001, well after July 1, 1980.

Second, the statute in the test claim legislation is Chapter 284, Statutes of 2000, enacted well after January 1, 1975.

Third, the postmortem examination and reporting program required under the test claim legislation, as detailed above, is new, not required under prior law. Therefore, "a new program or higher level of service..." has been enacted in the test claim legislation.

Therefore, reimbursement of the County's "costs mandated by the State", incurred in implementing the test claim legislation, as claimed herein, is required.

COUNTY OF LOS ANGELES

DEPARTMENT OF CORONER

1104 N. MISSION RD., LOS ANGELES, CALIFORNIA 90033

Anthony T. Hernandez
Director

L. Sathyavagiswaran, M.D.
Chief Medical Examiner-Coroner

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000
Adding Sections 27521 & 27521.1 of the Government Code,
Amending Section 102870 of the Health & Safety Code,
Amending Section 14202 of the Penal Code
Postmortem Examinations: Unidentified Bodies and Human Remains

Declaration of David Campbell

David Campbell makes the following declaration and statement under oath:

I, David Campbell, Supervising Coroner Investigator II, of the Los Angeles County Department of Coroner's Operations Bureau, Forensic Services Division, of the County of Los Angeles, am responsible for implementing the subject law.

I declare that the Department of Coroner has incurred new duties as a result of the test claim legislature, captioned above.

I declare that these new duties to contact a postmortem examination or autopsy upon an unidentified body or human remains are subject to Government Code Section 27251:

> ".....a postmortem examination or autopsy shall include, but shall not be limited to, the following:
>
> 1) Taking all available fingerprints and palms prints.
>
> 2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.
>
> 3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4) Frontal and lateral facial photographs with the scale indicated.

5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

6) Notations of observations pertinent to the estimation of the time of death.

7) Precise documentation of the location of the remains.

c) The postmortem examination or autopsy of the unidentified body or remains may include full body x-rays.

d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

e) The body of unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

f) If the coroner with the aid of the dental identity of dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered."

I declare that the above duties performed by the Los Angeles County Department of Coroner pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

I declare that I have prepared the attached description of reimbursable activities reasonably necessary to comply with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6/22/01 Los Angeles, Ca.
Date and Place

David Campbell
Signature

Description of Reimbursable Activities
Declaration of David Campbell

1. Develop policies and procedures for the initial and continuing implementation of the subject law.

2. Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, x-ray, notation of the time of the death, location of the death, dental examination, and preparing the final report to the Department of Justice.

3. Store autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

4. Conduct death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy. Utilize dentist, anthropologist, and/or other specialists to meet identification requirements.

5. Train departmental personnel to prepare the final report to the Department of Justice.

6. Participate in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law.

County of Los Angeles
Sheriff's Department Headquarters
4700 Ramona Boulevard
Monterey Park, California 91754-2169

LEROY D. BACA, SHERIFF

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000
Adding Sections 27521 & 27521.1 of the Government Code,
Amending Section 102870 of the Health & Safety Code,
Amending Section 14202 of the Penal Code
Postmortem Examinations: Unidentified Bodies and Human Remains

Declaration of Frank Merriman

Frank Merriman makes the following declaration and statement under oath:

I, Frank Merriman, Captain, Los Angeles County Sheriff's Homicide Bureau, Detective Division, am responsible for implementing the subject law.

I declare that the Sheriff's Department has incurred new duties as a result of Government Code Section 27521.1 as amended by Chapter 284, Statutes of 2000.

I declare that the Government Code Section 27521.1 as amended by Chapter 284, Statutes of 2000 requires the Sheriff's Department to report the death of an unidentified person to the Department of Justice, in a format acceptable to the Department of justice, no later than 10 calendar days after the date the body or human remains were discovered.

I declare that before the enactment of the subject law, there was no requirement for the Sheriff's Department to report the death of an unidentified person to the Department of Justice.

I declare that the above duties performed by the Los Angeles County Sheriff's Department pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

I declare that I have prepared the attached description of reimburseable activities reasonably necessary to comply with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

June 19, 2001 at Commerce, CA

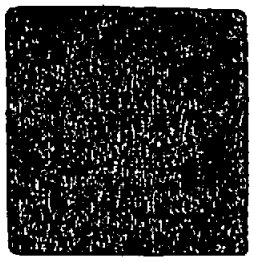
Frank Merriman, Captain

Description of Reimbursable Activities
Declaration of Frank Merriman

Develop policies and procedures for implementing the reporting requirement.

Preparing and filing of the DOJ reports.

Train departmental personnel on pertinent DOJ report requirement.



COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject test claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

" ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

6/26/01, Los Angeles, CA.
Date and Place

Len Kaye
Signature

CHAPTER 284

(Senate Bill No. 1736)

An act to add Sections 27521 and 27521.1 to the Government Code, to amend Section 102870 of the Health and Safety Code, and to amend Section 14202 of the Penal Code, relating to unidentified corpses.

[Approved by Governor August 31, 2000. Filed with Secretary of State September 1, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1736, Rainey. Unidentified bodies and human remains: coroners.

Existing law requires a coroner to conduct a postmortem examination or autopsy under certain circumstances and, under all other circumstances, permits a coroner, at his or her discretion, to take possession of the body and make or cause to be made a postmortem examination or autopsy. Existing law also authorizes a coroner or medical examiner to engage the services of a dentist to assist in the identification of a body or human remains.

This bill would require any postmortem examination or autopsy conducted at the discretion of a coroner upon an unidentified body or human remains to include specified procedures, including a dental examination, and the preparation of a final report of investigation containing specified information for submission to the Department of Justice. These procedures would also include a prohibition on the cremation or burial of an unidentified deceased person until specified samples are retained from the remains for possible future identification, and the retention of those samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

This bill would also require any law enforcement agency investigating the death of an unidentified person to report the death to the department no later than 10 days after the body or human remains were discovered. The imposition of this requirement on local agencies would create a state-mandated local program.

Existing law requires the Department of Justice to compare and retain dental examination records that coroners and medical examiners send to the department.

This bill would also require the department to compare and retain the final report of investigation that coroners, under specified circumstances, send to the department.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

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

SECTION 1. Section 27521 is added to the Government Code, to read:

§ 27521. (a) Any postmortem examination or autopsy conducted at the discretion of a coroner upon an unidentified body or human remains shall be subject to this section.

Italics indicate changes or additions. * * * indicate omissions.

(b) A postmortem examination or autopsy shall include, but shall not be limited to, the following procedures:

(1) Taking of all available fingerprints and palms prints.

(2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

(3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

(4) Frontal and lateral facial photographs with the scale indicated.

(5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

(6) Notations of observations pertinent to the estimation of the time of death.

(7) Precise documentation of the location of the remains.

(c) The postmortem examination or autopsy of the unidentified body or remains may include full body X-rays.

(d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

(e) The body of an unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

(f) If the coroner with the aid of the dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

(g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered.

SEC. 2. Section 27521.1 is added to the Government Code, to read:

§ 27521.1. The law enforcement agency investigating the death of an unidentified person shall report the death to the Department of Justice, in a format acceptable to the Department of Justice, no later than 10 calendar days after the date the body or human remains were discovered.

SEC. 3. Section 102870 of the Health and Safety Code is amended to read:

§ 102870. *(a)* In deaths investigated by the coroner or medical examiner where he or she is unable to establish the identity of the body or human remains by visual means, fingerprints, or other identifying data, the coroner or medical examiner may have a qualified dentist, as determined by the coroner or medical examiner, carry out a dental examination of the body or human remains. If the coroner or medical examiner with the aid of the dental examination and other identifying findings is still unable to establish the identity of the body or human remains, he or she shall prepare and forward the dental examination records to the Department of Justice on forms supplied by the Department of Justice for that purpose.

Italics indicate changes or additions. * * * indicate omissions.

(b) The Department of Justice shall act as a repository or computer center, or both, with respect to dental examination records ***and the final report of investigation specified in Section 27521 of the Government Code***. The Department of Justice shall compare the dental examination records ***and the final report of investigation, if applicable, to records filed with the Violent Crime Information Center (Title 12 (commencing with Section 14200) of Part 4 of the Penal Code)***, shall determine which scoring probabilities are the highest for purposes of identification, and shall submit the information to the coroner or medical examiner who ***submitted*** the dental examination records ***and the final report of investigation, if applicable***.

SEC. 4. Section 14202 of the Penal Code is amended to read:

§ 14202. (a) The Attorney General shall establish and maintain within the center an investigative support unit and an automated violent crime method of operation system to facilitate the identification and apprehension of persons responsible for murder, kidnap, including parental abduction, false imprisonment, or sexual assault. This unit shall be responsible for identifying perpetrators of violent felonies collected from the center and analyzing and comparing data on missing persons in order to determine possible leads which could assist local law enforcement agencies. This unit shall only release information about active investigations by police and sheriffs' departments to local law enforcement agencies.

(b) The Attorney General shall make available to the investigative support unit files organized by category of offender or victim and shall seek information from other files as needed by the unit. This set of files may include, among others, the following:

(1) Missing or unidentified, deceased persons dental files filed pursuant to this title, ***Section 27521 of the Government Code,*** or Section 102870 of the Health and Safety Code.

(2) Child abuse reports filed pursuant to Section 11169.

(3) Sex offender registration files maintained pursuant to Section 290.

(4) State summary criminal history information maintained pursuant to Section 11105.

(5) Information obtained pursuant to the parent locator service maintained pursuant to Section 11478.5 of the Welfare and Institutions Code.

(6) Information furnished to the Department of Justice pursuant to Section 11107.

(7) Other Attorney General's office files as requested by the investigative support unit.

This section shall become operative on July 1, 1989.

SEC. 5. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

EXPLANATORY NOTES SENATE BILL 1736:

H & S C § 102870. (1) Designated the former first and second paragraphs to be subds (a) and (b); (2) amended subd (b) by (a) adding "and the final report of investigation specified in Section 27521 of the Government Code"; (b) substituting "and the final report of investigation, if applicable, to records filed with the Violent Crime Information Center (Title 12 (commencing with Section 14200) of Part 4 of the Penal Code)" for "with dental records filed with it pursuant to Section 11114 of the Penal Code"; and (c) substituting "submitted the dental examination records and the final report of investigation, if applicable" for "prepared and forwarded the dental examination records"; and (3) deleted the former third paragraph which read: "Not later than three years following implementation of the dental identification program required by this section and Section 11114 of the Penal Code, the Department of Justice shall submit a report on the program to the Legislature."

Pen C § 14202. Added ", Section 27521 of the Government Code," in subd (b)(1).

SENATE JUDICIARY COMMITTEE
Adam B. Schiff, Chairman
1999-2000 Regular Session

SB 1736
Senator Rainey
As Amended April 6, 2000
Hearing Date: April 11, 2000
Health and Safety Code
GMO:pjs

SUBJECT

Unidentified Bodies and Human Remains: Retention of Evidence

DESCRIPTION

This bill would prohibit the cremation of an unidentified deceased person unless specified samples are retained for possible future identification. The samples would be retained by the coroner or medical examiner indefinitely.

This bill would require a coroner or medical examiner, where a deceased person cannot be identified, to conduct a medical examination with specified procedures, prepare a final report of the investigation, and forward this final report to the Attorney General if the deceased person remains unidentified 180 days after discovery.

The bill would require an agency investigating the death of an unidentified person to report the death to the Attorney General no later than 10 days after the investigation began. It would require a coroner or medical examiner to forward the deceased person's dental examination records to the Department of Justice within 45 days if the deceased person remains unidentified.

Lastly, the bill would require the Attorney General to develop and provide the format of the reports (notice of investigation and final report of investigation) to be submitted regarding an unidentified deceased person.

BACKGROUND

Sponsored by the California Society of Forensic Dentistry, this bill is the aftermath of years of volunteer consultant work done by members of the Society, helping the Department of Justice Missing/Unidentified Persons Unit track down identities of some 2,200 unidentified dead persons in California. From their work, they say it has become clear that there is no consistent manner by which evidence is collected or retained, and that information reported to the Attorney General varies from grossly inadequate to extremely detailed. Further, unidentified bodies have been buried or cremated without the retention of evidence that could assist in the identification of the deceased at a future date.

CHANGES TO EXISTING LAW

Existing law permits the coroner or medical examiner to engage the services of a dentist to carry out a dental examination if the coroner or medical examiner is unable to identify a deceased person by visual means, fingerprints or other identifying data.

Existing law requires the coroner or medical examiner to forward the dental examination records of the unidentified deceased person to the Department of Justice (DOJ) on forms supplied by the DOJ, if the identity of the person still could not be established. Under current law, the DOJ acts as the repository or computer center for the dental

examination records forwarded to it by coroners and medical examiners in the state.

This bill would expand the efforts to identify deceased persons by:

Requiring the coroner/medical examiner to conduct a specific medical examination of the unidentified deceased person, including body x-rays and a dental examination conducted by a "qualified forensic dentist";
Requiring the agency investigating the death of an unidentified person to notify the Attorney General within 10 days of the date the investigation began;

Requiring the coroner/medical examiner to forward the dental examination records to the Department of Justice if the body remains unidentified within 45 days of discovery of the body, even after the medical and dental examination;
Requiring the coroner/medical examiner to prepare a final report of the investigation, and to submit the final report to the Department of Justice, in a format acceptable to the Attorney General, if the deceased person remains unidentified after 180 days;
Requiring the coroner/medical examiner to retain and store the jaws (maxilla and mandible with teeth) of the unidentified deceased person indefinitely. No cremation would be allowed unless the jaws are retained.

COMMENT

1. Need for the bill

According to the author, there are currently a total of 2,200 unidentified dead bodies in California. Even with

the volunteer help of the California Forensic Dentistry members, coroners and medical examiners are not able to identify these human remains. The reason, they state, is that records are so inconsistent in content and quality, that it has been difficult to reconcile information from the coroner/medical examiner's investigation and information gathered by the Department of Justice on missing persons or victims of violent crimes. The State Coroners' Association's data reflect "the inconsistent nature of evidence collection and retention for unidentified deceased persons."

The bill would establish a statewide protocol for the investigations conducted pursuant to statute, expand the type of examination required, and require retention of jaws and other tissue samples indefinitely for possible identification in the future.

The Department of Justice's (DOJ) Missing and

Unidentified Persons Unit indicates they support this bill because it would improve their ability to match their records of missing or unidentified persons with unidentified dead persons or human remains.

2. Information to be collected by coroner/medical examiner

According to the DOJ's Missing and Unidentified Persons Unit, they depend on the coroner to collect and forward information to them about unidentified deceased persons, sufficient to make matches with their records. However, the information collected is not always the same, and in many cases is inadequate to make the match. More often, final reports are either not filed or are so delayed

that investigations are hampered.

The DOJ's Missing and Unidentified Persons Unit indicates that they would like the coroner to collect the following information, not currently collected by coroners/medical examiners:

Tissue samples, such as hair or body fluid
Frontal and lateral photographs
Photographs of significant scars, or body marks or other personal effects found around the body
The jaws (maxilla and mandible with teeth)
Full body x-rays, if needed

What are currently collected are fingerprints, palmprints, dental charts and dental x-rays, a listing of body marks and various notations and observations of the coroner. The additional information, the DOJ states, will greatly assist in their work with missing and unidentified persons.

IS THERE NO LESS INVASIVE MEANS OF SAVING TISSUE SAMPLES FOR FUTURE IDENTIFICATION TECHNOLOGY THAN CUTTING OUT THE DEAD PERSON'S JAWS?

3. Retention of jaws and tissue samples to be indefinite

This bill would require the retention of the jaws (maxilla and mandible with teeth) and other tissue samples of an unidentified deceased person by the

coroner/medical examiner, indefinitely, or until a positive identification of the body has been made.

There is no obligation under current law for the coroner/medical examiner to retain any of the body parts or tissue samples of an unidentified dead person after the coroner has forwarded the dental examination records to the Department of Justice. The DOJ, upon receipt of the dental records, is required to compare those records to those compiled of missing persons and unidentified victims of violent crime and to report back to the coroner/medical examiner the specified results of this comparison. The coroner/medical examiner can, under current law, order the cremation or burial of an unidentified person whenever the coroner is finished with his or her examination of the body or human remains.

This bill would require the collection of the jaws and other tissue samples of the dead person before he or she can be cremated.

Proponents state that samples of jaws (rather than individual teeth samples) should be preserved because they provide a "fingerprint" of the dead person - i.e., the "bite" or the relationship of the teeth to each other is unique to each person, and so jaws can substitute for fingerprints when fingerprints are not available or cannot be obtained. Also, tissue samples have to be retained in frozen form to be useful for future identification use (such as DNA testing) and are, therefore, more cumbersome to store than jaws which are skeletal, and can last for hundreds of years.

Suggested amendment from DOJ:

The DOJ states that they support the retention of these jaws and tissue samples for an indefinite period of time or until one year after the positive identification of the body or remains and no civil or criminal case is pending (the bill calls for retention until a positive

identification is made or indefinitely). The rationale for the one-year time period, the DOJ states, is to allow for a challenge to the identification made using the techniques current at the time the identification is

made. The DOJ would not want a situation where, after they identify a body a challenge is filed within one year and the tissue samples used for the DNA testing has been destroyed by the coroner.
If there is a challenge, either in civil or criminal court, then the samples would be retained indefinitely under the DOJ suggested amendment.

SHOULD THE BILL BE AMENDED AS SUGGESTED BY THE DOJ?

With this amendment and the technical amendment suggested in Comment 7, the Attorney General has expressed support for the bill.

The author's office indicated that since there are only 2,200 total unidentified dead persons in California, the burden of keeping these dental samples (jaws) and tissue samples indefinitely, in the hope that someday a DNA test or other new technology will be developed to identify the person, is negligible. They suggested that if the retention of jaws and other tissue samples becomes burdensome, the coroners/medical examiners could come back to the Legislature and ask for authority to dispose of the jaws and other tissue samples. This seems to be a waste of resources, when it is entirely possible that nobody will claim the deceased person's remains after 5 years, even if somehow DNA testing could identify the body. (A missing person may be presumed dead after 5 years. Penal Code Section 667, Probate Code Section 12401.) The only reason remaining would be the

possible prosecution of any person who might have caused the death of the unidentified person, but in those cases, just the fact that there is a deceased person, Jane or John Doe, for example, is sufficient for criminal prosecution. Besides, the coroner is already authorized to preserve evidence, including tissue samples and body parts or remains, in criminal cases.

4. "Qualified Forensic Dentist" undefined

Under current law, a dental examination may be ordered by a coroner/medical examiner if the identity of the dead person cannot be established by other means, such as visual or other identification and fingerprinting. The dental examination may be conducted by a qualified

dentist, as determined by the coroner/medical examiner.

This bill would require a "qualified forensic dentist", as determined by the coroner/medical examiner, to perform the examination, which shall include dental charts and dental x-rays of the deceased person.

The Board of Dental Examiners states there is no recognized specialty in the dental practice that may be regarded as "forensic dentistry", and that it would not require a "specialist" to conduct a dental examination and take dental x-rays of a dead person. The American Dental Association (ADA) also does not recognize "forensic dentistry" as a specialty. Under this bill, the coroner/medical examiner would be, therefore, the entity that would qualify a dentist as a "qualified forensic dentist."

WOULD THIS BILL CREATE A SPECIAL PROFESSIONAL LICENSE FOR "FORENSIC DENTISTRY"?

Placing the term "forensic dentistry" in this statute would undermine the Board of Dental Examiners, which has jurisdiction over the practice of dentistry in the state, and create conflict. Since the Board does not recognize "forensic dentistry" as a specialty area, the term should be dropped from the bill. Besides, under the bill, the coroner still would have to qualify the dentist for the job of conducting the dental examination and preparing the dental charts and x-rays.

SHOULD THE TERM "QUALIFIED FORENSIC DENTISTRY" BE AMENDED TO "QUALIFIED DENTIST" AS IN CURRENT LAW?

This bill is sponsored by the California Society of Forensic Dentistry.

5. Medical examination and final report required

Under current law, the coroner/medical examiner is not obligated to perform a complete medical examination of the unidentified person, for purposes of identifying the person, and may engage a dentist to conduct a dental examination so that the records may be forwarded to the Department of Justice for comparison with other records

compiled by the DOJ. (Health and Safety Code Section 102870.)

This bill would require the medical examination, including taking full body x-rays, and dental examination, including preparation of dental charts and dental x-rays, and the excision of the jaws of the

deceased person before cremation. The medical examination specified under the bill would include collection of hair, tissue or fluid samples, frontal and lateral photographs, notation of identifying marks on the body, and other observations such as estimated time of death and, at the discretion of the coroner, full body x-rays of the unidentified body or remains could be taken.

ARE THE ADDITIONAL COSTS OF PERFORMING THE MEDICAL EXAMINATION, AND EACH ADDITIONAL REQUIRED PROCEDURE ALL JUSTIFIED? COULD SOME OF THE REQUIREMENTS BE TRIMMED TO SAVE COSTS WITHOUT SIGNIFICANTLY AFFECTING THE EFFICACY OF THE BILL?

The coroner/medical examiner would be required to forward the dental records to the Department of Justice if the person remains unidentified after 45 days. And, if after 180 days the person remains unidentified, the coroner/medical examiner would be required to submit a final report of the investigation to the DOJ.

This bill would require the dental examination records to be submitted to the DOJ on forms supplied by the DOJ. The final report of the investigation would be submitted in a format acceptable to the DOJ. The DOJ would act as the repository for all these records - dental examinations and final reports (which would include all of the information gathered during the medical examination, including hair, tissue samples, dental charts and x-rays, etc.) - and would therefore retain the records as needed or dispose of them as provided under current law. The actual samples of tissue and jaws would be stored by the coroner/medical examiner.

According to the DOJ, the procedure and timelines established by the bill would help greatly in the work

of matching missing/unidentified persons with bodies or human remains.

6. Comparison of records to be conducted by DOJ Violent Crimes Information Center

As in current law, when the DOJ receives the dental examination records from the coroner or medical examiner, the DOJ would conduct a comparison of the records to those already in the DOJ Violent Crime information Center computer system. The current statute, however, refers to a Penal Code Section that has been repealed and replaced, and the changes found in the bill would correct this by removing the reference to the repealed statute (Penal Code Section 11114) and replacing it with the VCIC statutes (Penal Code Section 14200 et seq.)

7. Technical amendments needed

Several provisions of the bill are inartfully worded, and may cause confusion. The following amendments are suggested:

a) On page 3, strike out lines 23 to 32, and insert:

(d) The coroner or medical examiner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the medical examination conducted under subdivision (a).

(b) Subdivision (e) in the current version of the bill should be changed to (c)

(c) The DOJ has suggested another amendment that will clarify the timelines for submittal of dental records and the final report. Staff recommends that the committee adopt those amendments.

The language currently in the bill interchanges "dental examination records" and "reports, and uses reports" in inappropriate places. This amendment will separate the actions that the coroner/medical examiner is supposed to take vis-?-vis the dental examination records, and the

final report to the DOJ, and specify the deadline for each action to be taken.

Support: California Dental Association

Opposition: None Known

HISTORY

Source: California Society of Forensic Dentistry

Related Pending Legislation: None Known

Prior Legislation: SB 1360 (Ch. 415, Stats. 1995) allowed a coroner to engage a dentist to conduct dental examination of a body or human remains, for purposes of identifying the dead person.

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SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS

1. Summary of Chapter 955, Statutes of 1989

Chapter 955, Statutes of 1989, added Section 27491.41 to the Government code to require counties to:

A. Perform an autopsy within 24 hours or as soon thereafter as feasible in any case where an infant has died suddenly and unexpectedly.

B. Follow autopsy protocols established by the State Department of Health Services (DHS) pursuant to Government Code Section 27491.41. Protocols established under Section 27491.41 currently includes two DHS protocols:

(1) "Autopsy Protocol for Sudden Unexpected Infant Death" (DHS Form 4437 (9/91) in 27 pages).

(2) "Death Scene and Deputy Coroner Investigation Protocol" (DHS Form 4439 (9/92) in 23 pages).

On July 25, 1991, the Commission on State Mandates determined that Government Code Section 27491.41, added by Chapter 955, Statutes of 1989, resulted in state mandated costs which are reimbursable pursuant to Government Code Section 17561.

2. Eligible Claimants

Any county that incurs increased costs as a result of this mandate is eligible to claim reimbursement of those costs.

3. Appropriations

Claims may only be filed with the State Controller's Office for programs that have been funded in the state budget act or in special legislation. Initial funding for Chapter 955, Statutes of 1989, is provided in the local government claims bill SB 241 [Chapter 241, Statutes of 1993] which appropriated $5,312,000 for payment of 1990/91, 1991/92, 1992/93 and 1993/94 fiscal year costs.

To determine if current funding is available for this program, refer to the schedule "Appropriations for State Mandated Cost Programs" in the "Annual Claiming Instructions for State Mandated Costs" issued in mid-September of each year to the county auditor's office.

4. Types of Claims

A. Reimbursement and Estimated Claims

A claimant may file a reimbursement claim and/or an estimated claim. A reimbursement claim details the costs actually incurred for the previous fiscal year. An estimated claim shows the costs to be incurred for the current fiscal year. A claim for reimbursement or an estimate must exceed $200 per fiscal year.

B. Filing Deadline

(1) Refer to item 3 "Appropriations" to determine if the program is funded for the current fiscal year. If funding is available an estimated claim may be filed.

An estimated claim must be filed with the State Controller's Office and postmarked by **November 30** of the fiscal year in which costs are to be incurred. Timely filed estimated claims will be paid before late claims.

(2) A reimbursement claim detailing the actual costs must be filed with the State Controller's Office and postmarked by **November 30** following the fiscal year in which costs were incurred. If the claim is filed after the deadline, but by November 30 of the succeeding fiscal year, the approved claim will be reduced by a late penalty of 10% but not to exceed $1,000. If the claim is filed more than one year after the deadline, the claim cannot be accepted.

If a local agency received payment for an estimated claim, a reimbursement claim must be filed by November 30 regardless if the amount received was more or less than the actual costs. If the agency fails to file a reimbursement claim, monies received must be returned to the State. If no estimated claim was filed, the agency may file a reimbursement claim by November 30 detailing the actual costs incurred for the fiscal year, provided there was an appropriation for the program for that fiscal year. See item 3 above.

5. Reimbursable Components

Eligible claimants will be reimbursed for increased costs incurred in the performance of the following activities:

A. Develop policies and procedures for the initial and continuing implementation of the DHS protocol requirements.

B. Perform autopsies including any required microscopic, toxicology, and microbiological testing; photographs, x-rays, and neuropathology.

C. Storage of autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

D. Transportation of the body to another county if a coroner is unavailable to perform the autopsy within the 24 hour requirement

E. Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the protocol duties, including travel to pickup a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy.

F. Preparation and filing of SIDS protocol forms with the state.

G. Participation in workshops within the state for ongoing professional training as necessary to satisfy standards of the DHS autopsy protocols.

6. Reimbursement Limitations

A. The two DHS autopsy protocols were effective on July 1, 1990. Any amendments to the protocols subsequent to this date which mandates an increased level of service upon counties, would require an amendment of the parameter and guidelines before reimbursement.

B. Any reimbursement specifically received for this mandate from any non-local source (e.g., federal, state grant, foundation, etc.) shall be identified and deducted so only net local costs are claimed.

7. Claiming Forms and Instructions

The diagram "Illustration of Claim Forms" provides a graphical presentation of forms required to be filed with a claim. A claimant may submit a computer generated report in substitution for

forms AP-1 and AP-2 provided the format of the report and data fields contained within the report are identical to the claim forms included in these instructions. The claim forms provided with these instructions should be duplicated and used by the claimant to file estimated or reimbursement claims. The State Controller's Office will revise the manual and claim forms as necessary. In such instances, new replacement forms will be mailed to claimants.

A. Form AP-2, Component/Activity Cost Detail

This form is used to segregate the detailed costs by claim component. A separate form AP-2 must be completed for each cost component being claimed. Costs reported on this form must be supported as follows:

(1) Salaries and Benefits

Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the mandated functions performed by each employee and specify the actual time spent, the productive hourly rate and related fringe benefits. In lieu of actual time, the average number of hours devoted to each function may be claimed if supported by a documented time study. A time study may be appropriate for functions that are relatively short in duration and repetitive. If the claim is based on a time study, submit with the claim all time documentation for the Controller's review of the study's precision and reliability.

Source documents required to be maintained by the claimant may include, but are not limited to, employee time records that show the employee's actual time spent on this mandate.

(2) Office Supplies

Only expenditures that can be identified as a direct cost of this mandate may be claimed. List the cost of materials consumed or expended specifically for the purpose of this mandate. Purchases made shall be claimed at the actual price after deducting for all cash discounts, rebates, and allowances received by the claimant.

Source documents required to be maintained by the claimant may include, but are not limited to, invoices, receipts, purchase orders and other documents evidencing the validity of the expenditures.

(3) Contracted Services

Contracting costs are reimbursable to the extent that the function to be performed requires special skill or knowledge that is not readily available from the claimant's staff or the service to be provided by the contractor is cost effective.

Give the name(s) of the contractor(s) who performed the services. Describe the activities performed by each named contractor, actual time spent on this mandate, inclusive dates when services were performed, and itemize all costs for services performed. Attach consultant invoices with the claim.

(4) Travel Expenses

Travel expenses for mileage, per diem, lodging and other employee entitlements are reimbursable in accordance with the rules of the local jurisdiction. Give the name(s) of the traveler(s), purpose of travel, inclusive travel dates, destination points and costs.

Source documents required to be maintained by the claimant may include, but are not limited to, receipts, employee travel expense claims, and other documents evidencing the validity of the expenditures.

For audit purposes, all supporting documents must be retained for a period of two years after the end of the calendar year in which the reimbursement claim was filed or last amended, whichever is later. Such documents shall be made available to the State Controller's Office on request.

B. Form AP-1, Claim Summary

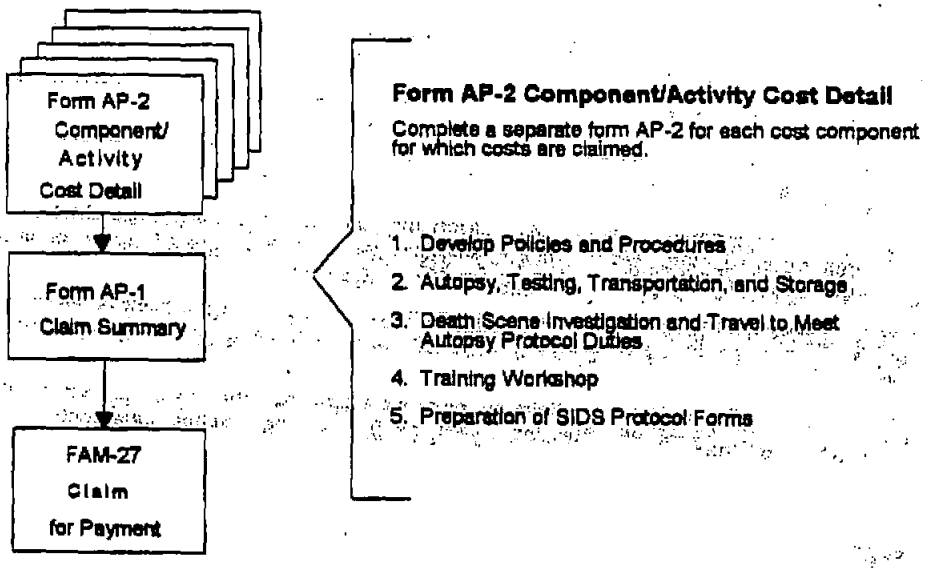
This form is used to summarize direct cost by cost component and compute allowable indirect cost for the mandate. Claim statistics shall identify the amount of work performed during the period for which costs are claimed. The claimant must provide the number of victims notified in the fiscal year of claim. Direct costs summarized on this form are derived from form AP-2 and carried forward to form FAM-27.

Indirect costs may be computed as 10% of direct labor costs, excluding fringe benefits. If an indirect cost rate greater than 10% is used, include the Indirect Cost Rate Proposal (ICRP) with the claim. If more than one department is involved in the mandated program, each department must have their own ICRP.

C. Form FAM-27, Claim for Payment

This form contains a certification that must be signed by an authorized representative of the local agency. All applicable information from form AP-1 must be carried forward to this form for the State Controller's Office to process the claim for payment.

Illustration of Claim Forms



CLAIM FOR PAYMENT

Pursuant to Government Code Section 17561

SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS

For State Controller Use Only

(19) Program Number 00110
(20) Date File ____/____/____
(21) LRS Input ____/____/____

LABEL HERE

(01) Claimant Identification Number

(02) Mailing Address

Claimant Name

County of Location

Street Address or P.O. Box

City State Zip Code

Type of Claim	Estimated Claim	Reimbursement Claim
	(03) Estimated ☐	(09) Reimbursement ☐
	(04) Combined ☐	(10) Combined ☐
	(05) Amended ☐	(11) Amended ☐
Fiscal Year of Cost	(06) 20___/20___	(12) 19___/20___
Total Claimed Amount	(07)	(13)
Less: 10% Late Penalty, not to exceed $1,000		(14)
Less: Estimated Claim Payment Received		(15)
Net Claimed Amount		(16)
Due from State	(08)	(17)
Due to State		(18)

Reimbursement Claim Data	
(22) AP-1, (03)	
(23) AP-1, (04)(1)(d)	
(24) AP-1, (04)(2)(d)	
(25) AP-1, (04)(3)(d)	
(26) AP-1, (04)(4)(d)	
(27) AP-1, (04)(5)(d)	
(28)	
(29)	
(30)	
(31)	
(32)	
(33)	
(34)	
(35)	
(36)	
(37)	

(38) CERTIFICATION OF CLAIM

In accordance with the provisions of Government Code § 17561, I certify that I am the person authorized by the local agency to file claims with the State of California for costs mandated by Chapter 955, Statutes of 1989, and certify under penalty of perjury that I have not violated any of the provisions of Government Code Sections 1090 to 1096, inclusive.

I further certify that there was no application other than from the claimant, nor any grant or payment received, for reimbursement of costs claimed herein; and such costs are for a new program or increased level of services of an existing program mandated by Chapter 955, Statutes of 1989.

The amounts for Estimated Claim and/or Reimbursement Claim are hereby claimed from the State for payment of estimated and/or actual costs for the mandated program of Chapter 955, Statutes of 1989, set forth on the attached statements.

Signature of Authorized Representative _____ Date _____

Type or Print Name _____ Title _____

(39) Name of Contact Person for Claim _____ Telephone Number (____) _____ _____ Ext. _____

E-mail Address _____

SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS Certification Claim Form Instructions	FORM FAM-27

(01) Leave blank.

(02) A set of mailing labels with the claimant's I.D. number and address has been enclosed with the claiming instructions. The mailing labels are designed to speed processing and prevent common errors that delay payment. Affix a label in the space shown on form FAM-27. Cross out any errors and print the correct information on the label. Add any missing address items, except county of location and a person's name. If you did not receive labels, print or type your agency's mailing address.

(03) If filing an original estimated claim, enter an "X" in the box on line (03) Estimated.

(04) If filing an original estimated claim on behalf of districts within the county, enter an "X" in the box on line (04) Combined.

(05) If filing an amended or combined claim, enter an "X" in the box on line (05) Amended. Leave boxes (03) and (04) blank.

(06) Enter the fiscal year in which costs are to be incurred.

(07) Enter the amount of estimated claim. If the estimate exceeds the previous year's actual costs by more than 10%, complete form AP-1 and enter the amount from line (11).

(08) Enter the same amount as shown on line (07).

(09) If filing an original reimbursement claim, enter an "X" in the box on line (09) Reimbursement.

(10) If filing an original reimbursement claim on behalf of districts within the county, enter an " X " in the box on line (10) Combined.

(11) If filing an amended or a combined claim on behalf of districts within the county, enter an "X " in the box on line (11) Amended.

(12) Enter the fiscal year for which actual costs are being claimed. If actual costs for more than one fiscal year are being claimed, complete a separate form FAM-27 for each fiscal year.

(13) Enter the amount of reimbursement claim from form AP-1, line (11).

(14) Reimbursement claims must be filed by January 15 of the fiscal year in which costs are incurred or the claims shall be reduced by a late penalty. Enter either the product of multiplying line (13) by the factor 0.10 (10% penalty) or $1,000, whichever is less.

(15) If filing a reimbursement claim and have previously filed an estimated claim for the same fiscal year, enter the amount received for the estimated claim. Otherwise, enter a zero.

(16) Enter the result of subtracting line (14) and line (15) from line (13).

(17) If line (16) Net Claimed Amount is positive, enter that amount on line (17) Due from State.

(18) If line (16) Net Claimed Amount is negative, enter that amount in line (18) Due to State.

(19) to (21) Leave blank.

(22) to (37) Reimbursement Claim Data. Bring forward the cost information as specified on the left-hand column of lines (22) through (37) for the reimbursement claim e.g. AP-1, (03), means the information is located on form AP-1, line (03). Enter the information on the same line but in the right-hand column. Cost information should be rounded to the nearest dollar, (i.e., no cents). Indirect costs percentage should be shown as a whole number and without the percent symbol (i.e., 35% should be shown as 35). Completion of this data block will expedite the payment process.

(38) Read the statement "Certification of Claim." If it is true, the claim must be dated, signed by the agency's authorized officer and must include the person's name and title, typed or printed. Claims cannot be paid unless accompanied by a signed certification.

(39) Enter the name, telephone number, and e-mail address of the person whom this office should contact if additional information is required.

SUBMIT A SIGNED ORIGINAL AND A COPY OF FORM FAM-27, AND A COPY OF ALL OTHER FORMS AND SUPPORTING DOCUMENTS TO:

Address, if delivered by U.S. Postal Service:

OFFICE OF THE STATE CONTROLLER
ATTN: Local Reimbursements Section
Division of Accounting and Reporting
P.O. Box 942850
Sacramento, CA 94250

Address, if delivered by other delivery service:

OFFICE OF THE STATE CONTROLLER
ATTN: Local Reimbursements Section
Division of Accounting and Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

MANDATED COSTS
SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS
CLAIM SUMMARY

FORM AP-1

(01) Claimant:	(02) Type of Claim: Reimbursement ☐ Estimated ☐	Fiscal Year: 19___/___

Claim Statistics

(03) 1. Number of Autopies Performed	

Direct Costs	Object Accounts			
(04) Reimbursable Components:	(a) Salaries	(b) Benefits	(c) Services and Supplies	(d) Total
1. Develop Policies and Procedures				
2. Autopsy, Testing, Transporation and Storage				
3. Death-scene Investigation and Travel to Meet Autopsy Protocol Duties				
4. Training Workshop				
5. Preparation of SIDS Protocol Forms				
(05) Total Direct Costs				

Indirect Costs	%
(06) Indirect Cost Rate [From ICRP]	
(07) Total Indirect Costs [Line (06) x line (05)(a)] or [line (06) x {line (05)(a) + line (05)(b)}]	
(08) Total Direct and Indirect Costs: [Line (05)(d) + line (07)]	

Cost Reduction

(09) *Less:* Offsetting Savings, if applicable	
(10) *Less:* Other Reimbursements, if applicable	
(11) **Total Claimed Amount:** {Line (08) - [Line (09) + line (10)]}	

SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS CLAIM SUMMARY Instructions	FORM AP-1

(01) Enter the name of claimant.

(02) Type of Claim. Check a box, Reimbursement or Estimated, to identify the type of claim being filed. Enter the fiscal year for which costs were incurred or are to be incurred.

Form AP-1 must be filed for a reimbursement claim. Do not complete Form AP-1 if you are filing an estimated claim and the estimate does not exceed the previous fiscal year's actual costs by more than 10%. Simply enter the amount of the estimated claim on Form FAM-27, line (07). However, if the estimated claim exceeds the previous fiscal year's actual costs by more than 10%, Form AP-1 must be completed and a statement attached explaining the increased costs. Without this information the high estimated claim will automatically be reduced to 110% of the previous fiscal year's actual costs.

(03) Number of Autopsies Performed. Enter the number of autopsies performed for which the costs are claimed.

(04) Reimbursable Components. For each reimbursable component, enter the total from Form AP-2, line (05) column (d), (e) and (f) to Form AP-1, block (04) columns (a), (b) and (c) in the appropriate row. Total each row.

(05) Total Direct Costs. Total columns (a), (b) and (c).

(06) Indirect Cost Rate. Enter the indirect cost rate. Indirect costs may be computed as 10% of direct labor costs, excluding fringe benefits and the cost of supervision above the first level. If an indirect cost rate of greater than 10% is used, include the Indirect Cost Rate Proposal (ICRP) with the claim. If more than one department is reporting costs, each must have their own ICRP for the program.

(07) Indirect Costs. Multiply Total Salaries, line (05)(a), by the Indirect Cost Rate, line (06). If both salaries and benefits are used in the distribution base for the computation of the indirect cost rate, then multiply Total Salaries and Benefits, line (05)(a) and line (05)(b), by the Indirect Cost Rate, line (06).

(08) Total Costs. Enter the sum of line (05)(d) and line (07).

(09) Less: Offsetting Savings, if applicable. Enter the total savings experienced by the claimant as a direct result of this mandate. Submit a schedule of detailed savings with the claim.

(10) Less: Other Reimbursements, if applicable. Enter the amount of other reimbursements received from any local agency source (i.e., federal, other State programs, foundations, etc.) which reimbursed any portion of the mandated cost program. Submit a schedule detailing the reimbursement sources and amounts.

(11) Total Amount Claimed. Subtract the sum of offsetting savings, line (09), and other reimbursements, line (10), from total costs, line (08). Enter the remainder on this line and carry the amount forward to From FAM-27, line (13) for the Reimbursement Claim, or line (07) for the Estimated Claim.

MANDATED COSTS
SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS
COMPONENT/ACTIVITY COST DETAIL

FORM AP-2

(01) Claimant:

(02) Fiscal Year costs were incurred:

(03) Reimbursable Component: Check a box to identify the cost being claimed. Check **only** one box per form.

- ☐ Development of Policies and Procedures
- ☐ Autopsy, Testing, Transportation and Storage
- ☐ Preparation of SIDS Form
- ☐ Death-scene Investigation and Travel to Meet Autopsy Protocol Duties
- ☐ Training Workshop

(04) Description of Expense: Complete columns (a) through (f).

(a) Employee Names, Job Classifications, Activities Performed and Description of Expenses	(b) Hourly Rate or Unit Cost	(c) Hours Worked or Quantity	Object Accounts (d) Salaries	(e) Benefits	(f) Services and Supplies
(05) Total ☐ Subtotal ☐ Page : ____ of ____					

SUDDEN INFANT DEATH SYNDROME: AUTOPSY PROTOCOLS COMPONENT/ACTIVITY COST DETAIL Instructions	FORM AP-2

(01) Enter the name of claimant.

(02) Enter the fiscal year for which costs were incurred.

(03) Reimburseable components. Check the box which indicates the cost component being claimed. Check only one box per form. A separate form AP-2 shall be prepared for each component which applies.

(04) Description of Expenses. The following table identifies the type of information required to support reimbursable costs. To detail costs for the component activity box "checked" in line (03), enter the employee names or position titles, a brief description of their activities performed, productive hourly rate, fringe benefits, supplies used, contracted services cost, etc. For audit purposes, all supporting documents must be retained for a period of two years after the end of the calendar year in which the reimbursement claim was filed or last amended, whichever is later. Such documents shall be made available to the State Controller's Office on request.

Object/ Subobject Accounts	Columns						Submit these supporting documents with the claim
	(a)	(b)	(c)	(d)	(e)	(f)	
Salaries	Employee Name Title Activities Performed	Hourly Rate	Hours Worked	(b) x (c) Hourly Rate x Hours Worked			
Benefits		Benefit Rate		Salaries	(b) x (d) Benefit Rate x Salaries		
Services and Supplies							
Office Supplies	Description of Supplies Used	Unit Cost	Quantity Used			(b) x (c) Unit Cost x Quantity Consumed	
Contracted Services	Name of Contractor Specific Tasks Performed	Hourly Rate	Hours Worked Inclusive Dates of Service			Itemize Cost for Services Performed	Invoice

(05) Total line (04), columns (d), (e) and (f) and enter the sum on this line. Check the appropriate box to indicate if the amount is a total or subtotal. If more than one form is needed to detail the component/activity costs, number each page. Enter totals from line (05), columns (d), (e) and (f) to form AP-1, block (04) columns (a), (b), and (c) in the appropriate row.

December 13, 1988

Mr. Jesse Huff, Chairman
Commission on State Mandates
1130 K Street, Suite LL50
Sacramento, CA 95814

Dear Mr Jesse Huff:

This letter responds to your request for a recommendation on Claim No. CSM-4313, related to the reporting of cases involving the abuse of elderly persons. In this claim, Fresno County requests reimbursement for the increased costs it has allegedly incurred in providing protective services in reported cases of elder abuse. The county claims that Chapter 769, Statutes of 1987, requires the county Department of Social Services to investigate a reported incident of elder abuse, assess the needs of the victim, provide various social or medical services, and follow-up to ensure a satisfactory outcome.

Our examination of the current law reveals, however, that most of the existing requirements with regard to county response to reported elder abuse preceded the enactment of Chapter 769. The statute which initially allowed reporting of dependent adult abuse was enacted in 1982. This reporting requirement was extended by legislation enacted in 1983 and 1985. Our analysis indicates, however, that Chapter 769 does impose increased workload on counties in the following manner:

- Chapter 769 repealed the 1990 sunset date on the existing law regarding reporting of dependent adult abuse. This imposes a mandate in 1990 and subsequent years by increasing county costs associated with reporting known or suspected dependent adult abuse cases. In addition, to the extent that the dependent adult abuse reporting program results in increased reports of abuse, it will increase county workload associated with investigation and resolution of these cases.

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- Chapter 769 requires county Adult Protective Services (APS) or law enforcement agencies receiving a report of abuse occurring within a long-term care facility to report the incident to the appropriate facility licensing agency.

Our analysis further indicates that the increased costs associated with Chapter 769 appear to be state-reimbursable to the extent that counties have augmented their County Services Block Grant (CSBG) with county funding to pay for these costs. A detailed analysis of the claim follows below.

Background

Adult Protective Services. Welfare and Institutions (W&I) Code Chapter 5.1 generally requires county governments to provide an APS program. The purpose of this program is to ensure the safety and well-being of adults unable to care for themselves. The program attempts to accomplish these objectives by providing social services and/or referrals to adults in need.

The state provides funding for APS through the County Services Block Grant (CSBG), which counties also use to fund a variety of other social service programs, including administration of In-Home Supportive Services. Under current law, each county generally has discretion as to the types of adult protective services to provide, the number of adults who receive such services, and the amount of CSBG funding allocated to these services. However, the state does require the county APS program to record and investigate reports of suspected elder or dependent adult abuse.

Reporting. Welfare and Institutions Code Chapter 11 (Section 15600 et seq.) requires dependent care custodians, health care providers, and specified public employees to report known or suspected physical abuse of an elderly or dependent adult. An elderly adult is defined as anyone aged 65 years or older. A dependent adult is any person between the ages of 18 and 64 years who is unable to care for himself or herself due to physical or mental limitations, or who is admitted as an inpatient to a specified 24-hour health facility. Care providers are permitted but not required to make such reports if the suspected abuse is not physical in nature.

Upon receiving a report, counties are required to file appropriate reports with the local law enforcement agency, the state long-term care ombudsman, and long-term care facility licensing agencies. In addition, the county is required to report monthly to the state Department of Social Services (DSS) regarding the number of abuse reports it has received.

Analysis

Fresno County claims that Chapter 769 requires the county Department of Social Services to investigate a reported incident of elder abuse, assess the needs of the victim, provide various social or medical services, and follow-up to ensure a satisfactory outcome. In our view, the central question before the commission is what Chapter 769 actually requires a county to do upon receiving a report of elder abuse. We examine

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requirements with regard to three areas of county response: reporting, investigation, and case resolution.

Reporting. Our review of the APS program's statutory history reveals that most of the current reporting requirements were in existence prior to the enactment of Chapter 769. Chapter 1184, Statutes of 1982, established W&I Code Chapter 11, which allowed any person witnessing or suspecting that a dependent adult was subject to abuse to report the suspected case to the county adult protective services agency. At that time, "dependent adult" included individuals over age 65 years. Chapter 11 initially was scheduled to sunset on January 1, 1986. Subsequent legislation expanded the reporting requirements. Specifically:

- Ch 1273/83 enacted W&I Code Chapter 4.5, which established a separate reporting system for suspected abuse of individuals aged 65 or older. This statute required elder care custodians, medical and nonmedical practitioners and employees of elder protective agencies to report suspected or known cases of physical abuse to the local APS agency. It also required county APS agencies to report the number of reports received to the state DSS.

- Ch 1164/85 amended W&I Code Chapter 11 to require similar mandatory reporting of physical abuse of a dependent adult. This statute also required law enforcement agencies and APS agencies to report to each other any known or suspected incident of dependent adult abuse. In addition, Chapter 1164 extended the program's sunset date to January 1, 1990.

Chapter 769, Statutes of 1987, consolidated the reporting requirements for elderly and dependent adult abuse within the same statute, and repealed the January 1, 1990 sunset date for dependent adult abuse reporting. The statute also made minor changes in the reporting requirements, including the following:

- The statute required abuse occurring within a long-term care facility to be reported to a law enforcement agency or the state long-term care ombudsman.

- The statute required county APS or law enforcement agencies receiving a report of abuse occurring within a long-term care facility to report the incident to the appropriate facility licensing agency.

In sum, various provisions of existing law impose increased reporting workload on local governments by requiring them to receive reports of suspected abuse made by other care providers, and to report specific information to other state and local agencies. However, our analysis indicates that the bulk of these requirements were imposed prior to Chapter 769. Therefore, only the marginal increase in workload imposed by Chapter 769 would appear to be subject to the current claim. These requirements include the following:

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- Reporting workload associated with reports of dependent adult abuse occurring after January 1, 1990. By repealing the January 1, 1990 sunset date for the dependent adult abuse reporting program, Chapter 769 imposes increased reporting workload on counties in 1990 and subsequent years.

- The workload required to report abuse incidents to the appropriate long-term care facility licensing agency.

We note that Chapter 769 also could reduce county workload to the extent that reports of abuse in a 24-hour health facility are made to the state long-term care ombudsman rather than to the local APS agency. We are unable to determine the potential magnitude of this reduction in costs. However, it appears unlikely that the reduction in costs in this area will fully offset the cost increases identified above, and particularly the costs associated with dependent adult abuse reporting in 1990 and beyond.

In addition to increasing reporting costs, Chapter 769 will increase county costs associated with investigating and resolving dependent adult abuse cases, to the extent that the mandatory reporting requirement results in identification of increased cases of abuse.

Investigation. Chapter 30-810.2 of the state Department of Social Services' (DSS) regulations, requires counties to investigate promptly most reports or referrals of adult abuse or neglect. Welfare and Institutions Code Section 15610 (m) defines "investigation" as the activities required to determine the validity of a report of elder or dependent adult abuse, neglect or abandonment. Thus, it appears that state law requires county APS agencies to act promptly to determine the validity of a reported incident of abuse.

Resolution. Welfare and Institutions Code Section 15635 (b) requires the county to maintain an inventory of public and private service agencies available to assist victims of abuse, and to use this inventory to refer victims in the event that the county cannot resolve the immediate or long-term needs of the victim. This referral requires assessment of the needs of the client, and identification of the appropriate agency to serve these needs. Depending on the needs of the client and the resources available, a county may refer the client to a county, state or federally funded program, or to a private organization. When serving an indigent client, the county is required to be the service provider of last resort if the client does not qualify for state or federal programs (W&I Section 17000).

To the extent that mandatory reporting of dependent adult abuse increases the number of cases reported to the county, it increases the county's APS workload. Presumably, the sunset of the reporting requirements would have led to a reduction in this workload. Thus, by repealing the January 1, 1990 sunset date on the dependent adult abuse reporting program, Chapter 769 probably results in increased county APS workload, in terms of both investigation and resolution in 1990 and subsequent years. Again, the

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requirements with regard to elder abuse cases, and with regard to dependent adult cases reported prior to January 1, 1990, are imposed by earlier statutes. Consequently, any increased workload associated with these cases does not appear to be subject to the current claim.

Are costs reimbursable? The second question before the commission is whether the increased county costs associated with this mandate are state-reimbursable. Specifically, you must determine whether the costs associated with dependent adult and elder abuse reporting are reimbursable, given that the Legislature currently provides funding for the APS program in the form of the CSBG.

In order to determine whether the CSBG fully funds the increased workload imposed by Chapter 769, it is useful to understand the history of funding for APS. Prior to 1981, the state DSS' social services regulations contained detailed requirements identifying the minimum level of APS service that counties had to provide to clients. In 1981, however, the federal government reduced its support for social service programs (Title XX of the Social Security Act) by approximately 20 percent. To help the counties accommodate this reduction, DSS eliminated the specific requirements from its APS regulations and from the regulations governing various other social services programs, thereby giving the counties substantial discretion in the level of service they provide and in the amount of federal Title XX funds they allocate to APS.

In recognition of this increased county discretion, the Legislature, in the Budget Act of 1985, created the CSBG, which provides funds for the various social services programs, including APS, over which counties have substantial discretion. (In contrast, the counties have limited discretion over two major social services programs -- Child Welfare Services and In-Home Supportive Services. These programs are budgeted and their funds are allocated based on county caseloads and costs.) The level of funding provided through the CSBG was not tied to any measurement of the workload in any of the CSBG programs. Rather, it was based on county expenditures for all of the programs in 1982-83, with the expectation that counties would allocate CSBG funds to the various programs based on local priorities.

In sum, counties have considerable flexibility as to the types and level of services provided under APS, and as to the level of CSBG funding each county devotes to the APS program. Moreover, the amount of CSBG funds provided to each county does not necessarily reflect workload in that county. Thus, in response to the increased workload requirements imposed by Chapter 769, counties with insufficient CSBG funding to pay for the workload increase generally face two choices:

- The county can fund the increased APS workload by reducing expenditures in other areas of the APS program, or in other programs funded through CSBG. This, in effect, requires the county to realign its existing program priorities in order to redirect CSBG money to pay for the recording, investigation, and referral of reported abuse cases.

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- The county can use its own funds to augment CSBG funding in order to provide an increased level of service within the existing program, while maintaining existing program priorities.

Article XIII B, Section 6 of the State Constitution requires the state to reimburse local entities for new programs and higher levels of service. It does not require counties to reduce service in one area to pay for a higher level of service in another. Moreover, in enacting Chapter 11, the Legislature did not require that counties realign their social service priorities in order to accommodate the increased workload. Therefore, we conclude that the costs associated with Chapter 769, are state-reimbursable to the extent that a county uses its own funding to pay for these costs. If, however, a county exercises its discretion to redirect CSBG funds to pay for the costs of elder and dependent adult abuse reporting, investigation, and resolution, these costs are not state-reimbursable.

Sincerely,

Elizabeth G. Hill

Elizabeth G. Hill
Legislative Analyst

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COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
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PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

August 31, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Agency Comments: County of Los Angeles Test Claim
Postmortem Examinations: Unidentified Bodies, Human Remains

The County of Los Angeles submits and encloses herewith a declaration of Captain David Campbell with our Department of Coroner's Operations Bureau, Forensic Services Division, prepared in response to State agency comments on the subject claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

COUNTY OF LOS ANGELES

DEPARTMENT OF CORONER

1104 N. MISSION RD., LOS ANGELES, CALIFORNIA 90033

Anthony T. Hernandez
Director

L. Sathyavagiswaran, M.D.
Chief Medical Examiner-Coroner

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000
Adding Sections 27521 & 27521.1 of the Government Code,
Amending Section 102870 of the Health & Safety Code,
Amending Section 14202 of the Penal Code
Postmortem Examinations: Unidentified Bodies and Human Remains

Declaration of David Campbell

David Campbell makes the following declaration and statement under oath:

I, David Campbell, Captain, Los Angeles County Department of Coroner's Operations Bureau, Forensic Services Division, am responsible for implementing the subject law.

I declare that I have reviewed the August 8, 2001 letter of Mr. S. Calvin Smith, Program Budget Manager with the State Department of Finance to Ms. Paula Higashi, Executive Director of the Commission on State Mandates, alleging that "[p]ursuant to Government Code Section 27491... the decision by a coroner to examine unidentified remains (other than DNA sampling) is a discretionary act ...".

It is my information or belief that the decision by a coroner to examine unidentified remains pursuant to the test claim legislation is not a discretionary act for the following reasons.

I declare that Government Code Section 27491 unambiguously specifies the types of deaths requiring the coroner's inquiry:

> "Section 27491. Classification of deaths requiring inquiry; determination of cause; signature on death certificate; exhumation; notice to coroner of cause of death.
>
> It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; unattended deaths; deaths wherein the deceased has not been attended by a physician in the 20 days before death; deaths related to or following known or suspected self-induced or criminal abortion; known or suspected homicide, suicide, or accidental poisoning; deaths known or suspected as resulting in whole or in part from or related to accident or injury either old or recent; deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or where the suspected cause of death is sudden infant death syndrome; death in whole or in part occasioned by criminal means; deaths associated with a known or alleged rape or crime against nature; deaths in prison or while under sentence; deaths known or suspected as due to contagious disease and constituting a public hazard; deaths from occupational diseases or occupational hazards; deaths of patients in state mental hospitals serving the

mentally disabled and operated by the State Department of Mental Health; deaths of patients in state hospitals serving the developmentally disabled and operated by the State Department of Developmental Services; deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another; and any deaths reported by physicians or other persons having knowledge of death for inquiry by coroner. Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies.

In any case in which the coroner conducts an inquiry pursuant to this section, the coroner or a deputy shall personally sign the certificate of death. If the death occurred in a state hospital, the coroner shall forward a copy of his or her report to the state agency responsible for the state hospital.

The coroner shall have discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances and falling within the provisions of this section, and if inquiry determines that the physician of record has sufficient knowledge to reasonably state the cause of a death occurring under natural circumstances, the coroner may authorize that physician to sign the certificate of death.

For the purpose of inquiry, the coroner shall have the right to exhume the body of a deceased person when necessary to discharge the responsibilities set forth in this section.

Any funeral director, physician, or other person who has charge of a deceased person's body, when death occurred as a result of any of the causes or circumstances described in this section, shall immediately notify the coroner. Any person who does not notify the coroner as required by this section is guilty of a misdemeanor."

I declare that in the case of an unidentified dead body or human remains, the coroner is mandated, pursuant to Government Code 27491 [above], "to inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual", "unattended"; and, if the deceased had "not been attended by a physician in the 20 days before death".

I declare that the mandatory inquiry into, and determination of, the circumstances, manner, and cause of death of an unidentified dead body or human remains, pursuant to Government Code Section 27491, must now be supplemented, under Government Code Section 27521, the test claim legislation, to determine the identity of the deceased.

I declare that irrespective of the types of postmortem inquiries, examinations or autopsies employed by the coroner to complete the mandatory determination of the circumstances, manner, and cause of death of an unidentified body or human remains pursuant to Government Code Section 27491, further mandatory duties to identify the deceased were added by Government Code Section 27521.

I declare that the new mandatory duties to determine identity of the deceased require, under Government Code Section 27521, that ".....a postmortem examination or autopsy shall include, but shall not be limited to, the following:

1) Taking all available fingerprints and palms prints.

2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4) Frontal and lateral facial photographs with the scale indicated.

5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

6) Notations of observations pertinent to the estimation of the time of death.

7) Precise documentation of the location of the remains.

c) The postmortem examination or autopsy of the unidentified body or remains may include full body x-rays.

d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

e) The body of unidentified deceased person may not cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

f) If the corner with the aid of the dental identity of dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered."

I declare that Government Code Section 27521(b) is explicit in what a postmortem examination, for the purposes of determining identity, shall include.

I declare that previous to the changes in the test claim legislation, the Coroner took fingerprints on most cases but limited the taking of palm prints to homicide victims.

I declare that previous to the changes in the test claim legislation, the Coroner did not include the taking of a hair sample for DNA testing. Hair standards were collected only in homicide cases. In fact, DNA testing was never a regular method for identification and the collection of fluids for identification was usually not performed.

I declare that previous to the changes in the test claim legislation, frontal and lateral facial photographs with the scale indicated were not mandated. .

I declare that previous to the changes in the test claim legislation, the retention of jaws (maxilla and mandible with teeth) and other tissue samples for future possible use was not mandated. Now, Government Code Section 27521(e) requires the retention of jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

I declare that previous to the changes in the test claim legislation, the Coroner made no provisions to store material used in positive identification. Once the body was identified, the jaws and/or tissues were returned to the body for disposition. The Coroner now requires additional storage for the jaws.

I declare that I have prepared the attached description of reimbursable activities reasonably necessary to comply with the subject law.

I declare that the above duties performed by the Los Angeles Coroner's Department pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

AUG 31, 2001 LOS ANGELES
Date and Place


Signature

Description of Reimbursable Activities
Declaration of David Campbell

1. Develop policies and procedures for the initial and continuing implementation of the subject law.

2. Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, x-ray, notation of the time of the death, location of the death, dental examination, and preparing the final report to the Department of Justice.

3. Storage of autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

4. Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy.

5. Train departmental personnel to prepare the final report to the Department of Justice.

6. Participation in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law.

Commission on State Mandates

List Date: 07/06/2001 **Mailing Information**

Mailing List

Claim Number 00-TC-18 **Claimant** County of Los Angeles

Subject Statutes of 2000, Chapter 284

Issue Postmortem Examinations: Unidentified Bodies, Human Remains

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Executive Director,
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Interested Person

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Executive Director
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Mr. Steve Keil,
California State Association of Counties

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Interested Person

Oy, 8 mls mailed
Post-it® brand fax transmittal memo 7671 | # of pages ▸ 10
To Paula Higashi | From Leonard Kaye
Co. CSM | Co. LA County
Dept. | Phone # 213-974-8564
Fax # 916-445-0278 | Fax # 213-617-8106

Claim Number 00-TC-18 **Claimant** County of Los Angeles

Subject Statutes of 2000, Chapter 284

Issue Postmortem Examinations: Unidentified Bodies, Human Remains

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Yolo County District Attorney's Office

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Woodland CA 95776 — *FAX:* (916) 000-0000

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Interested Person

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California State Sheriffs' Association

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Interested Person

Claim Number 00-TC-18 Claimant County of Los Angeles

Subject Statutes of 2000, Chapter 284

Issue Postmortem Examinations: Unidentified Bodies, Human Remains

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Interested Person

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Interested Party

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David Wellhouse & Associates, Inc.

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FAX: (916) 368-5723

Interested Person

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 31st day of August 2001, I served the attached:

Documents: Review of State Agency Comments: County of Los Angeles Test Claim, Postmortem Examinations: Unidentified Bodies, Human Remains, including *a 1 page letter of J. Tyler McCauley dated 8/31/01, and a 5 page declaration of David Campbell, all pursuant to CSM-00-TC-18, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates and State Controller's Office- FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2001, at Los Angeles, California.

Hasmik Yaghobyan

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
E: (916) 323-3562
916) 445-0278
E-mail: csminfo@csm.ca.gov

June 4, 2002

Leonard Kaye
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: **Draft Staff Analysis and Hearing Date**
Postmortem Examinations: Unidentified Bodies, Human Remains, 00-TC-18
County of Los Angeles, Claimant
Government Code Sections 27521, 27521.1; Health and Safety Code Section 102870, Penal Code Section 14202; Statutes 2000, Chapter 284

Dear Mr. Kaye:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **June 26, 2003**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on Thursday, **July 31, 2003** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about July 10, 2003. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

If you have any questions on the above, please contact Eric Feller at (916) 323-8221.

Sincerely,

Paula Higashi
Executive Director

Enc. Draft Staff Analysis
cc. Mailing List (current mailing list attached)

MAILED: Mail List ✓ FAXED: _____
DATE: 6/4/03 INITIAL: VS
CHRON: _____ FILE: ✓
WORKING BINDER: _____

ITEM

TEST CLAIM
DRAFT STAFF ANALYSIS

Government Code Sections 27521, 27521.1
Health and Safety Code Section 102870, Penal Code Section 14202
Statutes 2000, Chapter 284

Postmortem Examinations: Unidentified Bodies, Human Remains

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

6/29/01	Claimant County of Los Angeles files test claim with the Commission
8/8/01	Department of Finance (DOF) files comments on the test claim
9/6/01	Claimant County of Los Angeles files declaration in response to DOF comments
6/4/03	Commission issues draft staff analysis

BACKGROUND

Test claim legislation: The test claim legislation[1] states that a postmortem examination or autopsy[2] conducted at the discretion of the coroner on an unidentified body or human remains shall include the following activities:

(1) taking all available fingerprints and palm prints;
(2) a dental exam consisting of dental charts and dental X-rays;
(3) collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary;
(4) frontal and lateral facial photographs with the scale indicated;
(5) notation and photos, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body;
(6) notations of observations pertinent to the estimation of the time of death; and
(7) precise documentation of the location of the remains.

The test claim legislation authorizes the examination or autopsy to include full body X-rays, and requires the coroner to prepare a final report of investigation in a format established by the Department of Justice (DOJ).

In addition, the jaws and other tissue samples must be removed and retained for one year after identification of the deceased, and no civil or criminal challenges are pending, or indefinitely. If the coroner is unable to establish the identity of the deceased, the coroner must (1) submit dental charts and dental X-rays of the unidentified body to the DOJ on forms supplied by the DOJ within 45 days of the date the body or human remains were discovered; and (2) submit the final report of investigation to the DOJ within 180 days of the date the body or remains were discovered. If the coroner cannot establish the identity of the body or remains, a dentist may examine the body or remains, and if the body still cannot be identified, the coroner must prepare and forward the dental examination record to DOJ. Law enforcement must report the death of an unidentified person to DOJ no later than 10 calendar days after the date the body or remains are discovered.

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[1] Statutes 2000, chapter 284; Government Code sections 27521, 27521.1, Health and Safety Code section 102870, Penal Code section 14202.

[2] The terms "autopsy" and "postmortem exam," both in the test claim statute, are synonymous and "autopsy" is primarily used hereafter.

The test claim legislation was sponsored by the California Society of Forensic Dentistry in response to years of volunteer consultant work by members of the Society helping DOJ identify more than 2,200 unidentified dead persons in California. The sponsors argued that the ways in which evidence was collected or retained was inconsistent, and that information reported to the DOJ varied from very inadequate to extremely detailed. The sponsors also indicated that unidentified bodies had been buried or cremated without retaining evidence that could later assist in identifying them.[3]

Coroner duties: Each county in California performs the coroner's functions as defined in the California Government Code, the Health and Safety Code, the Penal Code and various other codes and regulations. The office of coroner may be elective or appointive,[4] or may be abolished and replaced by the office of medical examiner,[5] or may be consolidated with the duties of the public administrator, district attorney or sheriff.[6] Coroners and deputy coroners are peace officers.[7]

Pre-1975 statutes require coroners to inquire into and determine the circumstances, manner and causes of certain types of deaths. The coroner's duty is to investigate these deaths and ascertain the cause and time of death, which must be stated on the death certificate.[8] The types of death over which the coroner has jurisdiction, as listed in Government Code section 27491 and Health and Safety Code section 102850, are those that are:

- Violent, sudden or unusual;
- Unattended;
- Where the deceased has not been attended by a physician in the 20 days before death;
- Self-induced or criminal abortion;
- Known or suspected homicide, suicide or accidental poisoning;
- By recent or old injury or accident;
- Drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration;
- Suspected sudden infant death syndrome;
- By criminal means;
- Associated with known or alleged rape or crime against nature;
- In prison or while under sentence;
- By known or suspected contagious disease constituting a public hazard;
- By occupational disease or hazard;
- Of state mental hospital patient;
- Of developmentally disabled patient in state developmental services hospital.

---

[3] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading analysis of Senate Bill No. 1736 (1999-2000 Reg. Sess.) as amended August 8, 2000, page 4.

[4] Government Code section 24009.

[5] Government Code section 24010. Any reference to "coroners" in this analysis includes medical examiners, deputy coroners, or positions that perform the same duties.

[6] Government Code section 24300.

[7] Penal Code section 830.35, subdivision (c).

[8] Health and Safety Code sections 102855 and 102860.

- Under circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another.
- Where the attending physician and surgeon or physician assistant is unable to state the cause of death.[9]

When the coroner investigates one of these types of deaths, he or she signs the death certificate.[10] In deaths where it is reasonable to suspect criminal means, the coroner must report the death to local law enforcement, along with all information received by the coroner relating to the death.[11]

In order to carry out the duties of office in investigating death in accordance with applicable statutes, it is necessary that the coroner have wide discretion in ordering an autopsy when, in the coroner's judgment, it is the appropriate means of ascertaining the cause of death.[12] This is still true as evidenced by the express discretion granted the coroner in the statutory scheme. For example, the coroner has "discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances" and falling within Government Code section 27491 (the types of death over which the coroner has jurisdiction).[13] The coroner also "may, in his or her discretion, take possession of the body..."[14] and "allow removal of parts of the body by a licensed physician and surgeon or trained transplant technician" for transplant or scientific purposes, under certain conditions.[15] Currently, the only instances in which an autopsy is required by law, i.e., outside the coroner's discretion, is if a spouse (or if none, surviving child or parent or next of kin) requests it in writing,[16] or if the suspected cause of death is Sudden Infant Death Syndrome (SIDS).[17] Even in SIDS cases, the coroner has discretion in deciding whether to autopsy if the physician desires to certify the cause of death is SIDS.[18]

As far as unidentified bodies, existing law states that coroners shall forward dental examination records to the DOJ if all of the following apply: (1) the coroner investigates the death, (2) the coroner is unable to establish the identity of the body or remains by visual means, fingerprints or other identifying data, and (3) the coroner has a dentist conduct a dental examination of the body

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[9] Government Code section 27491 and Health and Safety Code section 102850.

[10] Government Code section 27491.

[11] Government Code section 27491.1.

[12] *Huntley v. Zurich General Acc. & Liability Ins. Co.* (1929) 100 Cal. App. 201, 213-214. 20 Opinions of the California Attorney General 145 (1952).

[13] Government Code section 27491.

[14] Government Code section 27491.4.

[15] Government Code section 27491.45, subdivision (b).

[16] Government Code section 27520. This section states that the requestor pays the autopsy costs.

[17] Government Code sections 27491, subdivision (a) and 27491.41, subdivision (c).

[18] Government Code sections 27491.41, subdivision (c) (2).

or remains and still cannot identify the deceased.[19] Preexisting law authorizes but does not require law enforcement to submit dental or skeletal X-rays to DOJ for missing persons.[20]

A coroner may be liable for "omission of an official duty."[21] In *Davila v. County of Los Angeles,*[22] the county was found negligent for cremating a body without notifying kin. The court held the that a coroner has a duty to act with reasonable diligence to locate a family member of a body placed in the coroner's custody before disposing of it. In *Davila,* the court started by restating and examining Government Code section 815.6:

> "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered. [citation.]

In finding the mandatory duty to notify the family, the *Davila* court stated:

> [T]he existence of a mandatory duty is established by Government Code section 27471 subdivision (a): "Whenever the coroner takes custody of a dead body pursuant to law, he or she *shall make a reasonable attempt to locate the family.*" [FN1] (Italics added.) The same duty is reflected in Health and Safety Code sections 7104 (when the person with the duty of interment "can not *after reasonable diligence* be found ... the coroner shall inter the remains ....") and 7104.1 (if within "30 days after the coroner notifies *or diligently attempts to notify the person responsible for the interment* ... the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains"). (Italics added.) Quite clearly, the coroner had a mandatory duty to make a reasonable attempt to locate decedent's family. [citation.][23]

Davila implies a coroner also has a duty of reasonable diligence to identify a body because it is necessary to identify the deceased in order to locate the deceased's family.

Related programs: In 1979, California became the first state to implement a statewide Dental Identification Program to process dental records submitted by law enforcement agencies and coroners in California and other states. The DOJ classifies, indexes, and compares dental records of missing and unidentified persons against each other for matches.[24]

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[19] Health and Safety Code section 102870.

[20] Penal Code section 14206, subdivision (a)(2) and (b).

[21] Code of Civil Procedure, section 339, states the statute of limitations is two years. The duties are outlined in Government Code section 27491 and Health and Safety Code section 102850.

[22] *Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137.

[23] *Id.* at page 140.

[24] California Department of Justice, Office of the Attorney General's website <http://www.ag.ca.gov/missing/content/dental.htm> [as of April 18, 2003]. Former Health and Safety Code section 10254 (Stats. 1978, ch. 462) was repealed in 1995 (Stats. 1995, ch. 415).

In 1998, the Legislature enacted the DNA and Forensic Identification Data Base and Data Bank Act to assist in prosecuting crimes and identifying missing persons. This database consists of DNA samples of those convicted of specified felonies.[25]

The DOJ administers the Violent Crime Information Center to assist in identifying and apprehending persons responsible for specific violent crimes, and for the disappearance and exploitation of persons, particularly children and dependent adults.[26]

The DOJ also keeps a DNA database in which law enforcement collects samples for DNA analysis voluntarily submitted by family members or relatives of a missing person, and the coroner collects samples from the unidentified deceased. Those samples are sent to DOJ for DNA analysis and comparison.[27]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the activities related to postmortem examinations of unidentified bodies and human remains and reporting the death of unidentified persons to the DOJ. Specifically, claimant alleges the following activities are now required relating to a postmortem examination or autopsy:

- Develop policies and procedures for the initial and continuing implementation of the subject law;
- Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, X-ray notation at the time of death, location of the death, dental examination, and preparing the final report to the DOJ;
- Storage and autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol;
- Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy;
- Train departmental personnel to prepare the final report to the DOJ;
- Participation in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law.

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[25] Penal Code section 295 et. seq. The list of felonies is in Penal Code section 296.

[26] Penal Code section 14200 et. seq.

[27] Penal Code section 14250. California Department of Justice, Office of the Attorney General's website <http://www.ag.ca.gov/missing/content/dna.htm> [as of April 18, 2003]. This program is the subject of the DNA database test claim filed by the county of San Bernardino (00-TC-27).

Claimant notes that similar duties to those above were found reimbursable, as evidenced by the State Controller's Office Claiming Instructions for the "Sudden Infant Death Syndrome (SIDS) Autopsy Protocol Program."[28]

Claimant also responds to the DOF's contention (stated below) that the activities of the test claim legislation are discretionary by arguing that the coroner, under Government Code section 27491, has a statutory duty to "inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual," "unattended," and if the deceased had "not been attended by a physician in the 20 days before death." Claimant contends that these requirements have been supplemented, pursuant to Government Code section 27521 of the test claim statute, to determine the identity of the deceased. Claimant states that prior to the test claim legislation certain activities, such as taking palm prints and hair samples, had been limited to homicide victims.

State Agency Position

In its comments on the test claim, the DOF states that pursuant to Government Code section 27491, the decision by a coroner to examine unidentified remains (other than DNA sampling) is a discretionary act that is not currently required by the State, nor was it required prior to the test claim legislation. Any subsequent requirements, according to DOF, regarding autopsy procedures are only initiated when a coroner chooses to examine unidentified remains.

DOF argues that the investigating law enforcement agency's report to DOJ is discretionary as well, because it is only initiated once the discretion to investigate a related case is exercised. Thus, DOF concludes that this test claim does not contain a state mandate that has resulted in a new activity or program and a reimbursable cost.

DISCUSSION

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must mandate a new program or an increased or higher level of service over the former required level of service. "Mandates" as used in article XIII B, section 6, is defined to mean "orders" or "commands."[29] The California Supreme Court has defined "program" subject to article XIII B, section 6 of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[30] To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal

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[28] Claimant refers to CSM# 4393, a test claim on Statutes 1989, chapter 955, entitled *Sudden Infant Death Syndrome Autopsies*, which was found to be a reimbursable mandate.

[29] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[30] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

requirements in effect immediately before the enactment of the test claim legislation.[31] Finally, the new program or increased level of service must impose "costs mandated by the state."[32]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service on local officials within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Does the test claim legislation impose state-mandated duties?

Article XIII B, section 6 of the California Constitution provides, with exceptions not relevant here, that "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." This constitutional provision was specifically intended to prevent the state from forcing programs on local government that require expenditure by local governments of their tax revenues.[33] In this respect, the California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts to reimbursement for all costs resulting from legislative enactments, but only those costs "mandated" by a new program or higher level of service imposed upon them by the state.[34]

To implement article XIII B, section 6, the Legislature enacted section 17500 and following. Section 17514 defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur . . . as a result of any statute. . . .which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Mandate is defined as "orders" or "commands."[35] Thus, in order for a statute to be subject to article XIII B, section 6, the statutory language must command or order an activity or task on local governmental agencies. If the statutory language does not mandate coroners to perform a task, then compliance with the test claim statute is at the option of the coroner and a reimbursable state mandated program does not exist.

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[31] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[32] Government Code section 17514.

[33] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles,* (1987) 43 Cal.3d 46, 56. *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284.

[34] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 834; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[35] *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, 174.

The question whether a test claim statute is a state-mandated program within the meaning of article XIII B, section 6 is purely a question of law.[36] Thus, based on the principles outlined below, when making the determination on this issue, the Commission, like the court, is bound by the rules of statutory construction.

Health and Safety Code section 102870: This section, enacted in 1995, requires coroners to forward dental examination records to the DOJ if all of the following apply: (1) the coroner investigates the death, (2) the coroner is unable to establish the identity of the body or remains by visual means, fingerprints or other identifying data, and (3) the coroner has a dentist conduct a dental examination of the body or remains and still cannot identify the deceased.

The test claim statute (Stats. 2000, ch. 284) technically amended subdivision (b) of section 102870 to refer to Government Code section 27521 and to the Violent Crime Information Center.[37] This amendment to the test claim statute does not impose any state mandated duties on local agencies. Because this amendment to section 102870 imposes no state-mandated duty, staff finds that section 102870, as amended by Statutes 2000, chapter 284, is not subject to article XIII B, section 6.

Penal Code section 14202: This section, operative since 1989, imposes requirements on the Attorney General to maintain the Violent Crime Information Center. The test claim statute (Stats. 2000, ch. 284) technically amended Penal Code section 14202 by adding a reference to Government Code section 27521. Therefore, because this amendment imposes no state-mandated duty, staff finds that Penal Code section 14202, as amended by Statutes 2000, chapter 284, is not subject to article XIII B, section 6.

Government Code section 27521.1: This section requires a local law enforcement agency investigating the death of an unidentified person to report the death to the DOJ no later than 10 calendar days after the date the body or human remains are discovered. Because this section imposes a reporting requirement on a local agency, staff finds that Government Code section 27521.1 imposes a state-mandated duty and is therefore subject to article XIII B, section 6. Therefore, this statute is further discussed below.

Government Code section 27521: This section specifies that autopsies conducted at the discretion of the coroner shall include collecting identifying data on the unidentified body or human remains and reporting the data to DOJ.

The issue is whether the activities under Government Code section 27521, performed in conjunction with a coroner-ordered autopsy on an unidentified body or human remains, are state-mandated activities and therefore subject to article XIII B, section 6. Subdivision (a) states that any autopsy conducted "at the discretion" of a coroner on an unidentified body or human remains shall be subject to section 27521.

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[36] *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1810.

[37] As stated above under related programs, the Violent Crime Information Center is administered by DOJ to assist in identifying and apprehending persons responsible for specific violent crimes, and for the disappearance and exploitation of persons. (Pen. Code, § 14200 et. seq.).

Subdivision (b) states that county coroners are to include the following data in the discretionary autopsies:

1. All available fingerprints and palm prints;
2. A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner;
3. The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary;
4. Frontal and lateral facial photographs with the scale indicated;
5. Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body;
6. Notations of observations pertinent to the estimation of the time of death;
7. Precise documentation of the location of the remains.

Subdivision (c) states that the examination or autopsy "may include full body X-rays."

Subdivision (d) states the coroner shall prepare a final report of investigation in a format established by DOJ, to include the autopsy information in subdivision (b).

Subdivision (e) states:

> The body of an unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

Subdivision (f) states:

> If the coroner with the aid of the dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

Subdivision (g) states:

> If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered.

As noted above, the DOF argues that pursuant to Government Code section 27491 (a pre-1975 statute that states the types of death over which the coroner has jurisdiction) the coroner's decision to examine unidentified remains (other than DNA sampling) is a discretionary act that is not currently required by the State, nor was it required prior to the test claim legislation. Any

subsequent requirements, according to DOF, regarding autopsy procedures are only initiated when a coroner chooses to examine unidentified remains.

Claimant responds to DOF by arguing that the coroner, under Government Code section 27491, has a statutory duty to "inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual," "unattended," and if the deceased had "not been attended by a physician in the 20 days before death." Claimant contends that these requirements have been supplemented, pursuant to Government Code section 27521 of the test claim statute, to determine the identity of the deceased.

Pursuant to the rules of statutory construction, courts and administrative agencies are required, when the statutory language is plain, to enforce the statute according to its terms. The California Supreme Court explained:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted][38]

Subdivision (a) of Government Code section 27521 states, "[a]ny postmortem examination or autopsy conducted *at the discretion* of a coroner upon an unidentified body or human remains shall be subject to this section." (Emphasis added.) The plain language of subdivision (a) is unambiguous in making the coroner's autopsy activities discretionary rather than mandatory.

If a local agency decision is discretionary, no state-mandated costs will be found. In *City of Merced v. State of California*,[39] in which the court determined that the city's decision to exercise eminent domain was discretionary so that no state reimbursement was required for loss of goodwill to businesses over which eminent domain was exercised, the court reasoned as follows:

> We agree that the Legislature intended for payment of goodwill to be discretionary. The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.* [Emphasis added.]

In deciding that a test claim statute's activities imposed on school districts that elected to participate in voluntary categorical programs did not constitute a reimbursable state mandate, the California Supreme Court recently characterized the *City of Merced* case as follows:

> [T]he core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds – even if the local entity

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[38] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[39] *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777, 783.

is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[40]

The legislative history of Government Code section 27521 also indicates that its autopsy activities are not mandatory.

As introduced, the test claim legislation included a mandatory autopsy in cases where the coroner could not otherwise identify the body. The original version of Senate Bill No. 1736 (Stats. 2000, ch. 284) amended Health and Safety Code section 102870, stating in relevant part:

> SECTION 1. Section 102870 of the Health and Safety Code is amended to read:
> 102870. *(a)* In deaths investigated by the coroner or medical examiner where he or she is unable to establish the identity of the body or human remains by visual means, fingerprints, or other identifying data, the coroner or medical examiner ~~may have a qualified dentist, as determined by the coroner or medical examiner, carry out a dental examination of the body or human remains.~~ *shall conduct a medical examination on the body or human remains that includes, but is not limited to, all the following procedures:*

The May 23, 2000 version amended the bill to move these unidentified body autopsy procedures to Government Code sections 27521, and to make the procedures discretionary.

Rejection of a specific provision contained in an act as originally introduced is most persuasive that the act should not be interpreted to include what was left out.[41] Since the bill originally required an autopsy for unidentified decedents, but was amended to make the autopsy discretionary (keeping consistent with the statutory scheme), the autopsy should not be interpreted to be a required activity.

Therefore, because Government Code section 27521 does not constitute a state mandate, staff finds that it is not subject to article XIII B, section 6. This includes all the activities of section 27521 because they are based on the coroner's discretion to autopsy, such as submitting autopsy data, submitting the final report of investigation, retention of jaws, and submitting dental records to DOJ.

B. Does Government Code section 27521.1 qualify as a program under article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[42] Only one of these findings is necessary to trigger article XIII B, section 6.[43]

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[40] *Department of Finance v. Commission on State Mandates* (May 22, 2003, S109219) __ Cal. 4th __.

[41] *Bollinger v. San Diego Civil Service Comm.* (1999) 71 Cal. App. 4th 568, 575. Also see *Robert Woodbury v. Patricia Brown-Dempsy* (June 3, 2003, E031001) ___ Cal. App. 4th. __ <http://www.courtinfo.ca.gov/opinions/documents/E031001.PDF>

[42] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[43] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

Government Code section 27521.1 involves the duty of law enforcement agencies investigating the death of an unidentified person to report the death to DOJ no later than 10 days after the body or human remains are discovered. This is a program that provides governmental functions in the areas of public safety, criminal justice, crime and vital statistics, and location of missing persons.

Moreover, Government Code section 27521.1 imposes unique data collecting and reporting duties on local law enforcement agencies that do not apply generally to all residents and entities in the state. Therefore, staff finds that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Does Government Code section 27521.1 impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[44]

Government Code section 27521.1, law enforcement agency report: This section requires a law enforcement agency investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 days of discovery.

DOF stated that the investigating law enforcement agency's report to DOJ is discretionary because the local law enforcement agency has to first choose to go forward with a criminal investigation. According to DOF, DOJ's report is only initiated once the discretion to investigate a related case is exercised.

Staff disagrees. Failure of peace officers to investigate criminal activities would be a dereliction of duty.[45] California law imposes on sheriffs the duty to "preserve peace,"[46] arrest "all persons who attempt to commit or who have committed a public offense,"[47] and "prevent and suppress any affrays, breaches of the peace, riots, and insurrections, and investigate public offenses which have been committed."[48] Police have the same duties.[49] These are mandatory duties, as evidenced by use of the word "shall" in the statutes.[50]

Preexisting law requires law enforcement to immediately report to DOJ when a person reported missing has been found.[51] Also, for found children under 12 or found persons with evidence that

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[44] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

[45] *People v. Mejia* (1969) 272 Cal. App. 2d 486, 490.

[46] Government Code section 26600.

[47] Government Code section 26601.

[48] Government Code section 26602.

[49] Government Code section 41601.

[50] Government Code section 14.

[51] Penal Code section 14207.

they were at risk,[52] a report must be filed within 24 hours after the person is found. And if a missing person is found alive or dead within 24 hours and local law enforcement has reason to believe the person was abducted, local law enforcement must also report that information to the DOJ.[53] These statutes do not require the person to be found alive.

Given that law enforcement already had to report to DOJ findings of missing persons, the new activities for finding a deceased person are limited to those in which the deceased is over 12 and not a missing person with evidence of being at risk, as defined.

Thus, staff finds that it is a new program or higher level of service for local law enforcement investigating the death of an unidentified person to report the death to the DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered, except for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213.

Issue 3: Does Government Code section 27521.1 impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[54] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

> ...any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In its test claim, the claimant stated that it would incur costs of over $200 per annum,[55] which was the standard under Government Code section 17564, subdivision (a) at the time the claim was filed.[56] There is no evidence in the record to rebut this declaration. In addition, staff finds that the exceptions to reimbursement in 17556 do not apply here.

In summary, staff finds that the test claim legislation imposes costs mandated by the state pursuant to Government Code section 17514.

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[52] Evidence that the person is at risk includes, but is not limited to, (1) The person missing is the victim of a crime or foul play. 2) The person missing is in need of medical attention. 3) The person missing has no pattern of running away or disappearing. (4) The person missing may be the victim of parental abduction. (5) The person missing is mentally impaired. (Pen. Code, § 14213, subd. (b).)

[53] Penal Code section 14207.

[54] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835. Government Code section 17514.

[55] Declaration of David Campbell, County of Los Angeles Coroner's Office.

[56] Currently the claim must exceed $1000 in costs. (Gov. Code, § 17564, subd. (a).)

CONCLUSION

Based on the foregoing analysis, staff concludes that the test claim legislation imposes a reimbursable state-mandated program local law enforcement within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Specifically, for local law enforcement investigating the death of an unidentified person, to report the death to the DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered, except for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213.

Staff finds that Government Code section 27521, Penal Code section 14202 and Health and Safety Code section 102870, as added or amended by Statutes 2000, chapter 284, do not constitute a reimbursable state-mandated program because they are not subject to article XIII B, section 6.

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

SB 1736

UNFINISHED BUSINESS

Bill No: SB 1736
Author: Rainey (R), et al
Amended: 8/8/00
Vote: 21

SENATE JUDICIARY COMMITTEE : 6-0, 4/11/00
AYES: Escutia, Haynes, Peace, Sher, Wright, Schiff

SENATE APPROPRIATIONS COMMITTEE : 13-0, 5/15/00
AYES: Johnston, Alpert, Bowen, Burton, Escutia, Johnson, Karnette, Kelley, Leslie, McPherson, Mountjoy, Perata, Vasconcellos

SENATE FLOOR : 39-0, 5/30/00 (Consent)
AYES: Alarcon, Alpert, Bowen, Brulte, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Hayden, Haynes, Hughes, Johannessen, Johnson, Johnston, Karnette, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Morrow, Mountjoy, Murray, O'Connell, Ortiz, Peace, Perata, Poochigian, Rainey, Schiff, Sher, Solis, Soto, Speier, Vasconcellos, Wright

ASSEMBLY FLOOR : 62-0, 8/18/00 (Passed on Consent) - See last page for vote

SUBJECT : Unidentified bodies and human remains: retention of evidence

SOURCE : Author

CONTINUED

Page 2

DIGEST : This bill prohibits the cremation or burial of an unidentified deceased person unless specified samples are retained for possible future identification, as specified.

This bill requires a coroner, where a deceased person cannot be identified, to conduct a medical examination with specified procedures, prepare a final report of the investigation, and forward this final report to the State Department of Justice if the deceased person remains unidentified 180 days after discovery.

Lastly, this bill requires the State Department of Justice to develop and provide the format of the reports (notice of investigation and final report of investigation) to be submitted regarding an unidentified deceased person.

Assembly Amendments authorizes, rather than requires, dental procedures. (See #2 in analysis.)

ANALYSIS : Existing law permits the coroner to engage the services of a dentist to carry out a dental examination if the coroner or medical examiner is unable to identify a deceased person by visual means, fingerprints or other identifying data.

Existing law requires the coroner or medical examiner to forward the dental examination records of the unidentified deceased person to the State Department of Justice (DOJ) on forms supplied by the DOJ, if the identify of the person still could not be established. Under current law, the DOJ acts as the repository or computer center for the dental examination records forwarded to it by coroners and medical examiners in the state.

This bill expands the efforts to identify deceased persons by specifying that any postmortem examination or autopsy conducted at the discretion of a coroner upon an unidentified body or human remains shall be subject to the provisions of this bill.

The bill requires that a postmortem examination or autopsy must include, but shall not be limited to, the following procedures:

1. Taking of all available fingerprints and palms prints.

2. A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

3. The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4. Frontal and lateral facial photographs with the scale indicated.

5. Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near he body.

6. Notations of observations pertinent to the estimation of the time of death.

7. Precise documentation of the location of the remains.

The bill provides that the postmortem examination or autopsy of the unidentified body or remains may include full body X-rays.

The bill requires the coroner to prepare a final report of investigation in a format established by the State Department of Justice (DOJ). The final report shall list or describe the information collected, pursuant to the postmortem examination or autopsy conducted by the coroner.

The bill provides that the body of an unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

The bill provides that if the coroner, with the aid of the dental examination and any other identifying findings, is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to DOJ on forms supplied by DOJ within 45 days of the date the body or

human remains were discovered.

If the coroner, with the aid of the dental examination and other identifying findings, is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to DOJ within 180 days of the date the body or human remains were discovered.

This bill requires any law enforcement agency investigating the death of an unidentified person to report the death to DOJ no later than ten days after body or human remains were discovered.

This bill requires DOJ to compare and retain the final report of investigation that coroners and medical examiners send to DOJ.

Background

Sponsored by the California Society of Forensic Dentistry, this bill is the aftermath of years of volunteer consultant work done by members of the Society, helping DOJs Missing/Unidentified Persons Unit track down identities of approximately 2,200 unidentified dead persons in California. From their work, they say it has become clear that there is no consistent manner by which evidence is collected or retained, and that information reported to the Attorney General varies from grossly inadequate to extremely detailed. Further, unidentified bodies have been buried or cremated without the retention of evidence that could assist in the identification of the deceased at a future date.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

Fiscal Impact (in thousands)

Major Provisions	2000-01	2001-02	2002-03	Fund
Coroners	Unknown, potentially significant,			Local
nonreimbursable costs		probably		
Dept. of Justice	Under $150 annually			General

SUPPORT : (Verified 8/17/00)

California Dental Assistant Association
California Society of Forensic Dentistry
California Peace Officers Association
California Police Chiefs Association
California State Coroners Association
California State Dental Association
Attorney General
Numerous individuals

ARGUMENTS IN SUPPORT : According to the author's office, there are currently a total of 2,200 unidentified dead bodies in California. Even with the volunteer help of the California Forensic Dentistry members, coroners and medical examiners are not able to identify these human remains. The reason, they state, is that records are so inconsistent in content and quality, that it has been difficult to reconcile information from the coroner/medical examiner's investigation and information gathered by the DOJ on missing persons or victims of violent crimes. The State Coroners' Association's data reflect "the inconsistent nature of evidence collection and retention for unidentified deceased persons."

The bill establishes a statewide protocol for the investigations conducted pursuant to statute, expand the type of examination required, and require retention of jaws and other tissue samples indefinitely for possible identification in the future.

The DOJs Missing and Unidentified Persons Unit indicates they support this bill because it would improve their

ability to match their records of missing or unidentified persons with unidentified dead persons or human remains.

ASSEMBLY FLOOR :
AYES: Aanestad, Ackerman, Alquist, Aroner, Ashburn, Baldwin, Bates, Battin, Baugh, Bock, Briggs, Calderon, Cardoza, Corbett, Cox, Cunneen, Davis, Dickerson, Ducheny, Dutra, Floyd, Gallegos, Granlund, Havice, Honda, House, Jackson, Kaloogian, Keeley, Leach, Lempert, Leonard, Longville, Lowenthal, Machado, Maddox, Maldonado, Margett, Mazzoni, McClintock, Migden, Nakano, Olberg, Oller, Robert Pacheco, Papan, Pescetti, Runner, Scott, Shelley, Steinberg, Strickland, Strom-Martin, Thompson, Thomson, Torlakson, Washington, Wayne, Wiggins, Wildman, Zettel, Hertzberg

RJG:cm 8/19/00 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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C

EMMA L. HUNTLY, Appellant,
v.
ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY et al., Respondents.

Civ. No. 6955.

District Court of Appeal, First District, Division 2, California.

August 1, 1929.

HEADNOTES

(1) DEAD BODIES--PROPERTY RIGHTS--CUSTODY--STATUTES.
In the absence of statutory provision, there is no property right in a dead body; and section 294 of the Penal Code, providing that a person charged by law with the duty of burying the body of a deceased person is entitled to the custody thereof for the purpose of burial, does not confer any property right.

See 8 Cal. Jur. 921, 928; 8 R. C. L. 684.

(2) LIMITATION OF ACTIONS--MUTILATION OF DEAD BODY--ACTION BY WIFE--PERSONAL INJURIES--SUBDIVISION 3, SECTION 340, CODE OF CIVIL PROCEDURE.
Where the gravamen of a cause of action by a wife for the mutilation of her deceased husband's body, as alleged, was the shock to plaintiff's mental and physical structure, and the wife introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria and nervousness, together with her physician's testimony of a similar character, the cause of action was one for an injury to plaintiff's person within subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for an injury to the person to be brought within one year.

See 8 Cal. Jur. 770.

(3) ID.--PERSONAL INJURIES--ACT OF FORCE OR BATTERY NOT NECESSARY--PRESUMPTIONS.
Under subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for any injury to the person to be brought within one year, it is not necessary that an act of force and violence or battery be inflicted upon plaintiff to constitute an "injury to the person," since when bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty, and adopts the nature of the damage as the test.

(4) ID.--ACTION FOR DAMAGES--STATUTORY CONSTRUCTION.
Subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for injury to another to be brought within one year, is intended to refer to actions for damages "on account of" personal injuries.

See 16 Cal. Jur. 472.*202

(5) ID.--NEGLIGENCE--DEATH--PERSONAL RIGHTS--PROPERTY RIGHTS--STATUTE OF LIMITATIONS.
The amendment to subdivision 3 of section 340 of the Code of Civil Procedure by Statutes of 1905, page 232, bringing within the one-year limitation causes of action for injury to or death of one caused by the wrongful act or neglect of another, was intended to embrace within its terms all infringements of personal rights as distinguished from property rights.

(6) CORONERS--DEAD BODIES--CAUSE OF DEATH--DISCRETION AS TO HOLDING INQUEST--AUTOPSY.
Under sections 1510 and 1512 of the Penal Code, authorizing the coroner to inquire into the cause of death in certain instances and hold post-mortem examinations, a coroner, having reasonable ground to suspect that the death of a person was sudden or unusual and of such a nature as to indicate the possibility of death by the hand of deceased, or through the instrumentality of some other person, has discretion to hold an inquest and should not be held responsible simply because at the conclusion of the inquest it has been determined that the deceased died a natural death.

See 6 Cal. Jur. 545.

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(7) ID.--RIGHT TO ORDER AUTOPSY--CONSENT.
A coroner may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the cause of death, and this he may do without the consent of the family of the deceased.

When holding of autopsy justified, note, 48 A. L. R. 1209. See, also, 6 R. C. L. 1167.

(8) EVIDENCE--PERFORMANCE OF OFFICIAL DUTY--PRESUMPTIONS.
It is presumed, in the absence of a contrary showing, that official duty has been regularly performed, in view of section 1963 of the Code of Civil Procedure.

(9) CORONERS--AUTHORITY TO HOLD INQUEST--AUTOPSY.
Where an autopsy was performed on the body of deceased in another county, but no inquest was held, and upon arrival of the body of deceased his wife was dissatisfied with the finding of the autopsy surgeon and represented that the husband's death was sudden and caused by a terrible fall or violence of some sort and was not the result of natural causes, the coroner acted within his authority in ordering an inquest and authorizing his autopsy surgeon to proceed in the usual manner under sections 1510 and 1512 of the Penal Code.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Louis H. Ward, Judge. Affirmed.

The facts are stated in the opinion of the court. ***203**

COUNSEL

Raymond Perry for Appellant.

Ford, Johnson & Bourquin, John J. O'Toole, City Attorney, Henry Heidelberg, Assistant City Attorney, and J. Hampton Hoge for Respondents.

LAMBERSON, J.

pro tem.-Plaintiff appeals from orders of the Superior Court granting defendants' motions for nonsuit and from the resulting judgment entered in favor of defendants.

The action is one to recover damages from the defendants arising from their alleged acts in jointly causing an autopsy to be performed upon the body of Thomas H. Huntly, deceased, husband of plaintiff herein.

Mr. Huntly died in the county of Los Angeles on March 22, 1926. A partial autopsy was performed upon the body by a surgeon occupying the position of autopsy surgeon in the office of the coroner of Los Angeles County, under the authority of the coroner, but no inquest was held in that county. The body was shortly thereafter shipped to San Francisco, which was the home of the deceased and his wife. Upon its arrival in San Francisco the body was received by representatives of the defendants Suhr and H. F. Suhr Company, and taken to their undertaking establishment.

It appears that the autopsy surgeon at Los Angeles determined that the cause of death was angina pectoris, and the coroner issued a death certificate upon such finding. Apparently dissatisfied with the result of the examination in Los Angeles, the plaintiff asked the defendant Suhr to give her the name of some surgeon who could make a further examination of the body and determine for her benefit the nature of a bruise appearing upon the forehead of the deceased. Mr. Suhr referred plaintiff to defendant Strange, who was then occupying the position of autopsy surgeon under the defendant Leland, who was coroner of the city and county of San Francisco. In an interview with Dr. Strange plaintiff asked him some questions about the possible effect of a blow on the forehead of the deceased. Dr. Strange asked if there had been an autopsy and if the people who performed such autopsy had examined the head.

According to the testimony of Dr. Strange, who was called as a witness on behalf of plaintiff, plaintiff asked him to do a ***204** private autopsy upon the body of her husband. He asked her what kind of a death it was, and upon being informed that the deceased died while at work and as the result of an accident, Dr. Strange informed her that he did not believe he would have a right to perform a

private autopsy on a violent death case, and that plaintiff informed him that she wanted to have the skull opened to find out if there was a fracture, because she thought she was entitled to certain insurance as the result of a death by accident; that she was not satisfied that the cause of death was angina pectoris, and wanted Dr. Strange to open the head to find out if there was a fracture of the skull, and Dr. Strange informed her that the matter should be taken up through the coroner's office.

The matter was reported to the coroner, who was informed, according to the testimony, that a partial autopsy had been performed at Los Angeles. He ordered that an inquest be held, and that an autopsy be performed, and the body was later removed to the office of the coroner, where the autopsy was performed by Dr. Strange, who testified that there had been a prior incision, and that he opened the body by cutting the stitches; that the organs had all previously been cut loose and examined. He found the arteries hardened, and took small samples from the heart, as well as from other organs of the body. He also opened the head and examined the skull to see if there had been a fracture, and examined the brain to ascertain whether there had been a contusion or laceration of the brain. The organs, with the exception of the specimens, were returned to the body. The specimens, which included samples from the brain, heart, lungs, spleen, kidneys and liver, were placed in a six-ounce bottle, containing a fluid, and were delivered to the defendant Ophuls for microscopic and other examination. Ophuls, who was in the employ of the defendant insurance company, was not present at the autopsy and did not see the body of Mr. Huntly, but received the samples from attendants at the coroner's office.

In her opening brief appellant states that the defendants are sued as joint tort-feasors, the defendant insurance company for having employed the defendant Newlin to employ defendant Ophuls to remove the specimens; the defendant Newlin, who was present at the autopsy, for unlawfully witnessing the mutilation and employing Dr. Ophuls to remove the specimens; *205 defendant Ophuls for an unlawful examination and removal of specimens; defendant H. F. Suhr Company and Fred Suhr for the unlawful removal of the body from their parlors for the purpose of mutilating it; defendant Leland for unlawfully granting permission to perform the mutilation, for permitting the use of his office for an unlawful mutilation and for permitting the unlawful removal of specimens, and the defendant Strange for performing the mutilation. Plaintiff claims that the autopsy was performed without her consent or knowledge, and that she was not informed of the same until the defendant Newlin informed her of it at his office at some later date.

The plaintiff alleges, in substance, that on the twenty-second day of March, 1926, the coroner of the county of Los Angeles ordered his assistant autopsy surgeon to perform an autopsy upon the body of Thomas H. Huntly, and said surgeon did on that date perform a legal autopsy upon said body; that the defendants, and each of them, knew on the twenty-fourth day of March, 1926, that "the legal and only lawful autopsy" had been performed by and under the authority of the coroner of the county of Los Angeles.

The complaint then alleges as follows:

"X.

"That on the 24th day of March, 1926, said defendants, with knowledge that a lawful autopsy had been performed upon the body of Thomas H. Huntly, did cause said body of the late Thomas H. Huntly to be removed from the undertaking establishment of H. F. Suhr Company in the City and County of San Francisco, State of California, to the office of the coroner of the City and County of San Francisco, State of California, without the consent, knowledge, or authority of the plaintiff, and did mutilate, desecrate, violate and outrage, and commit an act of irreverence and profanation upon the body of the late Thomas H. Huntly, in that without the permission of the plaintiff, the widow of the said Thomas H. Huntly, and the lawful owner and possessor of said body, and without authority of law, did perform in the City and County of San Francisco, State of California, a mutilation, desecration and violation upon said body of said Thomas H. Huntly in this: that said defendants did cause the skull of said Thomas H. Huntly to be opened and the brains removed; the body of said Thomas H. *206 Huntly to be opened and specimens of the heart, lungs, kidneys, liver and spleen to be removed and said specimens of the heart, lungs, kidneys, liver, spleen and brains to be

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delivered to the defendant William Ophuls, as the agent and representative of the defendant Zurich General Accident and Liability Insurance Company, a corporation.

"XI.

"That said mutilation, desecration, violation and outraging of the head and the body of her deceased husband was repugnant to the plaintiff, was offensive to and indecently insulted the said plaintiff, and by reason of said acts, and each of them, did cause the plaintiff a shock to her mental and physical equipoise, causing violent agitation of feeling and disturbances of her mind and wrecking her mental and physical equipoise, to her horror, mental anguish and extreme disgust, and disturbing permanently her peace of mind.

"XII.

"That by reason of the said acts of the defendants aforesaid the plaintiff has been damaged in the sum of $75,000.00."

The complaint was filed on May 6, 1927.

Upon the trial, and at the close of plaintiff's case, motion for nonsuit was made upon behalf of each of the defendants upon the ground, among others, that the action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and the motion was granted as to each of the defendants upon that ground.

Plaintiff contends that the cause of action stated in the complaint falls within the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which reads in part as follows: "Within two years: An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of section 337 of this code ... "

Defendants contend, on the other hand, that the action is one to recover damages for an injury to the person of the plaintiff, caused by the wrongful act of the defendants in mutilating, as alleged, the body of the deceased, and is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, which reads in part as follows: "Within one year ... 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury *207 to or for the death of one caused by the wrongful act or neglect of another."

The subdivision just quoted has undergone several amendments since its original enactment.

As enacted in 1872, it read "an action for libel, slander, assault, battery or false imprisonment." In 1874, the words "or seduction" were added, and in 1905, there were added the words "or for injury to or for the death of one caused by the wrongful act or neglect of another."

The primary question for consideration is the nature of the right upon which the plaintiff bases her cause of action.

[1] In the absence of statutory provision, there is no property in a dead body. (*Enos v. Snyder*, 131 Cal. 68 [82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170].)

Various statutes have been enacted for the purpose of enforcing, as well as protecting the duties which we owe to the bodies of the dead, as well as the public welfare and health. Among them is section 294 of the Penal Code, which provided at the time of the incident under examination as follows: "The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed."

The reservations and safeguards which have been placed around the right of possession by the relatives to the body of a deceased person have caused confusion in some cases, with the right of ownership, and have led to the use of the expression "*quasi* property." Numerous authorities, however, from earliest times to the present, support the conclusion of the courts of this state that there can be no ownership in a human body after death. An interesting discussion of the law, civil, common and ecclesiastical, is found in the case of *Pierce v. Proprietors Swan Point Cemetery*, 10 R. I. 227, 242 [14 Am. Rep. 667]. Therein the court said: "Although as we have said, the body is not property in the usually recognized sense of the word, yet we

may consider it as a sort of *quasi* property to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as ***208** the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship, have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed."

In the case of *Darcy v. Presbyterian Hospital*, 202 N. Y. 259 [Ann. Cas. 1912D, 1238, 95 N. E. 695], the Court of Appeals of New York said: "The most elaborate consideration of the question in the courts of this country appears in the case of *Larson v. Chase*, 47 Minn. 307 [28 Am. St. Rep. 370, 14 L. R. A. 85, 50 N. W. 238], in which, after an examination of authorities, both in this country and in England, the conclusion is reached that while no action can be maintained by the executor or administrator upon the theory of any property right in a decedent's body, the right to the possession of a dead body for the purpose of preservation and burial belongs to the surviving husband or wife or next of kin, in the absence of any testamentary disposition; and this right the law will recognize and protect from any unlawful mutilation of remains by awarding damages for injury to the feelings and mental suffering resulting from the wrongful acts, although no pecuniary damage is alleged or proved. ... "

In the case of *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 52 [14 Ann. Cas. 462, 19 L. R. A. (N. S.) 564, 114 N. W. 353], the court said: "The rule laid down in the Larson case expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and the courts award *solatium* for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation."

In the case of *Hasselbach v. Mt. Sinai Hospital*, 173 App. Div. 89 [159 N. Y. Supp. 376], the court held that it is well settled that there are no property rights in the ordinary commercial sense in a dead body, and the damages allowed to be recovered for its mutilation are never awarded as a ***209** recompense for the injury done to the body as a piece of property.

[2] Having come to the conclusion that there is no ownership in the body of a deceased human being, the next question for determination is the nature of the wrong for which damages are being sought in this action.

It is plaintiff's contention that her right to maintain an action arose out of the mutilation of the body, and that "the measure of damages is the mental suffering. Therefore, the damages for mental suffering are not the gist of the cause of action."

The injury upon which plaintiff bases her cause of action was an injury to her person.

In the case of *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 [32 L. R. A. 193, 44 Pac. 320, 322], the court said: "The real question presented by the objections and exceptions of the appellant is, whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire

nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is *210 direct, as by a blow, or indirect through some action upon the mind."

The language of that opinion was expressly approved in *Lindley v. Knowlton*, 179 Cal. 298 [176 Pac. 440].

In the case of *Johnson v. Sampson*, 167 Minn. 203 [46 A. L. R. 772, 208 N. W. 814], the court had under consideration an action in which false charges of unchastity had been made against a school girl fifteen years of age, resulting in alleged mental and bodily injuries. In its discussion of the case, the court said: "On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of."

In the case of *Morton v. Western Union Tel. Co.*, 130 N. C. 299 [41 S. E. 484, 485], the court, in discussing the meaning of the phrase "or other injury to the person," said: "In law, the word 'person' does not simply mean the physical body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul. Therefore any mental injury is necessarily an injury to the person. Personal injuries may be either bodily or mental, but, whether one or the other, they infringe upon the rights of the person, and not of property. A learned author has said that: 'The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally upon the other.'"

The allegations of injury to the plaintiff, as set forth in the complaint, have already been stated. The gravamen of the cause of action, as alleged, was the shock to the plaintiff, mental and physical. Without such injury to her, personally, there could have been no cause of action for the reasons heretofore discussed. In support of her case, the plaintiff introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria and nervousness.

Her physician testified that she was suffering from "exhaustion psychosis," which he defined as a lowered condition *211 of her nervous and physical system, a low blood pressure, a lowered mental condition, a slow power of concentration, a tardy memory, general weakness of her nervous system and as an anemia due to an interference of the nervous system that controls the blood mechanism and blood nutrition.

We think that the inescapable conclusion from the allegations of the complaint, and from the testimony offered on behalf of plaintiff, must be that the injury that was inflicted was to the person of the plaintiff, as a result of the acts of the defendants.

[3] It is not necessary that an act of force and violence, or a battery, be inflicted upon the plaintiff in order to bring the case within the meaning of subdivision 3 of section 340 of the Code of Civil Procedure.

In the case of *Basler v. Sacramento etc. Ry. Co.*, 166 Cal. 33 [134 Pac. 993] the plaintiff's wife sustained a personal injury by reason of the negligence of the defendant, and the plaintiff sued for the loss of his wife's services and for the expense incurred in her medical care.

[4] The court held that the action was barred under the provisions of subdivision 3 of section 340 because it was one for personal injuries and not upon an obligation or liability not founded upon an instrument in writing. In the discussion of the case at page 36 the court said:

"It has been held that the word 'for' means 'by reason of,' 'because of' and 'on account of' and that a statute prescribing a limitation on 'actions for injury to the person ... caused by negligence' should be interpreted to mean ' actions "by reason of" or "because of," or "on account of" injuries to the person caused by negligence.' (*Sharkey v. Skilton*, 83 Conn. 503 [77 Atl. 952].) Applying this rule to our own statute we must hold that the language of section 340 quoted above refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton*, the plaintiff was the husband of the injured woman and there, as here, counsel sought to make a distinction between the direct

injury to the wife and the indirect damages and loss to the husband, but the court held that both harmful results had their efficient cause in the accident to her and that therefore the same statute of limitations applied to actions in which the wife was a party *212 and to those in which the husband sued alone because of his relative rights.

"*Maxson v. Delaware, Lackawanna & Western R. R. Co.*, 112 N. Y. 560 [20 N. E. 544], was a case similar to this in which the husband sued for the loss of his wife's services because of injuries received by her on account of the defendant's negligence. It was held that his cause of action was governed by the statute prescribing the time within which an action might be commenced for a 'personal injury, resulting from negligence.'

"We see no escape from the reasoning of the foregoing authorities."

It is unnecessary to cite numerous cases in other jurisdictions which are in accord with the conclusion of our courts that there need be no physical contact with the body of a person to constitute a cause of action for personal injury. When a bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty. It adopts the nature of the damage as the test, and not the nature of the breach.

In the case of *Groff v. DuBois*, 57 Cal. App. 343 [207 Pac. 57], which was an action for damages for an injury alleged to have been suffered by plaintiffs as the result of an unlawful and malicious attempt by the defendants to eject them from certain premises of which they were in lawful and peaceful possession, and which it was alleged resulted in one of the plaintiffs suffering a miscarriage, the court held that the action was one brought for injury to the person, and should have been commenced within one year. In accord are *Krebenios v. Lindauer* , 175 Cal. 431 [166 Pac. 17]; *Harding v. Liberty Hospital Corp.*, 177 Cal. 520 [171 Pac. 98].

[5] We are of the opinion that by the amendment to subdivision 3 of section 340 introducing the clause "or for injury to or the death of one caused by the wrongful act or neglect of another," it was intended to embrace therein all infringements of personal rights as distinguished from property rights.

In this case plaintiff's cause of action arose solely from her relationship to deceased, and the effect the mutilation of his body had upon her, personally. If there had been an estrangement between herself and her husband, or an *213 absence of affection, or such an attitude of mind that the alleged desecration occasioned no anguish or distress or injury, then the plaintiff would have had no cause of action. As pointed out by respondents, the right which she sought to exercise in caring for her husband's body in death was one strictly personal to her, and which could not have been exercised by others.

The objection has also been made that the trial court erred in granting a motion for nonsuit against the defendant Leland, which was made upon the additional ground that the evidence introduced failed to show any carelessness or negligence upon the part of that defendant, or any breach of duty upon his part owing to the plaintiff.

[6] Section 1510 of the Penal Code provides that when a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of deceased is, to inquire into the cause of death.

Section 1512 provides that the coroner may summon a surgeon or physician to inspect the body, or hold a postmortem examination thereon, or a chemist to make an analysis of the stomach, or the tissues of the deceased, and give a professional opinion as to the cause of death.

If the coroner has reasonable ground to suspect that the death or killing of a person was sudden or unusual and of such a nature as to indicate the possibility of death by the hand of the deceased, or through the instrumentality of some other person, he has authority to hold an inquest. He has latitude in determining whether the case falls within section 1510 of the Penal Code. He may act upon information, and it should not be held that simply because at the conclusion of an inquest it has been determined that the deceased died a natural death,

he had no right, therefore, to hold an inquest. (*Morgan v. County of San Diego*, 3 Cal. App. 454 [86 Pac. 720].)

[7] A coroner may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the *214 cause of death, and this he may do without the consent of the family of the deceased. (*Young v. College of Physicians & Surgeons*, 81 Md. 358 [31 L. R. A. 540, 32 Atl. 177].)

In the case of *People v. Devine*, 44 Cal. 452, at page 458, the court said: "At common law, as well as under the statute of Edward I, and our statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest *super visum corporis* is in the performance of functions judicial in their character (*R. v. White*, 3 E. & E. R. 144; Rep. Const. Ct. So. Ca. 231; 32 Mis. R. 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person. (*Garnett v. Ferrand*, 6 Barn. & Cress. 611.)"

[8] It is presumed, in the absence of a contrary showing, that an official duty has been regularly performed. (*Morgan v. County of San Diego, supra*; Code Civ. Proc., sec. 1963.)

[9] The evidence offered by plaintiff shows that no inquest was held in Los Angeles County. The performance of an autopsy was not the holding of an inquest. It also shows that upon the arrival of the body in San Francisco plaintiff was dissatisfied with the findings of the autopsy surgeon in Los Angeles; that she represented that her husband's death was sudden; that he had had a "terrible fall." She further expressed the idea that his death had been occasioned by violence of some sort and was not the result of natural causes. Under the circumstances, the body being within the city and county of San Francisco, and within the jurisdiction of the defendant Leland, and he having been informed that no inquest had been held in the county of Los Angeles, and there being a question as to the cause of death as expressed by the plaintiff, the coroner acted within his authority in ordering an inquest held, and in authorizing his autopsy surgeon to proceed in the usual manner.

The decision of the question as to whether an inquest is necessary rests in the sound discretion of the coroner, and there is nothing in the record to counteract the presumption that he regularly performed his duty as coroner, and there was no breach of any duty which he owed to the plaintiff.

It is our opinion that the motions for nonsuit, based upon *215 the ground that the cause of action was barred within one year, were properly granted; and that the motion for nonsuit as to the defendant Leland, based upon the ground that the evidence introduced in the case failed to show any carelessness or negligence on the part of the defendant Leland, or any breach of duty on the part of such defendant owing to plaintiff, was also properly granted. We deem it unnecessary to discuss the other objections made by plaintiff to the judgment entered herein.

The judgment is affirmed.

Sturtevant, J., and Nourse, Acting P. J., concurred.

Cal.App.1.Dist.,1929.

Huntly v. Zurich General Acc. & Liability Ins. Co.

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e United States to exercise exclusive jurisdiction over it
he United States has waived by receding a part of such
iis territory is still Precinct 17 of Sandoval County of the
fexico. * * *." (p. 896)

d, there are no California cases dealing with the voting ques-
ases with respect to other matters do refer to the areas as
ere are no Federal cases on the subject.

when the question is directly presented, the California Courts
n original proposition, or because of the described recessions
he Federal areas in California are not areas outside the State,
ding thereon may qualify as California electors. In doing so,
would not have to disturb their decisions holding that State
le within the Federal reservations. Those holdings, whose basic
e police and regulatory laws would impair the exclusive legis-
a the Federal government by the Constitution, are perfectly
resent theme.

number of occasions, has ruled in accordance with the cases
:sons cannot acquire a residence for voting in California by
reservation which is under the exclusive jurisdiction of the
al. Atty. Gen. NS4278, dated May 4, 1942*) However, these
ot th ule established by such cases as *Sinks* v. *Reese*, supra.
le nor were these opinions rendered after the recession of
: of special jurisdiction mentioned herein. Therefore, these
t to which they hold that persons residing upon military reser-
lusive jurisdiction of the Federal government do not acquire
erein because the land is outside the State of California, are

ed, since 1946, Federal areas acquired for military purposes
e State, pursuant to Government Code section 126, have been
tion that "all persons residing on such land" shall have "all
hts including the right of suffrage, which they might have
given." (Par. (e), of Government Code sec. 126) None of
on the voting problem deal with this reservation. We do not
rnia Courts would hold that this provision is unconstitutional
e Federal areas are not deemed to be within the State of Cali-
fore the persons residing in such areas could not meet the
itions of being residents within the State. (Cf. *Sinks* v. *Reese*,
hand, in any effort to save the constitutionality of the voting
the rule of extra-territoriality (*Sinks* v. *Reese*, 19 Ohio St.
e v. *Mabry*, 197 P. 2d (N.M.) 884, 893), it would be quite

88, dated Dec. 20, 1933; 158 Letter Book 290, dated June 25, 1937.
ould also disenfranchise persons now resident within National Park
rms of the grant of exclusive jurisdiction (Stats. 1919, p. 74, ch.
also have saved to them their civil and political rights. (24 Cal.

meaningless to hold that only post 1946 grants of jurisdiction have reserved from the United States the right of persons living on the Federal areas to vote. (supra, p. 139) However, since the "reservation" of the privilege does not run against the grantee—the United States, and hence impair its legislative authority, but rather in favor of third persons—the citizens residing in the enclave, this paradox is avoided.

It should be understood that persons living upon military reservations in order to be eligible to vote must meet the standards for residence within the State of California (Govt. C. sec. 244) and the qualifications for voters. (Calif. Const. Art. II; Election C. secs. 5650-5932.5) With respect to military personnel stationed at and living on military reservations located in California, mere presence thereon is not sufficient to establish residence (Calif. Const. Art. II, sec. 4), but "the fact of his (i.e., their) being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed." (Citing *Percy* v. *Percy*, 188 Cal. 765, 768) (*Berger* v. *Super. Ct.*, 79 C.A. 2d 425, 429; *Stewart* v. *Kyser*, 105 Cal. 459, 464—a voting case.)

To conclude: In view of the developments in the concepts concerning the acquisition of "exclusive" jurisdiction over areas within the States either by consent of the States pursuant to Clause 17 or by cession for national purposes, the original idea of resulting extra-territoriality is no longer valid today. Even accepting its validity, it should not be applied to disenfranchise citizens of the State where both in fact and in law the State is exercising certain jurisdiction over the areas in an increasing number of respects through the Federal government's recession of jurisdiction.

Opinion No. 52-161—September 8, 1952

SUBJECT: AUTOPSY—Discretion as to need for, is vested in Coroner, whose decision is subject to question only if grossly unreasonable, arbitrary, or capricious; liability of Coroner and lawful assistants in regular performance of lawful duties also discussed.

Requested by: DISTRICT ATTORNEY, SANTA CLARA COUNTY.

Opinion by: EDMUND G. BROWN, Attorney General.
Henry A. Dietz, Assistant.

Honorable N. J. Menard, District Attorney of Santa Clara County, has requested the opinion of this office on the following question:

Should the County Pathologist perform an autopsy when ordered to do so by the County Coroner even though he believes the Coroner to be in error in making the order?

Our conclusion may be summarized as follows:

Discretion on the question of the need for an autopsy is vested in the Coroner, and his decision is subject to question only when grossly unreasonable, arbitrary or capricious.

ANALYSIS

Government Code section 27491 provides:

"It shall be the duty of the coroner to investigate or cause to be investigated, the cause of death of any person reported to the coroner as having been killed by violence, or who has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or who has committed suicide, and of all deaths of which the provisions of the Health and Safety Code make it the duty of the coroner to sign certificates of death. For the purpose of such investigation he may in his discretion take possession of and inspect the body of the decedent, which shall include the power to exhume such body, make or cause to be made a post mortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, blood, or contents, or organs, or tissues of the body, and secure professional opinions as to the result of such post mortem examination. He shall cause the information secured to be reduced to writing and forthwith filed by him in his records of the death of the individual. He may also in his discretion, if the circumstances warrant it, hold an inquest."

Section 7113 of the Health and Safety Code provides:

"A cemetery authority or a licensed funeral director may permit an autopsy of any remains in its or his custody upon the receipt of a written authorization of a person representing himself to be any of the following:

* * *

"(e) The coroner or other duly authorized public officer.

"A cemetery authority or a licensed funeral director is not liable for permitting or assisting in making an autopsy pursuant to such authorization unless it has actual notice that such representation is untrue."

Section 7114 of the Health and Safety Code provides:

"Any person who performs an autopsy on a dead body without having first obtained the written authorization required by Section 7113 of this code is guilty of a misdemeanor, except that this shall not be applicable to the performance of an autopsy by the coroner or other officer authorized by law to perform autopsies."

Section 10425 of the Health and Safety Code provides:

"The certificate of death shall be made by the coroner in case of any death occurring under any of the following circumstances:

(a) Without medical attendance.

(b) During the continued absence of the attending physician.

(c) Where the attending physician is unable to state the cause of death.

(d) Where the deceased person was killed or committed suicide.

(e) Where the deceased person died as the result of an accident.

(f) Under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another."

The policy of the laws set forth above is to provide a means for the determination of the cause of every death. If the cause of death is not known at the time of its occurrence, it is to be determined thereafter. *Gray* v. *Southern Pac. Co.*, 21 Cal. App. 2d 240, 244, 68 P. 2d 1011, 1014 (1937).

In order to carry out the duties of his office in the investigation of death in accordance with the provisions of section 27491 of the Government Code and also in carrying out his duties with respect to making a certificate of death required by section 10425 of the Health and Safety Code, it is necessary that the Coroner have wide discretion. He may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the cause of death. This he may do without the consent of the family of the deceased. *Huntly* v. *Zurich General A. & L. Ins. Co.*, 100 Cal. App. 201, 213, 280 Pac. 163, 168 (1929). Within the area of his duties, the judgment of the Coroner governs. The action of the Coroner in this respect is qualified only by the implied limitation that he not be grossly unreasonable, arbitrary or capricious in the exercise of his discretion.

As a point of information, there can be no liability for an act required by law. The Coroner and his lawful assistants in the regular performance of lawful duties are protected from responsibility in civil actions brought by private parties. *Gray* v. *So. Pac. Co.*, 21 Cal. App. 2d 240, 245, 68 P. 2d 1011 (1937); *Huntly* v. *Zurich General A. & L. Ins. Co.*, 100 Cal. App. 201, 280 Pac. 163 (1929).

Opinion No. 51-225—September 12, 1952

SUBJECT: AUTOMOBILE CLUBS: Necessity for, to maintain reserves for unearned dues, in the event of cancellation of liability to render specific service, and circumstances under which such clubs may be considered as transacting insurance and therefore subject to gross premiums tax both discussed.

Requested by: INSURANCE COMMISSIONER.

Opinion by: EDMUND G. BROWN, Attorney General.
Harold B. Haas, Deputy.

Honorable John R. Maloney, Insurance Commissioner of the State of California, has requested our opinion as to whether a reserve equal to the unused portions of the considerations paid by the motorists for membership in or service of a motor club, calculated on a pro rata basis over the period covered by the payment, must be accounted as a liability in determining whether the club is solvent.

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57 Cal.Rptr.2d 651, 96 Cal. Daily Op. Serv. 7798, 96 Daily Journal D.A.R. 12,853
(Cite as: 50 Cal.App.4th 137)

C

ROBERT DAVILA et al., Plaintiffs and Appellants,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents.

No. B102701.

Court of Appeal, Second District, Division 1, California.

Oct 22, 1996.

SUMMARY

Children of a deceased individual sued the coroner and associated defendants for damages on a negligence theory, alleging that their father was found dead in a parked car, was transported to a hospital where he was formally pronounced dead, but that the coroner failed to make an adequate or reasonable attempt to locate any relatives, and decedent's body was thereafter cremated. Plaintiffs alleged that, as a result, they suffered emotional distress. The trial court granted defendants summary judgment on the ground that the coroner owed no duty to plaintiffs. (Superior Court of Los Angeles County, No. BC110154, Loren Miller, Jr., Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to vacate the summary judgment and set the matter for trial. The court held that the trial court erred in granting summary judgment for defendants. It held that the coroner owed plaintiffs a mandatory duty (Gov. Code, § 815.6) to make reasonable efforts to locate the decedent's next of kin, established by Gov. Code, § 27471, subd. (a), and Health and Saf. Code, §§ 7104 , 7104.1. At least one of the purposes of the statutes is to protect against the kind of injury suffered by plaintiffs. Thus, assuming a duty existed, that duty was breached, and the breach was the cause of the injury suffered by plaintiffs. At trial, the coroner would be required to show that he acted with reasonable diligence in attempting to identify the decedent's body and in attempting to locate a family member. (Opinion by Vogel (Miriam A.), J., with Ortega, Acting P. J., and Masterson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Coroners § 6--Liability--Cremation of Remains Without Notifying Decedent's Next of Kin--Mandatory Duty.
The trial court *138 erred in granting summary judgment for a coroner and associated defendants in an action by a decedent's children for emotional distress allegedly caused by defendants' negligent failure to notify plaintiffs before cremating the remains. The coroner owed plaintiffs a mandatory duty (Gov. Code, § 815.6) to make reasonable efforts to locate the decedent's next of kin, established by Gov. Code, § 27471, subd. (a), and Health and Saf. Code, §§ 7104, 7104.1. At least one of the purposes of the statutes is to protect against the kind of injury suffered by plaintiffs. Thus, assuming a duty existed, that duty was breached, and the breach was the cause of the injury suffered by plaintiffs. At trial, the coroner would be required to show that he acted with reasonable diligence in attempting to identify the decedent's body and in attempting to locate a family member.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 160.]

(2) Government Tort Liability § 3--Grounds for Relief--Failure to Discharge Mandatory Duty.
For liability of a public entity to attach under Gov. Code, § 815.6, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered.

COUNSEL

Michael H. Kapland for Plaintiffs and Appellants.

Nelson & Fulton, Henry Patrick Nelson and Amber A. Logan for Defendants and Respondents.

VOGEL (Miriam A.), J.

The issue in this case is whether a coroner owes a

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duty to a decedent's children to attempt with reasonable diligence to notify the person responsible for the interment of the decedent's remains before disposing of the body. We hold that he does.

Facts

Robert Davila and Angelina Williamson (collectively Davila) sued the County of Los Angeles, the Los Angeles County Sheriff's Department and ***139** the Los Angeles County Coroner (collectively the Coroner) for damages on a negligence theory, alleging the following facts: On July 11, 1993, their father, Freddie Davila, was found dead in a car parked on Paramount Boulevard, in the City of Paramount. Decedent was transported to a hospital, where he was formally pronounced dead, but the Coroner failed "to make an adequate or reasonable attempt to locate any relatives" and, on August 11, decedent's body was cremated. Decedent had told Davila that he was going to take an extended trip and it was thus not until December 1993, that Davila became concerned that he hadn't heard from his father, at which time Davila filed a missing person's report and then learned that his father had died and that his body had been cremated. As a result, Davila suffered emotional distress.

The Coroner answered, and then moved for summary judgment on the ground that he owed no duty to Davila. In his separate statement of undisputed facts, the Coroner recounted the discovery of the body, the fact that the body was held by the Coroner's office for 30 days, that no one (including Davila) contacted the Coroner's office regarding decedent between July 11 and August 11, 1993, that the body was cremated on August 11, in conformance with the provisions of Health and Safety Code section 7104, and that "[t]he Los Angeles County Department of the Coroner attempts to locate the next-of-kin to prevent the County of Los Angeles from incurring the costs of disposition." Based on these facts, the Coroner asserted that, as a matter of law, he owed no duty to Davila to locate or notify him that his father had died.

Davila opposed the motion, admitting all of the facts relied on by the Coroner except his assertion that his disposition of the body was in compliance with Health and Safety Code section 7104, and asserting that, under the circumstances of this case, the Coroner was obligated by statute to "diligently attempt[] to notify" the next of kin. (Health & Saf. Code, § 7104.1.) Davila supported his opposition with evidence that he had been able to recover his father's personal effects from the Coroner's office, and had found within those effects his father's Social Security card and an identification card stating, "In case [of] accident please notify Rev. Robert Davila. Home 818814-4620. Work 213-603-6226" (Davila's then current telephone numbers). In decedent's car (recovered from the salvage yard where the Coroner had it towed), Davila found an address book with Davila's telephone numbers and address (along with phone numbers and addresses of other relatives).

The motion was granted (the trial court found no duty was owed), and Davila appeals from the judgment thereafter entered. ***140**

Discussion

(1a) Davila contends the Coroner's office owed him a duty to make reasonable efforts to locate decedent's next of kin. We agree.

Government Code section 815.6 provides that "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (2) For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered. (*Posey v. State of California* (1986) 180 Cal.App.3d 836, 848 [225 Cal.Rptr. 830].)

I.

Enactment Imposing a Mandatory Duty

(1b) In our case, the existence of a mandatory duty is established by Government Code section 27471, subdivision (a): "Whenever the coroner takes custody of a dead body pursuant to law, he or she

shall make a reasonable attempt to locate the family ." [FN1] (Italics added.) The same duty is reflected in Health and Safety Code sections 7104 (when the person with the duty of interment "can not *after reasonable diligence* be found ... the coroner shall inter the remains ....") and 7104.1 (if within "30 days after the coroner notifies *or diligently attempts to notify the person responsible for the interment* ... the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains"). (Italics added.) Quite clearly, the coroner had a mandatory duty to make a reasonable attempt to locate decedent's family. (Cf. *Morris v. County of Marin* (1977) 18 Cal.3d 901, 906-907 [136 Cal.Rptr. 251, 559 P.2d 606].)

FN1 Under Government Code section 14, "[s]hall" is mandatory.

To avoid this result, the Coroner contends *Bock v. County of Los Angeles* (1983) 150 Cal.App.3d 65 [197 Cal.Rptr. 470] compels the conclusion that no mandatory duty exists. Not so. In *Bock*, where a widow sued the county because the coroner had failed to promptly identify her husband's body and notify her of his death, Division Five of our court held that the coroner's "record-keeping" responsibilities did not create a general duty to identify a ***141** decedent or notify his family. [FN2] (*Id.* at pp. 69-70.) At the time *Bock* was decided, however, Government Code section 27471 required the coroner to "make a reasonable attempt to locate the family [of a dead body] *within 24 hours*" and provided that, "[a]t the end of 24 hours," the coroner "may embalm the body...." (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 70, italics added.) In 1984, the Legislature amended the statute, deleted the 24-hour time period, and left the unqualified language requiring the coroner to "make a reasonable attempt to locate the family." In short, *Bock* is no longer dispositive on this point.

FN2 Division Five nevertheless concluded that because the coroner "undertook to assist" the widow, he had assumed a duty to do so in a reasonably diligent manner. (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at pp. 71-72.)

II.

Enactment Intended to Protect Against This Kind of Injury

In *Bock*, Division Five also held that the second requirement of Government Code section 815.6 -that the enactment was intended to protect against the risk of the kind of injury suffered by the plaintiff-was not satisfied because "the statutes empowering the coroner to keep and transmit various records were [not] designed to protect against the risk of the particular kind of injuries alleged ...." (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 71.) As Davila points out, however, *Bock* did not consider Health and Safety Code sections 7104 (enacted in 1939) and 7104.1 (enacted in 1992, nine years after *Bock* was decided).

Sections 7104 and 7104.1 are part of chapter 3 ("Custody, and Duty of Interment") of division 7 ("Dead Bodies") of the Health and Safety Code. Section 7104 of the Health and Safety Code provides as follows: "(a) When no provision is made by the decedent, or where the estate is insufficient to provide for interment and the duty of interment does not devolve upon any other person residing in the state or *if such person can not after reasonable diligence be found* within the state the person who has custody of the remains may require the coroner of the county where the decedent resided at time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead. [¶] (b) A county exercising jurisdiction over the death of an individual pursuant to Section 27491 [covering the coroner's duty to inquire into the cause of all violent, sudden or unusual deaths], or who assumes jurisdiction pursuant to Section 27491.55 [coroner's right to delegate inquiry to other agencies] of the Government Code, shall be responsible for the disposition of the remains ***142** of that decedent. If the decedent is an indigent, the costs associated with disposition of the remains shall be borne by the county exercising jurisdiction." (Italics added.) Health and Safety Code section 7104.1, which was enacted in 1992 (Stats. 1992, ch. 1020, § 3.3), provides as follows: "If, within 30 days after the coroner *notifies or diligently attempts to notify the person responsible for the interment or inurnment of a decedent's remains which are in the possession of the coroner*,

the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains. The coroner may recover any expenses of the interment from the responsible person." (Italics added.)

Read together, these statutes provide that when no one is responsible for interment of a decedent, the coroner must assume that responsibility and its attendant costs. When a responsible person exists but refuses to inter the remains, the coroner must do so but may recover his expenses from the responsible party. According to the Coroner, this means the "kind of injury" the statutes were meant to prevent was the "incurring [of] costs [by the County] of interment of ... unclaimed decedents." We disagree.

While the recovery of interment costs may be *one* purpose of Health and Safety Code section 7104.1, just as the recovery of embalming costs may be *one* purpose of Government Code section 27471 (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 70), the statutes exist for other purposes as well and are designed to prevent other injuries. As has been noted, the Legislature is "aware that for cultural and religious reasons, the [interment] or other disposition of the deceased's body is an extremely important emotional catharsis for the family and friends of the deceased." (*Shelton v. City of Westminster* (1982) 138 Cal.App.3d 610, 625 [188 Cal.Rptr. 205] (dis. opn. of Wiener, J.).) To this end, Health and Safety Code section 7100 provides that "[t]he *right to control the disposition of the remains of a deceased person, including the location and conditions of interment,* unless other directions have been given by the decedent, *vests in*, and the duty of interment and the liability for the reasonable costs of interment of the remains devolves upon the following in the order named: [¶] (1) [t]he surviving spouse [;] [¶] (2) [t]he surviving child or children of the decedent ..." (Italics added.)

Had Division Five considered these points, *Bock* might have been decided differently. With the addition of Health and Safety Code section 7104.1, however, *Bock*'s views of the purpose of the statutory scheme are no longer controlling. We are satisfied that, today, the rights granted by the several statutes discussed above would have no meaning unless they are read to *143 impose upon the Coroner a duty to act with reasonable diligence in attempting to identify a body placed in his custody and then to attempt with reasonable diligence to locate some family member.

III.

The Breach Must Be the Cause of the Injury

For present purposes, it is undisputed that, assuming a duty exists in this case, that duty was breached and the breach was the cause of the injury suffered by Davila. Having found that a duty does exist and that it is owed to Davila, it follows that summary judgment must be reversed. At trial, the issues will be whether the Coroner acted with reasonable diligence in attempting to identify the decedent's body (such as by looking at his personal effects) and in attempting to locate a family member (such as by picking up the telephone and calling Davila).

Disposition

The judgment is reversed and the cause is remanded to the trial court with directions to vacate the summary judgment and set the matter for trial. Plaintiffs are awarded their costs of appeal.

Ortega, Acting P. J., and Masterson, J., concurred.
*144

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24 P.3d 1191, 108 Cal.Rptr.2d 165, 1 Cal. Daily Op. Serv. 5116, 2001 Daily Journal D.A.R. 6305
(Cite as: 25 Cal.4th 904)

H

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.

No. S087881.

Supreme Court of California

June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties *905 in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children--Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance

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contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, §§ 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the *906 ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial *907 court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

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BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory *908 construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold *909 divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children,

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Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. *910

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether

Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, ***912** test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the

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legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child" and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914 Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano*

reasoned, it certainly had precedent for doing so. (*Lozano, supra,* 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers, supra,* 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388- 389 [330 P.2d 452]; see *Estate of Gird, supra,* 157 Cal. at pp. 542- 543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra,* at p. 12; see Webster's 3d New Internat. Dict., *supra,* at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his *915 one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird, supra,* 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird, supra,* 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young, supra,* 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under

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former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

FN5 Section 255 of the former Probate Code provided in pertinent part: " ' Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. [FN6]

FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court

of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918 257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra* , 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold

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emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) *919

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such *920 exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of- wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the

decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] *921

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For

> the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453 , subd. (b)(1).)

> FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."
>
> FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he *922 argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir, supra*, 59 Cal.App.4th at pp. 1516-1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d

1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. *923 It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross- complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. *924

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question

here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. *925

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court- ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent

that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. *926

Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

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71 Cal.App.4th 568
84 Cal.Rptr.2d 27, 142 Lab.Cas. P 59,147, 99 Cal. Daily Op. Serv. 2877, 1999 Daily Journal D.A.R. 3710
(Cite as: 71 Cal.App.4th 568)

MICHAEL BOLLINGER et al., Plaintiffs and Respondents,
v.
SAN DIEGO CIVIL SERVICE COMMISSION et al., Defendants and Appellants.

No. D026130.

Court of Appeal, Fourth District, Division 1, California.

Mar. 30, 1999.

SUMMARY

The trial court granted a police officer and the city police officers' association a writ of mandate compelling the civil service commission to set aside its ratification, made during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld. (Superior Court of San Diego County, No. 693456, Anthony C. Joseph, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations, since a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice. The court further held that the commission did not violate the police officer's procedural due process rights by denying him the opportunity to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements. (Opinion by Nares, J., with O'Neill, J., [FN*] concurring. Concurring opinion by Work, Acting P. J. (see p. 578).)

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 29--Construction--Language--Legislative Intent.
Statutory interpretation presents a question of law subject to independent review. A court's analysis starts from the fundamental premise *569 that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, the court looks first to the words themselves. When the language is clear and unambiguous, there is no need for construction. When the language is susceptible of more than one reasonable interpretation, however, the court must look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(2a, 2b) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Personnel Exception to Ralph M. Brown Act.
The underlying purposes of the "personnel exception" (Gov. Code, § 54957) to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body. Nonetheless, a court must construe the personnel exception narrowly and the open meeting requirements liberally. Under Gov. Code, § 54957, an employee may request a public hearing only when complaints or charges are involved. Negative comments in an employee's performance evaluation do not constitute complaints or charges within the meaning of Gov. Code, § 54957.

(3) Statutes § 31--Construction--Language--Qualifying Words and Phrases.
An accepted rule of statutory construction is that qualifying words and phrases, when no contrary

intention appears, refer solely to the last antecedent.

(4a, 4b, 4c) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Ratification of Hearing Officer's Determination in Closed Session--Ralph M. Brown Act--Due Process.
In a mandamus proceeding in which a police officer objected to the civil service commission's ratification, during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld, the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations. A public agency may deliberate in closed session whether complaints or charges brought against an employee justify dismissal or disciplinary action without providing the statutory notice. Further, the commission did not violate the police officer's procedural due process rights by denying him the opportunity *570 to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 581.]

(5) Statutes § 42--Construction--Aids--Legislative History--Significance of Rejection of Specific Provision.
The rejection of a specific provision contained in a legislative act as originally introduced is most persuasive that the act should not be interpreted to include what was left out.

(6) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal--Administrative Hearing and Decision--Constitutional Procedural Due Process Requirements.
U.S. Const., 14th Amend., places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the due process clause. The California Constitution contains a similar provision. In cases of public employment, the employee is entitled to due process in matters involving contemplated discipline. Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action. To be meaningful, the right to respond must afford the employee an opportunity to present his or her side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter. The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process.

COUNSEL

John W. Witt and Casey Gwinn, City Attorneys, Anita M. Noone, Assistant City Attorney, and Lisa A. Foster, Deputy City Attorney, for Defendants and Appellants.

Everitt L. Bobbitt; and Sanford A. Toyen for Plaintiffs and Respondents. *571

NARES, J.

In this employment matter, Michael Bollinger and the San Diego Police Officers' Association (the Association) obtained a writ of mandate compelling the San Diego Civil Service Commission and Commissioners Linda LeGerrette, Robert P. Ottilie, Franne M. Ficara, Daniel E. Eaton and Al Best (collectively, the Commission), to set aside its closed session ratification of a hearing officer's findings of fact and recommendation that Bollinger's demotion be upheld. The court agreed the Commission's act was void under Government Code [FN1] section 54957, a provision of the Ralph M. Brown Act (§ 54950 et seq.) (the Brown Act) because it failed to give Bollinger 24-hour written notice of his right to request a public hearing. We reverse.

FN1 Statutory references are to the Government Code except where specified otherwise.

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Background

The facts are undisputed. On January 13, 1995, the San Diego Police Department demoted Bollinger from police agent to police officer II based upon his misconduct. He appealed to the Commission. A noticed public evidentiary hearing was held over three days in April and June 1995, with Commissioner Ottilie serving as the sole hearing officer. [FN2]

> FN2 The City of San Diego's civil service rules at the relevant time gave the Commission the discretion to "appoint one or more of its members to hear the appeal and submit findings of fact and a decision to [it]. Based on the findings of fact, the Commission may affirm, modify, or overturn the decision[.]"

The Commission's written agenda for its August 3, 1995, meeting noted it would "recess into closed session ... to ratify hearings in the cases of Michael Bollinger and [another person][.]" The Commission posted the agenda 72 hours before the hearing (§ 54954.2) and mailed a copy to the Association. Bollinger was notified of the meeting in a telephone call. During closed session, the Commission ratified Ottilie's factual findings and recommendation that Bollinger's demotion be upheld. Shortly thereafter, the Commission for the first time provided Bollinger with a copy of Ottilie's 22-page written report. Bollinger complained to no avail that he was deprived of the opportunity to respond to Ottilie's report before the full Commission made its decision.

Bollinger then filed this action for a writ of mandamus under Code of Civil Procedure section 1085. He alleged the Commission's decision was void as a matter of law under section 54947 because it failed to notify him in writing of his right to request a public hearing. The court agreed and tentatively granted the petition in a telephonic ruling; it confirmed its decision after oral argument. *572

Discussion

I. *Standard of Review*

(1) Statutory interpretation presents a question of law subject to independent review. (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964 [266 Cal.Rptr. 225].) " 'Our analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citation.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' " (*Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1562 [11 Cal.Rptr.2d 222], citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

II. *The Brown Act*

A

(2a) In enacting the open meeting requirements of the Brown Act in 1953, the Legislature expressly declared "the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (§ 54950.) Section 54953 accordingly provides "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

The Brown Act's "personnel exception" to the open meeting rule, found at section 54957, provides in relevant part: "Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions ... during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session."

"As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the *573 employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void." [FN3]

> FN3 Ordinarily, acts of a legislative body in violation of the Brown Act are not invalid; they merely subject the member of the governing body to criminal penalties. (*Griswold v. Mt. Diablo Unified Sch. Dist.* (1976) 63 Cal.App.3d 648, 657-658 [134 Cal.Rptr. 3]; § 54959.) Section 54957 thus affords an employee wrongfully deprived of written notice a valuable remedy.

"[T]he underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 [196 Cal.Rptr. 45].) We must nonetheless "construe the 'personnel exception' narrowly and the 'sunshine law' liberally in favor of openness [citation] ...." (*Ibid.*)

In *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876 [80 Cal.Rptr.2d 589], the court interpreted the first paragraph of section 54957 to allow an employee to request a public hearing only where "complaints or charges" are involved. It reasoned the phrase " 'unless the employee requests a public session' " applies only to the immediately preceding phrase " 'or to hear complaints or charges brought against the employee' ...." (68 Cal.App.4th at p. 881.) (3) "An accepted rule of statutory construction is that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." (*Ibid.*)

(2b) The *Furtado* court held that negative comments in an employee's performance evaluation did not constitute "complaints or charges" within the meaning of section 54957. "[T]o merge employee evaluations into the category of 'complaints or charges' in order to permit an open session is effectively to rewrite the statute." (*Furtado v. Sierra Community College, supra,* 68 Cal.App.4th at p. 882.) "[T]he Legislature has drawn a reasonable compromise, leaving most personnel matters to be discussed freely and candidly in closed session, but permitting an employee to request an open session to defend against specific complaints or charges brought against him or her by another individual." (*Ibid.*; see also *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87 [82 Cal.Rptr.2d 452] [performance evaluation of probationary teacher does not constitute the bringing of "specific complaints or charges"].) *574

(4a) Here, in contrast to *Furtado* and *Fischer*, the Commission concedes this matter does not involve a routine employee performance evaluation, but "specific complaints or charges" other police officers brought against Bollinger. [FN4] It contends, though, that Bollinger was not entitled to 24- hour written notice of its August 3, 1995, closed session, because it was solely for the purpose of *deliberating* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary hearing thereon.

> FN4 Ottilie's written report shows several police officers accused Bollinger of disobeying numerous orders and failing to properly document the chain of custody of evidence.

The Commission relies upon the clause in the second paragraph of section 54957, which provides "the employee shall be given written notice of his or her right to have the complaints or charges *heard* in open session rather than a closed session[.]" (Italics added.) We also note that in the first paragraph of section 54957, the Legislature used "to consider" in reference to the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee, but used "to hear" in reference to "complaints or charges brought against the employee by another person or employee." To

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"consider" is to "deliberate upon[.]" (American Heritage Dict. (1981) p. 284, col. 1.) To "hear" is to "listen to in an official ... capacity[.]" (*Id.* at p. 607, col. 2.) A "hearing" is "[a] proceeding of relative formality ..., generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented." (Black's Law Dict. (6th ed. 1990) p. 721, col. 1.) The plain language of section 54957 lends itself to the interpretation the Commission urges.

The statute's legislative history further supports the Commission's position. The second paragraph of section 54957 was enacted by parallel Assembly and Senate Bills. (Stats. 1993, ch. 1136, § 12 (Assem. Bill No. 1426 (1993-1994 Reg. Sess.)); Stats. 1993, ch. 1137, § 12 (Sen. Bill No. 36 (1993-1994 Reg. Sess.)).) As originally introduced, both bills read in part: "As a condition to holding a closed session *on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session." (Sen. Bill No. 36 (1993-1994 Reg. Sess.) § 17; Assem. Bill No. 1426 (1993-1994 Reg. Sess.) § 17, italics added.)*

Later, however, the italicized language was deleted and the bills were altered to what now appears in paragraph two of section 54957, cited *ante*. (Assem. Amend. to Sen. Bill No. 36, § 12 (1993-1994 Reg. Sess.) Aug. 19, 1993; Sen. Amend. to Assem. Bill No. 1426, § 12 (1993-1994 Reg. Sess.) ***575** Sept. 8, 1993.) The Legislature thus specifically rejected the notion an employee is entitled to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. (5) "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out. [Citations.]" (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 [7 Cal.Rptr.2d 848].) (4b) Accordingly, we conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.

B

Under the particular facts here, however, a question remains: Was Bollinger entitled to be "heard," within the meaning of section 54957, by the Commission before it recessed into closed session to deliberate whether to adopt the factual findings and recommendation of the single hearing officer?

Bollinger argues the Commission violated his procedural due process rights by denying him the opportunity to respond to Ottilie's written factual findings and recommendation before it made its final decision. The Commission counters that the evidentiary hearing before a single hearing officer, and the opportunity to seek judicial review, satisfied due process requirements. [FN5]

> FN5 Because due process principles were not raised in the trial court or in the initial appellate briefing, we asked the parties to provide supplemental letter briefs on the issue. We have taken their responses into consideration.

(6) " 'The Fourteenth Amendment to the United States Constitution "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." [Citations.] The California Constitution contains a similar provision. [Citations.]' " (*Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 946 [77 Cal.Rptr.2d 231].) "[I]n cases of public employment, the employee is entitled to due process in matters involving contemplated discipline." (*Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 1005 [159 Cal.Rptr. 222] (conc. opn. of Evans, J.).)

"Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) Notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is ***576** based, and (4) the opportunity to respond in opposition to the proposed action. (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736 [150 Cal.Rptr. 475, 586 P.2d 956]; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 [124 Cal.Rptr. 14, 539 P.2d 774].)

To be meaningful, the right to respond must afford the employee an opportunity to present his side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter." (*Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362-363 [181 Cal.Rptr. 699]; accord, *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Coleman v. Regents of University of California* (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589].) The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process. (*Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 29-30 [206 P.2d 841].)

(4c) In *Titus v. Civil Service Com., supra,* 130 Cal.App.3d 357, a lieutenant in the sheriff's department received notice of his proposed discharge. He was given the materials upon which the disciplinary action was based and the opportunity to respond orally or in writing. After the employee argued his position to a chief, the chief recommended his firing. The undersheriff and two assistant sheriffs reviewed the matter and adopted the chief's recommendation. The employee appealed to the Civil Service Commission of Los Angeles County, which adopted the hearing officer's recommendation and sustained the firing.

The employee then sought a writ of mandate to compel his reinstatement, arguing his due process rights were violated when he was precluded from responding to the chief's recommendation before a final decision was made. In affirming the lower court's denial, the court explained: "The record discloses that Chief Knox possessed the authority to recommend the ultimate disposition to the charges against appellant, subject only to review by a panel consisting of the undersheriff and two assistant sheriffs.... Appellant was permitted to present his side of the controversy. Due process requires nothing more." (*Titus v. Civil Service Com., supra,* 130 Cal.App.3d at p. 363.)

The Administrative Procedure Act (§ 11500 et seq.), applicable to certain state agencies, provides that if a contested matter is heard by an administrative law judge, the agency may adopt the written proposed decision in its entirety. In *Greer v. Board of Education* (1975) 47 Cal.App.3d 98 [121 Cal.Rptr. 542], the court held that in that instance an employee has no right to receive the hearing officer's proposed decision or present any argument to the full agency before it acts. The court noted the aggrieved party's remedy *577 is to seek review in the superior court on the basis of the evidentiary hearing record. [FN6] (*Id.* at pp. 110-112; § 11517.)

> FN6 Here, the City of San Diego's civil service rules required that a reporter record testimony taken at the evidentiary hearing.

In *Dami v. Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 154 [1 Cal.Rptr. 213], the court likewise held "neither the language of [section 11517] nor constitutional principle requires that the proposed decision [of the hearing officer] be served prior to the rendition of the final one." (Accord, *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.* (1969) 276 Cal.App.2d 132, 136 [80 Cal.Rptr. 758]; *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 314 [33 Cal.Rptr. 305]; *Strode v. Board of Medical Examiners* (1961) 195 Cal.App.2d 291, 297-298 [15 Cal.Rptr. 879].) It is only when the agency does not adopt the hearing officer's recommendation and reviews the evidence itself that the employee has the opportunity to argue the matter to the agency. (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 396 [184 P.2d 323]; § 11517, subd. (c).)

California's Civil Service Act (§ 18500 et seq.) similarly provides the board may adopt the proposed decision of its representative or may hear the matter itself. Only in the latter instance is the employee allowed to make additional argument to the board. (§ 19582.) In *Sinclair v. Baker* (1963) 219 Cal.App.2d 817 [33 Cal.Rptr. 522], the court rejected the notion due process was violated where the board adopted the hearing officer's recommendation without allowing the employee to respond. The court found dispositive the reasoning of the cases concerning the Administrative Procedure Act. (*Id.* at pp. 822-823; accord, *Fichera v. State Personnel Board* (1963) 217 Cal.App.2d 613, 620 [32 Cal.Rptr. 159] ["... due process is supplied by the hearing officer's taking of evidence, his findings and proposed decision, the decision of the board based on the findings and proposal, and by review by the court even though the last is not a trial de novo, followed by this appeal"].)

Where an administrative agency relegates the evidentiary hearing to one or more of its members, we observe the better practice would be to give the employee the opportunity to respond orally or in writing to the factual findings and recommendation before a final decision is made. [FN7] A hearing officer's report may contain critical inaccuracies and the employee's ability to address them would benefit everyone and result in a fairer process. *578

FN7 In its supplemental letter brief, the Commission advises that after Bollinger's case was heard, its rules were modified to allow an employee to challenge the proposed decision in writing prior to the final decision. The provision, however, expired after six months and has apparently not been renewed.

Given the above authorities, however, we are constrained to conclude Bollinger's minimum due process rights were satisfied. He received notice of the proposed demotion and the basis therefor and had the opportunity to fully respond at a public evidentiary hearing. Ottilie was a "reasonably impartial and noninvolved reviewer," and under the City of San Diego's civil service rules, he had the authority to recommend a final disposition of the matter. Moreover, Bollinger could have sought review of the substantive merits of the Commission's decision in his petition for writ relief, based upon the record of the evidentiary hearing before Ottilie. [FN8]

FN8 While Bollinger did seek writ relief, he raised only the Brown Act issue and failed to submit the administrative hearing record or challenge the substantive merits of the Commission's decision.

It follows that because Bollinger had no legal right to learn of or respond to Ottilie's factual findings and recommendation before the Commission ratified them, no portion of its August 1995 meeting can be construed as a "hearing" on complaints or charges within the meaning of section 54957. Rather, the matter was confined to deliberation which, as discussed, may be held in closed session. In sum, contrary to the trial courts' ruling, the Commission did not run afoul of the Brown Act and its action is valid. [FN9]

FN9 Given our holding, we deny without discussion Bollinger's request for sanctions under Code of Civil Procedure section 907 on the ground the Commission's appeal is frivolous.

Disposition

The judgment is reversed. Bollinger to pay the Commission's costs on appeal.

O'Neill, J., [FN*] concurred.

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

WORK, Acting P. J.,

Concurring.-Although I concur in the opinion, I write separately to identify the narrow context of the legal issue we address in part II.A as presented to the trial court by Michael Bollinger's petition for mandate and the narrow confines of the trial court's judgment in response to that petition which is a subject of this appeal.

I also point out the procedural due process discussion in part II.B fails to consider the significance of the fact that, in this case, the hearing officer whose findings of fact and recommendation were considered by the San Diego Civil Service Commission (Commission) in executive session, was himself a commissioner and was present when his fellow commissioners *579 considered his findings and recommendation. In response to our letter inquiry, we were advised, "The full Commission routinely meets with the hearing officer to fully discuss the proposed report of the hearing officer and ratify the findings that are prepared prior to the meeting." We were further advised that although more than three months transpired between the conclusion of the evidentiary

hearing on these complaints and charges and the ratification of the hearing officer's findings and recommendation, Bollinger was first apprised of those findings and recommendation when served with a copy of the Commission's ratification decision.

A.

Bollinger's petition for mandamus sets forth one narrow issue: whether the ratification action taken by the full Commission in closed session following a public evidentiary hearing was null and void for failure to notify Bollinger in writing that he also had the right to have the Commission's later ratification deliberations in open session. The issue was posed in light of the facts of this case. Here, Bollinger's evidentiary proceedings were heard by a single member of the Commission who had been designated as a hearing officer. More than three months after its conclusion, Bollinger received oral notice of the Commission's intent to meet in closed session to determine whether to ratify the hearing officer's findings and recommendation. Bollinger did not receive a copy of the hearing officer's findings or his recommendation. In spite of the oral notice, Bollinger did not make a specific request to have the deliberative session open.

Relevant to this appeal, the trial court found that although Bollinger was orally informed the deliberations would be held in a closed session, he never made a request for a public session. Finding actual notice irrelevant, the trial court confined its decision solely to whether Government Code section 54957 requires the Commission to give Bollinger written notice of a right to have the ratification deliberations conducted in public. Therefore, the court below did not, nor do we, address the broader issue of whether, had Bollinger specifically requested that deliberative process to be open, the failure to accede to his request would be a Ralph M. Brown Act violation.

B.

Turning to the procedural due process discussion, I agree with the analysis as a stated general proposition. However, had the issue been framed in light *580 of the facts of this case, we would have had to address it in a more meaningful context.

First, it is true that procedural due process is usually satisfied by the mere availability of an appellate remedy. However, in a practical sense, in cases such as this, appellate review is less than meaningful to one who is denied the right to present his case, to argue its merits, and to dissect factual findings for the edification of those faceless decision makers who are empowered to remove, demote or discipline. As the question is posed in our opinion, we only decide that constitutional procedural due process did not require, although we believe it preferable, to permit Bollinger to appear before the full Commission after first receiving the hearing officer's recommended findings, for the purpose of enlightening the Commission members as to their validity and whether the evidence was fairly characterized in that report.

Be that as it may, there is an additional significant fact which we obtained from the parties upon our direct inquiry which sets this case apart from those cited. That is, the hearing officer Commission member whose findings and recommendation were ratified by the Commission was present in the closed session while his fellow Commission members engaged in the deliberations. Thus, Bollinger, who was not even apprised of the hearing officer's findings and recommendation until after they were ratified, was excluded from the Commission's "free and candid" discussion of his fate in the presence of the hearing officer who was present to defend, encourage, enlighten and "freely and candidly" respond to any concerns expressed by his fellow Commission members. Whether the hearing officer did anything more than merely sit silently and impassively while his findings and recommendation were considered and ratified by the Commission, or in fact participated in some manner during the closed proceedings, is not shown in this record. However, the fact of his presence alone, in a position to defend his findings and recommendation while preventing Bollinger from even being aware of their nature let alone having the ability to argue their validity to the Commission, transcends the procedural unfairness considered in any of the numerous cases cited by the majority. However, whether a hearing officer/commissioner's presence while his colleagues deliberate to ratify his findings in closed sessions, coupled with the failure to disclose the nature of those findings to the affected employee, denying him the opportunity to argue their validity before the commissioners meet

in closed session with the hearing officer may deny the procedural due process guaranteed by the Fourteenth Amendment and article I, section 7, subdivision (a) of the California *581 Constitution, although a significant concern, is an issue not raised in this appeal. [FN1]

FN1 During oral argument in a recent unpublished case, *Kathan v. Civil Service Com.* (Mar. 10, 1999) D028812, the city attorney advised that the commission had adopted an interim policy, pending a decision in this matter, for the commission to hold its deliberations on personnel matters arising out of complaints and charges in open session. We were told that conducting those deliberations openly had created no impediment to efficiency, appropriate disposition of those matters or candor.

Therefore, subject to the comments expressed herein, I concur. *582

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Filed 4/30/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT KOREY WOODBURY, A Minor etc., et al. Plaintiffs and Respondents, v. PATRICIA BROWN-DEMPSEY, as Superintendent, etc., et al., Defendants and Appellants.	E031001 (Super.Ct.No. MCV3999) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift and John M. Pacheco, Judges.* Reversed with directions.

Girard & Vinson, Christian M. Keiner, William F. Schuetz, Jr., and Scott K. Holbrook for Defendants and Appellants.

*Judge Swift heard the writ proceedings; Judge Pacheco heard the second motion for attorney fees.

Miller Brown & Dannis, Nancy B. Bourne, Sue Ann Salmon Evans, and Elizabeth Rho-Ng for Education Legal Alliance of the California School Boards Association as Amicus Curiae on behalf of Defendants and Appellants.

Merele D. Chapman for Plaintiffs and Respondents.

Plaintiffs and respondents are five high school students in the Morongo Unified School District (the District).[1] They were members of the football team accused of sexual battery and other misconduct arising out of several locker room incidents. The District proposed to expel the students at a disciplinary hearing held before the District's governing board of trustees (the Trustees). The students, pursuant to Education Code section 48918, subdivision (i)(1), requested that certain witnesses be subpoenaed to attend the disciplinary hearing. The Trustees refused to issue the subpoenas.

After the disciplinary hearings, the Trustees expelled the students. The students appealed to defendant San Bernardino County Board of Education (the County Board).[2] The County Board upheld the expulsions.

The students petitioned the San Bernardino County Superior Court for a writ of administrative mandate requiring the school board to issue the subpoenas. The trial court

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[1] Six students were involved in the alleged misconduct. One of the six dismissed his petition for administrative mandate, without prejudice, in the proceedings below. That student, Blake Poist, is not a party to this appeal.

[2] The County Board was not named as an appellant in the notices of appeal filed in the superior court.

granted the writ. The court held that the issuance of subpoenas was mandatory under the statute.

Defendants and appellants, the individual Trustees, the District, the District superintendent of schools, and the principal and vice-principal of the students' high school, appeal the trial court's ruling. They argue that the trial court misinterpreted the statute and relevant legislative history. We shall reverse.

FACTS AND PROCEDURAL HISTORY

A. Summary of the Alleged Incidents

The charges against the six students involved several discrete events that took place in the football squad locker room.

The first incident took place in late August of 2000. Plaintiff and respondent Nathan Leatherman was alleged to have made another boy lick a stick of deodorant. Leatherman then stated that he had used the deodorant to "wipe his butt."

The second and third incidents took place on the afternoon of September 6, 2000. Plaintiffs and respondents Derrick Aguilar and Glenn Briggs, and possibly others, forced another boy (referred to in the proceedings as Student A) to the ground and held him down. Plaintiff and respondent Steven Hill then slapped Student A in the face with his penis. Minutes later, Leatherman, Aguilar, and Hill, together with plaintiffs and

respondents Blake Poist[3] and Korey Woodbury, wrestled yet another boy (Student F) to the floor. Poist had a wooden dildo; after a struggle, the aggressors managed to pull down Student F's pants and insert the wooden dildo into his anus.

The final incident took place in mid-October of 2000. Leatherman allegedly made Student F march around the locker room with the wooden dildo in his mouth. Leatherman also manipulated the wooden dildo in Student F's mouth, simulating oral copulation. When Leatherman saw another boy watching him, Leatherman put a real chicken's foot in that boy's mouth, and made both victims march around the locker room.

B. Disciplinary Proceedings

The District informed the students and their parents that the principal had recommended their expulsion. The expulsion hearing before the Trustees was set for December 12, 2000. The students engaged Dr. Mark Lopez, director of a student rights advocacy center, as their representative.

On behalf of the students, Dr. Lopez wrote a letter to the Trustees, requesting that all six hearings be held at the same time, and that the hearings be open to the public. Dr. Lopez further requested that the Trustees "issue subpoenas for the purpose of requiring attendance . . . of witnesses who have evidence that is relevant to this alleged discipline matter." Dr. Lopez indicated that the students believed that witnesses against them had been intimidated into making false accusations.

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[3] Strictly speaking plaintiff Poist is not a respondent. See footnote 1, *ante*.

The Trustees responded, agreeing to hold all the hearings simultaneously and to have the hearings open to the public. The Trustees gave notice of the scheduled time and place of the hearings. The Trustees further stated that, "[w]hile Education Code section 48918 does authorize governing boards to issue subpoenas for expulsion hearings, it does not require such action. The [Trustees] ha[ve] never issued subpoenas in the past and decline[] to do so in these pending matters."

On December 6, 2000, Dr. Lopez wrote to the Trustees asking that numerous persons be present to testify at the hearings. Dr. Lopez adverted to his earlier, denied, request for subpoenas, and took the position that the Trustees should "accept[] responsibility of insuring the production of all witnesses that the students deem necessary in the presentation of the students' case." The witnesses for whom Dr. Lopez requested subpoenas included the District superintendent, the assistant superintendent for educational services, the principal and vice-principals of Yucca Valley High School, the school's athletic director and ten football coaches, the school's "campus supervisors," and a classroom aide. Dr. Lopez did not indicate the nature of testimony expected of these witnesses, except his reiterated allegations that District agents or employees somehow coerced witnesses into giving false statements, or intimidated other witnesses from coming forward, or suppressed their statements. In addition to the specifically named witnesses, Dr. Lopez stated that the students intended to call "approximately 20-25 Yucca Valley HS students." Dr. Lopez declined to name the proposed student

witnesses, allegedly "because they fear that the . . . administrators will threaten, harass or intimidate them prior to the hearing while they are attending school."

The Trustees replied on December 8, 2000, indicating that a number of the football coaches were not District employees, but had served temporarily during the football season as "walk-on coaches." The Trustees reported that "[a]ll other employees in your request have been notified of your request for their voluntary appearance."

The administrative record contains one exemplar of the "notification" of request for voluntary appearance issued by the District to its employees. It stated: "Please be advised that [the students] ha[ve] requested that the following witnesses be present and give testimony at the expulsion hearing now scheduled [giving the date, time, and location, but not naming any witnesses]. [¶] The Board of Education has not issued a subpoena for the attendance of any witnesses in this matter. Therefore, neither the district nor the students can compel attendance at this hearing. In all likelihood, Mr. Lopez will be presenting his case after the end of your duty day. Your attendance in response to this request is purely voluntary on your part."

Dr. Lopez issued a supplemental witness list on December 12, 2000, the date the hearings were scheduled to begin, naming the Trustees' president, and the District's employee in charge of attendance and expulsion as witnesses. As before, Dr. Lopez referred to his earlier request for subpoenas, repeated his allegations of intimidation and coercion, and demanded that, if the Trustees did not issue subpoenas, they assume responsibility for producing the students' requested witnesses at the hearings.

The hearings commenced as scheduled on December 12, 2000. Dr. Lopez again raised the issue of subpoenas, making an "offer of proof" that the individual Trustees he had sought to subpoena would be examined concerning their role in the decision not to issue subpoenas.

In the balance of the hearings on that date, two of the victims testified in closed session. The hearings resumed on December 13, 2000, with evidence from the vice-principal who had conducted an initial investigation into the alleged incidents. The hearings were not able to be concluded on that date. The Trustees recessed the hearings to December 19, 2000. Dr. Lopez, insisting that the students had a statutory right to a continuous hearing, objected to the December 19 date. The Trustees overruled the objection, and ordered the hearings to resume on December 19.

The transcript indicates that the hearings were marred by something of a circus atmosphere, with outbursts from the parents and others who were present, including direct appeals by Dr. Lopez to the audience. A great deal of time in the initial two days of the hearings was taken up with wrangling over collateral issues and arguments. At the resumption of the hearings on December 19, therefore, the Trustees had certain remarks added to the record, appealing to those present to respect proper decorum and to allow the hearings to proceed in an orderly manner. The District's counsel and Dr. Lopez were admonished to focus their presentations upon factual matters concerning the occurrence or nonoccurrence of the events upon which the allegations were based. The advocates were further instructed not to approach witnesses or the board members, to speak only

from the podium provided, to remain seated when not at the podium, to refrain from addressing the audience directly or from making gestures to the audience, to refrain from improper or argumentative questions, and to refrain from arguing with the board members or their advisor. In addition, the audience was cautioned to refrain from making displays (e.g., cheering or clapping). The Trustees indicated that, if the procedural guidelines were not observed, the hearings would be recessed and conducted in the absence of anyone except legitimate participants.

The Trustees' legal advisor called upon Dr. Lopez to resume his cross-examination of the vice-principal. Dr. Lopez continued his obstructionist tactics, however, challenging the advisor: "I'm not going to stand at the podium. So are you going to arrest me? That's the big question, isn't it, Mr. Patterson [the Trustees' legal advisor]?

"MR. PATTERSON: If you're not going to comply, Dr. Lopez, the decision is in your hands, because we'll recess right now.

"DR. LOPEZ: Mr. Patterson, you can recess all you want to. . . .

"MR. PATTERSON: Are you going to comply with the procedures or not?

"DR. LOPEZ: First I have to ask and I asked before, are you making that under the Brown Act?

"MR. PATTERSON: Are you going to comply with the procedures or not?

"DR. LOPEZ: I asked a question, Mr. Patterson. You're the hearing advisor."

The Trustees, having given Dr. Lopez several opportunities to behave civilly, immediately recessed the hearings to the following day, "with only the students, their parents, attorney, advocate, and press present."

On December 20, 2000, the hearings resumed at 9:00 a.m. The Trustees' legal advisor invited Dr. Lopez to resume his cross-examination. Instead, Dr. Lopez stated, "pursuant to Education Code section 48918(a), the students will ask for a 30-day postponement," and apparently presented a document making such a written demand. Without waiting for a reply, he told his clients, "Let's go"; Dr. Lopez, the accused students and their families apparently then left the hearing room en masse. The Trustees denied the request for a postponement and directed an officer in attendance to inform Dr. Lopez and the students, who were apparently outside the hearing venue, that the hearings would be immediately resumed. Dr. Lopez reportedly said, "'They can do what they want,'" and departed.

The hearings then resumed with documentary and testimonial evidence. Ultimately the Trustees voted to expel all six students.

The students appealed their expulsions to the County Board. The County Board affirmed all six expulsions.

C. Writ Proceedings

The students then filed a petition for writ of administrative mandate, alleging numerous errors in the disciplinary proceedings. The trial court ruled against the students as to each point raised, save one: the Trustees' refusal to issue subpoenas for the

students' requested witnesses. Otherwise, the court would have affirmed the expulsions, with certain modifications not pertinent here. The trial court construed the relevant provisions of the Education Code to impose upon the Trustees a mandatory duty to issue the requested subpoenas; the refusal to do so deprived the students of due process and required either a new hearing, with the opportunity to subpoena witnesses, or expungement of the students' records.

The court's judgment denied the students' request for attorney fees and costs under Government Code section 800.[4] The students brought a new motion for attorney fees, however, before another judge on a private attorney general theory[5] and were awarded attorney fees.

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[4] Government Code section 800 provides: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.

"This section is ancillary only, and shall not be construed to create a new cause of action.

"Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section."

[5] Code of Civil Procedure section 1021.5.

D. Present Appeal

The Trustees, individually and as a governing board, the District, and the high school principal and vice-principal (collectively, defendants) appealed the judgment and the award of attorney fees. Defendants raise two points on appeal. First, they argue that the trial court misconstrued the pertinent statutory provisions. Defendants maintain that the relevant statute empowers school governing boards to issue subpoenas as a discretionary matter, and that issuing subpoenas is not mandatory upon request. Second, defendants argue the award of private attorney general attorney fees was improper.

ANALYSIS

I. The Subpoena Issue

A. Standard of Review

The main thrust of the appeal turns on the proper interpretation of Education Code section 48918, subdivision (i)(1). Statutory construction is a question of law, which this court reviews de novo.[6]

B. Education Code Section 48918

Education Code section 48918 provides, among other things, for an evidentiary hearing when the governing board proposes to expel a pupil. Provisions dealing with notice, the opportunity to appear at the hearing, the attendance of counsel or an advocate, preparation of findings and of an administrative record, are included. As pertinent here,

Education Code section 48918 provides: "The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. These procedures shall include, but are not necessarily limited to, all of the following:

". . . . . .

"(i)(1) Before the hearing has commenced, the governing board may issue subpoenas at the request of either the superintendent of schools or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. Enforcement of subpoenas shall be done in accordance with Section 11525 of the Government Code.

"(2) Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if so requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.

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[6] *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.

"(3) If the governing board, hearing officer, or administrative panel determines, in accordance with subdivision (f), that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena shall not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided for in subdivision (f)."

The question is whether the provision that the Trustees "may" issue subpoenas is a grant of discretionary power, or whether the statute creates a mandatory duty to issue subpoenas on request.

C. The Trial Court's Interpretation of the Statute

The trial court interpreted the word "may" in Education Code section 48918, subdivision (i)(1) simply as a term granting subpoena power. In other words, where there had previously been no subpoena power vested in school district governing boards, the Legislature extended a grant of such power to the board: "the Legislature is granting subpoena power to the board by saying that the board may issue subpoenas." The trial court accepted the students' argument that, "*in the context of a statute defining a public duty*, the word 'may' is *mandatory*."[7] Further, cases in which the administrative agency at issue did not have subpoena power suggested to the court that "*if an administrative agency does have subpoena power*, a party is *entitled* to use it as a matter of right.

Otherwise, there would be no [reason that] the court would assume that the plaintiff 'would have enjoyed' that subpoena power if the board had possessed it."[8] The trial court below therefore viewed the statutory language, that a school district governing board "may" issue subpoenas, as mandatory: i.e., the board "is without discretion *not* to use [their subpoena powers] to issue subpoenas on the request of a party before it."

D. Education Code Section 48918, Subdivision (i)(1) Vests School Boards With Discretionary Power to Issue Subpoenas in Expulsion Proceedings

"'Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law.'"[9] In so doing, "[w]e consider first the words of the statute because they are generally the most reliable indicator of legislative intent."[10] We "'giv[e] to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both

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[7] Citing *Mass v. Board of Education* (1964) 61 Cal.2d 612, 622-623.

[8] Citing *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 299, 304 quoting *Wool v. Maryland-Nat. Capital Park & Plan. Com'n* (D. Md. 1987) 664 F.Supp. 225, 230-231: "If the Board had possessed subpoena power, plaintiff would have enjoyed an additional avenue through which to present evidence in this case. But in light of the other means available to plaintiff, this Court is not convinced that the lack of subpoena power denied plaintiff the minimum procedural protections required by the Fourteenth Amendment."

[9] *In re J.W.* (2002) 29 Cal.4th 200, 209.

internally and with each other, to the extent possible.'"[11] Rules of statutory construction are not to be rigidly applied in isolation, however. The touchstone is always the intent of the legislation. Thus, for example, the California Supreme Court has noted that "the rule against interpretations that make some parts of a statute surplusage is only a guide and will not be applied if it would defeat legislative intent or produce an absurd result."[12] Similarly, the "courts do not apply the *expressio unius est exclusio alterius* principle 'if its operation would contradict a discernible and contrary legislative intent.' [Citations.]"[13]

The correct construction of a statute is not divorced from its context. "To determine the purpose of legislation, a court may," therefore, properly "consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice."[14]

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[10] *In re J.W., supra,* 29 Cal.4th 200, 209.

[11] *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.

[12] *In re J.W., supra,* 29 Cal.4th 200, 209.

[13] *In re J.W., supra,* 29 Cal.4th 200, 209.

[14] *In re J.W., supra,* 29 Cal.4th 200, 211.

1. The Words Do Not Evince an Intent to Create a Mandatory Duty to Issue Subpoenas

We look first to the words of the statute themselves. Education Code section 48918, subdivision (i)(1) states that the governing board "*may* issue subpoenas." (Italics added.) Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a mandatory or directory duty.[15] This distinction is particularly acute when both words are used in the same statute.[16]

Education Code section 48918, subdivision (i)(2) provides that the governing board may rule upon any objections to the issuance of subpoenas, and that the governing board's decision regarding any such objection "shall be binding and final." Education Code section 48918, subdivision (i)(2) thus assumes that the issuance of subpoenas is subject to some kind of evaluation by the governing board, and that the results of the governing board's evaluation lay the issue to rest.

Where the statutory language is clear and unambiguous, there is no need for judicial construction.[17] Giving the words used here their ordinary import and meaning, we discern no particular ambiguity. The Legislature is presumably aware of the ordinary

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[15] *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1144-1145.

[16] *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443; *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1420.

[17] *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519; *Praiser v. Biggs Unified School Dist.* (2001) 87 Cal.App.4th 398, 401.

meaning assigned to the words "may" and "shall," and has used the word "shall" almost exclusively in enacting Education Code section 48918. The word "may" has been reserved for use only in stating that "the governing board *may* contract with the county hearing officer"[18] to conduct an expulsion hearing, rather than conducting the hearing itself, and that the governing board "*may* issue subpoenas."

Based solely on the language of the statute, we would conclude that Education Code section 48918, subdivision (i)(1) prescribes a permissive, rather than a mandatory, act.

The matter is not wholly free from all doubt, however; assuming that the provision is ambiguous, we may look to other aids in interpreting its meaning: If the statutory language is ambiguous, we may look to the legislative history, the background of the enactment, including apparent goals of the legislation, and public policy, to determine its meaning.[19] We turn to these matters next.

2. The Legislative History and the Purpose of the Legislation Indicate an Intent to Make Issuance of Subpoenas a Matter of Discretion

The history of the enacting legislation demonstrates that, contrary to the students' thesis, Education Code section 48918, subdivision (i)(1) was intended to grant a discretionary authority, not to impose a mandatory duty. Education Code section 48918,

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[18] Education Code section 48918, subdivision (d).

subdivision (i) began life as Assembly Bill 618 (AB 618), introduced by Assembly Member William Morrow. In its original form, AB 618 proposed to add a new subdivision to Education Code section 48918, as follows:

"(i)(1) Before the hearing has commenced, the governing board *shall* issue subpoenas and subpoenas duces tecum at the request of either the county superintendent of schools or his or her designee or the pupil, for the attendance of witnesses or the production of documents at the hearing. After the hearing has commenced, the governing board of the hearing officer or administrative panel may, upon request of either the county superintendent of schools or his or her designee or the pupil, issue subpoenas and subpoenas duces tecum. . . ." (Italics added.)

The Legislative Counsel's Digest of the introduced bill explained: "Existing law requires the governing board of each school district to establish rules and regulations governing procedures for the expulsion of pupils, including a procedure that provides a pupil with a hearing to determine whether the pupil should be expelled. . . .

"This bill would *require*, before a hearing on an expulsion has been commenced, the governing board of the school district to issues subpoenas and subpoenas duces tecum for the attendance of witnesses or the production of documents at the request of the county superintendent of schools . . . or of the pupil. The bill would *authorize*, after the

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[19] *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.App.4th 116, 129;
[footnote continued on next page]

hearing on an expulsion has commenced, the governing board or the hearing officer or administrative panel to issue subpoenas or subpoenas duces tecum at the request of the county superintendent of schools . . . or of the pupil.

". . . . . .

"*Because the bill would place a new duty on the governing boards of school districts, it would constitute a state-mandated local program.*" (Italics added.)

The impetus for the bill apparently was the concern expressed by one school superintendent that the power to compel witnesses to attend expulsion hearings was necessary when witnesses were reluctant to testify.

An exchange of views among legislators and interested school groups resulted in modifications to the proposed bill. Among other things, some school officials believed that granting the subpoena power would make expulsion hearings more like civil or criminal courtroom trials: more cumbersome, more formal, more contentious, more protracted and more expensive. Some feared that making issuance of subpoenas mandatory would lead to abuses by pupils, and would clog hearings with numerous "character" and other collateral witnesses. Further, school board members are often not trained in the law, and would have difficulties ruling on objections to subpoenas, or in

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Case v. Lazben Financial Co. (2002) 99 Cal.App.4th 172, 186.

distinguishing legitimate from illegitimate uses of the subpoena power. Changes were suggested to address these problems.

The bill as amended read [with deletion indicated in strikeout type and additions in italics]:

"(i)(1) Before the hearing has commenced, the governing board ~~shall~~ *may* issue subpoenas ~~and subpoenas duces tecum~~ at the request of either the ~~county~~ superintendent of schools or ~~his or her~~ *the superintendent's* designee or the pupil, for the ~~attendance of~~ *personal appearance of percipient* witnesses ~~or the production of documents~~ at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or ~~his or her~~ *the superintendent's* designee or the pupil, issue subpoenas ~~and subpoenas duces tecum~~. . . ."

The Legislative Counsel's Digest of the amended bill reflected the changes [alterations indicated as before]: "This bill would ~~require~~ *authorize*, before a hearing on an expulsion has been commenced, the governing board of the school district to issue subpoenas ~~and subpoenas duces tecum~~ for the ~~attendance of~~ *personal appearance of percipient* witnesses ~~or the production of documents~~ at the request of the ~~county~~ superintendent of schools or ~~his or her~~ *the superintendent's* designee or of the pupil. . . .

". . . . . .

"~~Because the bill would place a new duty on the governing board of school districts, it would constitute a state-mandated local program~~. . . ."

The amended language of the bill was retained in the final enactment of Education Code section 48918, subdivision (i).

In our view, the alterations demonstrate with reasonable certainty that, although the bill as originally proposed would have created a mandatory duty to issue subpoenas before the hearing had commenced, and discretionary power to issue subpoenas once the hearing had begun, the bill as amended provided only for discretionary issuance of subpoenas, whether before or after the hearing had begun.

Revisions to a bill may properly be considered in construing the resulting statutory language.[20] Here, the Legislature specifically rejected the word "shall" in the enactment, replacing it with the word "may." Further, the Legislative Counsel's Digest initially reported that school boards would be "required" to issue subpoenas upon request, but amended the description of the bill simply to "authorize" school boards to issue subpoenas -- a sensible description of a grant of power where there had been none before. The bill as introduced was originally described as imposing a "new duty" on school boards, thus creating a state-mandated local program. The description of the amended bill deleted any reference to imposing a duty upon local school boards. (The bill as amended was ultimately evaluated as creating a state-mandated local program, however, but only insofar as enforcement of subpoenas in the superior court could result in reluctant witnesses being found guilty of a criminal contempt.)

We must construe an enactment to effectuate, and not to frustrate, the purpose of the law.[21] The purpose of the legislation also militates in favor of construing the statute as granting an exercise of discretion, rather than creating a mandatory public duty to issue subpoenas. The legislative committee reports described the purpose as, "to make expulsion hearings more effective." That is, the proponents argued, "the subpoena power will increase the effectiveness of expulsion hearings by ensuring that vital witnesses (i.e., *those who perceived the conduct*) will participate. Currently, many witnesses do not appear at hearings." (Italics added.)

It thus appears that the amendments to AB 618, restricting the issuance of subpoenas to "percipient witnesses" were intended to curb potential abuses by, e.g., subpoenaing numerous "character" witnesses, or witnesses who did not perceive the alleged misconduct, but whose evidence relates to collateral issues only.

Our interpretation fully accords with the maxim that statutes should be construed so as to avoid absurd results.[22]

Construing Education Code section 48918, subdivision (i) to require mandatory issuance of subpoenas upon request would foreseeably embroil school boards in

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[20] See *People ex rel. Mautner v. Quattrone* (1989) 211 Cal.App.3d 1389, 1396.

[21] *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.

[22] *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 142; *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500, 505.

protracted pre-hearing proceedings solely concerning contested rulings on the issuance of subpoenas. As correspondence during the pendency of AB 618 indicated, school board members are often volunteer citizens, untrained in the intricacies of evidence and legal procedures. Further, setting the pre-hearing subpoena proceedings and objections to one side, making expulsion hearings into full-blown trials, with the compelled attendance of many witnesses, will do little to enhance effectiveness of expulsion hearings. The purpose of the legislation is manifestly to provide school boards with a tool to be used when it is of benefit, rather than to create a mandatory duty to issue subpoenas upon demand.

We note in passing that there is no necessity that the power to issue subpoenas be mandatory, or even that such a power exist all, to satisfy due process requirements. "'It is entirely possible that an agency without subpoena powers could secure the voluntary appearance of witnesses whose testimony would be sufficient to establish a substantial case . . . .' [Citation.]"[23] The mere provision of a subpoena power does not, therefore, in itself require that the power be mandatory, rather than discretionary. Here, the context and background compel the conclusion that the power granted was intended to be discretionary.

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[23] *Townsel v. San Diego Metropolitan Development Bd.* (1998) 65 Cal.App.4th 940, 951.

E. Discretion to Issue Subpoenas Must Not Be Exercised Arbitrarily

"Hundreds of laws and regulations are subject to interpretation and application by state and local agencies designated to administer them; in so doing, the exercise of discretion is common. And the courts routinely review these decisions for 'abuse of discretion.'"[24] An administrative agency may abuse its discretion if it acts arbitrarily or capriciously. More pertinently here, "[a] refusal to exercise discretion is itself an abuse of discretion."[25] Thus, "although mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a particular result, it does lie to command the exercise of discretion—to compel some action upon the subject involved under a proper interpretation of the applicable law."[26]

Here, the Trustees apparently adopted a blanket policy never to issue subpoenas. In so doing, the Trustees in essence abdicated their discretion, rather than exercising it. This, they may not do. Nonetheless, by analogy to the mandate of the California Constitution, article VI, section 13, we discern no miscarriage of justice which has resulted from the Trustees' procedural error in refusing to issue subpoenas in this case.

F. No Abuse of Discretion Resulted From the Refusal to Issue Subpoenas in This Case

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[24] *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1077.

[25] *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63.

[26] *Morris v. Harper*, *supra*, 94 Cal.App.4th 52, 63.

The students named many witnesses -- individual Trustees, other administrators, numerous football coaches, and other school personnel -- and claimed they were "percipient" witnesses to the events at issue. They backed up these claims, however, with nothing other than bald assertion. The only witness as to whom Dr. Lopez made an offer of proof was one of the Trustees, not to give evidence regarding the incidents for which the students were to be expelled, but to explain the Trustees' decision-making process in refusing the subpoenas. There was not the slightest indication that any of the named witnesses for whom subpoenas were sought had any relevant information to impart. Dr. Lopez's entire conduct of the proceedings on the students' behalf exposed his manifest purposes: delay, obstruction, obfuscation, disruption, harassment -- in short, anything other than an attempt to determine the factual truth of the charges against the accused students. The matter has proceeded all the way through this appeal without identifying a single relevant purpose for the attendance of any of the requested witnesses.

We also find it significant that the students and their representatives walked out of the hearing. They never availed themselves even of the due process rights they were afforded; manifestly, Dr. Lopez's purpose was to thwart the proceedings and attempt to create "built-in" error. The Trustees were not required to kowtow to such belligerent truculence; thus we could not find any abuse of discretion under these facts in failing to issue the demanded subpoenas.

G. Reversal of the Judgment Granting the Writ Is Required

The students sought writ review of the administrative proceedings below, asserting numerous grounds of error. The trial court reviewed each contention with great care. Aside from the subpoena issue, the court would have affirmed the expulsions, with some slight modifications to the findings, in each case. The writ was granted solely on the ground that the Trustees had a mandatory duty to issue the requested subpoenas, and the refusal to do so deprived the students of due process in the expulsion hearings. The students have not appealed the judgment, and thus have not challenged the trial court's rulings as to any of their other grounds for the petition. We have interpreted the statute differently from the trial court, however, to grant a discretionary authority to issue subpoenas, rather than to create a mandatory duty to do so.

Accordingly, the judgment granting the writ must be reversed. The trial court is directed to issue a new judgment denying the writ.

II. The Attorney Fees Issue

The students first requested attorney fees of the trial court as prevailing parties, under Government Code section 800. The court denied the motion for fees. The students renewed their request on a new theory, the private attorney general theory, before a different judge. The new judge granted private attorney general fees under Code of Civil Procedure section 1021.5. Defendants appealed this order.

Private attorney general fees are available under Code of Civil Procedure section 1021.5 only to a "successful" party. Inasmuch as we have reversed the judgment as to

the sole issue upon which the students prevailed, they cannot be considered successful parties. The award of attorney fees under Code of Civil Procedure section 1021.5 must therefore be reversed also.

DISPOSITION

For the reasons stated, the judgment must be reversed, insofar as the trial court granted the writ on the ground of due process violation for refusal to issue subpoenas to the students' proposed witnesses. No other ruling concerning the merits of the writ was appealed. The trial court is therefore directed to enter a new judgment denying the writ.

The order granting the students' attorney fees must also be reversed.

Defendants and appellants to recover costs on appeal.

CERTIFIED FOR PUBLICATION

/s/Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.

272 Cal.App.2d 486
77 Cal.Rptr. 344
(Cite as: 272 Cal.App.2d 486)

C

THE PEOPLE, Plaintiff and Respondent,
v.
SY MEJIA, Defendant and Appellant.

Crim. No. 15905.

Court of Appeal, Second District, Division 1, California.

Apr. 30, 1969.

HEADNOTES

(1a, 1b, 1c, 1d, 1e, 1f) Arrest § 10--Without Warrant--On Charge of Felony on Reasonable CauseSearches and Seizures § 6--Investigations Falling Short of Search.
Circumstances justified defendant's detention by officers for questioning and his subsequent arrest by the officers, and a gun obtained from defendant was not obtained as the result of an unlawful search and seizure but as incident to the arrest, no issue of unlawful search and seizure being presented, where, at a late night hour and soon after a report of a burglary in progress, defendant was observed by the officers near the scene of the burglary carrying a package covered by a coat, and, after being spotlighted by the officers, continued to walk away, and where, after being halted by the officers, defendant dropped the package which broke and plainly revealed portions of the firearm and ammunition, at which time the officers placed defendant under arrest on suspicion of burglary.

(2) Criminal Law § 413.5(3)--Evidence--Motion to Suppress.
In a prosecution for violation of the Dangerous Weapons Control Act, in which defendant's pretrial motion to suppress evidence was denied, the trial court did not fail to exercise its discretion *487 in determining whether to allow defendant to renew such motion after the prosecution rested, where defendant's attempt to reargue the issue without a motion for leave therefor was sufficient to call the court's attention to the matter and the court seriously considered the same and ruled that further argument would not be allowed.

(3a, 3b) Arrest § 5.5--Detention Short of Arrest.
Circumstances short of probable cause for an arrest which would indicate to a reasonable man in a like position that an investigation was necessary to the discharge of his duties may justify temporary detention of a person by an officer for the purpose of questioning.

(4) Arrest § 5.5--Detention Short of Arrest.
Where the circumstances justified defendant's temporary detention for questioning by police officers, their order to defendant to "Hold it for a minute," did not constitute an arrest.

(5) Searches and Seizures § 6--Investigations Falling Short of Search.
Merely looking at that which is open to view is not a search.

(6) Arrest § 10--Without Warrant--On Charge of Felony on Reasonable Cause.
A peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony.

See **Cal.Jur.2d, Rev.,** Arrest, § 28 et seq.; **Am.Jur.2d,** Arrest, § 44 et seq.

(7) Arrest § 12(7)--Reasonable or Probable Cause--Test for Determining Reasonableness.
Reasonable cause for arrest exists when the facts and circumstances within the knowledge of the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Maurice T. Leader, Judge. Affirmed.

Prosecution for violation of the Dangerous Weapons Control Act. Judgment of conviction affirmed.

COUNSEL

Richard H. Levin, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and George J. Roth, Deputy Attorney General, for Plaintiff and Respondent.

LILLIE, J.

Defendant was charged with a violation of the Dangerous Weapons Control Act (§ 12021, Pen. Code) and *488 three prior felony convictions (Dyer Act [1946]; violations, section 211, Penal Code [1947], section 11500, Health and Safety Code [1953]). After his arraignment defendant moved to suppress the evidence under section 1538.5, Penal Code, and to dismiss under section 995, Penal Code; both motions were denied. Defendant then entered a plea of not guilty. By stipulation the cause was submitted on the transcript of the testimony taken at the preliminary hearing. After the commencement of the trial, the court had read and considered the transcript and the People had rested their case defendant sought to reargue the issue of unlawful search and seizure; noting that a motion to suppress the evidence pursuant to section 1538.5, Penal Code, and a motion to dismiss under section 995, Penal Code, had been made prior to trial and denied, the trial court refused to permit the reargument. Defendant was found guilty as charged; the court made no finding on the allegations of the three prior felony convictions. Defendant appeals from the judgment.

Around 12:30 in the morning on March 21, 1968, several police vehicles responded to "a burglary there now" radio call; they arrived at the location within five minutes. About 75 feet from the location where the burglary was reported to be in progress Officer Michael saw defendant walking on the street away from the premises; no other pedestrians were in the area. Defendant was illuminated by a spotlight from the black and white police vehicle but he paid no attention to it and continued walking carrying a coat over his left arm and a package beneath the coat. Officer Michael got out of the police car approximately 25 feet behind defendant and started to follow him; another officer got out in front of defendant and told him to "Hold it for a minute." Defendant then walked toward the curb and the officer and as he did so dropped the package from his left side which, when it hit the curb and parkway, made a metallic sound and split open, and continued walking. Officer Michael was 5 to 10 feet behind defendant; when he "got there"-where the package lay-it was split open revealing the grips of a weapon, portions of a clip and .45 caliber rounds; he then arrested defendant on suspicion of burglary after which he picked up the package, which lay about 4 feet from where he had arrested defendant, made an examination of the contents and found a .45 caliber automatic. Defendant denied "knowledge of possession of the package." Officer Gelb made an examination of the fingerprints on the gun and identified them as belonging to defendant; *489 an abstract of judgment reflected that on August 15, 1958, defendant was sentenced to the state prison pursuant to a plea of guilty to a violation of section 211, Penal Code.

Defendant took the witness stand and very briefly testified that "this particular firearm" was not his personal property.

(1a) Appellant's main contention is that the evidence was obtained by an unlawful search and seizure. (2) Prior to trial defendant did not seek appellate review of the court's denial of his pretrial motion to suppress the evidence by way of petition for writ of mandate or prohibition (§ 1538.5, subd. (i), Pen. Code) but, believing that subdivision (n) of section 1538.5 permitted him to do so, during the trial after the People rested their case attempted to raise the issue of unlawful arrest, search and seizure and direct an argument thereto. Commenting that pretrial motions under sections 1538.5 and 995, Penal Code, had been made and denied, the trial court stated it would "entertain no further argument as to those issues ... raised at the time of 1538.5 and 995." Defendant then abandoned his argument and took the stand on the merits of his defense denying that the weapon belonged to him. Appellant now says that he "specifically requested permission to renew the motion" and that the "trial judge denied the motion that he be permitted to renew the motion to suppress." The record reveals neither a request for permission to renew defendant's motion to suppress the evidence nor a motion that he be permitted to renew it, and technically he did not make one but his attempt to direct an argument to the issue of unlawful arrest, search and seizure was sufficient to call the court's attention thereto. However, to say, as does appellant here, that the trial court failed to exercise its discretion in

determining whether to grant a defense motion to renew the motion to suppress (if indeed it was a motion) is nonsense for the court did give serious consideration to his attempt to reargue the issue and decided not to permit another argument thereon. There is a clear exercise of discretion manifest in the record and not the arbitrary denial asserted by appellant. (1b) Moreover, his contention that he was arrested without probable cause and the gun was the product of an unlawful search and seizure is without merit.

It is readily apparent that in ordering defendant to "Hold it for a minute," the initial detention was intended by the officer to be but a temporary one for investigation only. (3a) Circumstances short of probable cause for an arrest may justify temporary detention of a person on the street late ***490** at night by an officer for the purpose of questioning. (*People v. Mickelson*, 59 Cal.2d 448, 450 [30 Cal.Rptr. 18, 380 P.2d 658]; *People v. Martin*, 46 Cal.2d 106, 108 [293 P.2d 52]; *Terry v. Ohio*, 392 U.S. 1 [20 L.Ed.2d 889, 88 S.Ct. 1868].) (1c) Here there was ample justification for ordering defendant to stop-the lateness of the hour, his close proximity to and movement away from the premises reported to have been burglarized with a package covered by a coat and his unusual behavior when illuminated by the police car spotlight; it was at this point the officer told him to "Hold it for a minute." (3b) "The circumstances which allow temporary detention are those which 'indicate to a reasonable man in a like position that an investigation is necessary to the discharge of his duties.' (*People v. Gibson*, 220 Cal.App.2d 15, 20 [33 Cal.Rptr. 775].)" (*People v. Manis*, 268 Cal.App.2d 653, 659 [74 Cal.Rptr. 423] ; *People v. Piedra*, 183 Cal.App.2d 760, 761-762 [7 Cal.Rptr. 152].) Had the officer not stopped defendant and sought an explanation of his peculiar conduct he would have been derelict in his duties. (4) The evidence does not warrant a claim that initially the approach of the officers was for any purpose other than questioning; and their order to defendant to "hold it" that they could investigate and talk to him does not constitute an arrest. (*People v. Williams*, 220 Cal.App.2d 108, 112-113 [33 Cal.Rptr. 765].)

(1d) It was not until defendant dropped the package, which made a metallic sound and split open revealing the contents when it hit the curb, and continued walking and Officer Michael, following a few feet behind, observed the package on the parkway to contain the grips of a weapon, portions of a clip and .45 caliber rounds, that defendant was arrested. Before the arrest the gun was not the product of any unlawful search and seizure; Officer Michael did not search to find the gun, nor did he pick it up. When he first observed the weapon it was partially exposed in the package split open on the parkway; it was in plain sight for all to see. (5) The mere looking at that which is open to view is not a search. (*People v. Nieto*, 247 Cal.App.2d 364, 370 [55 Cal.Rptr. 546]; *Mardis v. Superior Court*, 218 Cal.App.2d 70, 74-75 [32 Cal.Rptr. 263]; *People v. Spicer*, 163 Cal.App.2d 678, 683 [329 P.2d 917]; *People v. West*, 144 Cal.App.2d 214, 219-220 [300 P.2d 729].) (1e) As to the arrest there can be no question but that it was a lawful one. With defendant's unexpected conduct and Officer Michael's observation of the contents of the package, the officers' opportunity for further investigation ***491** ceased, and immediate action was required; under the circumstances Officer Michael could not be expected to do other than make the arrest. (6) A peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony. (§ 836, Pen. Code; *People v. Lara*, 67 Cal.2d 365, 374 [62 Cal.Rptr. 586, 432 P.2d 202]; *People v. Schader*, 62 Cal.2d 716, 722 [44 Cal.Rptr. 193, 401 P.2d 665]; *People v. Ingle*, 53 Cal.2d 407, 412 [2 Cal.Rptr. 14, 348 P.2d 577].) (7) "Reasonable cause exists when the facts and circumstances within the knowledge of the officer '... at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense had been committed. *Carroll v. United States*, 267 U.S. 132, 162 [45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790].' (*Beck v. Ohio* (1964) 379 U.S. 89, 96 [85 S.Ct. 223, 13 L.Ed.2d 142].)" (*People v. Schader*, 62 Cal.2d 716, 722 [44 Cal.Rptr. 193, 401 P.2d 665]; *People v. Cockrell*, 63 Cal.2d 659, 665 [47 Cal.Rptr. 788, 408 P.2d 116].) (1f) Nor is there a valid issue of unlawful search and seizure because it was not until defendant was placed under arrest that Officer Michael picked up the package, closely examined the contents and retained the weapon (Exh. 3), and this he had a right to do for it was clearly incident to a lawful arrest; and if under such circumstances it can be said that Officer Michael's conduct in picking up the package from the public parkway constituted a search and seizure of the gun it was

not "unreasonable" within the meaning of the Fourth Amendment. (*People v. Lara*, 67 Cal.2d 365, 373 [62 Cal.Rptr. 586, 432 P.2d 202]; *People v. Webb*, 66 Cal.2d 107, 111-112 [56 Cal.Rptr. 902, 424 P.2d 342, 19 A.L.R.3d 708].) Whether the package had ever been in defendant's possession was, of course, a factual question and the holding that it had been was fully supported by defendant's fingerprints on the gun and Officer Michael's testimony that he saw defendant drop the package containing the weapon.

Finally, appellant's reliance on *Gascon v. Superior Court*, 169 Cal.App.2d 356 [337 P.2d 201], and *Badillo v. Superior Court*, 46 Cal.2d 269 [294 P.2d 23], is misplaced. In *Gascon* the officers had threatened to illegally search the accused; in *Badillo*, the premises from which petitioner fled had been illegally entered by the investigating officer. Thus, in both cases "the petitioner was fleeing from the attempted illegal invasion of his constitutional rights." (*Gascon v. Superior Court*, 169 Cal.App.2d 356, 359 [337 P.2d 201].) In the instant case ***492** there was no statement or act indicating any illegal invasion of defendant's rights. In the light of "the presumption that official duty will be regularly performed" (*People v. Piedra*, 183 Cal.App.2d 760, 762 [7 Cal.Rptr. 152]), any suggestion that there was an implied threat of illegal search or unlawful arrest by the officers in ordering defendant to stop for the purpose of investigation, is wholly unwarranted on the record before us.

The judgment is affirmed.

Wood, P. J., and Fourt, J., concurred.

Cal.App.2.Dist.,1969.

People v. Mejia

END OF DOCUMENT

Original List Date: 7/6/2001
Last Updated: 3/26/2003
List Print Date: 06/04/2003
Claim Number: 00-TC-18
Issue: Postmortem Examinations: Unidentified Bodies, Human Remains

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 8, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of July 9, 2001, the Department of Finance has reviewed the test claim submitted by the County of Los Angeles (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 284, Statutes of 2000, (SB 1736 Rainey et al.), are reimbursable state mandated costs (Claim No. CSM-00-TC-18 "Postmortem Examinations & Unidentified Bodies, Humans Remains").

The test claimant asserts the following duties have resulted in costs to local government which it asserts are reimbursable state mandates:

- The collection of additional information regarding the examination of a postmortem autopsy which would include fingerprints and palm prints, a specified dental examination, the collection of tissue as specified, specific photographs of the body, photographs of scars/marks/tattoos/clothing items, or other personal effects found with or near the body, notations of observations to the estimation of the time of death, and precise documentation of the location of the remains.
- The discretion to include full body x-rays in the examination.
- The preparation of a final report of investigation to the Department of Justice (DOJ) in a format determined by DOJ with specific information listed.
- The required retention of specific jaw bone parts and other tissue samples for future use, unless the coroner determines the condition of the body is too far deteriorated to achieve this collection. The body is not allowed to be cremated or buried until the specified tissues are removed.
- If identification cannot be determined with the aid of dental identity and examination, the submission of dental records, examination records, and charts to DOJ on forms supplied by DOJ within 45 days of the date the body or remains were discovered.
- If identification cannot be determined as specified, the coroner shall submit the final report of investigation to DOJ within 180 days of the date the body or human remains were discovered.
- Local law enforcement involved must report the death of an unidentified person to DOJ no later than 10 days after discovery of the body or remains.

As a result of our review, we have made several conclusions regarding this claim. With regards to the first six elements concerning the autopsy procedure on unidentified remains, these test claim elements are discretionary in nature. Pursuant to Government Code Section 27491, we have determined that the decision by a coroner to examine unidentified remains (other than DNA sampling) is a discretionary act that is not currently required by the State nor was it required prior to the enactment of this test claim. In that regard, any subsequent requirements regarding such an examination's procedures are only initiated when a coroner chooses to examine unidentified remains. The investigating law enforcement agency's report to DOJ is discretionary as well. The local law enforcement agency has to first choose to go forward with a criminal investigation. The DOJ report is only initiated once the discretion to investigate a related case is exercised.

For the above stated reasons state we conclude that this test claim and its elements do not contain a state mandate that has resulted in a new activity or program and a reimbursable cost.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your March 21, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Todd Jerue, Principal Program Budget Analyst at (916) 445-8913 or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF TODD JERUE
DEPARTMENT OF FINANCE
CLAIM NO. 00-TC-18

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

AUG 8 2001

August 8, 2001 at Sacramento, CA

PROOF OF SERVICE

Test Claim Name: Postmortem Examinations: Unidentified Bodies, Human Remains
Test Claim Number: 00-TC-18

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On August 8, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
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Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 8, 2001 at Sacramento, California.

Mary Salomone

EXHIBIT D

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 1736

UNFINISHED BUSINESS

Bill No: SB 1736
Author: Rainey (R), et al
Amended: 8/8/00
Vote: 21

SENATE JUDICIARY COMMITTEE : 6-0, 4/11/00
AYES: Escutia, Haynes, Peace, Sher, Wright, Schiff

SENATE APPROPRIATIONS COMMITTEE : 13-0, 5/15/00
AYES: Johnston, Alpert, Bowen, Burton, Escutia, Johnson, Karnette, Kelley, Leslie, McPherson, Mountjoy, Perata, Vasconcellos

SENATE FLOOR : 39-0, 5/30/00 (Consent)
AYES: Alarcon, Alpert, Bowen, Brulte, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Hayden, Haynes, Hughes, Johannessen, Johnson, Johnston, Karnette, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Morrow, Mountjoy, Murray, O'Connell, Ortiz, Peace, Perata, Poochigian, Rainey, Schiff, Sher, Solis, Soto, Speier, Vasconcellos, Wright

ASSEMBLY FLOOR : 62-0, 8/18/00 (Passed on Consent) - See last page for vote

SUBJECT : Unidentified bodies and human remains: retention of evidence

SOURCE : Author

CONTINUED

Page 2

DIGEST : This bill prohibits the cremation or burial of an unidentified deceased person unless specified samples are retained for possible future identification, as specified.

This bill requires a coroner, where a deceased person cannot be identified, to conduct a medical examination with specified procedures, prepare a final report of the investigation, and forward this final report to the State Department of Justice if the deceased person remains unidentified 180 days after discovery.

Lastly, this bill requires the State Department of Justice to develop and provide the format of the reports (notice of investigation and final report of investigation) to be submitted regarding an unidentified deceased person.

Assembly Amendments authorizes, rather than requires, dental procedures. (See #2 in analysis.)

ANALYSIS : Existing law permits the coroner to engage the services of a dentist to carry out a dental examination if the coroner or medical examiner is unable to identify a deceased person by visual means, fingerprints or other identifying data.

Existing law requires the coroner or medical examiner to forward the dental examination records of the unidentified deceased person to the State Department of Justice (DOJ) on forms supplied by the DOJ, if the identify of the person still could not be established. Under current law, the DOJ acts as the repository or computer center for the dental examination records forwarded to it by coroners and medical examiners in the state.

This bill expands the efforts to identify deceased persons by specifying that any postmortem examination or autopsy conducted at the discretion of a coroner upon an unidentified body or human remains shall be subject to the provisions of this bill.

The bill requires that a postmortem examination or autopsy must include, but shall not be limited to, the following procedures:

1. Taking of all available fingerprints and palms prints.

2. A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

3. The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4. Frontal and lateral facial photographs with the scale indicated.

5. Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near he body.

6. Notations of observations pertinent to the estimation of the time of death.

7. Precise documentation of the location of the remains.

The bill provides that the postmortem examination or autopsy of the unidentified body or remains may include full body X-rays.

The bill requires the coroner to prepare a final report of investigation in a format established by the State Department of Justice (DOJ). The final report shall list or describe the information collected, pursuant to the postmortem examination or autopsy conducted by the coroner.

The bill provides that the body of an unidentified deceased person may not be cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

The bill provides that if the coroner, with the aid of the dental examination and any other identifying findings, is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to DOJ on forms supplied by DOJ within 45 days of the date the body or

human remains were discovered.

If the coroner, with the aid of the dental examination and other identifying findings, is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to DOJ within 180 days of the date the body or human remains were discovered.

This bill requires any law enforcement agency investigating the death of an unidentified person to report the death to DOJ no later than ten days after body or human remains were discovered.

This bill requires DOJ to compare and retain the final report of investigation that coroners and medical examiners send to DOJ.

Background

Sponsored by the California Society of Forensic Dentistry, this bill is the aftermath of years of volunteer consultant work done by members of the Society, helping DOJs Missing/Unidentified Persons Unit track down identities of approximately 2,200 unidentified dead persons in California. From their work, they say it has become clear that there is no consistent manner by which evidence is collected or retained, and that information reported to the Attorney General varies from grossly inadequate to extremely detailed. Further, unidentified bodies have been buried or cremated without the retention of evidence that could assist in the identification of the deceased at a future date.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

Fiscal Impact (in thousands)

Major Provisions	2000-01	2001-02	2002-03	Fund
Coroners	Unknown, potentially significant,			Local
nonreimbursable costs		probably		
Dept. of Justice	Under $150 annually			General

SUPPORT : (Verified 8/17/00)

California Dental Assistant Association
California Society of Forensic Dentistry
California Peace Officers Association
California Police Chiefs Association
California State Coroners Association
California State Dental Association
Attorney General
Numerous individuals

ARGUMENTS IN SUPPORT : According to the author's office, there are currently a total of 2,200 unidentified dead bodies in California. Even with the volunteer help of the California Forensic Dentistry members, coroners and medical examiners are not able to identify these human remains. The reason, they state, is that records are so inconsistent in content and quality, that it has been difficult to reconcile information from the coroner/medical examiner's investigation and information gathered by the DOJ on missing persons or victims of violent crimes. The State Coroners' Association's data reflect "the inconsistent nature of evidence collection and retention for unidentified deceased persons."

The bill establishes a statewide protocol for the investigations conducted pursuant to statute, expand the type of examination required, and require retention of jaws and other tissue samples indefinitely for possible identification in the future.

The DOJs Missing and Unidentified Persons Unit indicates they support this bill because it would improve their

ability to match their records of missing or unidentified persons with unidentified dead persons or human remains.

ASSEMBLY FLOOR :
AYES: Aanestad, Ackerman, Alquist, Aroner, Ashburn, Baldwin, Bates, Battin, Baugh, Bock, Briggs, Calderon, Cardoza, Corbett, Cox, Cunneen, Davis, Dickerson, Ducheny, Dutra, Floyd, Gallegos, Granlund, Havice, Honda, House, Jackson, Kaloogian, Keeley, Leach, Lempert, Leonard, Longville, Lowenthal, Machado, Maddox, Maldonado, Margett, Mazzoni, McClintock, Migden, Nakano, Olberg, Oller, Robert Pacheco, Papan, Pescetti, Runner, Scott, Shelley, Steinberg, Strickland, Strom-Martin, Thompson, Thomson, Torlakson, Washington, Wayne, Wiggins, Wildman, Zettel, Hertzberg

RJG:cm 8/19/00 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

100 Cal.App. 201
280 P. 163
(Cite as: 100 Cal.App. 201)

C

EMMA L. HUNTLY, Appellant,
v.
ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY et al., Respondents.

Civ. No. 6955.

District Court of Appeal, First District, Division 2, California.

August 1, 1929.

HEADNOTES

(1) DEAD BODIES--PROPERTY RIGHTS--CUSTODY--STATUTES.
In the absence of statutory provision, there is no property right in a dead body; and section 294 of the Penal Code, providing that a person charged by law with the duty of burying the body of a deceased person is entitled to the custody thereof for the purpose of burial, does not confer any property right.

See 8 **Cal. Jur.** 921, 928; 8 **R. C. L.** 684.

(2) LIMITATION OF ACTIONS--MUTILATION OF DEAD BODY--ACTION BY WIFE--PERSONAL INJURIES--SUBDIVISION 3, SECTION 340, CODE OF CIVIL PROCEDURE.
Where the gravamen of a cause of action by a wife for the mutilation of her deceased husband's body, as alleged, was the shock to plaintiff's mental and physical structure, and the wife introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria and nervousness, together with her physician's testimony of a similar character, the cause of action was one for an injury to plaintiff's person within subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for an injury to the person to be brought within one year.

See 8 **Cal. Jur.** 770.

(3) ID.--PERSONAL INJURIES--ACT OF FORCE OR BATTERY NOT NECESSARY--PRESUMPTIONS.
Under subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for any injury to the person to be brought within one year, it is not necessary that an act of force and violence or battery be inflicted upon plaintiff to constitute an "injury to the person," since when bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty, and adopts the nature of the damage as the test.

(4) ID.--ACTION FOR DAMAGES--STATUTORY CONSTRUCTION.
Subdivision 3 of section 340 of the Code of Civil Procedure, requiring an action for injury to another to be brought within one year, is intended to refer to actions for damages "on account of" personal injuries.

See 16 **Cal. Jur.** 472.*282

(5) ID.--NEGLIGENCE--DEATH--PERSONAL RIGHTS--PROPERTY RIGHTS--STATUTE OF LIMITATIONS.
The amendment to subdivision 3 of section 340 of the Code of Civil Procedure by Statutes of 1905, page 232, bringing within the one-year limitation causes of action for injury to or death of one caused by the wrongful act or neglect of another, was intended to embrace within its terms all infringements of personal rights as distinguished from property rights.

(6) CORONERS--DEAD BODIES--CAUSE OF DEATH--DISCRETION AS TO HOLDING INQUEST--AUTOPSY.
Under sections 1510 and 1512 of the Penal Code, authorizing the coroner to inquire into the cause of death in certain instances and hold post-mortem examinations, a coroner, having reasonable ground to suspect that the death of a person was sudden or unusual and of such a nature as to indicate the possibility of death by the hand of deceased, or through the instrumentality of some other person, has discretion to hold an inquest and should not be held responsible simply because at the conclusion of the inquest it has been determined that the deceased died a natural death.

See 6 **Cal. Jur.** 545.

(7) ID.--RIGHT TO ORDER AUTOPSY--CONSENT.
A coroner may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the cause of death, and this he may do without the consent of the family of the deceased.

When holding of autopsy justified, note, 48 **A. L. R.** 1209. See, also, 6 **R. C. L.** 1167.

(8) EVIDENCE--PERFORMANCE OF OFFICIAL DUTY--PRESUMPTIONS.
It is presumed, in the absence of a contrary showing, that official duty has been regularly performed, in view of section 1963 of the Code of Civil Procedure.

(9) CORONERS--AUTHORITY TO HOLD INQUEST--AUTOPSY.
Where an autopsy was performed on the body of deceased in another county, but no inquest was held, and upon arrival of the body of deceased his wife was dissatisfied with the finding of the autopsy surgeon and represented that the husband's death was sudden and caused by a terrible fall or violence of some sort and was not the result of natural causes, the coroner acted within his authority in ordering an inquest and authorizing his autopsy surgeon to proceed in the usual manner under sections 1510 and 1512 of the Penal Code.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Louis H. Ward, Judge. Affirmed.

The facts are stated in the opinion of the court. ***203**

COUNSEL

Raymond Perry for Appellant.

Ford, Johnson & Bourquin, John J. O'Toole, City Attorney, Henry Heidelberg, Assistant City Attorney, and J. Hampton Hoge for Respondents.

LAMBERSON, J.

pro tem.-Plaintiff appeals from orders of the Superior Court granting defendants' motions for nonsuit and from the resulting judgment entered in favor of defendants.

The action is one to recover damages from the defendants arising from their alleged acts in jointly causing an autopsy to be performed upon the body of Thomas H. Huntly, deceased, husband of plaintiff herein.

Mr. Huntly died in the county of Los Angeles on March 22, 1926. A partial autopsy was performed upon the body by a surgeon occupying the position of autopsy surgeon in the office of the coroner of Los Angeles County, under the authority of the coroner, but no inquest was held in that county. The body was shortly thereafter shipped to San Francisco, which was the home of the deceased and his wife. Upon its arrival in San Francisco the body was received by representatives of the defendants Suhr and H. F. Suhr Company, and taken to their undertaking establishment.

It appears that the autopsy surgeon at Los Angeles determined that the cause of death was angina pectoris, and the coroner issued a death certificate upon such finding. Apparently dissatisfied with the result of the examination in Los Angeles, the plaintiff asked the defendant Suhr to give her the name of some surgeon who could make a further examination of the body and determine for her benefit the nature of a bruise appearing upon the forehead of the deceased. Mr. Suhr referred plaintiff to defendant Strange, who was then occupying the position of autopsy surgeon under the defendant Leland, who was coroner of the city and county of San Francisco. In an interview with Dr. Strange plaintiff asked him some questions about the possible effect of a blow on the forehead of the deceased. Dr. Strange asked if there had been an autopsy and if the people who performed such autopsy had examined the head.

According to the testimony of Dr. Strange, who was called as a witness on behalf of plaintiff, plaintiff asked him to do a ***204** private autopsy upon the body of her husband. He asked her what kind of a death it was, and upon being informed that the deceased died while at work and as the result of an accident, Dr. Strange informed her that he did not believe he would have a right to perform a

private autopsy on a violent death case, and that plaintiff informed him that she wanted to have the skull opened to find out if there was a fracture, because she thought she was entitled to certain insurance as the result of a death by accident; that she was not satisfied that the cause of death was angina pectoris, and wanted Dr. Strange to open the head to find out if there was a fracture of the skull, and Dr. Strange informed her that the matter should be taken up through the coroner's office.

The matter was reported to the coroner, who was informed, according to the testimony, that a partial autopsy had been performed at Los Angeles. He ordered that an inquest be held, and that an autopsy be performed, and the body was later removed to the office of the coroner, where the autopsy was performed by Dr. Strange, who testified that there had been a prior incision, and that he opened the body by cutting the stitches; that the organs had all previously been cut loose and examined. He found the arteries hardened, and took small samples from the heart, as well as from other organs of the body. He also opened the head and examined the skull to see if there had been a fracture, and examined the brain to ascertain whether there had been a contusion or laceration of the brain. The organs, with the exception of the specimens, were returned to the body. The specimens, which included samples from the brain, heart, lungs, spleen, kidneys and liver, were placed in a six-ounce bottle, containing a fluid, and were delivered to the defendant Ophuls for microscopic and other examination. Ophuls, who was in the employ of the defendant insurance company, was not present at the autopsy and did not see the body of Mr. Huntly, but received the samples from attendants at the coroner's office.

In her opening brief appellant states that the defendants are sued as joint tort-feasors, the defendant insurance company for having employed the defendant Newlin to employ defendant Ophuls to remove the specimens; the defendant Newlin, who was present at the autopsy, for unlawfully witnessing the mutilation and employing Dr. Ophuls to remove the specimens; *205 defendant Ophuls for an unlawful examination and removal of specimens; defendant H. F. Suhr Company and Fred Suhr for the unlawful removal of the body from their parlors for the purpose of mutilating it; defendant Leland for unlawfully granting permission to perform the mutilation, for permitting the use of his office for an unlawful mutilation and for permitting the unlawful removal of specimens, and the defendant Strange for performing the mutilation. Plaintiff claims that the autopsy was performed without her consent or knowledge, and that she was not informed of the same until the defendant Newlin informed her of it at his office at some later date.

The plaintiff alleges, in substance, that on the twenty-second day of March, 1926, the coroner of the county of Los Angeles ordered his assistant autopsy surgeon to perform an autopsy upon the body of Thomas H. Huntly, and said surgeon did on that date perform a legal autopsy upon said body; that the defendants, and each of them, knew on the twenty-fourth day of March, 1926, that "the legal and only lawful autopsy" had been performed by and under the authority of the coroner of the county of Los Angeles.

The complaint then alleges as follows:

"X.

"That on the 24th day of March, 1926, said defendants, with knowledge that a lawful autopsy had been performed upon the body of Thomas H. Huntly, did cause said body of the late Thomas H. Huntly to be removed from the undertaking establishment of H. F. Suhr Company in the City and County of San Francisco, State of California, to the office of the coroner of the City and County of San Francisco, State of California, without the consent, knowledge, or authority of the plaintiff, and did mutilate, desecrate, violate and outrage, and commit an act of irreverence and profanation upon the body of the late Thomas H. Huntly, in that without the permission of the plaintiff, the widow of the said Thomas H. Huntly, and the lawful owner and possessor of said body, and without authority of law, did perform in the City and County of San Francisco, State of California, a mutilation, desecration and violation upon said body of said Thomas H. Huntly in this: that said defendants did cause the skull of said Thomas H. Huntly to be opened and the brains removed; the body of said Thomas H.*206 Huntly to be opened and specimens of the heart, lungs, kidneys, liver and spleen to be removed and said specimens of the heart, lungs, kidneys, liver, spleen and brains to be

delivered to the defendant William Ophuls, as the agent and representative of the defendant Zurich General Accident and Liability Insurance Company, a corporation.

"XI.

"That said mutilation, desecration, violation and outraging of the head and the body of her deceased husband was repugnant to the plaintiff, was offensive to and indecently insulted the said plaintiff, and by reason of said acts, and each of them, did cause the plaintiff a shock to her mental and physical equipoise, causing violent agitation of feeling and disturbances of her mind and wrecking her mental and physical equipoise, to her horror, mental anguish and extreme disgust, and disturbing permanently her peace of mind.

"XII.

"That by reason of the said acts of the defendants aforesaid the plaintiff has been damaged in the sum of $75,000.00."

The complaint was filed on May 6, 1927.

Upon the trial, and at the close of plaintiff's case, motion for nonsuit was made upon behalf of each of the defendants upon the ground, among others, that the action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and the motion was granted as to each of the defendants upon that ground.

Plaintiff contends that the cause of action stated in the complaint falls within the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which reads in part as follows: "Within two years: An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of section 337 of this code ... "

Defendants contend, on the other hand, that the action is one to recover damages for an injury to the person of the plaintiff, caused by the wrongful act of the defendants in mutilating, as alleged, the body of the deceased, and is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, which reads in part as follows: "Within one year ... 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury *207 to or for the death of one caused by the wrongful act or neglect of another."

The subdivision just quoted has undergone several amendments since its original enactment.

As enacted in 1872, it read "an action for libel, slander, assault, battery or false imprisonment." In 1874, the words "or seduction" were added, and in 1905, there were added the words "or for injury to or for the death of one caused by the wrongful act or neglect of another."

The primary question for consideration is the nature of the right upon which the plaintiff bases her cause of action.

[1] In the absence of statutory provision, there is no property in a dead body. (*Enos v. Snyder*, 131 Cal. 68 [82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170].)

Various statutes have been enacted for the purpose of enforcing, as well as protecting the duties which we owe to the bodies of the dead, as well as the public welfare and health. Among them is section 294 of the Penal Code, which provided at the time of the incident under examination as follows: "The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed."

The reservations and safeguards which have been placed around the right of possession by the relatives to the body of a deceased person have caused confusion in some cases, with the right of ownership, and have led to the use of the expression "*quasi* property." Numerous authorities, however, from earliest times to the present, support the conclusion of the courts of this state that there can be no ownership in a human body after death. An interesting discussion of the law, civil, common and ecclesiastical, is found in the case of *Pierce v. Proprietors Swan Point Cemetery*, 10 R. I. 227, 242 [14 Am. Rep. 667]. Therein the court said: "Although as we have said, the body is not property in the usually recognized sense of the word, yet we

may consider it as a sort of *quasi* property to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as ***208** the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship, have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed."

In the case of *Darcy v. Presbyterian Hospital*, 202 N. Y. 259 [Ann. Cas. 1912D, 1238, 95 N. E. 695], the Court of Appeals of New York said: "The most elaborate consideration of the question in the courts of this country appears in the case of *Larson v. Chase*, 47 Minn. 307 [28 Am. St. Rep. 370, 14 L. R. A. 85, 50 N. W. 238], in which, after an examination of authorities, both in this country and in England, the conclusion is reached that while no action can be maintained by the executor or administrator upon the theory of any property right in a decedent's body, the right to the possession of a dead body for the purpose of preservation and burial belongs to the surviving husband or wife or next of kin, in the absence of any testamentary disposition; and this right the law will recognize and protect from any unlawful mutilation of remains by awarding damages for injury to the feelings and mental suffering resulting from the wrongful acts, although no pecuniary damage is alleged or proved. ... "

In the case of *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 52 [14 Ann. Cas. 462, 19 L. R. A. (N. S.) 564, 114 N. W. 353], the court said: "The rule laid down in the Larson case expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and the courts award *solatium* for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation."

In the case of *Hasselbach v. Mt. Sinai Hospital*, 173 App. Div. 89 [159 N. Y. Supp. 376], the court held that it is well settled that there are no property rights in the ordinary commercial sense in a dead body, and the damages allowed to be recovered for its mutilation are never awarded as a ***209** recompense for the injury done to the body as a piece of property.

[2] Having come to the conclusion that there is no ownership in the body of a deceased human being, the next question for determination is the nature of the wrong for which damages are being sought in this action.

It is plaintiff's contention that her right to maintain an action arose out of the mutilation of the body, and that "the measure of damages is the mental suffering. Therefore, the damages for mental suffering are not the gist of the cause of action."

The injury upon which plaintiff bases her cause of action was an injury to her person.

In the case of *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 [32 L. R. A. 193, 44 Pac. 320, 322], the court said: "The real question presented by the objections and exceptions of the appellant is, whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire

nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is *210 direct, as by a blow, or indirect through some action upon the mind."

The language of that opinion was expressly approved in *Lindley v. Knowlton*, 179 Cal. 298 [176 Pac. 440].

In the case of *Johnson v. Sampson*, 167 Minn. 203 [46 A. L. R. 772, 208 N. W. 814], the court had under consideration an action in which false charges of unchastity had been made against a school girl fifteen years of age, resulting in alleged mental and bodily injuries. In its discussion of the case, the court said: "On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of."

In the case of *Morton v. Western Union Tel. Co.*, 130 N. C. 299 [41 S. E. 484, 485], the court, in discussing the meaning of the phrase "or other injury to the person," said: "In law, the word 'person' does not simply mean the physical body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul. Therefore any mental injury is necessarily an injury to the person. Personal injuries may be either bodily or mental, but, whether one or the other, they infringe upon the rights of the person, and not of property. A learned author has said that: 'The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally upon the other.'"

The allegations of injury to the plaintiff, as set forth in the complaint, have already been stated. The gravamen of the cause of action, as alleged, was the shock to the plaintiff, mental and physical. Without such injury to her, personally, there could have been no cause of action for the reasons heretofore discussed. In support of her case, the plaintiff introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria and nervousness.

Her physician testified that she was suffering from "exhaustion psychosis," which he defined as a lowered condition *211 of her nervous and physical system, a low blood pressure, a lowered mental condition, a slow power of concentration, a tardy memory, general weakness of her nervous system and as an anemia due to an interference of the nervous system that controls the blood mechanism and blood nutrition.

We think that the inescapable conclusion from the allegations of the complaint, and from the testimony offered on behalf of plaintiff, must be that the injury that was inflicted was to the person of the plaintiff, as a result of the acts of the defendants.

[3] It is not necessary that an act of force and violence, or a battery, be inflicted upon the plaintiff in order to bring the case within the meaning of subdivision 3 of section 340 of the Code of Civil Procedure.

In the case of *Basler v. Sacramento etc. Ry. Co.*, 166 Cal. 33 [134 Pac. 993] the plaintiff's wife sustained a personal injury by reason of the negligence of the defendant, and the plaintiff sued for the loss of his wife's services and for the expense incurred in her medical care.

[4] The court held that the action was barred under the provisions of subdivision 3 of section 340 because it was one for personal injuries and not upon an obligation or liability not founded upon an instrument in writing. In the discussion of the case at page 36 the court said:

"It has been held that the word 'for' means 'by reason of,' 'because of' and ' on account of' and that a statute prescribing a limitation on 'actions for injury to the person ... caused by negligence' should be interpreted to mean ' actions "by reason of" or "because of," or "on account of" injuries to the person caused by negligence.' (*Sharkey v. Skilton*, 83 Conn. 503 [77 Atl. 952].) Applying this rule to our own statute we must hold that the language of section 340 quoted above refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton*, the plaintiff was the husband of the injured woman and there, as here, counsel sought to make a distinction between the direct

injury to the wife and the indirect damages and loss to the husband, but the court held that both harmful results had their efficient cause in the accident to her and that therefore the same statute of limitations applied to actions in which the wife was a party ***212** and to those in which the husband sued alone because of his relative rights.

"*Maxson v. Delaware, Lackawanna & Western R. R. Co.*, 112 N. Y. 560 [20 N. E. 544], was a case similar to this in which the husband sued for the loss of his wife's services because of injuries received by her on account of the defendant's negligence. It was held that his cause of action was governed by the statute prescribing the time within which an action might be commenced for a 'personal injury, resulting from negligence.'

"We see no escape from the reasoning of the foregoing authorities."

It is unnecessary to cite numerous cases in other jurisdictions which are in accord with the conclusion of our courts that there need be no physical contact with the body of a person to constitute a cause of action for personal injury. When a bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty. It adopts the nature of the damage as the test, and not the nature of the breach.

In the case of *Groff v. DuBois*, 57 Cal. App. 343 [207 Pac. 57], which was an action for damages for an injury alleged to have been suffered by plaintiffs as the result of an unlawful and malicious attempt by the defendants to eject them from certain premises of which they were in lawful and peaceful possession, and which it was alleged resulted in one of the plaintiffs suffering a miscarriage, the court held that the action was one brought for injury to the person, and should have been commenced within one year. In accord are *Krebenios v. Lindauer* , 175 Cal. 431 [166 Pac. 17]; *Harding v. Liberty Hospital Corp.*, 177 Cal. 520 [171 Pac. 98].

[5] We are of the opinion that by the amendment to subdivision 3 of section 340 introducing the clause "or for injury to or the death of one caused by the wrongful act or neglect of another," it was intended to embrace therein all infringements of personal rights as distinguished from property rights.

In this case plaintiff's cause of action arose solely from her relationship to deceased, and the effect the mutilation of his body had upon her, personally. If there had been an estrangement between herself and her husband, or an ***213** absence of affection, or such an attitude of mind that the alleged desecration occasioned no anguish or distress or injury, then the plaintiff would have had no cause of action. As pointed out by respondents, the right which she sought to exercise in caring for her husband's body in death was one strictly personal to her, and which could not have been exercised by others.

The objection has also been made that the trial court erred in granting a motion for nonsuit against the defendant Leland, which was made upon the additional ground that the evidence introduced failed to show any carelessness or negligence upon the part of that defendant, or any breach of duty upon his part owing to the plaintiff.

[6] Section 1510 of the Penal Code provides that when a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of deceased is, to inquire into the cause of death.

Section 1512 provides that the coroner may summon a surgeon or physician to inspect the body, or hold a postmortem examination thereon, or a chemist to make an analysis of the stomach, or the tissues of the deceased, and give a professional opinion as to the cause of death.

If the coroner has reasonable ground to suspect that the death or killing of a person was sudden or unusual and of such a nature as to indicate the possibility of death by the hand of the deceased, or through the instrumentality of some other person, he has authority to hold an inquest. He has latitude in determining whether the case falls within section 1510 of the Penal Code. He may act upon information, and it should not be held that simply because at the conclusion of an inquest it has been determined that the deceased died a natural death,

he had no right, therefore, to hold an inquest. (*Morgan v. County of San Diego*, 3 Cal. App. 454 [86 Pac. 720].)

[7] A coroner may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the *214 cause of death, and this he may do without the consent of the family of the deceased. (*Young v. College of Physicians & Surgeons*, 81 Md. 358 [31 L. R. A. 540, 32 Atl. 177].)

In the case of *People v. Devine*, 44 Cal. 452, at page 458, the court said: "At common law, as well as under the statute of Edward I, and our statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest *super visum corporis* is in the performance of functions judicial in their character (*R. v. White*, 3 E. & E. R. 144; Rep. Const. Ct. So. Ca. 231; 32 Mis. R. 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person. (*Garnett v. Ferrand*, 6 Barn. & Cress. 611.)"

[8] It is presumed, in the absence of a contrary showing, that an official duty has been regularly performed. (*Morgan v. County of San Diego, supra*; Code Civ. Proc., sec. 1963.)

[9] The evidence offered by plaintiff shows that no inquest was held in Los Angeles County. The performance of an autopsy was not the holding of an inquest. It also shows that upon the arrival of the body in San Francisco plaintiff was dissatisfied with the findings of the autopsy surgeon in Los Angeles; that she represented that her husband's death was sudden; that he had had a "terrible fall." She further expressed the idea that his death had been occasioned by violence of some sort and was not the result of natural causes. Under the circumstances, the body being within the city and county of San Francisco, and within the jurisdiction of the defendant Leland, and he having been informed that no inquest had been held in the county of Los Angeles, and there being a question as to the cause of death as expressed by the plaintiff, the coroner acted within his authority in ordering an inquest held, and in authorizing his autopsy surgeon to proceed in the usual manner.

The decision of the question as to whether an inquest is necessary rests in the sound discretion of the coroner, and there is nothing in the record to counteract the presumption that he regularly performed his duty as coroner, and there was no breach of any duty which he owed to the plaintiff.

It is our opinion that the motions for nonsuit, based upon *215 the ground that the cause of action was barred within one year, were properly granted; and that the motion for nonsuit as to the defendant Leland, based upon the ground that the evidence introduced in the case failed to show any carelessness or negligence on the part of the defendant Leland, or any breach of duty on the part of such defendant owing to plaintiff, was also properly granted. We deem it unnecessary to discuss the other objections made by plaintiff to the judgment entered herein.

The judgment is affirmed,

Sturtevant, J., and Nourse, Acting P. J., concurred.

Cal.App.1.Dist.,1929.

Huntly v. Zurich General Acc. & Liability Ins. Co.

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e United States to exercise exclusive jurisdiction over it
he United States has waived by receding a part of such
his territory is still Precinct 17 of Sandoval County of the
Mexico. * * *." (p. 896)

d, there are no California cases dealing with the voting ques-
cases with respect to other matters do refer to the areas as
ere are no Federal cases on the subject.

when the question is directly presented, the California Courts
in original proposition, or because of the described recessions
the Federal areas in California are not areas outside the State,
iding thereon may qualify as California electors. In doing so,
would not have to disturb their decisions holding that State
le within the Federal reservations. Those holdings, whose basic
e police and regulatory laws would impair the exclusive legis-
n the Federal government by the Constitution, are perfectly
resent theme.

number of occasions, has ruled in accordance with the cases
rsons cannot acquire a residence for voting in California by
reservation which is under the exclusive jurisdiction of the
Cal. Atty. Gen. NS4278, dated May 4, 1942*) However, these
pt the rule established by such cases as *Sinks* v. *Reese*, supra.
de nor were these opinions rendered after the recession of
r of special jurisdiction mentioned herein. Therefore, these
t to which they hold that persons residing upon military reser-
lusive jurisdiction of the Federal government do not acquire
erein because the land is outside the State of California, are

ed, since 1946, Federal areas acquired for military purposes
e State, pursuant to Government Code section 126, have been
tion that "all persons residing on such land" shall have "all
hts including the right of suffrage, which they might have
given." (Par. (e) of Government Code sec. 126) None of
on the voting problem deal with this reservation. We do not
rnia Courts would hold that this provision is unconstitutional
e Federal areas are not deemed to be within the State of Cali-
fore the persons residing in such areas could not meet the
ations of being residents within the State. (Cf. *Sinks* v. *Reese*,
hand, in any effort to save the constitutionality of the voting
the rule of extra-territoriality (*Sinks* v. *Reese*, 19 Ohio St.
e v. *Mabry*, 197 P. 2d (N.M.) 884, 893), it would be quite

88, dated Dec. 20, 1933; 158 Letter Book 290, dated June 25, 1937.
ould also disenfranchise persons now resident within National Park
rms of the grant of exclusive jurisdiction (Stats. 1919, p. 74, ch.
also have saved to them their civil and political rights. (24 Cal.

meaningless to hold that only post 1946 grants of jurisdiction have reserved from the United States the right of persons living on the Federal areas to vote. (supra, p. 139) However, since the "reservation" of the privilege does not run against the grantee—the United States, and hence impair its legislative authority, but rather in favor of third persons—the citizens residing in the enclave, this paradox is avoided.

It should be understood that persons living upon military reservations in order to be eligible to vote must meet the standards for residence within the State of California (Govt. C. sec. 244) and the qualifications for voters. (Calif. Const. Art. II; Election C. secs. 5650-5932.5) With respect to military personnel stationed at and living on military reservations located in California, mere presence thereon is not sufficient to establish residence (Calif. Const. Art. II, sec. 4), but "the fact of his (i.e., their) being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed." (Citing *Percy* v. *Percy*, 188 Cal. 765, 768) (*Berger* v. *Super. Ct.*, 79 C.A. 2d 425, 429; *Stewart* v. *Kyser*, 105 Cal. 459, 464—a voting case.)

To conclude: In view of the developments in the concepts concerning the acquisition of "exclusive" jurisdiction over areas within the States either by consent of the States pursuant to Clause 17 or by cession for national purposes, the original idea of resulting extra-territoriality is no longer valid today. Even accepting its validity, it should not be applied to disenfranchise citizens of the State where both in fact and in law the State is exercising certain jurisdiction over the areas in an increasing number of respects through the Federal government's recession of jurisdiction.

Opinion No. 52-161—September 8, 1952

SUBJECT: AUTOPSY—Discretion as to need for, is vested in Coroner, whose decision is subject to question only if grossly unreasonable, arbitrary, or capricious; liability of Coroner and lawful assistants in regular performance of lawful duties also discussed.

Requested by: DISTRICT ATTORNEY, SANTA CLARA COUNTY.

Opinion by: EDMUND G. BROWN, Attorney General
Henry A. Dietz, Assistant.

Honorable N. J. Menard, District Attorney of Santa Clara County, has requested the opinion of this office on the following question:

Should the County Pathologist perform an autopsy when ordered to do so by the County Coroner even though he believes the Coroner to be in error in making the order?

Our conclusion may be summarized as follows:

Discretion on the question of the need for an autopsy is vested in the Coroner, and his decision is subject to question only when grossly unreasonable, arbitrary or capricious.

ANALYSIS

Government Code section 27491 provides:

"It shall be the duty of the coroner to investigate or cause to be investigated, the cause of death of any person reported to the coroner as having been killed by violence, or who has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or who has committed suicide, and of all deaths of which the provisions of the Health and Safety Code make it the duty of the coroner to sign certificates of death. For the purpose of such investigation he may in his discretion take possession of and inspect the body of the decedent, which shall include the power to exhume such body, make or cause to be made a post mortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, blood, or contents, or organs, or tissues of the body, and secure professional opinions as to the result of such post mortem examination. He shall cause the information secured to be reduced to writing and forthwith filed by him in his records of the death of the individual. He may also in his discretion, if the circumstances warrant it, hold an inquest."

Section 7113 of the Health and Safety Code provides:

298 "A cemetery authority or a licensed funeral director may permit an autopsy of any remains in its or his custody upon the receipt of a written authorization of a person representing himself to be any of the following:

* * *

"(e) The coroner or other duly authorized public officer.

"A cemetery authority or a licensed funeral director is not liable for permitting or assisting in making an autopsy pursuant to such authorization unless it has actual notice that such representation is untrue."

Section 7114 of the Health and Safety Code provides:

"Any person who performs an autopsy on a dead body without having first obtained the written authorization required by Section 7113 of this code is guilty of a misdemeanor, except that this shall not be applicable to the performance of an autopsy by the coroner or other officer authorized by law to perform autopsies."

Section 10425 of the Health and Safety Code provides:

"The certificate of death shall be made by the coroner in case of any death occurring under any of the following circumstances:

(a) Without medical attendance.

(b) During the continued absence of the attending physician.

(c) Where the attending physician is unable to state the cause of death.

(d) Where the deceased person was killed or committed suicide.

(e) Where the deceased person died as the result of an accident.

(f) Under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another."

The policy of the laws set forth above is to provide a means for the determination of the cause of every death. If the cause of death is not known at the time of its occurrence, it is to be determined thereafter. *Gray* v. *Southern Pac. Co.*, 21 Cal. App. 2d 240, 244, 68 P. 2d 1011, 1014 (1937).

In order to carry out the duties of his office in the investigation of death in accordance with the provisions of section 27491 of the Government Code and also in carrying out his duties with respect to making a certificate of death required by section 10425 of the Health and Safety Code, it is necessary that the Coroner have wide discretion. He may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the cause of death. This he may do without the consent of the family of the deceased. *Huntly* v. *Zurich General A. & L. Ins. Co.*, 100 Cal. App. 201, 213, 280 Pac. 163, 168 (1929). Within the area of his duties, the judgment of the Coroner governs. The action of the Coroner in this respect is qualified only by the implied limitation that he not be grossly unreasonable, arbitrary or capricious in the exercise of his discretion.

As a point of information, there can be no liability for an act required by law. The Coroner and his lawful assistants in the regular performance of lawful duties are protected from responsibility in civil actions brought by private parties. *Gray* v. *So. Pac. Co.*, 21 Cal. App. 2d 240, 245, 68 P. 2d 1011 (1937); *Huntly* v. *Zurich General A. & L. Ins. Co.*, 100 Cal. App. 201, 280 Pac. 163 (1929).

Opinion No. 51-225—September 12, 1952

SUBJECT: AUTOMOBILE CLUBS: Necessity for, to maintain reserves for unearned dues, in the event of cancellation of liability to render specific service, and circumstances under which such clubs may be considered as transacting insurance and therefore subject to gross premiums tax both discussed.

Requested by: INSURANCE COMMISSIONER.

Opinion by: EDMUND G. BROWN, Attorney General.
Harold B. Haas, Deputy.

Honorable John R. Maloney, Insurance Commissioner of the State of California, has requested our opinion as to whether a reserve equal to the unused portions of the considerations paid by the motorists for membership in or service of a motor club, calculated on a pro rata basis over the period covered by the payment, must be accounted as a liability in determining whether the club is solvent.

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(Cite as: 50 Cal.App.4th 137)

C

ROBERT DAVILA et al., Plaintiffs and Appellants,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents.

No. B102701.

Court of Appeal, Second District, Division 1, California.

Oct 22, 1996.

SUMMARY

Children of a deceased individual sued the coroner and associated defendants for damages on a negligence theory, alleging that their father was found dead in a parked car, was transported to a hospital where he was formally pronounced dead, but that the coroner failed to make an adequate or reasonable attempt to locate any relatives, and decedent's body was thereafter cremated. Plaintiffs alleged that, as a result, they suffered emotional distress. The trial court granted defendants summary judgment on the ground that the coroner owed no duty to plaintiffs. (Superior Court of Los Angeles County, No. BC110154, Loren Miller, Jr., Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to vacate the summary judgment and set the matter for trial. The court held that the trial court erred in granting summary judgment for defendants. It held that the coroner owed plaintiffs a mandatory duty (Gov. Code, § 815.6) to make reasonable efforts to locate the decedent's next of kin, established by Gov. Code, § 27471, subd. (a), and Health and Saf. Code, §§ 7104 , 7104.1. At least one of the purposes of the statutes is to protect against the kind of injury suffered by plaintiffs. Thus, assuming a duty existed, that duty was breached, and the breach was the cause of the injury suffered by plaintiffs. At trial, the coroner would be required to show that he acted with reasonable diligence in attempting to identify the decedent's body and in attempting to locate a family member. (Opinion by Vogel (Miriam A.), J., with Ortega, Acting P. J., and Masterson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Coroners § 6--Liability--Cremation of Remains Without Notifying Decedent's Next of Kin--Mandatory Duty.
The trial court ***138** erred in granting summary judgment for a coroner and associated defendants in an action by a decedent's children for emotional distress allegedly caused by defendants' negligent failure to notify plaintiffs before cremating the remains. The coroner owed plaintiffs a mandatory duty (Gov. Code, § 815.6) to make reasonable efforts to locate the decedent's next of kin, established by Gov. Code, § 27471, subd. (a), and Health and Saf. Code, §§ 7104, 7104.1. At least one of the purposes of the statutes is to protect against the kind of injury suffered by plaintiffs. Thus, assuming a duty existed, that duty was breached, and the breach was the cause of the injury suffered by plaintiffs. At trial, the coroner would be required to show that he acted with reasonable diligence in attempting to identify the decedent's body and in attempting to locate a family member.

[See 5 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 160.]

(2) Government Tort Liability § 3--Grounds for Relief--Failure to Discharge Mandatory Duty.
For liability of a public entity to attach under Gov. Code, § 815.6, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered.

COUNSEL

Michael H. Kapland for Plaintiffs and Appellants.

Nelson & Fulton, Henry Patrick Nelson and Amber A. Logan for Defendants and Respondents.

VOGEL (Miriam A.), J.

The issue in this case is whether a coroner owes a

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duty to a decedent's children to attempt with reasonable diligence to notify the person responsible for the interment of the decedent's remains before disposing of the body. We hold that he does.

Facts

Robert Davila and Angelina Williamson (collectively Davila) sued the County of Los Angeles, the Los Angeles County Sheriff's Department and *139 the Los Angeles County Coroner (collectively the Coroner) for damages on a negligence theory, alleging the following facts: On July 11, 1993, their father, Freddie Davila, was found dead in a car parked on Paramount Boulevard, in the City of Paramount. Decedent was transported to a hospital, where he was formally pronounced dead, but the Coroner failed "to make an adequate or reasonable attempt to locate any relatives" and, on August 11, decedent's body was cremated. Decedent had told Davila that he was going to take an extended trip and it was thus not until December 1993, that Davila became concerned that he hadn't heard from his father, at which time Davila filed a missing person's report and then learned that his father had died and that his body had been cremated. As a result, Davila suffered emotional distress.

The Coroner answered, and then moved for summary judgment on the ground that he owed no duty to Davila. In his separate statement of undisputed facts, the Coroner recounted the discovery of the body, the fact that the body was held by the Coroner's office for 30 days, that no one (including Davila) contacted the Coroner's office regarding decedent between July 11 and August 11, 1993, that the body was cremated on August 11, in conformance with the provisions of Health and Safety Code section 7104, and that "[t]he Los Angeles County Department of the Coroner attempts to locate the next-of-kin to prevent the County of Los Angeles from incurring the costs of disposition." Based on these facts, the Coroner asserted that, as a matter of law, he owed no duty to Davila to locate or notify him that his father had died.

Davila opposed the motion, admitting all of the facts relied on by the Coroner except his assertion that his disposition of the body was in compliance with Health and Safety Code section 7104, and asserting that, under the circumstances of this case, the Coroner was obligated by statute to "diligently attempt[] to notify" the next of kin. (Health & Saf. Code, § 7104.1.) Davila supported his opposition with evidence that he had been able to recover his father's personal effects from the Coroner's office, and had found within those effects his father's Social Security card and an identification card stating, "In case [of] accident please notify Rev. Robert Davila. Home 818814-4620. Work 213-603-6226" (Davila's then current telephone numbers). In decedent's car (recovered from the salvage yard where the Coroner had it towed), Davila found an address book with Davila's telephone numbers and address (along with phone numbers and addresses of other relatives).

The motion was granted (the trial court found no duty was owed), and Davila appeals from the judgment thereafter entered. ***140**

Discussion

(1a) Davila contends the Coroner's office owed him a duty to make reasonable efforts to locate decedent's next of kin. We agree.

Government Code section 815.6 provides that "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (2) For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered. (*Posey v. State of California* (1986) 180 Cal.App.3d 836, 848 [225 Cal.Rptr. 830].)

I.

Enactment Imposing a Mandatory Duty

(1b) In our case, the existence of a mandatory duty is established by Government Code section 27471, subdivision (a): "Whenever the coroner takes custody of a dead body pursuant to law, he or she

shall make a reasonable attempt to locate the family ." [FN1] (Italics added.) The same duty is reflected in Health and Safety Code sections 7104 (when the person with the duty of interment "can not *after reasonable diligence* be found ... the coroner shall inter the remains ....") and 7104.1 (if within "30 days after the coroner notifies *or diligently attempts to notify the person responsible for the interment* ... the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains"). (Italics added.) Quite clearly, the coroner had a mandatory duty to make a reasonable attempt to locate decedent's family. (Cf. *Morris v. County of Marin* (1977) 18 Cal.3d 901, 906-907 [136 Cal.Rptr. 251, 559 P.2d 606].)

FN1 Under Government Code section 14, "[s]hall" is mandatory.

To avoid this result, the Coroner contends *Bock v. County of Los Angeles* (1983) 150 Cal.App.3d 65 [197 Cal.Rptr. 470] compels the conclusion that no mandatory duty exists. Not so. In *Bock*, where a widow sued the county because the coroner had failed to promptly identify her husband's body and notify her of his death, Division Five of our court held that the coroner's "record-keeping" responsibilities did not create a general duty to identify a ***141** decedent or notify his family. [FN2] (*Id.* at pp. 69-70.) At the time *Bock* was decided, however, Government Code section 27471 required the coroner to "make a reasonable attempt to locate the family [of a dead body] *within 24 hours*" and provided that, "[a]t the end of 24 hours," the coroner "may embalm the body...." (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 70, italics added.) In 1984, the Legislature amended the statute, deleted the 24-hour time period, and left the unqualified language requiring the coroner to "make a reasonable attempt to locate the family." In short, *Bock* is no longer dispositive on this point.

FN2 Division Five nevertheless concluded that because the coroner "undertook to assist" the widow, he had assumed a duty to do so in a reasonably diligent manner. (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at pp. 71-72.)

II.

Enactment Intended to Protect Against This Kind of Injury

In *Bock*, Division Five also held that the second requirement of Government Code section 815.6 -that the enactment was intended to protect against the risk of the kind of injury suffered by the plaintiff-was not satisfied because "the statutes empowering the coroner to keep and transmit various records were [not] designed to protect against the risk of the particular kind of injuries alleged ...." (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 71.) As Davila points out, however, *Bock* did not consider Health and Safety Code sections 7104 (enacted in 1939) and 7104.1 (enacted in 1992, nine years after *Bock* was decided).

Sections 7104 and 7104.1 are part of chapter 3 ("Custody, and Duty of Interment") of division 7 ("Dead Bodies") of the Health and Safety Code. Section 7104 of the Health and Safety Code provides as follows: "(a) When no provision is made by the decedent, or where the estate is insufficient to provide for interment and the duty of interment does not devolve upon any other person residing in the state or *if such person can not after reasonable diligence be found* within the state the person who has custody of the remains may require the coroner of the county where the decedent resided at time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead. [¶] (b) A county exercising jurisdiction over the death of an individual pursuant to Section 27491 [covering the coroner's duty to inquire into the cause of all violent, sudden or unusual deaths], or who assumes jurisdiction pursuant to Section 27491.55 [coroner's right to delegate inquiry to other agencies] of the Government Code, shall be responsible for the disposition of the remains ***142** of that decedent. If the decedent is an indigent, the costs associated with disposition of the remains shall be borne by the county exercising jurisdiction." (Italics added.) Health and Safety Code section 7104.1, which was enacted in 1992 (Stats. 1992, ch. 1020, § 3.3), provides as follows: "If, within 30 days after the coroner *notifies or diligently attempts to notify the person responsible for the interment or inurnment of a decedent's remains which are in the possession of the coroner*,

the person fails, refuses, or neglects to inter the remains, the coroner may inter the remains. The coroner may recover any expenses of the interment from the responsible person." (Italics added.)

Read together, these statutes provide that when no one is responsible for interment of a decedent, the coroner must assume that responsibility and its attendant costs. When a responsible person exists but refuses to inter the remains, the coroner must do so but may recover his expenses from the responsible party. According to the Coroner, this means the "kind of injury" the statutes were meant to prevent was the "incurring [of] costs [by the County] of interment of ... unclaimed decedents." We disagree.

While the recovery of interment costs may be *one* purpose of Health and Safety Code section 7104.1, just as the recovery of embalming costs may be *one* purpose of Government Code section 27471 (*Bock v. County of Los Angeles*, *supra*, 150 Cal.App.3d at p. 70), the statutes exist for other purposes as well and are designed to prevent other injuries. As has been noted, the Legislature is "aware that for cultural and religious reasons, the [interment] or other disposition of the deceased's body is an extremely important emotional catharsis for the family and friends of the deceased." (*Shelton v. City of Westminster* (1982) 138 Cal.App.3d 610, 625 [188 Cal.Rptr. 205] (dis. opn. of Wiener, J.).) To this end, Health and Safety Code section 7100 provides that "[t]he *right to control the disposition of the remains of a deceased person, including the location and conditions of interment,* unless other directions have been given by the decedent, *vests in*, and the duty of interment and the liability for the reasonable costs of interment of the remains devolves upon the following in the order named: [¶] (1) [t]he surviving spouse [;] [¶] (2) [t]he surviving child or children of the decedent ...." (Italics added.)

Had Division Five considered these points, *Bock* might have been decided differently. With the addition of Health and Safety Code section 7104.1, however, *Bock*'s views of the purpose of the statutory scheme are no longer controlling. We are satisfied that, today, the rights granted by the several statutes discussed above would have no meaning unless they are read to *143 impose upon the Coroner a duty to act with reasonable diligence in attempting to identify a body placed in his custody and then to attempt with reasonable diligence to locate some family member.

III.

The Breach Must Be the Cause of the Injury

For present purposes, it is undisputed that, assuming a duty exists in this case, that duty was breached and the breach was the cause of the injury suffered by Davila. Having found that a duty does exist and that it is owed to Davila, it follows that summary judgment must be reversed. At trial, the issues will be whether the Coroner acted with reasonable diligence in attempting to identify the decedent's body (such as by looking at his personal effects) and in attempting to locate a family member (such as by picking up the telephone and calling Davila).

Disposition

The judgment is reversed and the cause is remanded to the trial court with directions to vacate the summary judgment and set the matter for trial. Plaintiffs are awarded their costs of appeal.

Ortega, Acting P. J., and Masterson, J., concurred.
*144

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END OF DOCUMENT

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(Cite as: 25 Cal.4th 904)

H

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.

No. S087881.

Supreme Court of California

June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties *905 in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance

contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, §§ 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ***906** ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial ***907** court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

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(Cite as: 25 Cal.4th 904)

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory ***908** construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self- described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court- ordered support to the clerk of the Huron County court.

FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold ***909** divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children,

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Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. ***910**

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452 . At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether

Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true, or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, *912 test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the

legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano*

reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388- 389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542- 543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313]; for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under

former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: " ' Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. [FN6]

> FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court

of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918 257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra* , 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold

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emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) ***919**

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of- wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the

decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] *921

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262- 263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For

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> the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453 , subd. (b)(1).)

> FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."
>
> FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he ***922** argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516- 1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d

1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross- complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question

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here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. *925

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court- ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent

that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. *926

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Estate of DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

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(Cite as: 71 Cal.App.4th 568)

MICHAEL BOLLINGER et al., Plaintiffs and Respondents,
v.
SAN DIEGO CIVIL SERVICE COMMISSION et al., Defendants and Appellants.

No. D026130.

Court of Appeal, Fourth District, Division 1, California.

Mar. 30, 1999.

SUMMARY

The trial court granted a police officer and the city police officers' association a writ of mandate compelling the civil service commission to set aside its ratification, made during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld. (Superior Court of San Diego County, No. 693456, Anthony C. Joseph, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations, since a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice. The court further held that the commission did not violate the police officer's procedural due process rights by denying him the opportunity to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements. (Opinion by Nares, J., with O'Neill, J., [FN*] concurring. Concurring opinion by Work, Acting P. J. (see p. 578).)

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 29--Construction--Language--Legislative Intent.
Statutory interpretation presents a question of law subject to independent review. A court's analysis starts from the fundamental premise *569 that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, the court looks first to the words themselves. When the language is clear and unambiguous, there is no need for construction. When the language is susceptible of more than one reasonable interpretation, however, the court must look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(2a, 2b) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Personnel Exception to Ralph M. Brown Act.
The underlying purposes of the "personnel exception" (Gov. Code, § 54957) to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body. Nonetheless, a court must construe the personnel exception narrowly and the open meeting requirements liberally. Under Gov. Code, § 54957, an employee may request a public hearing only when complaints or charges are involved. Negative comments in an employee's performance evaluation do not constitute complaints or charges within the meaning of Gov. Code, § 54957.

(3) Statutes § 31--Construction--Language--Qualifying Words and Phrases.
An accepted rule of statutory construction is that qualifying words and phrases, when no contrary

intention appears, refer solely to the last antecedent.

(4a, 4b, 4c) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Ratification of Hearing Officer's Determination in Closed Session--Ralph M. Brown Act--Due Process.
In a mandamus proceeding in which a police officer objected to the civil service commission's ratification, during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld, the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations. A public agency may deliberate in closed session whether complaints or charges brought against an employee justify dismissal or disciplinary action without providing the statutory notice. Further, the commission did not violate the police officer's procedural due process rights by denying him the opportunity ***570** to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 581.]

(5) Statutes § 42--Construction--Aids--Legislative History--Significance of Rejection of Specific Provision.
The rejection of a specific provision contained in a legislative act as originally introduced is most persuasive that the act should not be interpreted to include what was left out.

(6) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Constitutional Procedural Due Process Requirements.
U.S. Const., 14th Amend., places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the due process clause. The California Constitution contains a similar provision. In cases of public employment, the employee is entitled to due process in matters involving contemplated discipline. Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action. To be meaningful, the right to respond must afford the employee an opportunity to present his or her side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter. The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process.

COUNSEL

John W. Witt and Casey Gwinn, City Attorneys, Anita M. Noone, Assistant City Attorney, and Lisa A. Foster, Deputy City Attorney, for Defendants and Appellants.

Everitt L. Bobbitt; and Sanford A. Toyen for Plaintiffs and Respondents. ***571**

NARES, J.

In this employment matter, Michael Bollinger and the San Diego Police Officers' Association (the Association) obtained a writ of mandate compelling the San Diego Civil Service Commission and Commissioners Linda LeGerrette, Robert P. Ottilie, Franne M. Ficara, Daniel E. Eaton and Al Best (collectively the Commission), to set aside its closed session ratification of a hearing officer's findings of fact and recommendation that Bollinger's demotion be upheld. The court agreed the Commission's act was void under Government Code [FN1] section 54957, a provision of the Ralph M. Brown Act (§ 54950 et seq.) (the Brown Act) because it failed to give Bollinger 24-hour written notice of his right to request a public hearing. We reverse.

FN1 Statutory references are to the Government Code except where specified otherwise.

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Background

The facts are undisputed. On January 13, 1995, the San Diego Police Department demoted Bollinger from police agent to police officer II based upon his misconduct. He appealed to the Commission. A noticed public evidentiary hearing was held over three days in April and June 1995, with Commissioner Ottilie serving as the sole hearing officer. [FN2]

> FN2 The City of San Diego's civil service rules at the relevant time gave the Commission the discretion to "appoint one or more of its members to hear the appeal and submit findings of fact and a decision to [it]. Based on the findings of fact, the Commission may affirm, modify, or overturn the decision[.]"

The Commission's written agenda for its August 3, 1995, meeting noted it would "recess into closed session ... to ratify hearings in the cases of Michael Bollinger and [another person][.]" The Commission posted the agenda 72 hours before the hearing (§ 54954.2) and mailed a copy to the Association. Bollinger was notified of the meeting in a telephone call. During closed session, the Commission ratified Ottilie's factual findings and recommendation that Bollinger's demotion be upheld. Shortly thereafter, the Commission for the first time provided Bollinger with a copy of Ottilie's 22-page written report. Bollinger complained to no avail that he was deprived of the opportunity to respond to Ottilie's report before the full Commission made its decision.

Bollinger then filed this action for a writ of mandamus under Code of Civil Procedure section 1085. He alleged the Commission's decision was void as a matter of law under section 54947 because it failed to notify him in writing of his right to request a public hearing. The court agreed and tentatively granted the petition in a telephonic ruling; it confirmed its decision after oral argument. ***572**

Discussion

I. *Standard of Review*

(1) Statutory interpretation presents a question of law subject to independent review. (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964 [266 Cal.Rptr. 225].) " 'Our analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citation.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' " (*Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1562 [11 Cal.Rptr.2d 222], citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007- 1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

II. *The Brown Act*

A

(2a) In enacting the open meeting requirements of the Brown Act in 1953, the Legislature expressly declared "the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (§ 54950.) Section 54953 accordingly provides "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

The Brown Act's "personnel exception" to the open meeting rule, found at section 54957, provides in relevant part: "Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions ... during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

"As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the *573 employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void." [FN3]

> FN3 Ordinarily, acts of a legislative body in violation of the Brown Act are not invalid; they merely subject the member of the governing body to criminal penalties. (*Griswold v. Mt. Diablo Unified Sch. Dist.* (1976) 63 Cal.App.3d 648, 657-658 [134 Cal.Rptr. 3]; § 54959.) Section 54957 thus affords an employee wrongfully deprived of written notice a valuable remedy.

"[T]he underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 [196 Cal.Rptr. 45].) We must nonetheless "construe the 'personnel exception' narrowly and the 'sunshine law' liberally in favor of openness [citation] ...." (*Ibid.*)

In *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876 [80 Cal.Rptr.2d 589], the court interpreted the first paragraph of section 54957 to allow an employee to request a public hearing only where "complaints or charges" are involved. It reasoned the phrase " 'unless the employee requests a public session' " applies only to the immediately preceding phrase " 'or to hear complaints or charges brought against the employee' ...." (68 Cal.App.4th at p. 881.) (3) "An accepted rule of statutory construction is that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." (*Ibid.*)

(2b) The *Furtado* court held that negative comments in an employee's performance evaluation did not constitute "complaints or charges" within the meaning of section 54957. "[T]o merge employee evaluations into the category of 'complaints or charges' in order to permit an open session is effectively to rewrite the statute." (*Furtado v. Sierra Community College, supra,* 68 Cal.App.4th at p. 882.) "[T]he Legislature has drawn a reasonable compromise, leaving most personnel matters to be discussed freely and candidly in closed session, but permitting an employee to request an open session to defend against specific complaints or charges brought against him or her by another individual." (*Ibid.*; see also *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87 [82 Cal.Rptr.2d 452] [performance evaluation of probationary teacher does not constitute the bringing of "specific complaints or charges"].) *574

(4a) Here, in contrast to *Furtado* and *Fischer,* the Commission concedes this matter does not involve a routine employee performance evaluation but "specific complaints or charges" other police officers brought against Bollinger. [FN4] It contends, though, that Bollinger was not entitled to 24- hour written notice of its August 3, 1995, closed session, because it was solely for the purpose of *deliberating* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary hearing thereon.

> FN4 Ottilie's written report shows several police officers accused Bollinger of disobeying numerous orders and failing to properly document the chain of custody of evidence.

The Commission relies upon the clause in the second paragraph of section 54957, which provides "the employee shall be given written notice of his or her right to have the complaints or charges *heard* in open session rather than a closed session[.]" (Italics added.) We also note that in the first paragraph of section 54957, the Legislature used "to consider" in reference to the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee, but used "to hear" in reference to "complaints or charges brought against the employee by another person or employee." To

"consider" is to "deliberate upon[.]" (American Heritage Dict. (1981) p. 284, col. 1.) To "hear" is to "listen to in an official ... capacity[.]" (*Id.* at p. 607, col. 2.) A "hearing" is "[a] proceeding of relative formality ..., generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented." (Black's Law Dict. (6th ed. 1990) p. 721, col. 1.) The plain language of section 54957 lends itself to the interpretation the Commission urges.

The statute's legislative history further supports the Commission's position. The second paragraph of section 54957 was enacted by parallel Assembly and Senate Bills. (Stats. 1993, ch. 1136, § 12 (Assem. Bill No. 1426 (1993-1994 Reg. Sess.)); Stats. 1993, ch. 1137, § 12 (Sen. Bill No. 36 (1993-1994 Reg. Sess.)).) As originally introduced, both bills read in part: "As a condition to holding a closed session *on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session." (Sen. Bill No. 36 (1993-1994 Reg. Sess.) § 17; Assem. Bill No. 1426 (1993-1994 Reg. Sess.) § 17, italics added.)*

Later, however, the italicized language was deleted and the bills were altered to what now appears in paragraph two of section 54957, cited *ante*. (Assem. Amend. to Sen. Bill No. 36, § 12 (1993-1994 Reg. Sess.) Aug. 19, 1993; Sen. Amend. to Assem. Bill No. 1426, § 12 (1993-1994 Reg. Sess.) *575 Sept. 8, 1993.) The Legislature thus specifically rejected the notion an employee is entitled to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. (5) "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out. [Citations.]" (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 [7 Cal.Rptr.2d 848].) (4b) Accordingly, we conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.

B

Under the particular facts here, however, a question remains: Was Bollinger entitled to be "heard," within the meaning of section 54957, by the Commission before it recessed into closed session to deliberate whether to adopt the factual findings and recommendation of the single hearing officer?

Bollinger argues the Commission violated his procedural due process rights by denying him the opportunity to respond to Ottilie's written factual findings and recommendation before it made its final decision. The Commission counters that the evidentiary hearing before a single hearing officer, and the opportunity to seek judicial review, satisfied due process requirements. [FN5]

> FN5 Because due process principles were not raised in the trial court or in the initial appellate briefing, we asked the parties to provide supplemental letter briefs on the issue. We have taken their responses into consideration.

(6) " 'The Fourteenth Amendment to the United States Constitution "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." [Citations.] The California Constitution contains a similar provision. [Citations.]' " (*Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 946 [77 Cal.Rptr.2d 231].) "[I]n cases of public employment, the employee is entitled to due process in matters involving contemplated discipline." (*Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 1005 [159 Cal.Rptr. 222] (conc. opn. of Evans, J.).)

"Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) Notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is *576 based, and (4) the opportunity to respond in opposition to the proposed action. (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736 [150 Cal.Rptr. 475, 586 P.2d 956]; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 [124 Cal.Rptr. 14, 539 P.2d 774].)

To be meaningful, the right to respond must afford the employee an opportunity to present his side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter." (*Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362-363 [181 Cal.Rptr. 699]; accord, *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Coleman v. Regents of University of California* (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589].) The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process. (*Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 29-30 [206 P.2d 841].)

(4c) In *Titus v. Civil Service Com., supra,* 130 Cal.App.3d 357, a lieutenant in the sheriff's department received notice of his proposed discharge. He was given the materials upon which the disciplinary action was based and the opportunity to respond orally or in writing. After the employee argued his position to a chief, the chief recommended his firing. The undersheriff and two assistant sheriffs reviewed the matter and adopted the chief's recommendation. The employee appealed to the Civil Service Commission of Los Angeles County, which adopted the hearing officer's recommendation and sustained the firing.

The employee then sought a writ of mandate to compel his reinstatement, arguing his due process rights were violated when he was precluded from responding to the chief's recommendation before a final decision was made. In affirming the lower court's denial, the court explained: "The record discloses that Chief Knox possessed the authority to recommend the ultimate disposition to the charges against appellant, subject only to review by a panel consisting of the undersheriff and two assistant sheriffs.... Appellant was permitted to present his side of the controversy. Due process requires nothing more." (*Titus v. Civil Service Com., supra,* 130 Cal.App.3d at p. 363.)

The Administrative Procedure Act (§ 11500 et seq.), applicable to certain state agencies, provides that if a contested matter is heard by an administrative law judge, the agency may adopt the written proposed decision in its entirety. In *Greer v. Board of Education* (1975) 47 Cal.App.3d 98 [121 Cal.Rptr. 542], the court held that in that instance an employee has no right to receive the hearing officer's proposed decision or present any argument to the full agency before it acts. The court noted the aggrieved party's remedy ***577** is to seek review in the superior court on the basis of the evidentiary hearing record. [FN6] (*Id.* at pp. 110-112; § 11517.)

> FN6 Here, the City of San Diego's civil service rules required that a reporter record testimony taken at the evidentiary hearing.

In *Dami v. Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 154 [1 Cal.Rptr. 213], the court likewise held "neither the language of [section 11517] nor constitutional principle requires that the proposed decision [of the hearing officer] be served prior to the rendition of the final one." (Accord, *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.* (1969) 276 Cal.App.2d 132, 136 [80 Cal.Rptr. 758]; *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 314 [33 Cal.Rptr. 305]; *Strode v. Board of Medical Examiners* (1961) 195 Cal.App.2d 291, 297-298 [15 Cal.Rptr. 879].) It is only when the agency does not adopt the hearing officer's recommendation and reviews the evidence itself that the employee has the opportunity to argue the matter to the agency. (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 396 [184 P.2d 323]; § 11517, subd. (c).)

California's Civil Service Act (§ 18500 et seq.) similarly provides the board may adopt the proposed decision of its representative or may hear the matter itself. Only in the latter instance is the employee allowed to make additional argument to the board. (§ 19582.) In *Sinclair v. Baker* (1963) 219 Cal.App.2d 817 [33 Cal.Rptr. 522], the court rejected the notion due process was violated where the board adopted the hearing officer's recommendation without allowing the employee to respond. The court found dispositive the reasoning of the cases concerning the Administrative Procedure Act. (*Id.* at pp. 822-823; accord, *Fichera v. State Personnel Board* (1963) 217 Cal.App.2d 613, 620 [32 Cal.Rptr. 159] ["... due process is supplied by the hearing officer's taking of evidence, his findings and proposed decision, the decision of the board based on the findings and proposal, and by review by the court even though the last is not a trial de novo, followed by this appeal"].)

71 Cal.App.4th 568
84 Cal.Rptr.2d 27, 142 Lab.Cas. P 59,147, 99 Cal. Daily Op. Serv. 2877, 1999 Daily Journal D.A.R. 3710
(Cite as: 71 Cal.App.4th 568)

Where an administrative agency relegates the evidentiary hearing to one or more of its members, we observe the better practice would be to give the employee the opportunity to respond orally or in writing to the factual findings and recommendation before a final decision is made. [FN7] A hearing officer's report may contain critical inaccuracies and the employee's ability to address them would benefit everyone and result in a fairer process. *578

FN7 In its supplemental letter brief, the Commission advises that after Bollinger's case was heard, its rules were modified to allow an employee to challenge the proposed decision in writing prior to the final decision. The provision, however, expired after six months and has apparently not been renewed.

Given the above authorities, however, we are constrained to conclude Bollinger's minimum due process rights were satisfied. He received notice of the proposed demotion and the basis therefor and had the opportunity to fully respond at a public evidentiary hearing. Ottilie was a "reasonably impartial and noninvolved reviewer," and under the City of San Diego's civil service rules, he had the authority to recommend a final disposition of the matter. Moreover, Bollinger could have sought review of the substantive merits of the Commission's decision in his petition for writ relief, based upon the record of the evidentiary hearing before Ottilie. [FN8]

FN8 While Bollinger did seek writ relief, he raised only the Brown Act issue and failed to submit the administrative hearing record or challenge the substantive merits of the Commission's decision.

It follows that because Bollinger had no legal right to learn of or respond to Ottilie's factual findings and recommendation before the Commission ratified them, no portion of its August 1995 meeting can be construed as a "hearing" on complaints or charges within the meaning of section 54957. Rather, the matter was confined to deliberation which, as discussed, may be held in closed session. In sum, contrary to the trial courts' ruling, the Commission did not run afoul of the Brown Act and its action is valid. [FN9]

FN9 Given our holding, we deny without discussion Bollinger's request for sanctions under Code of Civil Procedure section 907 on the ground the Commission's appeal is frivolous.

Disposition

The judgment is reversed. Bollinger to pay the Commission's costs on appeal.

O'Neill, J., [FN*] concurred.

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

WORK, Acting P. J.,

Concurring.-Although I concur in the opinion, I write separately to identify the narrow context of the legal issue we address in part II.A as presented to the trial court by Michael Bollinger's petition for mandate and the narrow confines of the trial court's judgment in response to that petition which is a subject of this appeal.

I also point out the procedural due process discussion in part II.B fails to consider the significance of the fact that, in this case, the hearing officer whose findings of fact and recommendation were considered by the San Diego Civil Service Commission (Commission) in executive session, was himself a commissioner and was present when his fellow commissioners *579 considered his findings and recommendation. In response to our letter inquiry, we were advised, "The full Commission routinely meets with the hearing officer to fully discuss the proposed report of the hearing officer and ratify the findings that are prepared prior to the meeting." We were further advised that although more than three months transpired between the conclusion of the evidentiary

hearing on these complaints and charges and the ratification of the hearing officer's findings and recommendation, Bollinger was first apprised of those findings and recommendation when served with a copy of the Commission's ratification decision.

A.

Bollinger's petition for mandamus sets forth one narrow issue: whether the ratification action taken by the full Commission in closed session following a public evidentiary hearing was null and void for failure to notify Bollinger in writing that he also had the right to have the Commission's later ratification deliberations in open session. The issue was posed in light of the facts of this case. Here, Bollinger's evidentiary proceedings were heard by a single member of the Commission who had been designated as a hearing officer. More than three months after its conclusion, Bollinger received oral notice of the Commission's intent to meet in closed session to determine whether to ratify the hearing officer's findings and recommendation. Bollinger did not receive a copy of the hearing officer's findings or his recommendation. In spite of the oral notice, Bollinger did not make a specific request to have the deliberative session open.

Relevant to this appeal, the trial court found that although Bollinger was orally informed the deliberations would be held in a closed session, he never made a request for a public session. Finding actual notice irrelevant, the trial court confined its decision solely to whether Government Code section 54957 requires the Commission to give Bollinger written notice of a right to have the ratification deliberations conducted in public. Therefore, the court below did not, nor do we, address the broader issue of whether, had Bollinger specifically requested that deliberative process to be open, the failure to accede to his request would be a Ralph M. Brown Act violation.

B.

Turning to the procedural due process discussion, I agree with the analysis as a stated general proposition. However, had the issue been framed in light *580 of the facts of this case, we would have had to address it in a more meaningful context.

First, it is true that procedural due process is usually satisfied by the mere availability of an appellate remedy. However, in a practical sense, in cases such as this, appellate review is less than meaningful to one who is denied the right to present his case, to argue its merits, and to dissect factual findings for the edification of those faceless decision makers who are empowered to remove, demote or discipline. As the question is posed in our opinion, we only decide that constitutional procedural due process did not require, although we believe it preferable, to permit Bollinger to appear before the full Commission after first receiving the hearing officer's recommended findings, for the purpose of enlightening the Commission members as to their validity and whether the evidence was fairly characterized in that report.

Be that as it may, there is an additional significant fact which we obtained from the parties upon our direct inquiry which sets this case apart from those cited. That is, the hearing officer Commission member whose findings and recommendation were ratified by the Commission was present in the closed session while his fellow Commission members engaged in the deliberations. Thus, Bollinger, who was not even apprised of the hearing officer's findings and recommendation until after they were ratified, was excluded from the Commission's "free and candid" discussion of his fate in the presence of the hearing officer who was present to defend, encourage, enlighten and "freely and candidly" respond to any concerns expressed by his fellow Commission members. Whether the hearing officer did anything more than merely sit silently and impassively while his findings and recommendation were considered and ratified by the Commission, or in fact participated in some manner during the closed proceedings, is not shown in this record. However, the fact of his presence alone, in a position to defend his findings and recommendation while preventing Bollinger from even being aware of their nature let alone having the ability to argue their validity to the Commission, transcends the procedural unfairness considered in any of the numerous cases cited by the majority. However, whether a hearing officer/commissioner's presence while his colleagues deliberate to ratify his findings in closed sessions, coupled with the failure to disclose the nature of those findings to the affected employee, denying him the opportunity to argue their validity before the commissioners meet

in closed session with the hearing officer may deny the procedural due process guaranteed by the Fourteenth Amendment and article I, section 7, subdivision (a) of the California ***581** Constitution, although a significant concern, is an issue not raised in this appeal. [FN1]

> FN1 During oral argument in a recent unpublished case, *Kathan v. Civil Service Com.* (Mar. 10, 1999) D028812, the city attorney advised that the commission had adopted an interim policy, pending a decision in this matter, for the commission to hold its deliberations on personnel matters arising out of complaints and charges in open session. We were told that conducting those deliberations openly had created no impediment to efficiency, appropriate disposition of those matters or candor.

Therefore, subject to the comments expressed herein, I concur. ***582**

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Filed 4/30/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT KOREY WOODBURY, A Minor etc., et al. Plaintiffs and Respondents, v. PATRICIA BROWN-DEMPSEY, as Superintendent, etc., et al., Defendants and Appellants.	E031001 (Super.Ct.No. MCV3999) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift and John M. Pacheco, Judges.* Reversed with directions.

Girard & Vinson, Christian M. Keiner, William F. Schuetz, Jr., and Scott K. Holbrook for Defendants and Appellants.

*Judge Swift heard the writ proceedings; Judge Pacheco heard the second motion for attorney fees.

Miller Brown & Dannis, Nancy B. Bourne, Sue Ann Salmon Evans, and Elizabeth Rho-Ng for Education Legal Alliance of the California School Boards Association as Amicus Curiae on behalf of Defendants and Appellants.

Merele D. Chapman for Plaintiffs and Respondents.

Plaintiffs and respondents are five high school students in the Morongo Unified School District (the District).[1] They were members of the football team accused of sexual battery and other misconduct arising out of several locker room incidents. The District proposed to expel the students at a disciplinary hearing held before the District's governing board of trustees (the Trustees). The students, pursuant to Education Code section 48918, subdivision (i)(1), requested that certain witnesses be subpoenaed to attend the disciplinary hearing. The Trustees refused to issue the subpoenas.

After the disciplinary hearings, the Trustees expelled the students. The students appealed to defendant San Bernardino County Board of Education (the County Board).[2] The County Board upheld the expulsions.

The students petitioned the San Bernardino County Superior Court for a writ of administrative mandate requiring the school board to issue the subpoenas. The trial court

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[1] Six students were involved in the alleged misconduct. One of the six dismissed his petition for administrative mandate, without prejudice, in the proceedings below. That student, Blake Poist, is not a party to this appeal.

[2] The County Board was not named as an appellant in the notices of appeal filed in the superior court.

granted the writ. The court held that the issuance of subpoenas was mandatory under the statute.

Defendants and appellants, the individual Trustees, the District, the District superintendent of schools, and the principal and vice-principal of the students' high school, appeal the trial court's ruling. They argue that the trial court misinterpreted the statute and relevant legislative history. We shall reverse.

FACTS AND PROCEDURAL HISTORY

A. Summary of the Alleged Incidents

The charges against the six students involved several discrete events that took place in the football squad locker room.

The first incident took place in late August of 2000. Plaintiff and respondent Nathan Leatherman was alleged to have made another boy lick a stick of deodorant. Leatherman then stated that he had used the deodorant to "wipe his butt."

The second and third incidents took place on the afternoon of September 6, 2000. Plaintiffs and respondents Derrick Aguilar and Glenn Briggs, and possibly others, forced another boy (referred to in the proceedings as Student A) to the ground and held him down. Plaintiff and respondent Steven Hill then slapped Student A in the face with his penis. Minutes later, Leatherman, Aguilar, and Hill, together with plaintiffs and

respondents Blake Poist[3] and Korey Woodbury, wrestled yet another boy (Student F) to the floor. Poist had a wooden dildo; after a struggle, the aggressors managed to pull down Student F's pants and insert the wooden dildo into his anus.

The final incident took place in mid-October of 2000. Leatherman allegedly made Student F march around the locker room with the wooden dildo in his mouth. Leatherman also manipulated the wooden dildo in Student F's mouth, simulating oral copulation. When Leatherman saw another boy watching him, Leatherman put a real chicken's foot in that boy's mouth, and made both victims march around the locker room.

B. Disciplinary Proceedings

The District informed the students and their parents that the principal had recommended their expulsion. The expulsion hearing before the Trustees was set for December 12, 2000. The students engaged Dr. Mark Lopez, director of a student rights advocacy center, as their representative.

On behalf of the students, Dr. Lopez wrote a letter to the Trustees, requesting that all six hearings be held at the same time, and that the hearings be open to the public. Dr. Lopez further requested that the Trustees "issue subpoenas for the purpose of requiring attendance . . . of witnesses who have evidence that is relevant to this alleged discipline matter." Dr. Lopez indicated that the students believed that witnesses against them had been intimidated into making false accusations.

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[3] Strictly speaking plaintiff Poist is not a respondent. See footnote 1, *ante*.

The Trustees responded, agreeing to hold all the hearings simultaneously and to have the hearings open to the public. The Trustees gave notice of the scheduled time and place of the hearings. The Trustees further stated that, "[w]hile Education Code section 48918 does authorize governing boards to issue subpoenas for expulsion hearings, it does not require such action. The [Trustees] ha[ve] never issued subpoenas in the past and decline[] to do so in these pending matters."

On December 6, 2000, Dr. Lopez wrote to the Trustees asking that numerous persons be present to testify at the hearings. Dr. Lopez adverted to his earlier, denied, request for subpoenas, and took the position that the Trustees should "accept[] responsibility of insuring the production of all witnesses that the students deem necessary in the presentation of the students' case." The witnesses for whom Dr. Lopez requested subpoenas included the District superintendent, the assistant superintendent for educational services, the principal and vice-principals of Yucca Valley High School, the school's athletic director and ten football coaches, the school's "campus supervisors," and a classroom aide. Dr. Lopez did not indicate the nature of testimony expected of these witnesses, except his reiterated allegations that District agents or employees somehow coerced witnesses into giving false statements, or intimidated other witnesses from coming forward, or suppressed their statements. In addition to the specifically named witnesses, Dr. Lopez stated that the students intended to call "approximately 20-25 Yucca Valley HS students." Dr. Lopez declined to name the proposed student

witnesses, allegedly "because they fear that the . . . administrators will threaten, harass or intimidate them prior to the hearing while they are attending school."

The Trustees replied on December 8, 2000, indicating that a number of the football coaches were not District employees, but had served temporarily during the football season as "walk-on coaches." The Trustees reported that "[a]ll other employees in your request have been notified of your request for their voluntary appearance."

The administrative record contains one exemplar of the "notification" of request for voluntary appearance issued by the District to its employees. It stated: "Please be advised that [the students] ha[ve] requested that the following witnesses be present and give testimony at the expulsion hearing now scheduled [giving the date, time, and location, but not naming any witnesses]. [¶] The Board of Education has not issued a subpoena for the attendance of any witnesses in this matter. Therefore, neither the district nor the students can compel attendance at this hearing. In all likelihood, Mr. Lopez will be presenting his case after the end of your duty day. Your attendance in response to this request is purely voluntary on your part."

Dr. Lopez issued a supplemental witness list on December 12, 2000, the date the hearings were scheduled to begin, naming the Trustees' president, and the District's employee in charge of attendance and expulsion as witnesses. As before, Dr. Lopez referred to his earlier request for subpoenas, repeated his allegations of intimidation and coercion, and demanded that, if the Trustees did not issue subpoenas, they assume responsibility for producing the students' requested witnesses at the hearings.

The hearings commenced as scheduled on December 12, 2000. Dr. Lopez again raised the issue of subpoenas, making an "offer of proof" that the individual Trustees he had sought to subpoena would be examined concerning their role in the decision not to issue subpoenas.

In the balance of the hearings on that date, two of the victims testified in closed session. The hearings resumed on December 13, 2000, with evidence from the vice-principal who had conducted an initial investigation into the alleged incidents. The hearings were not able to be concluded on that date. The Trustees recessed the hearings to December 19, 2000. Dr. Lopez, insisting that the students had a statutory right to a continuous hearing, objected to the December 19 date. The Trustees overruled the objection, and ordered the hearings to resume on December 19.

The transcript indicates that the hearings were marred by something of a circus atmosphere, with outbursts from the parents and others who were present, including direct appeals by Dr. Lopez to the audience. A great deal of time in the initial two days of the hearings was taken up with wrangling over collateral issues and arguments. At the resumption of the hearings on December 19, therefore, the Trustees had certain remarks added to the record, appealing to those present to respect proper decorum and to allow the hearings to proceed in an orderly manner. The District's counsel and Dr. Lopez were admonished to focus their presentations upon factual matters concerning the occurrence or nonoccurrence of the events upon which the allegations were based. The advocates were further instructed not to approach witnesses or the board members, to speak only

from the podium provided, to remain seated when not at the podium, to refrain from addressing the audience directly or from making gestures to the audience, to refrain from improper or argumentative questions, and to refrain from arguing with the board members or their advisor. In addition, the audience was cautioned to refrain from making displays (e.g., cheering or clapping). The Trustees indicated that, if the procedural guidelines were not observed, the hearings would be recessed and conducted in the absence of anyone except legitimate participants.

The Trustees' legal advisor called upon Dr. Lopez to resume his cross-examination of the vice-principal. Dr. Lopez continued his obstructionist tactics, however, challenging the advisor: "I'm not going to stand at the podium. So are you going to arrest me? That's the big question, isn't it, Mr. Patterson [the Trustees' legal advisor]?

"MR. PATTERSON: If you're not going to comply, Dr. Lopez, the decision is in your hands, because we'll recess right now.

"DR. LOPEZ: Mr. Patterson, you can recess all you want to. . . .

"MR. PATTERSON: Are you going to comply with the procedures or not?

"DR. LOPEZ: First I have to ask and I asked before, are you making that under the Brown Act?

"MR. PATTERSON: Are you going to comply with the procedures or not?

"DR. LOPEZ: I asked a question, Mr. Patterson. You're the hearing advisor."

The Trustees, having given Dr. Lopez several opportunities to behave civilly, immediately recessed the hearings to the following day, "with only the students, their parents, attorney, advocate, and press present."

On December 20, 2000, the hearings resumed at 9:00 a.m. The Trustees' legal advisor invited Dr. Lopez to resume his cross-examination. Instead, Dr. Lopez stated, "pursuant to Education Code section 48918(a), the students will ask for a 30-day postponement," and apparently presented a document making such a written demand. Without waiting for a reply, he told his clients, "Let's go"; Dr. Lopez, the accused students and their families apparently then left the hearing room en masse. The Trustees denied the request for a postponement and directed an officer in attendance to inform Dr. Lopez and the students, who were apparently outside the hearing venue, that the hearings would be immediately resumed. Dr. Lopez reportedly said, "'They can do what they want,'" and departed.

The hearings then resumed with documentary and testimonial evidence. Ultimately the Trustees voted to expel all six students.

The students appealed their expulsions to the County Board. The County Board affirmed all six expulsions.

C. Writ Proceedings

The students then filed a petition for writ of administrative mandate, alleging numerous errors in the disciplinary proceedings. The trial court ruled against the students as to each point raised, save one: the Trustees' refusal to issue subpoenas for the

students' requested witnesses. Otherwise, the court would have affirmed the expulsions, with certain modifications not pertinent here. The trial court construed the relevant provisions of the Education Code to impose upon the Trustees a mandatory duty to issue the requested subpoenas; the refusal to do so deprived the students of due process and required either a new hearing, with the opportunity to subpoena witnesses, or expungement of the students' records.

The court's judgment denied the students' request for attorney fees and costs under Government Code section 800.[4] The students brought a new motion for attorney fees, however, before another judge on a private attorney general theory[5] and were awarded attorney fees.

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[4] Government Code section 800 provides: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.

"This section is ancillary only, and shall not be construed to create a new cause of action.

"Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section."

[5] Code of Civil Procedure section 1021.5.

D. Present Appeal

The Trustees, individually and as a governing board, the District, and the high school principal and vice-principal (collectively, defendants) appealed the judgment and the award of attorney fees. Defendants raise two points on appeal. First, they argue that the trial court misconstrued the pertinent statutory provisions. Defendants maintain that the relevant statute empowers school governing boards to issue subpoenas as a discretionary matter, and that issuing subpoenas is not mandatory upon request. Second, defendants argue the award of private attorney general attorney fees was improper.

ANALYSIS

I. The Subpoena Issue

A. Standard of Review

The main thrust of the appeal turns on the proper interpretation of Education Code section 48918, subdivision (i)(1). Statutory construction is a question of law, which this court reviews de novo.[6]

B. Education Code Section 48918

Education Code section 48918 provides, among other things, for an evidentiary hearing when the governing board proposes to expel a pupil. Provisions dealing with notice, the opportunity to appear at the hearing, the attendance of counsel or an advocate, preparation of findings and of an administrative record, are included. As pertinent here,

Education Code section 48918 provides: "The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. These procedures shall include, but are not necessarily limited to, all of the following:

". . . . . .

"(i)(1) Before the hearing has commenced, the governing board may issue subpoenas at the request of either the superintendent of schools or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. Enforcement of subpoenas shall be done in accordance with Section 11525 of the Government Code.

"(2) Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if so requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.

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[6] *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.

"(3) If the governing board, hearing officer, or administrative panel determines, in accordance with subdivision (f), that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena shall not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided for in subdivision (f)."

The question is whether the provision that the Trustees "may" issue subpoenas is a grant of discretionary power, or whether the statute creates a mandatory duty to issue subpoenas on request.

C. The Trial Court's Interpretation of the Statute

The trial court interpreted the word "may" in Education Code section 48918, subdivision (i)(1) simply as a term granting subpoena power. In other words, where there had previously been no subpoena power vested in school district governing boards, the Legislature extended a grant of such power to the board: "the Legislature is granting subpoena power to the board by saying that the board may issue subpoenas." The trial court accepted the students' argument that, "*in the context of a statute defining a public duty*, the word 'may' is *mandatory*."[7] Further, cases in which the administrative agency at issue did not have subpoena power suggested to the court that "*if an administrative agency does have subpoena power*, a party is *entitled* to use it as a matter of right.

Otherwise, there would be no [reason that] the court would assume that the plaintiff 'would have enjoyed' that subpoena power if the board had possessed it."[8] The trial court below therefore viewed the statutory language, that a school district governing board "may" issue subpoenas, as mandatory: i.e., the board "is without discretion *not* to use [their subpoena powers] to issue subpoenas on the request of a party before it."

D. Education Code Section 48918, Subdivision (i)(1) Vests School Boards With Discretionary Power to Issue Subpoenas in Expulsion Proceedings

"'Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law.'"[9] In so doing, "[w]e consider first the words of the statute because they are generally the most reliable indicator of legislative intent."[10] We "'giv[e] to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both

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[7] Citing *Mass v. Board of Education* (1964) 61 Cal.2d 612, 622-623.

[8] Citing *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 299, 304 quoting *Wool v. Maryland-Nat. Capital Park & Plan. Com'n* (D. Md. 1987) 664 F.Supp. 225, 230-231: "If the Board had possessed subpoena power, plaintiff would have enjoyed an additional avenue through which to present evidence in this case. But in light of the other means available to plaintiff, this Court is not convinced that the lack of subpoena power denied plaintiff the minimum procedural protections required by the Fourteenth Amendment."

[9] *In re J.W.* (2002) 29 Cal.4th 200, 209.

internally and with each other, to the extent possible.'"[11] Rules of statutory construction are not to be rigidly applied in isolation, however. The touchstone is always the intent of the legislation. Thus, for example, the California Supreme Court has noted that "the rule against interpretations that make some parts of a statute surplusage is only a guide and will not be applied if it would defeat legislative intent or produce an absurd result."[12] Similarly, the "courts do not apply the *expressio unius est exclusio alterius* principle 'if its operation would contradict a discernible and contrary legislative intent.' [Citations.]"[13]

The correct construction of a statute is not divorced from its context. "To determine the purpose of legislation, a court may," therefore, properly "consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice."[14]

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[10] *In re J.W., supra,* 29 Cal.4th 200, 209.

[11] *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.

[12] *In re J.W., supra,* 29 Cal.4th 200, 209.

[13] *In re J.W., supra,* 29 Cal.4th 200, 209.

[14] *In re J.W., supra,* 29 Cal.4th 200, 211.

1. The Words Do Not Evince an Intent to Create a Mandatory Duty to Issue Subpoenas

We look first to the words of the statute themselves. Education Code section 48918, subdivision (i)(1) states that the governing board "*may* issue subpoenas." (Italics added.) Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a mandatory or directory duty.[15] This distinction is particularly acute when both words are used in the same statute.[16]

Education Code section 48918, subdivision (i)(2) provides that the governing board may rule upon any objections to the issuance of subpoenas, and that the governing board's decision regarding any such objection "shall be binding and final." Education Code section 48918, subdivision (i)(2) thus assumes that the issuance of subpoenas is subject to some kind of evaluation by the governing board, and that the results of the governing board's evaluation lay the issue to rest.

Where the statutory language is clear and unambiguous, there is no need for judicial construction.[17] Giving the words used here their ordinary import and meaning, we discern no particular ambiguity. The Legislature is presumably aware of the ordinary

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[15] *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1144-1145.

[16] *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443; *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1420.

[17] *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519; *Praiser v. Biggs Unified School Dist.* (2001) 87 Cal.App.4th 398, 401.

meaning assigned to the words "may" and "shall," and has used the word "shall" almost exclusively in enacting Education Code section 48918. The word "may" has been reserved for use only in stating that "the governing board *may* contract with the county hearing officer"[18] to conduct an expulsion hearing, rather than conducting the hearing itself, and that the governing board "*may* issue subpoenas."

Based solely on the language of the statute, we would conclude that Education Code section 48918, subdivision (i)(1) prescribes a permissive, rather than a mandatory, act.

The matter is not wholly free from all doubt, however; assuming that the provision is ambiguous, we may look to other aids in interpreting its meaning: If the statutory language is ambiguous, we may look to the legislative history, the background of the enactment, including apparent goals of the legislation, and public policy, to determine its meaning.[19] We turn to these matters next.

2. The Legislative History and the Purpose of the Legislation Indicate an Intent to Make Issuance of Subpoenas a Matter of Discretion

The history of the enacting legislation demonstrates that, contrary to the students' thesis, Education Code section 48918, subdivision (i)(1) was intended to grant a discretionary authority, not to impose a mandatory duty. Education Code section 48918,

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[18] Education Code section 48918, subdivision (d).

subdivision (i) began life as Assembly Bill 618 (AB 618), introduced by Assembly Member William Morrow. In its original form, AB 618 proposed to add a new subdivision to Education Code section 48918, as follows:

"(i)(1) Before the hearing has commenced, the governing board *shall* issue subpoenas and subpoenas duces tecum at the request of either the county superintendent of schools or his or her designee or the pupil, for the attendance of witnesses or the production of documents at the hearing. After the hearing has commenced, the governing board of the hearing officer or administrative panel may, upon request of either the county superintendent of schools or his or her designee or the pupil, issue subpoenas and subpoenas duces tecum. . . ." (Italics added.)

The Legislative Counsel's Digest of the introduced bill explained: "Existing law requires the governing board of each school district to establish rules and regulations governing procedures for the expulsion of pupils, including a procedure that provides a pupil with a hearing to determine whether the pupil should be expelled. . . .

"This bill would *require*, before a hearing on an expulsion has been commenced, the governing board of the school district to issues subpoenas and subpoenas duces tecum for the attendance of witnesses or the production of documents at the request of the county superintendent of schools . . . or of the pupil. The bill would *authorize*, after the

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[19] *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.App.4th 116, 129;
[footnote continued on next page]

hearing on an expulsion has commenced, the governing board or the hearing officer or administrative panel to issue subpoenas or subpoenas duces tecum at the request of the county superintendent of schools . . . or of the pupil.

". . . . . .

"*Because the bill would place a new duty on the governing boards of school districts, it would constitute a state-mandated local program.*" (Italics added.)

The impetus for the bill apparently was the concern expressed by one school superintendent that the power to compel witnesses to attend expulsion hearings was necessary when witnesses were reluctant to testify.

An exchange of views among legislators and interested school groups resulted in modifications to the proposed bill. Among other things, some school officials believed that granting the subpoena power would make expulsion hearings more like civil or criminal courtroom trials: more cumbersome, more formal, more contentious, more protracted and more expensive. Some feared that making issuance of subpoenas mandatory would lead to abuses by pupils, and would clog hearings with numerous "character" and other collateral witnesses. Further, school board members are often not trained in the law, and would have difficulties ruling on objections to subpoenas, or in

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Case v. Lazben Financial Co. (2002) 99 Cal.App.4th 172, 186.

distinguishing legitimate from illegitimate uses of the subpoena power. Changes were suggested to address these problems.

The bill as amended read [with deletion indicated in strikeout type and additions in italics]:

"(i)(1) Before the hearing has commenced, the governing board ~~shall~~ *may* issue subpoenas ~~and subpoenas duces tecum~~ at the request of either the ~~county~~ superintendent of schools or ~~his or her~~ *the superintendent's* designee or the pupil, for the ~~attendance of~~ *personal appearance of percipient* witnesses ~~or the production of documents~~ at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or ~~his or her~~ *the superintendent's* designee or the pupil, issue subpoenas ~~and subpoenas duces tecum~~. . . ."

The Legislative Counsel's Digest of the amended bill reflected the changes [alterations indicated as before]: "This bill would ~~require~~ *authorize*, before a hearing on an expulsion has been commenced, the governing board of the school district to issue subpoenas ~~and subpoenas duces tecum~~ for the ~~attendance of~~ *personal appearance of percipient* witnesses ~~or the production of documents~~ at the request of the ~~county~~ superintendent of schools or ~~his or her~~ *the superintendent's* designee or of the pupil. . . .

". . . . . .

"~~Because the bill would place a new duty on the governing board of school districts, it would constitute a state mandated local program~~. . . ."

The amended language of the bill was retained in the final enactment of Education Code section 48918, subdivision (i).

In our view, the alterations demonstrate with reasonable certainty that, although the bill as originally proposed would have created a mandatory duty to issue subpoenas before the hearing had commenced, and discretionary power to issue subpoenas once the hearing had begun, the bill as amended provided only for discretionary issuance of subpoenas, whether before or after the hearing had begun.

Revisions to a bill may properly be considered in construing the resulting statutory language.[20] Here, the Legislature specifically rejected the word "shall" in the enactment, replacing it with the word "may." Further, the Legislative Counsel's Digest initially reported that school boards would be "required" to issue subpoenas upon request, but amended the description of the bill simply to "authorize" school boards to issue subpoenas -- a sensible description of a grant of power where there had been none before. The bill as introduced was originally described as imposing a "new duty" on school boards, thus creating a state-mandated local program. The description of the amended bill deleted any reference to imposing a duty upon local school boards. (The bill as amended was ultimately evaluated as creating a state-mandated local program, however, but only insofar as enforcement of subpoenas in the superior court could result in reluctant witnesses being found guilty of a criminal contempt.)

We must construe an enactment to effectuate, and not to frustrate, the purpose of the law.[21] The purpose of the legislation also militates in favor of construing the statute as granting an exercise of discretion, rather than creating a mandatory public duty to issue subpoenas. The legislative committee reports described the purpose as, "to make expulsion hearings more effective." That is, the proponents argued, "the subpoena power will increase the effectiveness of expulsion hearings by ensuring that vital witnesses (i.e., *those who perceived the conduct*) will participate. Currently, many witnesses do not appear at hearings." (Italics added.)

It thus appears that the amendments to AB 618, restricting the issuance of subpoenas to "percipient witnesses" were intended to curb potential abuses by, e.g., subpoenaing numerous "character" witnesses, or witnesses who did not perceive the alleged misconduct, but whose evidence relates to collateral issues only.

Our interpretation fully accords with the maxim that statutes should be construed so as to avoid absurd results.[22]

Construing Education Code section 48918, subdivision (i) to require mandatory issuance of subpoenas upon request would foreseeably embroil school boards in

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[20] See *People ex rel. Mautner v. Quattrone* (1989) 211 Cal.App.3d 1389, 1396.

[21] *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.

[22] *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 142; *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500, 505.

protracted pre-hearing proceedings solely concerning contested rulings on the issuance of subpoenas. As correspondence during the pendency of AB 618 indicated, school board members are often volunteer citizens, untrained in the intricacies of evidence and legal procedures. Further, setting the pre-hearing subpoena proceedings and objections to one side, making expulsion hearings into full-blown trials, with the compelled attendance of many witnesses, will do little to enhance effectiveness of expulsion hearings. The purpose of the legislation is manifestly to provide school boards with a tool to be used when it is of benefit, rather than to create a mandatory duty to issue subpoenas upon demand.

We note in passing that there is no necessity that the power to issue subpoenas be mandatory, or even that such a power exist all, to satisfy due process requirements. "'It is entirely possible that an agency without subpoena powers could secure the voluntary appearance of witnesses whose testimony would be sufficient to establish a substantial case . . . .' [Citation.]"[23] The mere provision of a subpoena power does not, therefore, in itself require that the power be mandatory, rather than discretionary. Here, the context and background compel the conclusion that the power granted was intended to be discretionary.

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[23] *Townsel v. San Diego Metropolitan Development Bd.* (1998) 65 Cal.App.4th 940, 951.

E. Discretion to Issue Subpoenas Must Not Be Exercised Arbitrarily

"Hundreds of laws and regulations are subject to interpretation and application by state and local agencies designated to administer them; in so doing, the exercise of discretion is common. And the courts routinely review these decisions for 'abuse of discretion.'"[24] An administrative agency may abuse its discretion if it acts arbitrarily or capriciously. More pertinently here, "[a] refusal to exercise discretion is itself an abuse of discretion."[25] Thus, "although mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a particular result, it does lie to command the exercise of discretion—to compel some action upon the subject involved under a proper interpretation of the applicable law."[26]

Here, the Trustees apparently adopted a blanket policy never to issue subpoenas. In so doing, the Trustees in essence abdicated their discretion, rather than exercising it. This, they may not do. Nonetheless, by analogy to the mandate of the California Constitution, article VI, section 13, we discern no miscarriage of justice which has resulted from the Trustees' procedural error in refusing to issue subpoenas in this case.

F. No Abuse of Discretion Resulted From the Refusal to Issue Subpoenas in This Case

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[24] *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1077.

[25] *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63.

[26] *Morris v. Harper*, *supra*, 94 Cal.App.4th 52, 63.

The students named many witnesses -- individual Trustees, other administrators, numerous football coaches, and other school personnel -- and claimed they were "percipient" witnesses to the events at issue. They backed up these claims, however, with nothing other than bald assertion. The only witness as to whom Dr. Lopez made an offer of proof was one of the Trustees, not to give evidence regarding the incidents for which the students were to be expelled, but to explain the Trustees' decision-making process in refusing the subpoenas. There was not the slightest indication that any of the named witnesses for whom subpoenas were sought had any relevant information to impart. Dr. Lopez's entire conduct of the proceedings on the students' behalf exposed his manifest purposes: delay, obstruction, obfuscation, disruption, harassment -- in short, anything other than an attempt to determine the factual truth of the charges against the accused students. The matter has proceeded all the way through this appeal without identifying a single relevant purpose for the attendance of any of the requested witnesses.

We also find it significant that the students and their representatives walked out of the hearing. They never availed themselves even of the due process rights they were afforded; manifestly, Dr. Lopez's purpose was to thwart the proceedings and attempt to create "built-in" error. The Trustees were not required to kowtow to such belligerent truculence; thus we could not find any abuse of discretion under these facts in failing to issue the demanded subpoenas.

G. Reversal of the Judgment Granting the Writ Is Required

The students sought writ review of the administrative proceedings below, asserting numerous grounds of error. The trial court reviewed each contention with great care. Aside from the subpoena issue, the court would have affirmed the expulsions, with some slight modifications to the findings, in each case. The writ was granted solely on the ground that the Trustees had a mandatory duty to issue the requested subpoenas, and the refusal to do so deprived the students of due process in the expulsion hearings. The students have not appealed the judgment, and thus have not challenged the trial court's rulings as to any of their other grounds for the petition. We have interpreted the statute differently from the trial court, however, to grant a discretionary authority to issue subpoenas, rather than to create a mandatory duty to do so.

Accordingly, the judgment granting the writ must be reversed. The trial court is directed to issue a new judgment denying the writ.

II. The Attorney Fees Issue

The students first requested attorney fees of the trial court as prevailing parties, under Government Code section 800. The court denied the motion for fees. The students renewed their request on a new theory, the private attorney general theory, before a different judge. The new judge granted private attorney general fees under Code of Civil Procedure section 1021.5. Defendants appealed this order.

Private attorney general fees are available under Code of Civil Procedure section 1021.5 only to a "successful" party. Inasmuch as we have reversed the judgment as to

the sole issue upon which the students prevailed, they cannot be considered successful parties. The award of attorney fees under Code of Civil Procedure section 1021.5 must therefore be reversed also.

DISPOSITION

For the reasons stated, the judgment must be reversed, insofar as the trial court granted the writ on the ground of due process violation for refusal to issue subpoenas to the students' proposed witnesses. No other ruling concerning the merits of the writ was appealed. The trial court is therefore directed to enter a new judgment denying the writ.

The order granting the students' attorney fees must also be reversed.

Defendants and appellants to recover costs on appeal.

CERTIFIED FOR PUBLICATION

/s/Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.

272 Cal.App.2d 486
77 Cal.Rptr. 344
(Cite as: 272 Cal.App.2d 486)

C

THE PEOPLE, Plaintiff and Respondent,
v.
SY MEJIA, Defendant and Appellant.

Crim. No. 15905.

Court of Appeal, Second District, Division 1, California.

Apr. 30, 1969.

HEADNOTES

(1a, 1b, 1c, 1d, 1e, 1f) Arrest § 10--Without Warrant--On Charge of Felony on Reasonable CauseSearches and Seizures § 6--Investigations Falling Short of Search.
Circumstances justified defendant's detention by officers for questioning and his subsequent arrest by the officers, and a gun obtained from defendant was not obtained as the result of an unlawful search and seizure but as incident to the arrest, no issue of unlawful search and seizure being presented, where, at a late night hour and soon after a report of a burglary in progress, defendant was observed by the officers near the scene of the burglary carrying a package covered by a coat, and, after being spotlighted by the officers, continued to walk away, and where, after being halted by the officers, defendant dropped the package which broke and plainly revealed portions of the firearm and ammunition, at which time the officers placed defendant under arrest on suspicion of burglary.

(2) Criminal Law § 413.5(3)--Evidence--Motion to Suppress.
In a prosecution for violation of the Dangerous Weapons Control Act, in which defendant's pretrial motion to suppress evidence was denied, the trial court did not fail to exercise its discretion *487 in determining whether to allow defendant to renew such motion after the prosecution rested, where defendant's attempt to reargue the issue without a motion for leave therefor was sufficient to call the court's attention to the matter and the court seriously considered the same and ruled that further argument would not be allowed.

(3a, 3b) Arrest § 5.5--Detention Short of Arrest.
Circumstances short of probable cause for an arrest which would indicate to a reasonable man in a like position that an investigation was necessary to the discharge of his duties may justify temporary detention of a person by an officer for the purpose of questioning.

(4) Arrest § 5.5--Detention Short of Arrest.
Where the circumstances justified defendant's temporary detention for questioning by police officers, their order to defendant to "Hold it for a minute," did not constitute an arrest.

(5) Searches and Seizures § 6--Investigations Falling Short of Search.
Merely looking at that which is open to view is not a search.

(6) Arrest § 10--Without Warrant--On Charge of Felony on Reasonable Cause.
A peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony.

See **Cal.Jur.2d, Rev.,** Arrest, § 28 et seq.; **Am.Jur.2d,** Arrest, § 44 et seq.

(7) Arrest § 12(7)--Reasonable or Probable Cause--Test for Determining Reasonableness.
Reasonable cause for arrest exists when the facts and circumstances within the knowledge of the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Maurice T. Leader, Judge. Affirmed.

Prosecution for violation of the Dangerous Weapons Control Act. Judgment of conviction affirmed.

COUNSEL

Richard H. Levin, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and George J. Roth, Deputy Attorney General, for Plaintiff and Respondent.

LILLIE, J.

Defendant was charged with a violation of the Dangerous Weapons Control Act (§ 12021, Pen. Code) and *488 three prior felony convictions (Dyer Act [1946]; violations, section 211, Penal Code [1947], section 11500, Health and Safety Code [1953]). After his arraignment defendant moved to suppress the evidence under section 1538.5, Penal Code, and to dismiss under section 995, Penal Code; both motions were denied. Defendant then entered a plea of not guilty. By stipulation the cause was submitted on the transcript of the testimony taken at the preliminary hearing. After the commencement of the trial, the court had read and considered the transcript and the People had rested their case defendant sought to reargue the issue of unlawful search and seizure; noting that a motion to suppress the evidence pursuant to section 1538.5, Penal Code, and a motion to dismiss under section 995, Penal Code, had been made prior to trial and denied, the trial court refused to permit the reargument. Defendant was found guilty as charged; the court made no finding on the allegations of the three prior felony convictions. Defendant appeals from the judgment.

Around 12:30 in the morning on March 21, 1968, several police vehicles responded to "a burglary there now" radio call; they arrived at the location within five minutes. About 75 feet from the location where the burglary was reported to be in progress Officer Michael saw defendant walking on the street away from the premises; no other pedestrians were in the area. Defendant was illuminated by a spotlight from the black and white police vehicle but he paid no attention to it and continued walking carrying a coat over his left arm and a package beneath the coat. Officer Michael got out of the police car approximately 25 feet behind defendant and started to follow him; another officer got out in front of defendant and told him to "Hold it for a minute." Defendant then walked toward the curb and the officer and as he did so dropped the package from his left side which, when it hit the curb and parkway, made a metallic sound and split open, and continued walking. Officer Michael was 5 to 10 feet behind defendant; when he "got there"-where the package lay-it was split open revealing the grips of a weapon, portions of a clip and .45 caliber rounds; he then arrested defendant on suspicion of burglary after which he picked up the package, which lay about 4 feet from where he had arrested defendant, made an examination of the contents and found a .45 caliber automatic. Defendant denied "knowledge of possession of the package." Officer Gelb made an examination of the fingerprints on the gun and identified them as belonging to defendant; *489 an abstract of judgment reflected that on August 15, 1958, defendant was sentenced to the state prison pursuant to a plea of guilty to a violation of section 211, Penal Code.

Defendant took the witness stand and very briefly testified that "this particular firearm" was not his personal property.

(1a) Appellant's main contention is that the evidence was obtained by an unlawful search and seizure. (2) Prior to trial defendant did not seek appellate review of the court's denial of his pretrial motion to suppress the evidence by way of petition for writ of mandate or prohibition (§ 1538.5, subd. (i), Pen. Code) but, believing that subdivision (n) of section 1538.5 permitted him to do so, during the trial after the People rested their case attempted to raise the issue of unlawful arrest, search and seizure and direct an argument thereto. Commenting that pretrial motions under sections 1538.5 and 995, Penal Code, had been made and denied, the trial court stated it would "entertain no further argument as to those issues ... raised at the time of 1538.5 and 995." Defendant then abandoned his argument and took the stand on the merits of his defense denying that the weapon belonged to him. Appellant now says that he "specifically requested permission to renew the motion" and that the "trial judge denied the motion that he be permitted to renew the motion to suppress." The record reveals neither a request for permission to renew defendant's motion to suppress the evidence nor a motion that he be permitted to renew it, and technically he did not make one but his attempt to direct an argument to the issue of unlawful arrest, search and seizure was sufficient to call the court's attention thereto. However, to say, as does appellant here, that the trial court failed to exercise its discretion in

determining whether to grant a defense motion to renew the motion to suppress (if indeed it was a motion) is nonsense for the court did give serious consideration to his attempt to reargue the issue and decided not to permit another argument thereon. There is a clear exercise of discretion manifest in the record and not the arbitrary denial asserted by appellant. (1b) Moreover, his contention that he was arrested without probable cause and the gun was the product of an unlawful search and seizure is without merit.

It is readily apparent that in ordering defendant to "Hold it for a minute," the initial detention was intended by the officer to be but a temporary one for investigation only. (3a) Circumstances short of probable cause for an arrest may justify temporary detention of a person on the street late *490 at night by an officer for the purpose of questioning. (*People v. Mickelson,* 59 Cal.2d 448, 450 [30 Cal.Rptr. 18, 380 P.2d 658]; *People v. Martin,* 46 Cal.2d 106, 108 [293 P.2d 52]; *Terry v. Ohio,* 392 U.S. 1 [20 L.Ed.2d 889, 88 S.Ct. 1868].) (1c) Here there was ample justification for ordering defendant to stop-the lateness of the hour, his close proximity to and movement away from the premises reported to have been burglarized with a package covered by a coat and his unusual behavior when illuminated by the police car spotlight; it was at this point the officer told him to "Hold it for a minute." (3b) "The circumstances which allow temporary detention are those which 'indicate to a reasonable man in a like position that an investigation is necessary to the discharge of his 'duties.' (*People v. Gibson,* 220 Cal.App.2d 15, 20 [33 Cal.Rptr. 775].)" (*People v. Manis,* 268 Cal.App.2d 653, 659 [74 Cal.Rptr. 423] ; *People v. Piedra,* 183 Cal.App.2d 760, 761-762 [7 Cal.Rptr. 152].) Had the officer not stopped defendant and sought an explanation of his peculiar conduct he would have been derelict in his duties. (4) The evidence does not warrant a claim that initially the approach of the officers was for any purpose other than questioning; and their order to defendant to "hold it" that they could investigate and talk to him does not constitute an arrest. (*People v. Williams,* 220 Cal.App.2d 108, 112-113 [33 Cal.Rptr. 765].)

(1d) It was not until defendant dropped the package, which made a metallic sound and split open revealing the contents when it hit the curb, and continued walking and Officer Michael, following a few feet behind, observed the package on the parkway to contain the grips of a weapon, portions of a clip and .45 caliber rounds, that defendant was arrested. Before the arrest the gun was not the product of any unlawful search and seizure; Officer Michael did not search to find the gun, nor did he pick it up. When he first observed the weapon it was partially exposed in the package split open on the parkway; it was in plain sight for all to see. (5) The mere looking at that which is open to view is not a search. (*People v. Nieto,* 247 Cal.App.2d 364, 370 [55 Cal.Rptr. 546]; *Mardis v. Superior Court,* 218 Cal.App.2d 70, 74-75 [32 Cal.Rptr. 263]; *People v. Spicer,* 163 Cal.App.2d 678, 683 [329 P.2d 917]; *People v. West,* 144 Cal.App.2d 214, 219-220 [300 P.2d 729].) (1e) As to the arrest there can be no question but that it was a lawful one. With defendant's unexpected conduct and Officer Michael's observation of the contents of the package, the officers' opportunity for further investigation *491 ceased, and immediate action was required; under the circumstances Officer Michael could not be expected to do other than make the arrest. (6) A peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony. (§ 836, Pen. Code; *People v. Lara,* 67 Cal.2d 365, 374 [62 Cal.Rptr. 586, 432 P.2d 202]; *People v. Schader,* 62 Cal.2d 716, 722 [44 Cal.Rptr. 193, 401 P.2d 665]; *People v. Ingle,* 53 Cal.2d 407, 412 [2 Cal.Rptr. 14, 348 P.2d 577].) (7) "Reasonable cause exists when the facts and circumstances within the knowledge of the officer '... at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense had been committed. *Carroll v. United States,* 267 U.S. 132, 162 [45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790].' (*Beck v. Ohio* (1964) 379 U.S. 89, 96 [85 S.Ct. 223, 13 L.Ed.2d 142].)" (*People v. Schader,* 62 Cal.2d 716, 722 [44 Cal.Rptr. 193, 401 P.2d 665]; *People v. Cockrell,* 63 Cal.2d 659, 665 [47 Cal.Rptr. 788, 408 P.2d 116].) (1f) Nor is there a valid issue of unlawful search and seizure because it was not until defendant was placed under arrest that Officer Michael picked up the package, closely examined the contents and retained the weapon (Exh. 3), and this he had a right to do for it was clearly incident to a lawful arrest; and if under such circumstances it can be said that Officer Michael's conduct in picking up the package from the public parkway constituted a search and seizure of the gun it was

not "unreasonable" within the meaning of the Fourth Amendment. (*People v. Lara,* 67 Cal.2d 365, 373 [62 Cal.Rptr. 586, 432 P.2d 202]; *People v. Webb,* 66 Cal.2d 107, 111-112 [56 Cal.Rptr. 902, 424 P.2d 342, 19 A.L.R.3d 708].) Whether the package had ever been in defendant's possession was, of course, a factual question and the holding that it had been was fully supported by defendant's fingerprints on the gun and Officer Michael's testimony that he saw defendant drop the package containing the weapon.

Finally, appellant's reliance on *Gascon v. Superior Court,* 169 Cal.App.2d 356 [337 P.2d 201], and *Badillo v. Superior Court,* 46 Cal.2d 269 [294 P.2d 23], is misplaced. In *Gascon* the officers had threatened to illegally search the accused; in *Badillo,* the premises from which petitioner fled had been illegally entered by the investigating officer. Thus, in both cases "the petitioner was fleeing from the attempted illegal invasion of his constitutional rights." (*Gascon v. Superior Court,* 169 Cal.App.2d 356, 359 [337 P.2d 201].) In the instant case ***492** there was no statement or act indicating any illegal invasion of defendant's rights. In the light of "the presumption that official duty will be regularly performed" (*People v. Piedra,* 183 Cal.App.2d 760, 762 [7 Cal.Rptr. 152]), any suggestion that there was an implied threat of illegal search or unlawful arrest by the officers in ordering defendant to stop for the purpose of investigation, is wholly unwarranted on the record before us.

The judgment is affirmed.

Wood, P. J., and Fourt, J., concurred.

Cal.App.2.Dist.,1969.

People v. Mejia

END OF DOCUMENT

COUNTY OF LOS ANGELES
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

June 23, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of Commission Staff Draft Analysis
County of Los Angeles Test Claim, CSM-00-TC-18
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code:
Postmortem Examinations: Unidentified Bodies, Human Remains

We submit and enclose herein the subject review.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

for J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

Review of Commission Staff Draft Analysis
County of Los Angeles Test Claim, CSM-00-TC-18
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code:
Postmortem Examinations: Unidentified Bodies, Human Remains

Commission staff, in their June 4, 2003 analysis, find that a reimbursable State-mandated program is imposed on local law enforcement agencies under the [above captioned] test claim legislation.

Staff further specify, on page 15 of their analysis, that this reimbursable program includes activities of "... local law enforcement investigating the death of an unidentified person, to report the death to DOJ, in a DOJ-approved format, within 10 calendar days of the date the body or human remains are discovered, except for children under 12 or found persons with evidence that they were at risk, as defined in Penal Code section 14213".

However, staff conclude that the coroner's duties pursuant to the identification of unidentified bodies or human remains," ... such as submitting autopsy data, submitting the final report of investigation, retention of jaws, and submitting dental records... " are discretionary [Staff Analysis, page 12] and, therefore, are not to be included in the State mandated reimbursement program [Staff Analysis, page 15].

We disagree. The Corner's duties, here, are mandatory, not discretionary.

Coroner's Mandate

Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000 and amended by Chapter 467, Statutes of 2001, affirm, and are substantially related to, the mandatory duty of the coroner to examine unidentified remains and perform required autopsies, microscopic, toxicology, and microbiological testing, take photographs, fingerprints, tissue sampling for future DNA testing, x-ray, and prepare samples and reports for the Department of Justice:

"(b) The department shall develop standards and guidelines for the preservation and storage of DNA samples. Any agency that is required to collect samples from unidentified remains for DNA testing shall follow these standards and guidelines. These guidelines shall address all scientific methods used for the identification of remains, including DNA, anthropology, odontology, and fingerprints.

(c)(1) A coroner shall collect samples for DNA testing from the remains of all unidentified persons and shall send those samples to the Department of Justice for DNA testing and inclusion in the DNA data bank. After the department has taken a sample from the remains for DNA analysis and analyzed it, the remaining evidence shall be returned to the appropriate local coroner." [Emphasis added.][1]

Missing Persons Database Submissions

Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000, also was required to establish a "Missing Persons Database", as set forth in Section 1 of Chapter 822, Statutes of 2000, as follows:

"SECTION 1. The Legislature finds and declares the following:

(a) That unidentified remains and unsolved missing

[1] As Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000 and amended by Chapter 467, Statutes of 2001, affirm, and are substantially related to, the mandatory duty of the coroner to examine unidentified remains and perform required autopsies, microscopic, toxicology, and microbiological testing, take photographs, fingerprints, tissue sampling for future DNA testing, x-ray, and prepare samples and reports for the Department of Justice, an amendment to the subject test claim has been filed by the County of Los Angeles [test claimant] with the Commission on State Mandates to include Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000 and amended by Chapter 467, Statutes of 2001, in the test claim legislation. A copy of the declaration of David Campbell, Captain, Los Angeles County Department of Coroner's Operation Bureau, Forensic Services Division, supporting the subject amendment, is attached hereto.

persons cases constitute a critical problem for law enforcement and victims' families in the State of California.

(b) Hundreds of people, both children and adults, vanish each year under suspicious circumstances, and their cases remain unsolved. Meanwhile, coroners retain dozens of remains each year that cannot be identified. Families of missing persons must live with no sense of closure, even though their loved one may have already been found.

(c) The Legislature finds that new technology can play an invaluable role in identifying these remains through deoxyribonucleic acid (DNA) analysis.

(d) In order to identify these remains and bring closure to missing persons cases, the Legislature enacts the "Missing Persons DNA Data Base." This data base shall be used to identify remains and to locate missing persons. The intention of this data base is to identify remains to bring closure to the families of missing persons." [Emphasis added.]

Therefore, the Legislature has unambiguously mandated, in the test claim legislation, that coroners examine unidentified remains and perform required autopsies, microscopic, toxicology, and microbiological testing, take photographs, fingerprints, tissue sampling for future DNA testing, x-ray, and prepare samples and reports for the Department of Justice.

Coroner's Duties

In the case of an unidentified dead body or human remains, the coroner is mandated, pursuant to Government Code 27491, "to inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or

unusual", "unattended"; and, if the deceased had "not been attended by a physician in the 20 days before death".

The mandatory inquiry into, and determination of, the circumstances, manner, and cause of death of an unidentified dead body or human remains, pursuant to Government Code Section 27491, must now be supplemented, under Government Code Section 27521, to determine the identity of the deceased.

Irrespective of the types of postmortem inquiries, examinations or autopsies employed by the coroner to complete the mandatory determination of the circumstances, manner, and cause of death of an unidentified body or human remains pursuant to Government Code Section 27491, further mandatory duties to identify the deceased were added by Government Code Section 27521.

The new mandatory duties to determine identity of the deceased require, under Government Code Section 27521, that ".....a postmortem examination or autopsy shall include, but shall not be limited to, the following:

1) Taking all available fingerprints and palms prints.

2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4) Frontal and lateral facial photographs with the scale indicated.

5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

6) Notations of observations pertinent to the estimation of the time of death.

7) Precise documentation of the location of the remains.

c) The postmortem examination or autopsy of the unidentified body or remains may include full body x-rays.

d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

e) The body of unidentified deceased person may not cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

f) If the coroner with the aid of the dental identity of dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered."

Accordingly, Government Code Section 27521(b) is explicit in what a postmortem examination, for the purposes of determining identity, shall include.

Previous to the test claim legislation, the Coroner took fingerprints on most cases but limited the taking of palm prints to homicide victims.

Previous to the changes in the test claim legislation, the Coroner did not include the taking of a hair sample for DNA testing. Hair standards were collected only in homicide cases. In fact, DNA testing was never a regular method for identification and the collection of fluids for identification was usually not performed.

Previous to the changes in the test claim legislation, frontal and lateral facial photographs with the scale indicated were not mandated.

Previous to the changes in the test claim legislation, the retention of jaws (maxilla and mandible with teeth) and other tissue samples for future possible use was not mandated. Government Code Section 27521(e) requires the retention of jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

Previous to the changes in the test claim legislation, the Coroner made no provisions to store material used in positive identification. Once the body was identified, the jaws and/or tissues were returned to the body for disposition. The Coroner now requires additional storage for the jaws.

Accordingly, for all the reasons stated above, prompt and complete reimbursement of costs incurred by the County Coroner as well as the County Sheriff, in identifying unidentified bodies and human remains in accordance with the test claim legislation, is required.

County of Los Angeles Test Claim
Chapter 284, Statutes of 2000
Adding Sections 27521 & 27521.1 of the Government Code,
Amending Section 102870 of the Health & Safety Code,
Amending Section 14202 of the Penal Code,
Postmortem Examinations: Unidentified Bodies and Human Remains

Declaration of David Campbell

David Campbell makes the following declaration and statement under oath:

I, David Campbell, Captain, Los Angeles County Department of Coroner's Operations Bureau, Forensic Services Division, am responsible for implementing the subject law.

I declare that it is my information or belief that Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000 and amended by Chapter 467, Statutes of 2001, affirms, and is substantially related to, the mandatory duty of the coroner to examine unidentified remains and perform required autopsies, microscopic, toxicology, and microbiological testing, take photographs, fingerprints, tissue sampling for future DNA testing, x-ray, and prepare samples and reports for the Department of Justice:

> "(b) The department shall develop standards and guidelines for the preservation and storage of DNA samples. Any agency that is required to collect samples from unidentified remains for DNA testing shall follow these standards and guidelines. These guidelines shall address all scientific methods used for the identification of remains, including DNA, anthropology, odontology, and fingerprints.
>
> (c)(1) A coroner shall collect samples for DNA testing from the remains of all unidentified persons and shall send those samples to the Department of Justice for DNA testing and inclusion in the DNA data bank. After the department has taken a sample from the remains for DNA analysis and analyzed it, the remaining evidence shall be returned to the appropriate local coroner." [Emphasis added.]

I declare that it is my information or belief that Penal Code Section 14250(b) and Section (c)(1), as added by Chapter 822, Statutes of 2000, also was required to establish a "Missing Persons Database", as set forth in Section 1 of Chapter 822, Statutes of 2000, as follows:

> "SECTION 1. The Legislature finds and declares the following:
>
> (a) That unidentified remains and unsolved missing persons cases constitute a critical problem for law enforcement and victims' families in the State of California.
>
> (b) Hundreds of people, both children and adults, vanish each year under suspicious circumstances, and their cases remain unsolved. Meanwhile, coroners retain dozens of remains each year that cannot be identified. Families of missing persons must live with no sense of closure, even though their loved one may have already been found.
>
> (c) The Legislature finds that new technology can play an invaluable role in identifying these remains through deoxyribonucleic acid (DNA) analysis.
>
> (d) In order to identify these remains and bring closure to missing persons cases, the Legislature enacts the "Missing Persons DNA Data Base." This data base shall be used to identify remains and to locate missing persons. The intention of this data base is to identify remains to bring closure to the families of missing persons." [Emphasis added.]

I declare that it is my information or belief that therefore the Legislature has unambiguously mandated, in the test claim legislation as amended herein, that coroners examine unidentified remains and perform required autopsies, microscopic, toxicology, and microbiological testing, take photographs, fingerprints, tissue sampling for future DNA testing, x-ray, and prepare samples and reports for the Department of Justice.

I declare that in the case of an unidentified dead body or human remains, the coroner is mandated, pursuant to Government Code 27491 [above], "to inquire into and determine the circumstances, manner, and cause of" death and conduct necessary inquiries to determine, among other things, whether the death was "violent, sudden, or unusual", "unattended"; and, if the deceased had "not been attended by a physician in the 20 days before death".

I declare that the mandatory inquiry into, and determination of, the circumstances, manner, and cause of death of an unidentified dead body or human remains, pursuant to Government Code Section 27491, must now be supplemented, under Government Code Section 27521, to determine the identity of the deceased.

I declare that irrespective of the types of postmortem inquiries, examinations or autopsies employed by the coroner to complete the mandatory determination of the circumstances, manner, and cause of death of an unidentified body or human remains pursuant to Government Code Section 27491, further mandatory duties to identify the deceased were added by Government Code Section 27521.

I declare that the new mandatory duties to determine identity of the deceased require, under Government Code Section 27521, that ".....a postmortem examination or autopsy shall include, but shall not be limited to, the following:

1) Taking all available fingerprints and palms prints.

2) A dental examination consisting of dental charts and dental X-rays of the deceased person's teeth, which may be conducted on the body or human remains by a qualified dentist as determined by the coroner.

3) The collection of tissue, including a hair sample, or body fluid samples for future DNA testing, if necessary.

4) Frontal and lateral facial photographs with the scale indicated.

5) Notation and photographs, with a scale, of significant scars, marks, tattoos, clothing items, or other personal effects found with or near the body.

6) Notations of observations pertinent to the estimation of the time of death.

7) Precise documentation of the location of the remains.

c) The postmortem examination or autopsy of the unidentified body or remains may include full body x-rays.

d) The coroner shall prepare a final report of investigation in a format established by the Department of Justice. The final report shall list or

describe the information collected pursuant to the postmortem examination or autopsy conducted under subdivision (b).

e) The body of unidentified deceased person may not cremated or buried until the jaws (maxilla and mandible with teeth) and other tissue samples are retained for future possible use. Unless the coroner has determined that the body of the unidentified deceased person has suffered significant deterioration or decomposition, the jaws shall not be removed until immediately before the body is cremated or buried. The coroner shall retain the jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

f) If the corner with the aid of the dental identity of dental examination and any other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit dental charts and dental X-rays of the unidentified deceased person to the Department of Justice on forms supplied by the Department of Justice within 45 days of the date the body or human remains were discovered.

g) If the coroner with the aid of the dental examination and other identifying findings is unable to establish the identity of the body or human remains, the coroner shall submit the final report of investigation to the Department of Justice within 180 days of the date the body or human remains were discovered."

I declare that Government Code Section 27521(b) is explicit in what a postmortem examination, for the purposes of determining identity, shall include.

I declare that previous to the changes in the test claim legislation as amended herein, the Coroner took fingerprints on most cases but limited the taking of palm prints to homicide victims.

I declare that previous to the changes in the test claim legislation as amended herein, the Coroner did not include the taking of a hair sample for DNA testing. Hair standards were collected only in homicide cases. In fact, DNA testing was never a regular method for identification and the collection of fluids for identification was usually not performed.

I declare that previous to the changes in the test claim legislation as amended herein, frontal and lateral facial photographs with the scale indicated were not mandated. .

I declare that previous to the changes in the test claim legislation as amended herein, the retention of jaws (maxilla and mandible with teeth) and other tissue samples for future possible use was not mandated. Government Code Section 27521(e) requires the retention of jaws and other tissue samples for one year after a positive identification is made, and no civil or criminal challenges are pending, or indefinitely.

I declare that previous to the changes in the test claim legislation as amended herein, the Coroner made no provisions to store material used in positive identification. Once the body was identified, the jaws and/or tissues were returned to the body for disposition. The Coroner now requires additional storage for the jaws.

I declare that I have prepared the attached description of reimbursable activities reasonably necessary to comply with the test claim legislation as amended herein.

I declare that the duties performed by the Los Angeles County Coroner's Department pursuant to the test claim legislation as amended herein, are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $1,000 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the test claim legislation as amended herein require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

LOS ANGELES
JUNE 19, 2003
Date and Place

David R. Campbell
Signature

Description of Reimbursable Activities
Declaration of David Campbell

1. Develop policies and procedures for the initial and continuing implementation of the subject law.

2. Perform autopsies, including any required microscopic, toxicology, and microbiological testing, photographs, fingerprints, tissue sampling for future DNA testing, x-ray, notation of the time of the death, location of the death, dental examination, and preparing the final report to the Department of Justice.

3. Storage of autopsy samples under appropriate conditions, including tissue and fluids, in proper receptacles, and allowing access as necessary for periods of time as required by the autopsy protocol.

4. Death scene investigation and related interviews, evidence collection, including specimens and photographs, and travel as required for the fulfillment of the requirements, including travel to pick up a body for autopsy, and to return the body to the original county, if it has been transported out of the county for autopsy.

5. Train departmental personnel to prepare the final report to the Department of Justice.

6. Participation in workshops within the state for ongoing professional training as necessary to satisfy standards required by the subject law.

COUNTY OF LOS ANGELES
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

County of Los Angeles Test Claim
Review of Commission Staff Draft Analysis
Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject review.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

6/21/03; Los Angeles, CA
Date and Place

L. Kaye
Signature

Mailing List

Claim Number: 00-TC-18
Issue: Postmortem Examinations: Unidentified Bodies, Human Reamins

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Sacramento, California 95814

Original will mail

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To Paula Higashi | From Jeanne Lays
Co./Dept. CSM | Co. | Phone # 916-445-0328 | Fax # 916-324-4554

Mailing List

Claim Number: 00-TC-18
Issue: Postmortem Examinations: Unidentified Bodies, Human Reamins

Mr. Mark Sigman, Accountant II
Riverside County Sheriff's Office
4095 Lemon Street, P. O. Box 512
Riverside, CA 92502

Mr. Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518, P.O. Box 942850
Sacramento, California 95814

Executive Director,
California State Coroners' Association
5925 Maybrook Circle
Riverside, California 92506

Mr. J. Bradley Burgess
Public Resources Management Group
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Roseville, CA 95661

Executive Director,
Association of California Water Agency
910 K Street, Suite 250
Sacramento, California 95814

Ms. Joan L. Phillipo, Executive Director
California State Sheriff's Association
P. O. Box 890790
West Sacramento, California 95898

Ms. Sarah Ahonima
County of Los Angeles, Department of Coroner
1104 N. Mission Rd.
Los Angeles, CA 90033

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 24th day of June 2003, I served the attached:

Documents: Review of Commission Staff Draft Analysis, County of Los Angeles Test Claim, CSM-00-TC-18, Chapter 284, Statutes of 2000, Adding Sections 27521 & 27521.1 of the Government Code, Amending Section 102870 of the Health & Safety Code, Amending Section 14202 of the Penal Code: Postmortem Examinations: Unidentified Bodies, Human Remains, including *a 1 page letter of J. Tyler McCauley dated 6/23/03, a 6 page narrative, a 7 page declaration of David Campbell, and a 1 page declaration of Leonard Kaye, all pursuant to 00-TC-18, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of June, 2003, at Los Angeles, California.

Hasmik Yaghobyan