Hastings Law Journal

Volume 21 | Issue 5 Article 7

1-1970

Code of Civil Procedure Section 473.5: Setting Aside Defaults and Default Judgments

Robert B. Gex IV

CODE OF CIVIL PROCEDURE SECTION 473.5: SETTING ASIDE DEFAULTS AND DEFAULT JUDGMENTS

It has often been said that "the law favors a trial on the merits."[1] In affirmation of this axiom, section 473[2] and old section 473a[3] of the California Code of Civil Procedure provide a means by which a defaulted litigant can attack an otherwise final judgment of a trial court. In 1969 the legislature enacted section 473.5,[4] which supersedes sec-

1. Kooper v. King, 195 Cal. App. 2d 621, 625, 15 Cal. Rptr. 848, 850 (1961); Reed v. Williamson, 185 Cal. App. 2d 244, 248-49, 8 Cal. Rptr. 39, 42 (1960).

2. CAL. CODE CIV. PROC. § 473 provides, in part: "The court may, upon such terms as may be just, relieve a party or his legal respresentative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending said six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his attorney of record, if any, notifying said party and his attorney of record, if any, that such order, judgment or other proceeding was taken against him and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his attorney of record, if any, whichever service shall be later."

3. Cal. Stat. 1961, ch. 722, § 2, at 1966, CAL. CODE CIV. PROC. § 473a (effective until July 1, 1970) provides: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action; provided, however, that, without extending said one year period, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, when a notice in writing is personally served within or without the State of California both upon said defendant and upon his attorney of record, if any, that such judgment had been rendered against him and that any rights said defendant has to apply for relief under Section 473a of the Code of Civil Procedure shall expire 180 days after service of said notice, then the time within which said defendant or his legal representatives may apply for such relief shall not exceed 180 days after said service of said notice upon said defendant or his attorney of record, if any, whichever service shall be later."

4. CAL. CODE CIV. PROC. § 473.5 (operative July 1, 1970) provides:

"(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him in such action, he may serve and file a notice of motion to set aside such default

tion 473a effective July 1, 1970.[5] The purpose of this Note is to acquaint the reader with the effect of this statutory change and the rules governing attack on default judgments by comparing pertinent provisions of section 473 and old section 473a with those of new section 473.5.

Background and Present Statutory Scheme

At common law a trial court had complete power over its proceedings and could amend, modify, or vacate any interlocutory motion or order.[6] Even after final judgment the court retained these powers until the end of the term.[7] Since historically it was the purpose of terms of court to give finality to judgments,[8] it was not until the expiration of the term that the power of a trial court over its judgment ceased.[9] In addition the courts had the power to vacate their judgments under the common law writs of *coram nobis, coram vobis* and *audita querela*[10] when the winning party engaged in wrongful acts or when

or default judgment and for leave to defend the action. Such notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him; or (ii) 180 days after service on him of a written notice that such default or default judgment has been entered.

"(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date not less than 10 nor more than 20 days after filing of such notice, and it shall be accompanied by an affidavit showing under oath that such party's lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect. The party shall serve and file with such notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

"(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect, it may set aside the default or default judgment on such terms as may be just and allow such party to defend the action."

5. This is part of a broad revision of Title 5 of the Code of Civil Procedure proposed by the Judicial Council of California. See JUDICIAL COUNCIL OF CALIFORNIA, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATURE 27 [hereinafter cited as 1969 JUDICIAL COUNCIL REPORT]. The proposal, with some modification, was introduced in the legislature as S.B. 503 in the 1969 Regular Session. It has been passed and signed and will become effective on July 1, 1970. Cal. Stat. 1969, ch. 1610, § 30, at 3375.

6. 1 A. FREEMAN, JUDGMENTS §§ 140, 194 (5th ed. 1925) [hereinafter cited as FREEMAN]; 30 CALIF. L. REV. 74 (1941).

7. 1 FREEMAN §§ 140, 194.

8. 2 J. MOORE, FEDERAL PRACTICE ¶ 6.09, at 1485, 1489 (2d ed. 1967) [hereinafter cited as MOORE]; Comment, *Setting Aside Default Judgments in Florida*, 16 U. MIAMI L. REV. 109, 116 (1962).

9. 1 FREEMAN §§ 141, 196; 30 CALIF. L. REV. 74 (1941).

10. 7 MOORE ¶¶ 60.13-.14; Comment, 16 U. MIAMI L. REV., *supra* note 8, at 116.

changes in status requiring relief occurred after rendition of judgment.[11] A final judgment could also be vacated by independent action in equity[12] for fraud, inadvertence, surprise, or excusable neglect.[13]

These ancillary remedies of the common law have largely been replaced by statutes which provide the same grounds for setting judgments aside.[14] Today most jurisdictions have special provisions permitting a defendant to set aside a default judgment upon application within a limited time, if he can show either that he did not have actual knowledge of the pending action and has a good defense on the merits, or that he has equitable grounds for vacating the judgment.[15] California Code of Civil Procedure section 473 and old section 473a are typical of these statutory provisions.[16] Section 473a affords a defendant an opportunity to defend on the merits if he has not received personal notice.[17] Section 473 provides a party relief from "a judgment, order,

11. 1 FREEMAN §§ 199, 257; 13 CALIF. L. REV. 361, 362 (1925).

12. 7 MOORE ¶ 60.36; Comment, 16 U. MIAMI L. REV., *supra* note 8, at 116-17.

13. F. JAMES, CIVIL PROCEDURE § 11.8, at 546 (1965) [hereinafter cited as JAMES].

14. *Id.* § 11.1, at 519 n.9; Comment, 16 U. MIAMI L. REV., *supra* note 8, at 116. Such statutes presuppose that jurisdiction was obtained over the defendant. JAMES § 11.4, at 532. Terms of court were abolished in 1879 by adoption of CALIFORNIA CONSTITUTION art. VI, § 5. *See* 30 CALIF. L. REV. 74 (1941). Thereafter, California courts had no power to alter their judgments in matters of substance without statutory authority. *See* 1 FREEMAN § 141, at 272.

15. Fraud or excusable mistake are sufficient equitable grounds. See JAMES §§ 11.4, 11.5, at 532, 534. The time limit provided under these statutory provisions is often one year. *E.g.*, ILL. ANN. STAT. ch. 110, § 50(7) (Smith-Hurd 1968) (one year or 90 days after written notice); N.Y. CIV. PRAC. LAW § 317 (McKinney Supp. 1969-70) (five years), N.Y. CIV. PRAC. R. 5015 (McKinney 1963) (one year); WIS. STAT. ANN. § 269.46 (Supp. 1969) (one year); FED. R. CIV. P. 60(b) (one year). The federal rule was adapted from section 473 of the California Civil Code. See 7 MOORE ¶ 60.10[5].

16. *See* JAMES § 11.4, at 532 n.2. Sections 473 and 473a first appeared in 1853, in combination, as section 68 of the Practice Act of California: "The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer to be made after the time limited by this Act; and may upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives, from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, when from any cause the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action." Cal. Prac. Act 1853, § 68 (H. Labatt ed. 1856).

Section 68 was codified as section 473 of the 1871 Code of Civil Procedure. Since 1871, the section has been amended several times. *E.g.*, Cal. Stat. 1961, ch. 722, § 1, at 1965-66; Cal. Stat. 1933, ch. 744, §§ 34, 35, at 1851-52; Cal. Stat. 1917, ch. 159, § 1, at 242-43.

17. Zobel v. Zobel, 151 Cal. 98, 100, 90 P. 191 (1907); *accord*, People v. One

or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect,"[18] and the term "other proceeding" has been interpreted to include a default judgment.[19]

Although sections 473 and 473a overlap in the sense that they both may offer relief from default judgments, they cover entirely different classes of cases. While old section 473a applies only where there has been no personal service of summons, section 473 applies where a defendant may have been served but seeks relief from a default that has been brought about by his own omission.[20] Further, section 473a explicitly applies only to defendants, while section 473 entitles both plaintiffs and defendants to the vacation of a judgment or order.[21]

Liberal access to the remedy provided by these sections is favored by the courts.[22] As a general rule, a favorable ruling on a motion brought under section 473 or old section 473a will be reversed on appeal only where the appellate court is forced to find clear error or abuse of discretion.[23] An unfavorable ruling on such a motion, however, will receive closer scrutiny.[24] In addition, where the record on appeal is doubtful and the decision in the lower court has been against granting relief, the appellate court will readily intercede in favor of granting the relief sought.[25]

Section 473 and old section 473a are remedial statutes, and under

1941 Chrysler, 81 Cal. App. 2d 18, 21, 183 P.2d 368, 370 (1947).

Sections 473 and 473a are both remedial statutes. Slack v. Murray, 175 Cal. App. 2d 558, 562, 346 P.2d 826, 828 (1959). Section 473a also affords relief to a third party defendant. *See* 1969 JUDICIAL COUNCIL REPORT, *supra* note 2, at 62.

18. Section 473 also covers the amendment of pleadings and the correction of clerical errors.

19. Brockman v. Wagenbach, 152 Cal. App. 2d 603, 615, 313 P.2d 659, 668 (1957).

20. *Id.* at 615, 313 P.2d at 667; Doxey v. Doble, 12 Cal. App. 2d 62, 64-66, 54 P.2d 1143, 1145 (1936).

21. Olson v. Olson, 148 Cal. App. 2d 479, 482, 306 P.2d 1036, 1039 (1957); Lemon v. Hubbard, 10 Cal. App. 471, 476, 102 P. 554, 556 (1909).

22. Kooper v. King, 195 Cal. App. 2d 621, 625, 15 Cal. Rptr. 848, 850 (1961); Slack v. Murray, 175 Cal. App. 2d 558, 562, 346 P.2d 826, 828 (1959); Beckett v. Bobbitt, 180 Cal. App. 2d 921, 924, 4 Cal. Rptr. 833, 835 (Super. Ct. App. Dep't 1960); *see In re* Cardenas, 194 Cal. App. 2d 849, 853-54, 15 Cal. Rptr. 238, 241 (1961).

Although it is generally true that the courts have been liberal in this area, they have, in one important sense, restricted the application of section 473a. See text accompanying notes 29-34 *infra*.

23. Freeman v. Goldberg, 55 Cal. 2d 622, 625, 361 P.2d 244, 246, 12 Cal. Rptr. 668, 670 (1961); Kooper v. King, 195 Cal. App. 2d 621, 625, 15 Cal. Rptr. 848, 850 (1961); Reed v. Williamson, 185 Cal. App. 2d 244, 248-49, 8 Cal. Rptr. 39, 42 (1961).

24. Slack v. Murray, 175 Cal. App. 2d 558, 562, 346 P.2d 826, 828 (1959).

25. Beckett v. Bobbitt, 180 Cal. App. 2d 921, 924, 4 Cal. Rptr. 833, 838 (Super. Ct. App. Dep't 1960); *accord*, Kooper v. King, 195 Cal. App. 2d 621, 625, 15 Cal. Rptr. 848, 850 (1961).

California law remedial statutes are cumulative in nature.[26] The remedy afforded by section 473 and 473a is but one of six methods of direct attack on judgments in California.[27] An unsuccessful attempt to obtain relief under any one of these methods, therefore, does not preclude recourse to any of the others. Thus, after failing to get relief under section 473 or old section 473a, a party may, for example, try a separate suit in equity.[28]

The New Section

A successful motion under new section 473.5 requires that a party (1) serve and file a notice of motion within the appropriate time limit and within a reasonable time after knowledge of the default or default judgment, no matter how that knowledge was acquired; (2) present the court with the notice of motion, an affidavit that the default was not caused by avoidance of service or inexcusable neglect, and a copy of the proposed pleading showing a meritorious defense; and (3) be prepared to refute a claim of laches or estoppel raised by the opposing party. If these burdens are borne successfully, the court will grant relief under section 473.5.

The changes in the law resulting from the enactment of section 473.5 can best be understood by comparing that section with section 473 and old section 473a. A cursory reading of section 473.5 indicates possible changes in the law by the provisions of notice, time limits, inexcusable neglect, court discretion in granting relief, and requirements of documentation.

a. Notice

Despite an apparent change, the notice requirement is the same under new section 473.5 as it was under old section 473a. Section 473.5 merely codifies the interpretation the courts have placed on section 473a. Under the latter section relief may be invoked when a

26. Miller v. Lee, 52 Cal. App. 2d 10, 16, 125 P.2d 627, 631 (1942); 31 CALIF. L. REV. 600, 603 (1943).

27. The five other means are (1) by appeal; (2) by motion for a new trial; (3) by motion when the conclusions of law are inconsistent with the findings, or the judgment is inconsistent with a special verdict; (4) by motion when the judgment is void on its face; (5) by an independent suit in equity, when the judgment is regular on its face, but extrinsically void for want of jurisdiction or by reason of fraud or mistake. 30 CALIF. L. REV. 74, 75 n.8 (1941). *Compare* Ransom v. Los Angeles City High School Dist., 129 Cal. App. 2d 500, 507, 277 P.2d 455, 459-60 (1954), *with* Fletcher v. Superior Court, 79 Cal. App. 468, 475, 250 P. 195, 198 (1926).

28. 31 CALIF. L. REV. 600, 603 (1943); *see* Bennett v. Hibernia Bank, 47 Cal. 2d 540, 558, 305 P.2d 20, 32 (1956). This is so even though section 473 was intended to incorporate the equitable powers of the court. Olson v. Olson, 148 Cal. App. 2d 479, 482, 306 P.2d 1036, 1039 (1957).

summons has not been "personally served" on the defendant. Under new section 473.5 relief is available when a summons has not resulted in "actual notice,"[29] a term that is interpreted by the California courts to mean knowledge.[30]

The courts first held that section 473a was in the nature of an automatic remedy, available whenever service of summons was made by any method other than personal service.[31] One court went so far as to say that "a person served by publication may come in at any time within a year and have the judgment set aside."[32] This early view has not been followed rigidly for many years though, and more recent cases hold that constructive service will generally defeat a claim under either section 473 or section 473a:

> Service by publication and mailing a copy of the complaint and summons is not personal service . . . . [However], this is sufficient to make a *prima facie* case for relief . . . . The law presumes from the fact of constructive service only that the failure to answer is due to lack of notice of the service. But the provision is not designed to afford relief from a judgment which may be validly entered upon constructive service to those who with full knowledge of such service upon them, by reason of receipt of a copy of the summons and complaint through the mail, remain inactive.[33]

Relief has been denied under old section 473a where a party, bedridden but capable of transacting business, received no personal service, but was informed of the contents of the summons and complaint and of the pendency of the action by different persons on several occa-

---

29. The terms "actual notice" and "constructive notice" and the relation between them are defined in sections 18 and 19 of the Civil Code.

CAL. CIV. CODE § 18 provides: "Notice is: 1. Actual—which consists in express information of a fact; or,

"2. Constructive—which is imputed by law."

CAL. CIV. CODE § 19 provides: "Every person who has actual notice of circumstance sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

30. *See* Santa Rosa Bank v. White, 139 Cal. 703, 705, 73 P. 577, 578 (1903); Brockman v. Wagenbach, 152 Cal. App. 2d 603, 611, 313 P.2d 659, 665 (1957); Witherow v. United Am. Ins. Co., 101 Cal. App. 334, 339, 281 P. 668, 671 (1929).

The older cases which state that notice and knowledge are not synonymous use "notice" strictly in the sense of a legal instrument or procedure and not in the broad sense of actual notice of a fact. *See* Williams v. Bergin, 108 Cal. 166, 171, 41 P. 287, 288-89 (1895).

31. *See* Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 P. 21 (1913).

32. *Id.* at 434, 137 P. at 25.

33. Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821, 823 (1932) (citations omitted); *accord*, Pierson v. Fischer, 131 Cal. App. 2d 208, 212, 280 P.2d 491, 493 (1955); Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198, 210 (1958). *Contra*, Tucker v. Tucker, 59 Cal. App. 2d 557,

sions during a time within which an appearance might have been made.[34] Thus, the rewording of section 473.5, in effect, codifies the judicial gloss placed on section 473a.

b. Time Limits

New section 473.5 provides two time periods during which a defendant can move to set aside a default or default judgment. The basic maximum period during which a defendant may move for relief is extended from one year under section 473a to two years under section 473.5. Section 473.5 also contains a new provision which allows the plaintiff to shorten the maximum period to 180 days by serving the defendant with written notice of the default or default judgment. This latter provision is identical to a provision in old section 473a except that its scope is much broader, for the 180 day provision in section 473a applies only to actions "determining the ownership or right to possession of real or personal property." The net effect of these two time limits in new section 473.5, taken together, apparently is to lengthen the time during which default judgments are subject to attack, since in many default situations the defendant cannot be reached and so never receives actual notice of the proceeding by service of process,[35] and he may be equally unavailable when the plaintiff later attempts to notify him of the judgment.

The two year period under new section 473.5 begins to run from the entry of the default judgment, and the 180 day period commences at the date of service of a written notice of the entry of either a default or default judgment.[36] The defendant may stop the running of either of these time periods by serving on the plaintiff and filing with the court a notice of motion, which informs the other party of the place and time of the hearing on the motion to set aside the default or default judgment.[37]

559, 139 P.2d 348, 350 (1943).

34. Boland v. All Persons, 160 Cal. 486, 117 P. 547 (1911).

35. *E.g.*, Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821, 823 (1932); Parsons v. Weis, 144 Cal. 410, 77 P. 1007 (1904).

36. Under section 473a, the running of the one year period is measured from the entry of the default judgment. Brockman v. Wagenbach, 152 Cal. App. 2d 603, 616, 313 P.2d 659, 668 (1957); Doxey v. Doble, 12 Cal. App. 2d 62, 54 P.2d 1143 (1936). This contrasts with section 473 where the measurement of the time period begins from the entry of the default. Wyoming Pac. Oil Co. v. Preston, 171 Cal. App. 2d 735, 741, 341 P.2d 732, 735 (1959); Castagnoli v. Castagnoli, 124 Cal. App. 2d 39, 41, 268 P.2d 37, 38 (1954); Doxey v. Doble, 12 Cal. App. 2d 62, 54 P.2d 1143 (1936).

37. Sample forms for the notice of motion, supporting affidavits, and counter-affidavits for actions under section 473a may be found in 5 CAL. PRACTICE §§ 31: 48-52 (1968).

CAL. CODE CIV. PROC. § 1005.5 provides in part: "A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending be-

c. *Inexcusable Neglect*

New section 473.5 adds "inexcusable neglect" as a cause for denying relief to a defendant who has suffered a default or default judgment. The section provides that the notice of motion "shall be accompanied by an affidavit showing under oath that such party's lack of actual notice was not caused by his avoidance of service or inexcusable neglect," and that the court shall base its decision for or against relief in part on a finding that the moving party's "lack of actual notice was not caused by his avoidance of service or inexcusable neglect." These new provisions change the present law slightly by increasing the petitioner's initial burden of proof over that required under old section 473a. Under the old section, the petitioning defendant need only show that he was not personally served in order to make out a prima facie case for relief from the default or default judgment.[38] Once the petitioner has shown lack of personal service, the plaintiff in the original action, in order to prevent the default or default judgment from being set aside, must show actual notice,[39] inexcusable neglect, or estoppel.[40] Under either the new or the old section, however, whether a given fact situation constitutes inexcusable neglect is within the discretion of the court.[41]

---

fore the court for all purposes, upon the due service and filing of the notice of motion . . . ." This statute, passed in 1953, resolves what would otherwise be an ambiguity in section 473.5 between subdivision (a), which prescribes that the notice of motion shall be served and filed within the prescribed time limit, and subdivision (c), which requires "a finding by the court that the motion was made within the period permitted by subdivision (a)." Prior to the passage of section 1005.5, the courts disagreed regarding the action required within the prescribed time to secure relief under section 473. All agreed, however, that if both the notice of motion and motion proper were completed within the time limit, the court retained jurisdiction to consider and pass on the motion after the expiration of the period. Marston v. Rood, 62 Cal. App. 2d 435, 436, 144 P.2d 863, 864 (1944); Roseborough v. Campbell, 46 Cal. App. 2d 257, 261, 115 P.2d 839, 841 (1941); *see* Gray v. Laufenberger, 195 Cal. App. 2d 875, 880, 15 Cal. Rptr. 813, 816 (Super. Ct. App. Dep't 1961). A strong line of authority held, however, that if only the notice of motion were served and filed within the prescribed time, it was insufficient to secure relief. *In re* Yoder, 199 Cal. 699, 702, 251 P. 205, 207 (1926); Brownell v. Superior Court, 157 Cal. 703, 709-10, 109 P. 91, 94 (1910); Barry v. Barry, 124 Cal. App. 2d 107, 111, 268 P.2d 147, 150 (1954). This line of authority ended with Gardner v. Trevaskis, 158 Cal. App. 2d 410, 322 P.2d 545 (1958), which held, relying on section 1005.5, that the service and filing of the notice of motion within the prescribed time was sufficient to secure relief under section 473 and that the motion proper need not be made within the six month period. Applying this decision to section 473.5, it becomes apparent that serving and filing the notice of motion proper, will be sufficient to stop the running of the two year period.

38. Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821, 823 (1932).
39. See text accompanying notes 33-34 *supra.*
40. See text accompanying notes 57-58 *infra.*
41. Baxter v. Prescott, 158 Cal. App. 2d 531, 533, 322 P.2d 1008, 1010 (1958).

Cases decided under section 473 indicate how "inexcusable neglect" will be interpreted under new section 473.5, for section 473 affords relief from a default judgment suffered through excusable neglect, the opposite of "inexcusable neglect" as used in section 473.5. In interpreting section 473, the courts have held that to warrant relief "a litigant's neglect must have been the act of a reasonably prudent person under the same circumstances."[42] An example of inexcusable neglect is where the default occurs as the result of a deliberate refusal to act and relief is sought after a change of mind.[43] Perhaps the best statement discussing what considerations define inexcusable neglect is found in *Elms v. Elms*:[44]

> It is the duty of every person . . . to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows on important business his motion for relief under section 473 will be denied. Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. . . . The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing.[45]

If inexcusable neglect exists, it is immaterial whether the neglect is traceable to the party himself or to his attorney.[46] For example, in *Hummel v. Hummel*,[47] the attorneys apparently failed to recognize the significance of a document in time to avert the entry of a default judgment. This negligence was chargeable to the client, and relief sought under section 473 was denied. In *Galper v. Galper*,[48] the court held that a failure to file within the prescribed time limit set by section 473 could not be excused by the defendant's reliance on a written statement by his counsel to the effect that the allowable time period ran from the entry of the default judgment rather than from the default. Thus, the courts have been very strict in determining what constitutes excusable

42. Elms v. Elms, 72 Cal. App. 2d 508, 513, 164 P.2d 936, 939 (1946).

43. Fidelity Fed. Sav. & Loan Ass'n v. Long, 175 Cal. App. 2d 149, 345 P.2d 568 (1959).

44. 72 Cal. App. 2d 508, 164 P.2d 936 (1946).

45. *Id.* at 513, 164 P.2d at 939.

46. Galper v. Galper, 162 Cal. App. 2d 391, 399, 328 P.2d 487, 492 (1958); Hummel v. Hummel, 161 Cal. App. 2d 272, 277, 326 P.2d 542, 546 (1958).

47. 161 Cal. App. 2d 272, 326 P.2d 542 (1958).

48. 167 Cal. App. 2d 391, 328 P.2d 487 (1958).

neglect. It is fair to presume that courts will continue this policy in applying new section 473.5.

d. Discretion of the Court

Under section 473.5 a court is given discretion to grant relief if the defendant's notice of motion has been made in "a reasonable time" within the maximum statutory time limits "on such terms as may be just." Old section 473a contains the phrase "on such terms as may be just" but does not contain the phrase "a reasonable time." Both phrases appear in section 473 to define the parameters of a court's discretion,[49] however, so the cases decided under that section again may be examined to see how the new term "reasonable time" will be interpreted under new section 473.5.

What constitutes a reasonable time is a question of fact within the discretion of the trial court, unless the circumstances demonstrate unreasonable delay as a matter of law.[50] For example, it has been held that it is within a judge's discretion to find that a delay of two to five months in filing for relief after discovery of the default is unreasonable so as to bar relief.[51] In other cases, it has been found within the judge's discretion to excuse equally long delays if the delay was reasonable and the adverse party was not prejudiced thereby.[52] Of course, a court has no discretion to grant relief by finding that delay longer than the applicable statutory limit of 180 days or two years is reasonable.[53]

Even notice of motion within a reasonable time not exceeding the applicable statutory limit does not guarantee that relief will be granted. The rights or status of the other party may have become altered to such an extent that the granting of relief will not be on "such terms as may be just." This would be particularly applicable, for example, in actions for divorce or dissolution of marriage[54] where the party in whose

49. The judge's discretion is legal, not arbitrary. Riskin v. Towers, 24 Cal. 2d 274, 279, 148 P.2d 611, 614 (1944).

50. Baxter v. Prescott, 158 Cal. App. 2d 531, 534, 322 P.2d 1008, 1010 (1958).

51. Benjamin v. Dalmo Mfg. Co., 31 Cal. 2d 523, 529, 190 P.2d 593, 596 (1948) (3½ months' delay); City of Pac. Grove v. Hamilton, 100 Cal. App. 2d 508, 511, 224 P.2d 19, 21 (1950) (5½ months); Mercantile Collection Bureau v. Pinheiro, 84 Cal. App. 2d 606, 609, 191 P.2d 511, 512 (1948) (two months).

52. Waite v. Southern Pac. Co., 192 Cal. 467, 471, 221 P. 204, 206 (1923) (5 month delay).

53. See text accompanying notes 36 & 37 *supra*.

54. A decree of dissolution of marriage apparently may be rendered upon the default of a party under California's new Family Law Act. ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 40-41, 128-29 (Cal. Cont. Educ. Bar ed. 1970). *Compare* CAL. CIV. CODE § 4511 (operative Jan. 1, 1970) *with* Cal. Civ. Code § 130 (1872), *as amended*, Cal. Code Amnds. 1873-74, ch. 612, § 32, at 191. A defaulting spouse, then, may seek relief under section 473.5 as he can under section 473. *E.g.*, Heathman v. Vant, 172 Cal. App. 2d 639, 343 P.2d 104 (1959).

favor the default judgment was rendered has remarried and the ex-spouse later seeks to vacate the judgment by a motion brought under either section 473 or new section 473.5. In this situation, the status of the remarried spouse would be so altered in reliance on the default judgment that the application of section 473 or section 473.5 would not be just; consequently, the court would have discretion to deny the relief sought.[55]

e. Documentation

Section 473.5 requires that the defendant's notice of motion to set aside a default or default judgment be accompanied (1) by an affidavit stating under oath that a party's lack of actual notice was not caused by his avoidance of service or inexcusable neglect and (2) by a copy of the answer, motion, or other pleading to be filed in the action. The requirement of the affidavit under oath is new and increases the documentation above that required under either section 473 or old section 473a. Under section 473 the notice of motion need only be accompanied by a copy of the answer or other pleading. The documentation requirements under old section 473a are even less rigorous; although the requirement for the showing of a meritorious defense amounts to much the same thing as a copy of the answer, it is sufficient for a section 473a affidavit to state only the ultimate facts of the defense, and not the probative facts.[56]

Under both section 473 and old section 473a, the burden of proving injury due to the neglect of the other party is on the party in whose favor the default or default judgment was rendered.[57] That party's counter-affidavit, to be effective, must state the grounds of laches or estoppel;[58] a mere attempt to controvert the truth of the petitioner's allegations will not suffice.[59] Apparently, the showing required for an effective counter-affidavit under section 473.5 will remain the same as under section 473 and old section 473a.

55. Compare N.Y. CIV. PRAC. LAW § 317 (McKinney 1963) which specifically exempts actions for divorce, annulment, or partition from its operation. The only reason for such exemptions would seem to be the prevalence of estoppel. It is submitted that leaving the application of a remedial statute to the discretion of the court in all cases, as California has done, preserves flexibility and is preferable for that reason.

56. Thompson v. Sutton, 50 Cal. App. 2d 272, 279, 122 P.2d 975, 980 (1942).

57. The hearing on a motion is an adversary action and the grounds for denial of relief must be proven. The burden of proving laches or estoppel is on the party in whose favor the default was taken. *In re* Stanfield, 32 Cal. App. 2d 283, 89 P.2d 696 (1939).

58. Thompson v. Sutton, 50 Cal. App. 2d 272, 280, 122 P.2d 975, 980 (1942).

59. *Id.*

Conclusion

The California legislature, in replacing section 473a with section 473.5, has not made a sweeping revision of the law relating to motions to set aside defaults or default judgments. Several provisions, while indicating a change from the former law, are largely codifications of court interpretations of the old law. An example of such a provision is the requirement under 473.5 that the defendant not have "actual notice" of the action against him.[60]

New section 473.5 does, however, make several significant changes in the law. The most important is the increase from one year to two years in the maximum time period in which a default judgment may be set aside. Such a change is in accord with the desire to permit a defendant his day in court if he has a meritorious defense but has not received notice of the proceeding. In conflict with this desire, however, is the desire that judgments be final. To balance the interests of the defendant with those of the plaintiff, therefore, new section 473.5 provides for changes in the law to help assure the finality of default judgments. It provides, for example, that the plaintiff can shorten the allowable period for a defendant's motion to set aside a default or default judgment to 180 days, regardless of the nature of the original action, by giving the defendant written notice of the default. Further, the greater documentation required under new section 473.5[61] will discourage sharp practice and frivolous motions by increasing the movant's burden of proof. Finally, the new requirements that the defendant must move to set aside a default or default judgment within a reasonable time[62] and show that he was not guilty of "inexcusable neglect"[63] will tend to lessen the effect of the two year limitation.

*Robert B. Gex IV**

60. See text accompanying notes 29-34 *supra.*
61. See text accompanying notes 56-59 *supra.*
62. See text accompanying notes 49-55 *supra.*
63. See text accompanying notes 38-48 *supra.*

* Member, Second Year Class.