

Memorandum 76-79

Subject: Study 39.33 - Wage Garnishment (Comprehensive Statute)

BACKGROUND

You will recall that the Commission published a recommendation relating to wage garnishment procedure in 1975 but decided not to introduce legislation at the 1976 session because there was substantial opposition to the recommended legislation and it was still under study by the State Bar.

The Executive Secretary reported the Commission's decision to Assemblyman McAlister, and Assemblyman McAlister concurred in the decision not to introduce legislation in 1976 but indicated that he would be interested in carrying the legislation in 1977.

The Commission has just received a comprehensive report from the State Bar Committee on Relations of Debtor and Creditor on the wage garnishment procedure recommendation. Accordingly, the staff believes that this is an appropriate time to review the comments of the State Bar and to determine the content of the legislation, if any, to be introduced in 1977.

Attached are copies of the Recommendation Relating to Wage Garnishment Exemptions (December 1974) (AB 90 was introduced in 1975 to effectuate this recommendation; the bill passed the Assembly but was defeated in the Senate Judiciary Committee) and the Recommendation Relating to Wage Garnishment Procedure (April 1975) (not introduced). The proposed legislation contained in the Recommendation Relating to Wage Garnishment Procedure includes the substance of the earlier Recommendation Relating to Wage Garnishment Exemptions.

RECENT LEGISLATIVE ENACTMENTS

Two recommendations included in the Recommendation Relating to Wage Garnishment Procedure have been the subject of bills enacted or to be enacted in 1976:

(1) Chapter 317 of the Statutes of 1976 amends Section 690.6 to provide an exemption of earnings "necessary for the use of the debtor or

the debtor's family, residing in this state and supported in whole or in part by the debtor, unless the debts are. . . ." This amendment (which is the only change made by the bill) makes the exemption available to a single debtor as well as one with a family and effectuates one of the Commission's recommendations. See Section 723.051 and Comment thereto, on pages 661-662.

(2) Assembly Bill 3520 (Knox) would provide that the earnings of public employees are to be garnished in the same manner as those of other wage earners. (This bill has passed the Assembly, has been approved by the Senate Judiciary Committee, and will have been sent to the Governor by the time of the September meeting.) It too effectuates a recommendation of the Commission. See Recommendation on page 619. The bill amends Section 710 of the Code of Civil Procedure in substance as proposed on pages 639-643 of the Recommendation.

GENERAL COMMENT ON STATE BAR COMMITTEE'S REPORT

In considering the suggestions of the State Bar Committee and the staff comments presented in this memorandum, you should remember that the exemption recommendation (AB 90 of the 1975 session) was killed in the Senate Judiciary Committee because of the opposition of the California Association of Collectors who viewed the bill as being too favorable to debtors. A review of the report of the State Bar Committee shows that the State Bar Committee generally would make the proposed legislation considerably more favorable to debtors than the Commission's recommendations--e.g., the Committee recommends higher exemptions, prelevy notice, further limitations on wage garnishments by tax authorities, and other provisions more favorable to debtors.

Attached as Exhibit I (pink) is (1) a letter of transmittal (stating that the State Bar Committee report does not represent the views of the State Bar), (2) the Report of the Committee (pages 1-14), (3) Appendix B to the Report (pages 1-27, containing the text of the State Bar Committee recommendations), and (4) Appendix B-1 (pages 1-3, relating to prelevy notice).

The State Bar Committee approves the Commission recommendations with some important exceptions noted on pages 4 and 5 of the Committee report attached as Exhibit I.

The staff has not attempted in this memorandum to revise the recommended legislation contained in the wage garnishment procedure recommendation because the purpose of this memorandum is to obtain the Commission views on the major policy issues raised by the State Bar Committee.

ANALYSIS OF STATE BAR COMMITTEE COMMENTS

This analysis considers the major points made in the Committee Report in the order in which they appear in Appendix B to the report. The report of the State Bar Committee (pages 1-14 of Exhibit I) is not discussed as such in this memorandum since each specific recommendation of the State Bar Committee is set out in Appendix B of Exhibit I (which is analyzed below). However, you should read the Report for an overview of the Commission's Recommendation and the State Bar Committee's views.

§ 723.024. Employer's service charge for withholding

The committee recommends the deletion of the provision for a one dollar service charge to be deducted by the employer to help defray the costs of withholding the garnished amount. See pages 2 and 3 of Appendix B. If Section 723.024 is deleted, Section 723.083 likewise should be deleted. In addition to the reasons noted in the State Bar Report for deleting the service charge, it should be noted that public employees will now be under the general wage garnishment procedure (if AB 3520 is approved by the Governor) and as a result the public entities will no longer receive a \$2.50 charge they formerly received when the abstract of judgment procedure was used. The loss of this revenue to public entities was one reason the Commission included the \$1 service charge. On the other hand, the employers did not oppose this bill when previous versions were introduced, and one factor they took into consideration in deciding not to oppose the bill was the one dollar service charge.

§ 723.025. Payment of withheld amount to levying officer

Section 723.025 requires the employer to pay over monthly to the levying officer the amounts withheld. Section 723.026 requires that the levying officer shall pay to the judgment creditor the amount so paid within 15 days after receipt. Under existing law, the employer must pay

over to the levying officer each time an amount is withheld and the levying officer must pay over the amount to the creditor "at least once every 30 days."

The scheme proposed in the Commission's recommendation is designed to minimize the amount of bookkeeping required of the levying officer and thereby permit a modest fee (\$6.50) for the levying officer's services in connection with a continuing wage garnishment. To some extent, permitting the employer to pay over to the levying officer more frequently will defeat this purpose.

§ 723.027. Duty of creditor to notify levying officer when judgment satisfied

In connection with the comment of the State Bar Committee concerning this section, it should be noted that failure to comply with Code of Civil Procedure Section 675 (duty to furnish debtor with a satisfaction of judgment) makes the creditor liable for actual damages and, in addition, the sum of one hundred dollars and, in addition, (under a 1975 amendment) reasonable attorney's fees. Although the creditor has a duty to repay to the debtor any excess amount withheld (Section 723.105(i)), there is no specific remedy provided in the statute for failure to comply with Section 723.027. The debtor can, of course, request a satisfaction of judgment and give that to the levying officer who would then terminate the earnings levy. The remedies provided in Section 675 would apply if such satisfaction were not provided by the creditor.

§ 723.028. Withholding order for costs and interest

The staff recommends that the bracketed language suggested by the State Bar Committee be added to this section.

§ 723.030. Withholding order for support

The staff agrees with the minority insofar as the minority believes that priority for attorney's fees will encourage attorneys to represent parties seeking supplemental remedies for delinquent support. In order to clarify the meaning of subdivision (a), the staff suggests it be revised to read:

(a) A "withholding order for support" is an earnings withholding order on a writ of execution issued to collect delinquent amounts payable under a judgment for the support of a child,

spouse, or former spouse of the judgment debtor, including reasonable attorney's fees allowed in the procedure used to obtain the writ of execution and earnings withholding order to collect such delinquent amounts.

In connection with Section 723.030, the State Bar Committee also raises the question whether the employer should be required to notify the levying officer when the employer is required to cease withholding under a prior earnings withholding order because an earnings withholding order entitled to greater priority (or a wage assignment for support) is served on the employer. Under Section 723.077, the employer is required to notify the levying officer when a withholding order for taxes supersedes a prior earnings withholding order. With respect to other earnings withholding orders, the staff suggests that the form for the employer's return be revised to include information concerning a prior earnings order that is superseded by an order having greater priority. See Section 723.126 (employer's return). In addition, a provision should be added to Section 723.031 (wage assignment for support) that is comparable to the provision in Section 723.077 (tax orders), requiring the employer to notify the levying officer if a prior earnings withholding order is superseded. Although these provisions will somewhat increase the paperwork, they will alert the levying officer to the reason why he will no longer be receiving any payments under the superseded earnings withholding order and may avoid the need for the levying officer or creditor to contact the employer for this information.

As to the policy issue concerning whether support orders should have priority, the policy of the state is well established that support obligations have priority over other creditors. This is evident in the recent enactment of the wage assignment for support provisions in Section 4701 of the Civil Code. A departure from this policy would, in the staff's view, operate to shift support costs to the taxpayers generally and would be contrary to recent legislative trends to strengthen procedures for enforcement of support obligations. The minority of the State Bar Committee suggests a percentage participation, or equitable distribution scheme, either of which would complicate the proposal and either require court participation or some other mechanics for implementing the scheme.

§ 723.050. Standard exemption

The committee recommends that the exemption formula be changed in two respects. The committee would deduct the sums paid for a regular policy of health insurance from "available earnings." It is not clear whether the committee's proposal concerns only sums for health insurance paid on a payroll deduction plan or sums paid for health insurance in any regular manner, or both. Obviously, the withholding table scheme would be made entirely impossible if nonpayroll deduction health insurance fees were deductible from available earnings since neither the Judicial Council (which prepares the tables) nor the employer would know what that amount is. Partial tables, from which the employer then subtracted the amount of a payroll deduction for health insurance, would be feasible but would reduce the usefulness of the tables since the calculation spelled out in subdivision (b) would have to be done by the employer after he subtracted the amount of health insurance payments from "available earnings." One of the important advantages of the Commission's wage garnishment recommendation is the certainty, simplicity, and efficiency provided by the tables. Since this proposal would severely limit the utility of the tables, the staff recommends against adopting this proposal.

The committee also recommends that 40 rather than 30 times the federal minimum wage be deducted from gross earnings in the determination of available earnings. This change would obviously encounter stiff opposition from the creditors. As indicated in footnote 18 on page 915 of the Recommendation Relating to Wage Garnishment Exemptions (copy attached), seven states in 1974 provided an exemption formula based on 40 times the federal minimum wage although four of these applied the formula only to consumer debts. The following table (based on May 1, 1975, income tax tables, and a \$2.30 per hour minimum wage) illustrates the difference in the amount that would be garnished under the two formulas at several selected income levels (ignoring the proposal to deduct health insurance costs):

COMPARISON OF AMOUNTS WITHHELD UNDER WAGE GARNISHMENT

<u>Gross Earnings</u> <u>(weekly/annual)</u>	<u>CLRC</u>	<u>State Bar</u>
\$110/\$5720	\$8.00	-0-
135/7020	15.00	-0-

150/7800	21.00	9.00
200/10,400	30.00	25.00
300/15,600	45.00	39.00
500/26,000	69.00	63.00

For approximate amounts withheld under existing law, see table on page 925 of Recommendation Relating to Wage Garnishment Exemptions. You should also review the table on page 926 of the same publication. It is obvious that the amount of income remaining after garnishment in the lowest income brackets is inadequate under the Commission's recommendation. Nevertheless, our past experience over a period of five years has demonstrated the reluctance of the Legislature to approve even the modest additional protection proposed in the Law Revision Commission's recommendations.

§ 723.051. Hardship exemption

The committee would retain the language of Section 690.6 providing an additional exemption for earnings "necessary for the use of the debtor's family" apparently in order to preserve any case law gloss on that language. The staff is not aware of any important gloss on the word "use" which Section 723.051 deletes. In any event, the purpose of Section 723.051 is to alter the existing law, as the last sentence makes clear, by eliminating the station in life test. It should also be remembered that, since the basic exemption is greater, there should be less need for the hardship exemption and that the common necessities exemption to the hardship exemption has been eliminated.

The language in Section 723.051 making clear that a judgment debtor without any dependents would take advantage of the hardship exemption has been enacted this year. See Cal. Stats. 1976, Ch. 317, amending Section 690.6.

§ 723.072. Withholding order for taxes

The committee's proposed addition to subdivision (b)(2) is acceptable to the staff, although it might be objected that it in effect establishes a standard of finality of a tax assessment or determination which may differ from the provisions of the Revenue and Taxation Code or the Unemployment Insurance Code.

The committee's proposal to require notice under subdivision (c) to be sent by certified or registered mail, return receipt requested, would be opposed by the tax authorities who have customarily used first-class mail. The staff recommends against the suggested change.

§ 723.074. Agency issued withholding order for taxes

The committee recommends that the state be permitted to issue withholding orders for the same amount as may be withheld from an employee's earnings under a withholding order obtained by a general creditor. This same revision suggested by the staff in Memorandum 75-66 (Sept. 2, 1975) was approved by the Commission at the October 1975 meeting. It appears that, in the committee's report, the recommended revision was not completely carried out. See page 10. Subdivision (c) should read as follows:

(c) Unless a lesser amount is specified in the order, the amount to be withheld pursuant to an order issued under this section is ~~two times~~ the maximum amount that may be withheld under Section 723.050.

It should be noted that the state may apply to the court under Section 723.076 for an order directing the withholding of a greater amount than is specified in Section 723.050.

§ 723.075. Notice to taxpayer; reduction in amount withheld

The State Bar Committee would permit the tax debtor to apply to the court for protection of a greater amount of earnings than is protected under Section 723.050. Although the staff recommends that the amount that can be withheld pursuant to an agency issued order (as distinguished from a court issued order) should be reduced to one-half of the amount specified in the recommendation (that is, it should be the amount specified in Section 723.050), we believe that the agency hearing on the hardship exemption should be final. This is consistent with the last sentence of subdivision (d) of Section 723.075 which provides that the court may not reduce the amount required to be withheld to less than that permitted to be withheld under Section 723.050. Since the agency issued order cannot require a greater amount to be withheld, the staff recommends that subdivision (d) of Section 723.075 be deleted and that the following sentence be added to subdivision (c) of that section:

"The determination of the state pursuant to this subdivision is final and not subject to court review." Subdivision (e) should be renumbered as subdivision (d).

§ 723.076. Court issued withholding order for taxes

The committee would delete this section which permits a court to order a greater amount to be withheld. This is consistent with their recommendation that the state be treated as a general creditor. The staff does not believe that treating the state as a general creditor in the normal case necessarily leads one to the conclusion that there are not extraordinary cases where the wages of a delinquent taxpayer should not be subject to a withholding order except to the extent that the wages are necessary for the support of the debtor and his family. This section is needed if the state issued order is limited in amount to the amount that would be withheld in the case of an ordinary creditor. The section would be most useful where the delinquent taxpayer has high earnings.

§ 723.077. Priority of orders

The employer's return (see Section 723.126) should give notice to the state agency serving a withholding order for taxes that there is a prior withholding order for taxes in effect. An appropriate revision should be made to make this clear.

§ 723.078. Jeopardy withholding order for taxes; withholding period

The committee would eliminate this section as inconsistent with treating the state as a general creditor. The staff believes that there may be cases where special remedies like the jeopardy withholding order for taxes are needed and would retain this section.

The committee would also make the withholding period the same as specified in Section 723.022, the crucial difference being that, under that section, the order terminates 130 days after receipt whereas the withholding order for taxes, like the withholding order for support, continues until satisfied. We assume that this change would be unacceptable to the Franchise Tax Board.

§ 723.079. When receipt required

The committee would require the state to send a receipt for amounts withheld unless the taxpayer requests that a receipt not be sent. The

staff thinks that the burden should be on the taxpayer to request a receipt since normally a judgment debtor does not receive a receipt and most debtors probably do not want a receipt. This proposal seems an added unnecessary expense to the state and would be a change in existing practice which is codified in Section 723.079.

§ 723.080. Service

Requiring service of withholding orders for taxes by certified or registered mail, rather than by first-class mail, would be opposed by the Franchise Tax Board, which is satisfied with the present scheme. The staff is not convinced that this change is needed to place the state in a position nearer that of general creditors. The Franchise Tax Board is satisfied with experience under the present system of using first-class mail.

§ 723.083. Refund of employer's service charge

The committee's proposal to require (rather than authorize) refund of the employer's service charge where there is an erroneous withholding should be adopted unless it is decided to eliminate the employer's service charge. See Section 723.024.

§ 723.084. Warrant or notice deemed withholding order for taxes

The committee would delete this section. The staff thinks that it is needed. As pointed out in the Comment, it may not be clear whether a taxpayer is an employee and the other forms may be issued on the assumption that the taxpayer is an independent contractor. This technicality should not be permitted to void the levy.

§ 723.103. Service of order and information on employer

The committee would require that the employer be given blank forms for exemption claims and financial statements at the time of service of the earnings withholding order. The obvious objection is that this sort of requirement merely proliferates paper without significantly facilitating the making of just exemption claims. This is an important policy issue. In this connection, see Section 723.122(d)(last sentence)(might be modified to include address of levying officer's office).

§ 723.105. Judgment debtor's claim of exemption

The committee would speed up the exemption procedure by paring down the various time limits in subdivision (f). This may not be practical.

§ 723.121. Application for earnings withholding order

The committee would add "declaration under penalty of perjury" after "executed under oath." This would be inconsistent with the Commission's usual approach. In any event, the Comment refers to Section 2015.5 and the declaration option. The form could also make this clear. The staff thinks that including this language in the statute will not aid lay persons; putting it on the form would accomplish this goal. The staff also questions whether lay persons who look at the statute will know what "executed under oath" means.

§ 723.122. Notice to employee

The committee would add subdivision (f) requiring notice in Spanish and any other language the levying officer deems appropriate. The staff assumes that the notice in a foreign language will be a notice that complies with Section 723.120 which provides that only the forms prescribed by the Judicial Council are to be used. Should the levying officer be authorized to add additional information to the Judicial Council approved form? See Committee Comment to Section 723.122.

§ 723.123. Form of claim of exemption

(See discussion of Section 723.121.) Note the committee recommendation concerning the debtor's address.

§ 723.125. Earnings withholding order

(See discussion of Section 723.103.)

Labor Code § 300. Wage assignments

The committee proposes to revise the law concerning wage assignments by eliminating the requirement in Labor Code Section 300 that the spouse of a married person consent in writing to the assignment. The reason for this proposal is that "the laws relating to community property allow the assignment to be made separately by either spouse." However, Section 300, which is the law now, clearly does not allow assignment by one spouse although, since 1975 (pursuant to legislation enacted

in 1973), the general rule has been that either spouse has the management and control of community personal property. The staff believes that the wage garnishment recommendation is not the place to change the nature of wage assignments except where directly relevant to wage garnishment. The fact that Section 300 was left unchanged by the 1973 amendments may indicate that, like the restrictions on the transfer of community real property (Civil Code § 5127) and furniture or wearing apparel (Civil Code § 5125(c)), there is a compelling reason for this exception to the general rules.

The staff does not think that the addition of paragraph (3) serves any purpose since Section 300 does not require the filing of the assignment for it to be valid. If the substance of paragraph (3) is considered a useful clarification, the staff suggests that it be added as subdivision (j).

Civil Code § 4701. Assignment of wages for support

The committee would treat spousal support in the same manner as child support is treated under Civil Code Section 4701. The staff does not think that the wage garnishment recommendation is the place to make this change, if it is desirable.

Labor Code § 2929. Discharge from employment for wage garnishment

The committee would forbid firing an employee by reason of the garnishment of his wages, except where financial responsibility is a qualification of the job, and would provide a penalty for violation of the prohibition. The existing law, enacted in 1971 on recommendation of the Commission, forbids discharge for one indebtedness (a prohibition contained in federal law) and provides a civil penalty for the enforcement of the prohibition which may be used so long as the criminal penalty provided by federal law is not used. In 1971, even this modest recommendation encountered the vocal opposition of the Conference of Employers Associations. The Western Center on Law and Poverty argued at that time that it is irrational to forbid the discharge of an employee where there are 10 levies for one indebtedness while permitting discharge where there is one levy under each of two indebtednesses. There was no significant support in the Legislature for expanding the scope of protection afforded by Section 2929. Even members of the legislative

committee who were concerned about the problems of debtors have viewed proposals to expand the scope of protection afforded debtors as providing a means whereby a discharged employee could claim the discharge was for garnishment in cases where it was for good cause.

Prelevy Notice--Sections 723.102, 723.121

Appendix B-1 to the State Bar Committee's report proposes that the judgment debtor be afforded notice before the garnishment is effective so that the debtor may claim his hardship exemption if he desires. Note that there was sharp division on this issue within the committee and that, if this proposal is not approved by the Board of Governors, the committee would still recommend support of the Commission's recommendation.

The constitution does not require that a judgment debtor receive notice before his property, including wages, is levied upon. Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924); Raigoza v. Sperl, 34 Cal. App.3d 560, 110 Cal. Rptr. 296 (1973); Phillips v. Bartolomie, 46 Cal. App.3d 346, 121 Cal. Rptr. 56 (1975). Phillips rejects the conclusion of Brown v. Liberty Loan Corp. of Duval, 392 F. Supp. 1023 (M.D. Fla. 1974) (holding Florida's postjudgment wage garnishment scheme unconstitutional), that a judgment debtor must be afforded prior notice and an opportunity to be heard on the issue of exemptions because there is a substantial risk of being discharged from employment and because there is a substantial risk of error in issuance of the garnishment since the creditor does not have to assert under oath that the judgment debtor is not entitled to a statutory exemption. Brown rejected the notion that a prelevy notice and hearing were not required because the issue of the employee's liability to the creditor had already been established in the main action, stating that the "post-judgment garnishment involves significantly different legal issues than those arising under the proceedings to secure the judgment."

The proposed prelevy notice procedure seems unnecessarily burdensome in light of the number of cases in which it would result in a successful claim. Note that the notice provided in subdivision (b) refers to cases where all of the debtor's earnings is claimed to be needed to

support his family. If a prelevy notice scheme is adopted, presumably the debtor should be able to have a hearing where he claims that some additional, but not all, earnings are necessary to support his family. The judgment debtor making the claim apparently sends notice to the judgment creditor directly, and the creditor is then required to institute a special proceeding to obtain an order for the issuance of an earnings withholding order. Nothing prevents the judgment debtor from making the claim merely for the purposes of delay. While this argument may be leveled against any exemption procedure, in this case, it costs the debtor nothing to make the claim. If a debtor desires to delay the garnishment of his wages, he would accomplish the longest delay by refusing to accept the written notice sent under subdivision (a). The judgment creditor is then required to mail another notice to the debtor at his place of employment. Only then may the judgment creditor apply for an earnings withholding order, by which time the writ of execution may have expired and he will have to start over. It is also not clear from the proposed procedure how the unscrupulous creditor is prevented from obtaining an earnings withholding order despite the exemption claim.

The staff is sympathetic to the problem the committee seeks to solve, but the staff believes that the proposed remedy is too cumbersome and will result in evasion, delay, and additional costs without any significant compensating benefit for judgment debtors with just claims. The better scheme is to increase the amount automatically exempt. It has been the Commission's position that, by increasing the exemption from garnishment, particularly where the debtor has a number of dependents, the need for the hardship exemption will be diminished.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL

STANFORD, CALIFORNIA 94305

1 497-1731



NOTICE

The enclosed exhibit was inadvertently omitted when we sent you Memorandum 76-79. Please attach it to that memorandum.

We regret any inconvenience you may have been caused.

THE STATE BAR OF CALIFORNIA

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August 2, 1976

John H. DeMouilly
 Executive Secretary
 California Law Revision Commission
 School of Law
 Stanford, California 94305

Dear Mr. DeMouilly:

In accordance with our phone conversation, herewith is the report of the Debtor-Creditor Committee regarding the LRC recommendation relating to Wage-Garnishment Procedures.

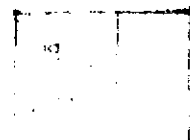
Also included as Appendix B-I is a recommendation of the committee regarding pre-levey notice to debtors which it is hoped the Commission will consider.

The Board of Governors did not approve these recommendations, but merely accepted the report and authorized it to be sent to the LRC for its consideration. This was because approval would have implied Board agreement with each of the recommendations and would have entailed considerable discussion by the Board. Since it will have an opportunity to review the final LRC proposal before any legislative action, the Board felt it should simply forward the report as being the comments of the committee for the consideration of the Commission.

Yours very truly,

Bill
 William B. Eades
 Committee Coordinator

WBE:rr
 Encl.



AGENDA ITEM

JULY 11(b)(1)
Report of the Committee re
Relations of Debtor and Creditor
on California Law Revision Com-
mission Recommendation relating
to Wage Garnishment Procedures.

July 9, 1976

Report of the Committee re: Relations of Debtor and Creditor

Re: Wage Garnishment Procedure California Law
Revision Commission.

At its meeting on October 16, 1975 the Board of Governors had before it the interim report of the State Bar Committee dated October 1, 1975, and voted to re-refer this report to the State Bar Committee with the instruction that the report be further considered by the State Bar Committee. The Board further instructed the State Bar Committee to properly consider and present the various points of issues of concern in order to insure that the report of the State Bar Committee represents a balanced perspective.

The California Law Revision Commission in early 1975 made proposals relating to wage garnishment procedures which were distributed in pamphlet form in April 1975. These proposals were incorporated into pre-print Senate Bill No. 3.

INTRODUCTION

Judgment creditors^{1/} favor wage garnishment because it reaches the judgment debtor's earnings while still in the hands of his employer and because the possibility of a wage garnishment often compels the debtor to make payments on the judgment.^{2/} Code of Civil Procedure Section 682.3 currently

^{1/} Before judgment, all earnings are exempt from attachment. See Code Civ. Proc. §690.6(a) (existing law) and §487.020(c) (Cal. Stats. 1974 Ch. 1516, §49, effective January 1, 1976).

^{2/} See E. Jackson, California Debt Collection Practice, §9.73, at 186 (CEB 1968). The State Bar Committee notes the persuasive effect of a garnishment on the unwilling debtor with the ability to pay. A number of members of the State Bar Committee feel that garnishment is a remedy that encourages lending on the basis of the remedy, rather than the ability to pay, i.e., "predatory lending."

provides the procedure for a wage garnishment.^{3/}

Section 682.3 imposes a continuing duty on the debtor's employer for a 90-day period to withhold and pay over to the levying officer the required amounts and deals with other aspects of wage garnishment. The amount to be withheld by the employer pursuant to a wage garnishment is determined by Section 690.6^{4/} which is the subject of a separately

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§682.3. Levy of Execution Against Earnings of Judgment Debtor-- Payments Withheld.

(a) Whenever the levy of execution is against the earnings of a judgment debtor, the employer served with the writ of execution shall withhold the amount specified in the writ from earnings then or thereafter due to the judgment debtor and not exempt under Section 690.6, and shall pay such amount, each time it is withheld, to the sheriff, constable or marshal who served the writ. If such person shall fail to pay each amount to the sheriff, constable or marshal, the judgment creditor may commence a proceeding against him for the amounts not paid. The execution shall terminate and the person served with the writ shall cease withholding sums thereunder when any one of the following events takes place:

(1) Such person receives a direction to release from the levying officer. Such release shall be issued by the levying officer in any of the following cases:

(a) Upon receipt of a written direction from the judgment creditor.

(b) Upon receipt of an order of the court in which the action is pending, or a certified copy of such order, discharging or recalling the execution or releasing the property. This subdivision shall apply only if no appeal is perfected and undertaking executed and filed as provided in Section 917.2 or a certificate to that effect has been issued by the clerk of the court.

(c) In all other cases provided by law.

(2) Such person has withheld the full amount specified in the writ of execution from the judgment debtor's earnings.

(3) The judgment debtor's employment is terminated by a resignation or dismissal at any time after service of the execution and he is not reinstated or reemployed within 90 days after such termination.

(4) A period of 90 days has passed since the time such person was served with the writ of execution.

(b) At any time after a levy on his earnings the judgment debtor may proceed to claim a full exemption of his earnings in accordance with the provisions of Sections 689.6 and 690.50 (1). The exemption so claimed shall extend to any wages withheld pursuant to the levy of execution whether or not withheld after the claim of exemption is filed.

(c) Subject to the provisions of Section 690.50, the sheriff, constable or marshal who serves the writ of execution and receives the amounts withheld from the judgment debtor's earnings, shall account for and pay to the person entitled thereto, all sums collected under the writ, less his lawful fees and expenses at least once every 30 days, and make return on collection thereof to the court.

Leg. H. 1971 ch. 1084, 1972 ch. 648, operative Aug. 9, 1972.

§682.3. 1973 Statutes. 1. within 30 days of the date of the levy of execution

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Section 690.6 (as amended by Cal. Stats. 1974, Ch. 1316, § 17, which becomes operative on January 1, 1976) provides:

690.6. (a) One-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor received for his personal services rendered at any time within 30 days next preceding the date of a withholding by the employer under Section 682.3, shall be exempt from execution without filing a claim for exemption as provided in Section 690.50.

(b) All earnings of the debtor received for his personal services rendered at any time within 30 days next preceding the date of a withholding by the employer under Section 682.3, if necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor, unless the debts are:

(1) Incurred by the debtor, his wife, or his family for the common necessities of life.

(2) Incurred for personal services rendered by any employee or former employee of the debtor.

published LRC proposal submitted to the 1975 legislative session and subsequently rejected.^{2/}

The LRC proposal covers the area of wage garnishment procedure and proposes enactment of a new comprehensive statute that the LRC believes will significantly reduce the cost of wage garnishments, greatly alleviate the hardship such garnishments cause employers, and make numerous other improvements in wage garnishment procedure.

Under existing law, there are three different procedures whereby the earnings of employees may be garnished;^{6/}

1. In the ordinary case, the judgment creditor obtains a writ of execution and a public officer executes the levy by personal service on the employer.^{7/}
2. Numerous statutory provisions permit mail service of orders to withhold an employee's earnings to secure payment of a delinquent state tax liability.^{8/}
3. The earnings of a public employee may be garnished by filing an abstract or transcript of judgment with the employing public entity.^{9/}

The text of the comprehensive statute proposed by the LRC is in Appendix A. The State Bar Committee approves^{10/} the recommendations with some exceptions for the reason that the present statutory procedure for garnishing the earnings of employees is confused, costly, and causes hardship to employers, employees, and creditors alike.

^{5/} See Recommendation Relating to Wage Garnishment Exemptions, 12 Cal. L. Revision Comm'n Reports 901 (1974), and 1975 AB 90.

^{6/} Civil Code Section 4701, which provides a compulsory wage assignment to enforce a judgment for child support, is not directly affected by the LRC proposal, but in light of the priority given a CC 4701 assignment under proposed CCP §723.031, the State Bar Committee recommends that CC 4701 be amended to include spousal support as well. See note 17, *infra*.

^{7/} Code Civ. Proc. §§681 et seq.

^{8/} By warrant: Unemp. Ins. Code §1785; Rev. & Tax. Code §§6776, 7881, 9001, 16071, 18906, 26191, 30341, 32365, see also §14321. Exemptions are applicable under Code Civ. Proc. §690.51. By notice to withhold: Unemp. Ins. Code §1755; Rev. & Tax. Code §§6702, 7851, 8952, 11451, 16101, 18817, 26132, 30311, 32381.

^{9/} Code Civ. Proc. §710.

^{10/} Significant dissent was present in State Bar Committee meetings, undoubtedly because of the varied background and debtor-creditor affiliation of the Committee members. However, the atmosphere resulted in dialogue rather than conflict. The entire State Bar Committee approved reform of some kind in the area of wage garnishment. Dissenting views are noted where appropriate.

This State Bar Committee is in substantial accord with many of the proposals of the Law Revision Commission. However, this State Bar Committee makes numerous recommendations to improve on the Law Revision Commission proposals relating to wage garnishment procedure.

The principal recommendations^{11/} of this Committee are that the Board of Governors support the LRC proposal and attempt to amend in order to:

1. Clarify certain sections without substantive change;^{12/}
2. Provide pre-levy notice to debtors;^{13/}
3. Provide procedures whereby the debtor would be provided with all blank documents necessary to file a claim of exemption;^{14/}
4. Provide a "notice to debtor" in English, Spanish and any other language the levying officer deems appropriate;^{15/}
5. Provide that a wage assignment under Civil Code Section 4701 be available for spousal support and that spousal support have the same priority as child support;^{16/}
6. Provide that notice of a prior withholding order, or a supervening withholding order with higher priority, be given a creditor who thereafter attempts to levy;^{17/}

^{11/}Text of amendments in Appendix B.

^{12/}E.g.: "his" to "his or her" in proposed Code Civ. Proc. §723.021.

^{13/} This recommendation is contained in Appendix B-1. The recommendation is a departure from current law as well as the LRC proposal. The Committee was sharply divided in opinion on this recommendation and it might be considered separately from the rest of this Report.

^{14/}See proposed CCP §§723.122, 723.103. Dissenting members noted the possible waste of time, paper and postage, since often debtors do not avail themselves of the current exemption procedure.

^{15/}An example is attached as Appendix C. See proposed CCP §§723.122, 723.128. The requirement of another piece of paper caused dissent.

^{16/}See note 6, supra, and note 17, infra.

^{17/}See proposed CCP§723.030. There was substantial opposition to any priority among creditors, or the requirement suggested by the majority of the State Bar Committee, that the employer notify a creditor that his or her levy has been nullified by a preceding levy or a levy of higher priority. A minority of the State Bar Committee considered the employer to be a "victim" of a wage garnishment, while several members more would agree that the employer is a neutral party who must be inconvenienced. Only a small minority remains that feels the employer has an active role.

7. Provide that the levy of a taxing authority be subject to the same exemption as a general creditor's levy, that the taxing authority be treated as a general creditor whenever possible, and that the procedural preference given to the taxing authority be severely limited;18/
8. Prohibit discharge of an employee by reason of any number of wage garnishments,19/ except when financial responsibility is job related;20/
9. Delete the provision whereby the employer is compensated for each levy he or she processes.21/

18/See proposed CCP §§723.070-723.084.

19/Currently an employee may not be discharged by reason of garnishment for any "one indebtedness." 16 USC 1674, Labor Code §2929. 1975 SB 635 proposed amendments to Labor Code §2929 to protect an employee from discharge by reason of garnishments resulting from two judgments instead of the current one. This legislative proposal originated in the State Bar, but was not adopted this year. See 1971 Conference Resolution 12-3, and the Report of the Legislative Representative of the State Bar dated August 18, 1975.

20/The State Bar Committee departs from previous recommendations by including an exception for "job-related financial responsibility." An employer should not be required to retain an employee who controls large sums of money if that employee is the subject of multiple garnishments by multiple creditors. The Committee also suggests a penalty of \$1,000 plus attorney's fees for violation of the law.

21/\$1.00 for each levy under proposed CCP §723.024. The State Bar Committee initially amended to limit the deduction to \$5.00 per month in order to protect against multiple levies for small amounts. Ultimately the Committee deleted the provision entirely, since the sum allowed is totally inadequate to defray the cost to the employer, and the possibility of future increase great. The cost would be transferred to the debtor. A minority of the Committee felt that even a small amount should be allowed the employer, and that such a provision would be necessary for passage of a comprehensive reform bill.

SUMMARY OF RECOMMENDATIONS

The changes proposed by the Law Revision Commission are intended to result in significant improvement in wage garnishment procedure. The anticipated effects on the most directly affected groups: employers, employees, and creditors, are summarized below. The State Bar Committee comments follow each summary. Reference is made to the appropriate section of the proposal and the text of Committee recommendations is in Appendix B.

EMPLOYERS

A primary objective of the Law Revision Commission's proposal is to provide a wage garnishment procedure that minimizes the burden that such garnishments impose on employers.

Forms and instructions. Instructions prepared by the Judicial Council will explain the employer's duties under a wage garnishment order. Forms adopted by the Judicial Council will minimize the employer's burden in complying with the order.

Committee comment: Under current law an employer, particularly the small employer, is substantially burdened by a wage garnishment. Large businesses almost always employ counsel to aid them in the processing of wage garnishments, but the small employer usually processes the garnishment himself or simply discharges the employee. The Law Revision Commission seeks to alleviate this problem for both the large and small employer, and therefore the State Bar Committee approves their proposal.²² See proposed CCP §§723.120 to 723.128.

Mail service. Mail service of earnings withholding orders by the levying officer will enable the employer to process garnishment orders to the appropriate department or person for action without disruption of normal business procedures.

²²/See note 14, supra.

Committee comment: The use of mail service in wage garnishment should result in substantial savings in the cost of service. The use of the sheriff or marshal as a high priced messenger when a creditor is attempting to reach an asset like earnings is generally an extravagant waste of time and money. Mail service presents the most efficient and economical manner of service of a wage garnishment. The State Bar Committee concurs with the proposed service by registered mail or certified mail return receipt requested. See proposed CCP §§723.021, 723.101.

Service charge. A one-dollar service charge the employer will be permitted to make each time he withholds earnings will lessen the employer's economic burden.

Committee comment: A one-dollar service charge is a minimal contribution to the expenses an employer must bear when processing a wage garnishment. It is the opinion of the State Bar Committee that one dollar is insufficient and that the legislation providing a service charge for processing an earnings withholding order will ultimately be amended to provide an amount in conformity with the actual expense the employer bears. Since the employee is ultimately responsible for the service charge expense the State Bar Committee feels that any legislation providing a service charge should be opposed and therefore recommends disapproval of that portion of the Law Revision Commission proposal.^{23/} See proposed CCP §723.024.

Withholding table. A withholding table supplied to the employer will make it relatively simple to determine the amount to be withheld. Withholding will be on the basis of the employee's gross earnings, and the need to compute "disposable earnings" will be eliminated.

Committee comment: The principle of simplifying wage garnishment procedure by providing a withholding table to the employer and computing the amount withheld on the basis of the employee's gross earnings is approved by the State Bar Committee.^{24/} See proposed CCP §723.050.

Delay in effective date of order. A 10-day delay in the effective date of a withholding order will avoid the need to compute the amount to be withheld for only part of a pay period and will permit the employer to process the order in a businesslike way rather than having to withhold on earnings due on the date the order is received.

^{23/}See note 21, *supra*.

^{24/}This portion of the LRC proposal has been deleted by the LRC. See excerpts of the LRC Minutes, October 9, 10, and 11, 1975, attached as Appendix D.

Committee comment: No comment. See proposed CCP §723.022.

Reduction in number of wage garnishments. Greater protection afforded the earnings of low income employees will reduce the number of cases where withholding is required, and a five-dollar minimum on the amount to be withheld will avoid the need to deduct small amounts where the cost to the employer may exceed the amount received by the creditor.

Committee comment: Where the available earnings^{25/} of a judgment debtor for the work week are less than \$10.00 nothing shall be withheld. If the available earnings of the judgment debtor for the work week are at least \$10.00 but not more than \$45.00, 50% of the available earnings shall be withheld under the proposed statute. The statute will protect the earnings of low income employees and avoid the need to deduct small amounts but the employer will still be burdened with computing the available earnings of the judgment debtor. Therefore the cost to the employer may remain the same. See proposed CCP §723.050.

Monthly payment. A provision for monthly payment by the employer of withheld earnings will avoid the necessity of preparing and sending a check for the withheld earnings after each payday.

Committee comment: The employer should be able to select a more frequent payment schedule if appropriate to the employer's accounting procedure. See proposed CCP §723.025.

Protection from liability for good faith errors. Provisions are included that will protect the employer from civil or criminal liability for good faith errors.

Committee comment: The employer should be protected from liability for good faith errors. See proposed CCP §723.154 (b).

EMPLOYEES

The Law Revision Commission's proposal is designed to provide significant benefits to employees.

Greater protection for low income employees with dependents. Substantial reductions will be made in the amount to be withheld from the earnings of low income employees with dependents.

^{25/}"Available earnings" is defined in proposed CCP §723.050(a). Under current Federal law, 15 USC 1673, "disposable earnings" is the measure. A taxpayer with several dependents has more take home pay, and hence more "disposable earnings", than a taxpayer with the same gross income and no dependents. This anomalous result is avoided in the proposed CCP §723.050(a).

Committee comment: While protection of low income employees with dependents is a admirable goal, the competing interest of creditors, who may also be low income persons with dependents, requires close attention. See proposed CCP §723.050.

Withholding table. Use of a withholding table based on gross earnings^{26/} will greatly simplify the computation of the proper amount to be withheld and will make it easier for the employee to discover any errors made by the employer in computing the amount to be withheld.

Committee comment: The use of a withholding table based on gross earnings is a substantial improvement over current law. See proposed CCP §723.050 (d).

Avoidance of need to claim exemption. The adequacy of the protection afforded by the withholding table system will reduce the need to claim a hardship exemption.

Committee comment: It makes sense to grant an automatic exemption, but it also makes sense that such exemption be fair to everyone. The State Bar Committee feels that the minimum cost of living across the State sets the floor on which the exemption should be based. The Committee proposes a standard of forty times the minimum wage, rather than the thirty times the minimum wage provided in the Law Revision Commission proposal, be used as the standard. See proposed CCP §723.050 (b).

Hardship exemption. A sensible "hardship exemption" will be provided that cannot be defeated on the ground that the underlying debt was incurred for a "common necessary." Where it is necessary for the employee to claim the hardship exemption, the streamlined procedure and information provided the employee will assist him in making his claim.

Committee comment: The Committee thinks that this section has been severed from the case law arising from the current Code Civ. Proc. section 690.6^{27/}. The Committee preserves former case law by adopting the language of the former statute relating to necessities. See proposed CCP §723.051.

Mail service. Authorization to use mail service in the ordinary case will substantially reduce the cost of wage garnishment, a cost that ultimately is paid by the employee.

^{26/}See note 25, supra.

^{27/}To be repealed by the proposed legislation.

Committee comment: Mail service in the ordinary case should be by registered mail, or certified mail, return receipt requested. See proposed CCP §723.101.

Tax delinquency withholding orders. The harsh effects of a withholding order for delinquent state taxes will be mitigated.

Committee comment: The harsh effect of a withholding order for delinquent state taxes is only one aspect of the advantages the State as a taxing authority has over general creditors in wage garnishments. The State Bar Committee feels that the same exemptions should apply to the taxing authority and that the maximum amount withheld should be the same for the taxing authority as a general creditor. The Committee also feels that treatment of the taxing authority as a general creditor will result in a substantial simplification^{28/} of the wage garnishment statute.^{29/} See proposed CCP §§723.070 to 723.084.

Wage assignments. The employee will be permitted to revoke a wage assignment (other than a wage assignment for support under Civil Code Section 4701) insofar as it relates to wages unearned at the time he revokes the assignment.

Committee comment: The State Bar Committee feels that spousal support should be afforded the same treatment as child support under CC4701.^{30/} See proposed CCP Labor Code §300.

CREDITORS

The establishment of a simple, businesslike procedure for the collection of judgments through wage garnishment is the primary benefit creditors are intended to receive under the proposed legislation. Clear answers to a large number of procedural questions will be provided. A series of forms will be available to permit easy compliance with statutory requirements. The Judicial Council and levying officers will be a ready source of reliable information concerning wage garnishment procedure. Other benefits to creditors are listed below.

Mail service. Use of mail service by the levying officer will be authorized. Not only will this reduce the cost of wage garnishments but it will also significantly

^{28/}See the many statutes in note 8, supra.

^{29/}There was substantial opposition to any priority among creditors in the State Bar Committee. See notes 6, 17, supra, 30, 36, infra.

^{30/}There was substantial opposition to any priority among creditors in the State Bar Committee. See note 29 (taxing authority), note 36 (child or spouse).

reduce the fees that a creditor now has to advance to the levying officer. A flat \$6.50 fee^{31/} is recommended to cover all duties of the levying officer in a wage garnishment, including service cost and receiving and paying over amounts received from the employer.

Committee comment: Registered mail, or certified mail, return receipt requested should be used whenever possible. Personal service^{32/} by the levying officer is not necessary in all cases and reduces the sheriff or marshal to a highly paid messenger in most cases. See proposed CCP §723.101.

Earnings withholding tables. The earnings withholding tables will enable the creditor more easily to determine whether the correct amount has been withheld from the employee's earnings. Disputes between creditors and employers will be minimized by using gross income^{33/} as the basis for withholding since this will avoid the possibility of the subtraction of improper items in computing the amount of "disposable earnings."

Committee comment: The use of a table seems to be beneficial to the creditors, debtors, and employers. See proposed CCP §723.050 (d).

Minimizing hardship exemption hearings. Protecting more adequate amounts of a debtor's earnings without the requirement that he claim a hardship exemption should significantly reduce the number of cases where a hardship exemption will be claimed, thus reducing the creditor's burden in attending court hearings. The requirement that the debtor submit a complete financial statement with his claim for the hardship exemption and that the creditor be provided a copy of the statement prior to the hearing on the claim should assist the creditor in determining which claims he will resist (thus avoiding his attending court hearings where the exemption is clearly justified) and also will assist the creditor in recovering the full amount he is allowed by law.

Committee comment: The idea of an automatic exemption makes sense. The use of a complete financial statement seems to be designed to assist the creditor in contesting a claim in excess of the automatic exemption. It has the beneficial effect of discouraging fraudulent claims of exemption by the debtor. See proposed CCP §§723.052, 723.105, 723.106, 723.128.

^{31/}The LRC indicates that this sum accurately reflects the cost of the levying officer.

^{32/}Presently required under Code Civ. Proc. §§682,687. Personal delivery is an authorized alternative under the proposed CCP §723.101.

^{33/}See note 25, supra.

Garnishment of earnings of public employees. The uniform procedure will make the continuing levy and mail service procedure available for the garnishment of earnings of public employees, thus avoiding the need to resort to multiple levies.

Committee comment: There does not seem to be any reasonable need for excepting public employees from the procedure applicable to private employees. See proposed CCP §710.

Goodwill of employers. The recommended legislation is carefully designed to make compliance with wage garnishment orders as easy as possible for employers. The improved procedures should do much to minimize employer ill will created by wage garnishments and to combat the possible tendency of some employers to avoid the problems created by a wage garnishment by discharging the employee.

Committee comment: Prevention of employer ill will is definitely a desirable goal in any revision of the wage garnishment laws. It has been noted that the power of a wage garnishment in satisfaction of judgment is often the direct threat to employment.^{34/} The State Bar Committee recommends adoption of legislation prohibiting discharge for any number of garnishments except where financial responsibility is job-related.^{35/} See proposed CCP §§723.125 to 723.127, Labor Code §2929, §§723.102-723.104.

Avoidance of debtor's bankruptcy. The more adequate protection given the earnings of the debtor by the LRC proposal is meant to encourage the debtor who is pushed by a number of creditors to discharge the judgments against him over a period of time rather than resorting to bankruptcy.

Committee comment: The ability to pay debts slowly, which is inherent in the proposed wage garnishment procedure, should encourage the debtor who is pushed by a number of creditors to discharge the judgments rather than resort to bankruptcy. See proposed CCP §723.050.

Priorities among creditors. A fair and equitable system for dealing with priorities among creditors will be provided. In addition, the judgment debtor will be prevented from giving one creditor preference over others by a wage assignment.^{36/}

^{34/}See note 2, supra.

^{35/}See note 19, supra.

^{36/}A strong dissenting view in the State Bar Committee notes that under the Committee recommendation re Civil Code §4701 (see notes 6, 17, 29, and 30, supra), a spouse might be able to give a preference by wage assignment to his or her spouse.

Committee comment: A system whereby the first creditor to file or one with a designated priority shall be paid before the other creditors are paid, then the other creditors are paid in sequence, is a scheme that the State Bar Committee approves.^{37/} See proposed CCP §§723.107, 723.052, 723.030, 723.031, 723.023.

Enforcing employer compliance. Although the recommended statute would protect the employer from liability for good faith errors, it includes provisions that will preclude the employer and employee from deferring or accelerating the payment of earnings to defeat the creditor's rights and will authorize civil actions by creditors to obtain the amounts that employers are required to withhold but fail to withhold and pay over to the creditor.

Committee comment: Along with protection for good faith errors the statute provides sanctions for bad faith or grossly negligent errors of the employer.^{38/} See proposed CCP §§723.154(a), 723.153, 723.152.

^{37/}Subject to strong opposition by a minority of the State Bar Committee to any scheme of priority. See note 30, *supra*.

^{38/}The State Bar Committee majority also recommends amendment of Labor Code §2929 to provide a penalty to be paid to the employee, plus reasonable attorney's fees, for the wrongful discharge of the employee by reason of any number of wage levies, except where financial responsibility is "job-related". The minority feels that the threat of criminal prosecution under present Federal and State laws, and possibly an action for abuse of process, is a sufficient deterrent for a firing for not more than one levy. The minority also notes that levy only occurs after the debtor-employee has had an opportunity to make his peace with the levying creditor, and feels that the employer should be able to discharge him.

SUPPLEMENTARY
RECOMMENDATION

The Committee re Relations of Debtor and Creditor considered the principle of pre-levy notice to debtors at its November 1975 meeting. The benefit to the debtor is seen as a real possibility of asserting his or her right to an exemption under the law. The harm to the creditor is that at some point in the judicial process, the creditor's right to collect on a lawful debt becomes superior to the debtor's rights of due process. The principle of pre-levy notice was approved by a vote of 7 for and 4 against.

At the March, 1976 meeting of this Committee, a draft of a statute embodying the principle of pre-levy notice was considered. (See Appendix B-1). This draft requires a notice to be sent to the debtor 20 days before levy. The debtor-employee would be notified at his home address, or if undelivered there, at the address of his employee. CCP §712.105, as proposed by the LRC, limits the debtor to one hearing on his or her claim of exemption. Thus, the debtor could either claim the exemption before or after the garnishment, but not both. The Committee approved the draft by a vote of 8 for and 3 against. The feeling of the majority was that lawful exemptions, even to lawful claims of creditors, must be given effect in a fair manner.

May 12, 1976

Very truly yours,



Robert McMahon
Staff Attorney

RM:jk

APPENDIX B - TEXT OF STATE BAR COMMITTEE RECOMMENDATIONS.

Proposals made by the Law Revision Commission which the State Bar Committee approved or took no action on are not reiterated. The text of these sections may be found in the LRC recommendation.

Where the State Bar Committee has been prompted to comment, either because the Committee comment differs from the LRC comment, or because the section has a special significance, the text of the proposal is presented in full.

Amendments made by the State Bar Committee to the LRC proposal are in the usual form: additions are underlined, deletions are stricken. If a passage is both underlined and stricken, the State Bar Committee has deleted an addition made by the LRC to an existing law. If a passage is either double underlined or double stricken, the State Bar has further amended an existing law amended by the LRC, which LRC amendments are indicated by single underlining or striking. The text of LRC proposals deleted in entirety by the State Bar Committee is not presented.

State Bar Committee comments on amendments made by the Committee are presented where appropriate (for instance, a division in opinion in the Committee) after each affected section.

Amendments or additions made by the State Bar Committee and not made by the LRC are presented in a separate section in the usual form: additions are underlined, deletions are stricken.

LRC PROPOSAL:

Code of Civil Procedure

STATE BAR COMMITTEE ACTION:

- § 682 (technical amendment).....approve.
- § 682.3 (repealed). Wage garnish-
ment procedureapprove.
- § 683 (amended). Return of writ of
execution.....approve.
- § 690.6 (repealed). Exemption of
earnings.....approve.
- § 690.50 (technical amendment).....approve.
- § 710 (technical amendment).....approve.

Chapter 2.5. Employees' Earnings Protection

Law.....

Article 1. Short Title; Definitions

- § 723.010. Short titleapprove.
- § 723.011. Definitionsamend.

Article 2. General Provisions

- § 723.020. Exclusive procedure for
withholding earnings.....approve.
- § 723.021. Levy made by earnings
withholding order.....amend.
- § 723.022. Employer's duty to
withhold; withholding
periodapprove.
- § 723.023. Priority of orders generallyamend.
- § 723.024. Employer's service charge
for withholdingdelete.
- § 723.025. Payment to levying officer...amend.
- § 723.026. Levying officer's duty to
pay over amounts
received and make
return on writapprove.
- § 723.027. Creditor required to notify
levying officer when
judgment satisfied; notice
of terminationcomment.
- § 723.028. Withholding order for costs
and interestamend, see also LC §2929.
- § 723.029. Lien created by service of
earnings withholding
ordercomment.
- § 723.030. Withholding order for
supportamend.
- § 723.031. Effect of wage assignment
for supportapprove.

LRC PROPOSAL:

STATE BAR COMMITTEE ACTION:

Article 3. Restrictions on Earnings

Withholding

- § 723.050. Standard exemption.....amend.
- § 723.051. Additional amounts
necessary for support
exempt.....amend, see also CC 14701.
- § 723.052. Exemption when judgment
is for delinquent support
payments.....comment.

Article 4. Earnings Withholding Orders

for Taxes

- § 723.070. Definitionsapprove.
- § 723.071. Exclusive procedure for
withholding earnings for
state tax liabilityapprove.
- § 723.072. Withholding order for taxes;
notice and opportunity
for review of liability
before order issuedamend.
- § 723.073. Provisions governing tax
withholding orders.....approve.
- § 723.074. Agency issued withholding
order for taxes.....amend.
- § 723.075. Notice to taxpayer; reduc-
tion in amount withheld.....amend.
- § 723.076. Court issued withholding
order for taxes.....delete.
- § 723.077. Priority of ordersamend.
- § 723.078. Withholding period; notice
terminating order.....delete.
- § 723.079. When receipt required.....amend.
- § 723.080. Service.....amend.
- § 723.081. Forms.....amend.
- § 723.082. Review of tax liabilityapprove.
- § 723.083. Refund of employer's
service chargeamend.
- § 723.084. Warrant or notice deemed
withholding order for
taxesdelete.

Article 5. Procedure for Issuance of
Earnings Withholding Orders

- § 723.100. Judicial Council authorized to prescribe practice and procedureapprove.
- § 723.101. Serviceamend.
- § 723.102. Application for issuance of earnings withholding orderapprove.
- § 723.103. Service of order and information on employeramend.
- § 723.104. Delivery of papers to employee; employer's return.....approve.
- § 723.105. Judgment debtor's claim of exemptionamend.
- § 723.106. Findings not requiredapprove.
- § 723.107. Limitation on obtaining additional earnings withholding orders.....approve.

Article 6. Forms; Employer's Instructions;
Withholding Tables

- § 723.120. Judicial Council to prescribe formsapprove.
- § 723.121. Application for earnings withholding order.....amend.
- § 723.122. Notice to employeeamend.
- § 723.123. Form of claim of exemptionamend.
- § 723.124. Judgment debtor's financial statementapprove.
- § 723.125. Earnings withholding order.....amend.
- § 723.126. Employer's returnapprove.
- § 723.127. Employer's instructions and withholding tablesapprove.
- § 723.128. Judgment creditor's notice of oppositionapprove.

LRG PROPOSAL:

STATE BAR COMMITTEE ACTION:

Article 7. Administration and Enforcement

- § 723.150. Rulesapprove.
- § 723.151. Liaison with federal administratorapprove.
- § 723.152. Fraudulent withholding by employer.....comment.
- § 723.153. Employer not to defer or accelerate payment of earnings.....approve.
- § 723.154. Remedies of judgment creditor; limitation of employer's liability.....approve.

Government Code

- § 26750 (added). Fee under Employees Earnings Protection Lawapprove.

Labor Code

- § 300 (amended). Wage assignments.....amend.

Welfare and Institutions Code

- § 11489 (technical amendment).....no action.

Transitional Provisionsno action.

Operative Date.....no action.

Mandated Local Costs Provisionno action.

Partial Invalidity.....no action.

ADDITIONS MADE BY STATE BAR COMMITTEE:

Amended Civil Code §4701. Wage Assignments; Child and Spousal Support.

Amended Labor Code §2929. Prohibition of Discharge of Employee by Reason of Garnishment.

§723.011. Definitions

723.011. As used in this chapter:

(a) "Earnings" means compensation payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise.

(b) "Employee" means a public officer or any individual who performs services subject to the right to the control of an employer as to both what shall be done and how it shall be done.

(c) "Employer" means a person for whom an individual performs services as an employee.

(d) "Judgment creditor," as applied to the state, means the specific state agency seeking to collect a judgment or tax liability.

(e) "Judgment debtor" includes a person from whom the state is seeking to collect a tax liability under Article 4 (commencing with Section 723.070), whether or not a judgment has been obtained on such tax liability.

(f) "Person" includes an individual, a corporation, a partnership or other uninterested association, and a public entity.

Committee Comment: Subsection (a), definition of "earnings" was questioned as being overly broad, but it was noted that the section tracks the Federal statute, 15 USC 1672, and broadness in the statute provides a necessary flexibility of interpretation. The character of accumulations, bonuses, or vacation pay remains undefined.

Subsection (b) was amended since it could have excluded a salesperson.

§723.021. Levy made by earnings withholding order

723.021. Notwithstanding Section 688, a levy of execution upon the earnings of an employee shall be made by service of an earnings withholding order upon his or her employer in accordance with this chapter.

Committee Comment: The Committee recommends "de-sexing" the LRC proposal, but did not exhaustively search for errors such as the one corrected by amendment here.

§723.023. Priority of orders generally

723.023. Except as otherwise provided in this chapter/ Sections 723.030 (support orders), 723.031 (wage assignment for support) and 723.077 (state taxes):

(a) An employer shall comply with the first earnings withholding orders served upon him.

(b) If the employer is served with two or more earnings withholding orders on the same day, he shall comply with the order issued pursuant to the judgment first entered. If two or more orders served on the same day are based on judgments entered upon the same day, the employer shall comply with whichever one of such orders he selects.

(c) Except as otherwise provided in Section 723.030(b)(3), if (e) ~~if~~ an earnings withholding order is served during the period that an employer is required to comply with another earnings withholding order for the same judgment debtor, the subsequent order is ineffective and the employer shall not withhold earnings pursuant to the subsequent order.

Committee Comment: The section was amended to provide clear reference to other sections. There was a critical division in the committee as to whether there should be any priority among creditors at all.

§723.024--Employer's service charge for withholding

~~723.024--Each time an employer makes a deduction from an employee's earnings pursuant to an earnings withholding order, he may make an additional deduction of one dollar (\$1.00) and retain it as a charge for his services in complying with the earnings withholding order/~~

Committee Comment: A majority of the committee recommends deletion of this section. The underlying reasons of the majority are: 1. that the \$1.00 charge is totally inadequate and does not reflect the actual expense of the employer, therefore it will have no positive effect on preventing the discharge of the employee. 2. Many judgment debtors are economic hardship cases, who are willing but unable to pay their debts, and the added cost to them has the effect of increasing the original debt to punitive proportions. 3. The new and additional cost to the employee could easily be increased by the Legislature. A minority of the committee felt that the employer is at least a neutral party in a wage garnishment, and sometimes a victim. This minority recommends that the employer's cost, which should be nothing, should be lessened by even a nominal service charge such as the \$1.00 proposed by the LRC.

The committee recommends a monthly ceiling of \$5.00 on the service charge (5 or more levies) if the section is retained.

§723.024. Cont'd.

The California Association of Collectors has objected to the \$1.00 charge provision, probably because it would diminish the amount available to the creditor. See LRC Minutes, October 9, 10, and 11, 1975, pages 13-14.

§723.025. Payment to levying officer

723.025. The amount required to be withheld pursuant to any earnings withholding order ~~shall~~ may be paid monthly to the levying officer not later than the 15th day of each month. The If the employer chooses to remit to the levying officer on a monthly basis the initial monthly payment shall include all amounts required to be withheld from the earnings of the employee during the preceding calendar month up to the last day of that month, and thereafter each monthly payment shall include amounts withheld from the employee's earnings for services rendered in the interim up to the close of the employee's pay period ending closest to the day of the preceding calendar month. If the employer does not remit on a monthly basis as described above, the employer shall remit as of the close of each of the employee's shorter pay periods.

Committee Comment: A rigid monthly scheme may not be appropriate for all accounting procedures. The Committee amended this section to allow for other, more frequent payment schedules.

The California Association of Collectors objected to monthly rather than weekly remittance by the employer. See LRC Minutes October 9, 10, and 11, 1975 pages 13-14.

§723.027. Creditor required to notify levying officer when judgment satisfied; notice of termination

723.027. If the judgment pursuant to which the earnings withholding order is issued is satisfied before the order otherwise terminates pursuant to Section 723.022, the judgment creditor shall promptly notify the levying officer who shall promptly terminate the order by serving a notice of termination on the employer.

Committee Comment: The LRC comments that CCP 675 imposes a duty on a creditor to furnish a debtor with a satisfaction of judgment under penalty of payments of actual damages plus a forfeiture of \$100. A majority of the State Bar Committee feels that the remedies provided in the present proposed section are insufficient compensation to the debtor and his or her attorney. The minority notes the availability of an abuse of process action, but the majority feels that the tort action is unsatisfactory because few attorneys would represent the debtor without some guaranteed fee.

§723.028. Withholding order for costs and interest

723.029. Subject to Section 723.107, after the amount stated as owing in the earnings withholding order is paid, the judgment creditor may apply for issuance of another earnings withholding order covering the costs and interest that may have accrued since application for the prior order. [Any supplemental withholding order granted pursuant to this section shall be considered as part of the same indebtedness.]

Committee Comment: The Committee reviewed the provisions of this section and is troubled as to whether the use of the term "costs" may create a "second indebtedness" for the purpose of discharge of the employee under 15 USC 1674 or Labor Code §2929. If the Committee's recommendation amending Labor Code §2929, prohibiting discharge by reason of any number of garnishments, except where financial responsibility is job-related, is not accepted, the Committee recommends that the language in brackets be adopted.

§723.029. Lien created by service of earnings withholding order

723.029. Service of an earnings withholding order creates a lien upon the earnings required to be withheld pursuant to such order. Such lien shall continue for a period of one year from the date such earnings became payable.

Committee Comment: The Committee notes that creation of a lien may create a significant priority in later Bankruptcy proceedings and approves the section without further comment.

§723.030. Withholding order for support

723.030. (a) A "withholding order for support" is an earnings withholding order on a writ of execution issued upon a judgment for delinquent amounts payable upon a judgment for the support of a child, or spouse or former spouse, of the judgment debtor, ~~including reasonable attorney's fees allowed in connection with the obtaining of such judgment.~~ A withholding order for support shall be denoted as such on its face.

(b) Notwithstanding any other provision of this chapter:

(1) An employer shall continue to withhold pursuant to a withholding order for support until the earliest of the dates specified in paragraphs (2), (3), or (4) of subdivision (a) of Section 723.022, except that a withholding order for support shall automatically terminate one year after the employment of the employee by the employer terminates.

(2) A withholding order for support shall be given priority over any other earnings withholding order. An employer upon whom a withholding order for support is served shall withhold and pay over earnings of the employee pursuant to such order notwithstanding the requirements of another earnings withholding order. When an employer is required to cease withholding earnings pursuant to a prior earnings withholding order for taxes or otherwise, he or she shall notify the levying officer, or, in the case of a withholding order for taxes, the taxing authority, who served the prior earnings withholding order that a supervening order for support is in effect.

(3) Subject to paragraph (2) and to Article 3 (commencing with Section 723.050), an employer shall withhold earnings pursuant to both a withholding order for support and another earnings withholding order simultaneously.

Committee Comment: A slim majority of the Committee feels that the portions of any judgment for support relating to attorney's fees should not be given priority. The majority felt that attorneys should be treated like general creditors, and that the LRC proposal was unclear as to whether attorney's fees earned in obtaining an order for delinquent support, or fees earned in obtaining the original order for support, or both, were to have priority. The minority agreed that the proposal was unclear, but felt that a priority for attorney's fees would encourage attorneys to represent parties seeking supplemental remedies for delinquent support, and thereby aid dependent children and spouses.

Another view, strongly held by a minority of the committee, is that there should be no absolute among creditors. It was noted that the debtor who refuses to pay support will create a priority and thereby place himself or herself in a better position than if he or she voluntarily made payments. The minority suggested a percentage participation, or equitable distribution scheme (i.e., to amend §723.052 to include general

§723.030. Cont'd.

creditors) instead of an absolute priority.

The Committee recommends the notice in §723.030 (b)(2) for the convenience of creditors. A minority of the committee objects to placing another task in the hands of the employer.

§723.050. Standard Exemption

723.050. (a) As used in this section, "available earnings" for any workweek means the earnings of the judgment debtor for that week less the sum of all the following:

(1) The amount that would be withheld for federal personal income taxes from the same amount of earnings of a single person who claims no exemptions.

(2) The amount that would be withheld for federal social security taxes from the same amount of earnings if earned during the first week of a calendar year by a person subject to withholding for that tax.

(3) The amount that would be withheld for worker contributions to the Unemployment Compensation Disability Fund under Sections 984 and 985 of the Unemployment Insurance Code from the same amount of earnings if earned during the first week of a calendar year by a person subject to withholding for that purpose.

(4) The amount that would be withheld for state personal income taxes from the same amount of earnings of a single person who claims no exemption.

(5) An amount equal to 38 40 times the federal minimum hourly wages prescribed by Section 6 (a)(1) of the Fair Labor Standards Act of 1968 in effect at the time the earnings are payable.

(6) Sums paid for a regular policy of health insurance.

(b) Except as otherwise provided in Section 723.030, 723.031, 723.051, 723.052, 723.075, and 723.076, the maximum amount of the earnings of a judgment debtor in any one workweek which may be withheld pursuant to this chapter shall be computed as provided in this subdivision. Where the available earnings of the judgment debtor for the workweek are less than ten dollars (\$10), nothing shall be withheld. If the available earnings of the judgment debtor for the workweek are at least ten dollars (\$10) but not more than forty-five dollars (\$45) 50 percent of the available earnings shall be withheld. Where the available earnings of the judgment debtor for the workweek are greater than forty-five dollars (\$45), twenty-three dollars (\$23) plus 25 percent of the available earnings in excess of forty-five dollars (\$45) shall be withheld. Where the available earnings of the judgment debtor for the workweek are ten dollars (\$10) or more, if the amount computed under this subdivision is not a multiple of one dollar (\$1), fractional amounts less than one-half dollar (\$.50) shall be disregarded and fractional amounts of one-half dollar (\$.50) or more shall be rounded upward to the next higher whole dollar.

(c) The Judicial Council shall prescribe by rule the method of computing the amount to be withheld in the case of earnings for any pay period other than a week, which method shall be substantially equivalent in effect to that prescribed in subdivision (b).

(d) The Judicial Council shall prepare withholding tables for determining the amount to be withheld from the earnings of employees for representative pay periods. The tables may prescribe the amounts to be withheld according to reasonable earnings brackets. The tables used to determine the amount to be withheld in all cases where the tables permit computation of the amount to be withheld.

Committee Comment: It makes sense to grant an automatic exemption rather than proceed through the courts, but it also makes sense that such exemption be fair to everyone. The State Bar Committee feels that the minimum cost of living across the State sets the floor on which the automatic exemptions should be based, and the Federal minimum wage standard of forty times the Federal minimum hourly wage rather than the thirty proposed by the LRC.

It also makes sense to treat low-income debtors with dependents no more poorly than low-income debtors without dependents. An anomaly in the present law (CCP 690.6, 15 USC 1973) allows a creditor to garnish "disposable earnings", i.e. take home pay, which is greater for the wage earner who declares dependents as tax exemptions.

The State Bar Committee feels that sums paid for a regular policy of health insurance should be automatically exempt.

§723.051. Additional amounts necessary for support exempt

723.051. Except as provided in Section 723.052 and in Article 4 (commencing with Section 723.052), the portion of his earnings necessary for the use of the debtor's family which a judgment debtor proves is necessary for the support of the debtor of the debtor's family supported in whole or in part by the debtor is exempt from levy under this chapter unless the debt is incurred for personal services by any employee or former employee of the judgment debtor. Neither the judgment debtor's accustomed standard of living nor a standard of living "appropriate to his station in life" is a criterion for measuring the judgment debtor's claim for exemption under this section.

Committee Comment: A majority of the State Bar Committee had reservations that the provisions of this section were severed from case law arising from former CCP §690.6, and therefore amends the section to include language from that section.

§723.052. Exemption when judgment is for delinquent support payments

723.052. (a) Except as provided in subdivision (b), only one-half of the earnings of the judgment debtor plus any amount withheld from the judgment debtor's earnings pursuant to a wage assignment under Section 4701 of the Civil Code is exempt from levy under this chapter where the earnings withholding order is a withholding order for support under Section 723.030.

(b) Upon motion of any interested party, the court shall make an equitable division of the judgment debtor's earnings that takes into account the needs of all the persons that the judgment debtor is required to support and shall effectuate such division by any order determining the amount to be withheld from the judgment debtor's earnings pursuant to the withholding order for support.

Committee Comment: See discussion relating to §723.030. The Committee notes that §723.052 (b) provides for an equitable division only among "persons the judgment debtor is required to support" and does not include general creditors. A minority unsuccessfully sought to amend this section to include general creditors.

§ 723.072. Withholding order for taxes; notice and opportunity for review of liability before order issued

723.072. (a) A "withholding order for taxes" is an earning [sic] withholding order issued pursuant to this article to collect a state tax liability and shall be denoted as a withholding order for taxes on its face.

(b) A withholding order for taxes may only be issued where:

(1) The existence of the state tax liability appears on the face of the taxpayer's return, including a case where such tax liability is disclosed from the taxpayer's return after errors in mathematical computations in the return have been corrected ; or

(2) The state tax liability has been assessed or determined as provided in the Revenue and Tax Code or Unemployment Insurance Code, and the taxpayer had notice of the proposed assessment or determination reviewed by appropriate administrative procedures, whether-or-not-he took-advantage-of-that-opportunity. If the taxpayer requests review of the assessment or determination, the state shall not issue the withholding order for taxes until the administrative review procedure is completed. If the taxpayer is sent such a notice and does not request such a review within 30 days from the date the notice was mailed to him, the state may issue the withholding order for taxes.

(c) In any case where a state tax liability has been assessed or determined prior to January 1, 1977, and the state determines that the requirements of subdivision (b) have may not have been satisfied, the state shall may send a "Notice of Proposed Issuance of Withholding Order for Taxes" to the taxpayer at his last known address by first class-mail/ certified or registered mail, return receipt requested, postage prepaid. The notice shall advise the taxpayer that he may have the assessment or determination reviewed by appropriate administrative procedure and how he may obtain such a review. If the taxpayer is sent such a notice and requests such a review within 30 days from the date the notice was mailed to him, the state shall provide appropriate administrative procedures for review of assessment or determination and shall not issue the withholding order for taxes until the administrative review procedure is completed. If the taxpayer is sent such a notice and does not request such a review within 30 days from the date the notice was mailed to him, the state may issue the withholding order for taxes.

(d) A withholding order for taxes may issued whether or not the state tax liability has been reduced to judgment.

Committee Comment: Susection (b) (2) seeks to require notice to the taxpayer of the proposed assessment or determination where the liability for taxes is not shown in the face of tax returns. However, the subsections proposed by the LRC would appear to allow the state to issue a tax withholding order even if appropriate administrative review procedures were then pending.

Subsection (c) apparently attempts to provide for circumstances where tax liability has been assessed or determined prior to the effective date of the legislation. The provisions of this subsection should be mandatory upon the state. All notices should be sent by certified or registered mail, return receipt requested, in conformity with the other provisions of this chapter.

§723.074. Agency issued withholding order for taxes

723.074. (a) The state may itself issue a withholding order for taxes under this section to collect a state tax liability. The order shall specify the maximum amount that may be withheld pursuant to the order (unpaid tax liability including any penalties, accrued interest, and costs).

(b) The amount to be withheld by the employer pursuant to an order issued under this section shall be the amount required to be withheld pursuant to subdivision (c) or such lesser amount is specified.

(c) Unless a lesser amount is specified in the order, the amount to be withheld pursuant to an order issued under this section is two times the maximum amount that may be withheld under Section 723.050/ ~~except that the state may require that ten dollars (\$10) be withheld if the amount of the taxpayer's earnings is sufficient that a portion of his earnings would be withheld pursuant to Section 18866 of the Revenue and Taxation Code if such earnings were subject to withholding under that section but the amount of his earnings is not sufficient to permit withholding under Section 723.050/ in determining whether the earnings are sufficient so that a portion of the earnings would be withheld pursuant to Section 18866 of the Revenue and Taxation Code/ the table issued under that section applicable to a single person without allowance for additional exemptions shall be used.~~ The state shall prepare withholding tables for determining the amount to be withheld from the earnings of employees for representative pay periods pursuant to orders issued under this section. The tables may prescribe the amounts to be withheld according to reasonable earnings brackets. The tables shall be used to determine the amount to be withheld in all cases where the tables permit computation of the amount to be withheld.

Committee Comment: The State Bar Committee discussed the provisions of §723.074 and Article 4 and concluded by agreeing that the maximum amount to which the State should be entitled should be the same as that of a general creditor and that the State's levy should be subject to the same claims (see §723.050) as are available against the levy of a general creditor.

§723.075. Notice to taxpayer; reduction in amount withheld

723.075. (a) This section applies to any withholding order for taxes issued under this article.

(b) Together with the withholding order for taxes, the state shall serve upon the employer an additional copy of the order and a notice informing the taxpayer of the effect of the order and of his right to hearings and remedies provided in this chapter. Within 10 days from the date of service, the employer shall deliver to the taxpayer a copy of the order and the notice, except that immediate delivery shall be made where a jeopardy withholding order for taxes has been served. If the taxpayer is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

(c) The State shall provide for an administrative hearing to reconsider or modify the amount to be withheld pursuant to the withholding order for taxes, and the taxpayer may request such a hearing at any time after service of the order. If the taxpayer requests a hearing the hearing shall be provided, and the matter shall be determined, within 15 days after the request is received by the state.

(d) After the state has made its determination under subdivision (c), the taxpayer may file a claim of exemption to claim the exemption provided by Section 723.051, in the manner provided in Section 723.105, with a court of record in his county of residence. No fee shall be charged for filing such claim of exemption. ~~After hearing, the court may modify the withholding order for taxes previously issued, but in no event shall the amount required to be withheld be less than that permitted to be withheld under Section 723.050.~~

(e) The employer is not subject to any civil liability for failure to comply with subdivision (b). Nothing in this subdivision limits the power of a court to hold the employer in contempt of court for failure to comply with subdivision (b).

Committee Comment: Service to be made in conformity with §723.080. Subsection (d) is amended to conform with Committee recommendations as to §723.074.

§723.076. Court issued withholding order for taxes

~~723.076~~ Deleted.

Committee Comment: The State Bar Committee recommends deletion of this section as surplus with respect to its other recommendation treating the State as a general creditor.

§723.077. Priority of orders

723.077. (a) Subject to subdivision (b), an employer upon whom a withholding order for taxes is served shall withhold and pay over any earnings of the employee pursuant to such order and shall cease to withhold earnings pursuant to any prior earnings withholding order except that a withholding order for support shall be given priority as provided in Section 723.030. When an employer is required to cease withholding earnings pursuant to a prior earnings withholding order, he shall notify the levying officer who served the prior earnings withholding order that a supervening withholding order for taxes is in effect.

(b) An employer shall not withhold earnings of an employee pursuant to a withholding order for taxes if a prior withholding order for taxes is in effect, and, in such case, the subsequent withholding order is ineffective. When an employer does not withhold earnings pursuant to a withholding order for taxes pursuant to this subsection, the employer shall notify the state agency having issued the subsequent withholding order for taxes that a prior withholding order for taxes is in effect.

Committee Comment: A minority objected to any priority among creditors and any burden placed on employers (See §723.030). The majority felt that the public fisc should have some priority over all others, especially in light of the Committee's other recommendations, and retained the section. The Committee acted to give notice of creditors of such priority when in effect.

§723.078. Withholding period; notice termination order

~~723.078.~~ Deleted.

Committee Comment: The State Bar Committee recommends deletion of this section as surplus with respect to its other recommendations treating the State as a general creditor.

§723.079. When receipt required

723.079. No receipt-need Receipt must be sent to the taxpayer for amounts paid over to the state pursuant to a withholding order for taxes unless the taxpayer has requested in writing that he or she not be sent receipts for such amounts.

Committee Comment: The Committee seeks to place the State in a position closer to that of a general creditor.

§723.080. Service

723.080. Service of a withholding order for taxes or of any other notice or document required under this chapter in connection with a withholding order for taxes may be made by the state by first class mail/certified or registered mail, return receipt requested, postage prepaid, or by any authorized state employee. Service of a withholding order for taxes is complete when it is received by the employer. Service of, or the providing of, any other notice or document required to be served or provided under this chapter in connection with a withholding order for taxes is complete when the notice or document is deposited in the mail addressed to the last known address of the person on whom it is served or to whom it is to be provided.

Committee Comment: Service should be made in conformity with the other provisions of the chapter. The Committee places the State in a position closer to that of a general creditor.

§723.081. Forms

723.081. The Except-for-the-forms-referred-to-in-Section-723.076/ the state shall prescribe the form of any order, notice, or other document required by this chapter in connection with a withholding order for taxes notwithstanding Sections 723.100 and 723.120, and any form so prescribed is deemed to comply with this chapter.

Committee Comment: Deletes reference to §723.076, previously deleted by recommendation of State Bar Committee.

§723.083. Refund of employer's service charge

723.083. If the state determines that a withholding order for taxes has been issued in error or that there is no tax liability, the state may shall refund to the employee any amounts deducted by his employer pursuant to Section 723.024.

Committee Comment: The State should bear the cost of an erroneous levy. The refund is made mandatory.

§723.084. Warrant or notice deemed withholding order for taxes

723-085 Deleted.

Committee Comment: The State should be required to use the proper form, especially when empowered to prescribe the form under §723.081.

§723.101. Service

723.101. (a) An earnings withholding order shall be served upon the employer by the levying officer by delivery of the order to any of the following:

(1) The managing agent or person in charge, at the time of service, of the branch of office where the employee works or the office from which he is paid.

(2) Any person to whom a copy of the summons and of the complaint may be delivered to make service on the employer under Article 4 (commencing with Section 416.10) of Chapter 4 of Title 5 of Part 2.

(b) Service of an earnings withholding order shall be made by personal delivery as provided in Section 415.10 or 415.20 or by delivery by registered or certified mail, postage prepaid, with return receipt requested. When service is made by mail, service is completed at the time the return receipt is executed by or on behalf of the recipient. If the levying officer attempts service by mail under this subdivision and he does not receive a return receipt within 15 days from the date of deposit in the mail of the earnings withholding order, he shall make service as provided in Article 3 (commencing with Section 415.10 of Chapter 4 of Title 5 of Part 2.)

(c) Service of any notice or document under this chapter may be made in the same manner as an earnings withholding order. If service is made on the employer after his employer's return has been received by the levying officer, the service shall be made by registered or certified mail, postage prepaid, with return receipt requested, on the person designated in the employer's return to receive notices and at the address indicated in the employer's return, whether or not such address is within the county. Nothing in this subdivision precludes service by personal delivery on the person designated in the employer's return.

Committee Comment: Amended for clarity. The Committee intends that the levying officer shall cause delivery by mail by depositing the addressed item in the mail, postage prepaid, certified of registered mail, return receipt requested.

§723.103. Service of order and information on employer

734.103. (a) The levying officer shall serve upon the designated employer all of the following:

- (1) The original and one copy of the earnings withholding order.
- (2) The form for the employer's return.
- (3) The notice to employee of earnings withholding order in the form prescribed pursuant to Sections 723.120 and 723.122.
- (4) The blank claim of exemption form.
- (5) The blank financial statement form.

(b) At the time he makes service pursuant to subdivision (a) the levying officer shall provide the employer with a copy of that employer's instructions and withholding tables referred to in Section 723.127. The Judicial Council may adopt rules prescribing the circumstances when compliance with this subdivision is not required.

(c) No earnings withholding order shall be served upon the employer after the time specified in subdivision (a) of Section 683 for the return of the writ of execution under which the order was issued has expired/ , except for an earnings withholding order for taxes or for support.

Committee Comment: A majority of the Committee feels that service of blank forms, much like dissolution of marriage practice, will expedite debtor's claims. The minority feels that it is an unnecessary waste of time, paper and postage since many debtors do not and will not avail themselves of the exemptions in any case.

§723.105. Judgments debtor's claim of exemption

723.105. (a) A judgment debtor may claim an exemption under Section 723.051 if:

(1) No prior hearing has been held with respect to the earnings withholding order; or

(2) There has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order.

(b) A claim of exemption shall be made by filing with the levying officer an original and one copy of (1) the judgment debtor's claim of exemption and (2) the judgment debtor's financial statement.

(c) Upon the filing of the claim of exemption, the levying officer shall promptly send to the judgment creditor by first-class mail, postage prepaid, all of the following:

(1) A copy of the claim of exemption.

(2) A copy of the financial statement.

(3) A notice of claim of exemption, stating that the claim of exemption has been filed and that the earnings withholding order will be terminated, or modified to reflect the amount of earnings claimed to be exempt in the claim of exemption, unless a notice of opposition to the claim or exemption is filed with the levying officer by the judgment creditor within 10 days after the date of the mailing of notice of claim of exemption.

(d) A judgment creditor who desires to contest a claim of exemption shall, within 10 days after the date of the mailing of the notice of claim of exemption, file with the levying officer a notice of opposition to the claim of exemption.

(e) If the levying officer does not receive a notice of opposition within the 10-day period, he shall serve on the employer one of the following:

(1) A notice that the earnings withholding order has been terminated if all the judgment debtor's earnings was claimed to be exempt.

(2) A modified earnings withholding order which reflects the amount of earnings claimed to be exempt in the claim of exemption if only a portion of the judgment debtor's earnings was claimed to be exempt.

(f) If a notice of opposition to the claim of exemption is filed with the levying officer within the 10-day period, the levying officer shall promptly file by the next court business day the judgment debtor's claim of exemption and financial statement and the notice of opposition to the claim of exemption with the court clerk and the

§723.105. Cont'd.

court clerk shall set the matter for hearing, which hearing shall be held within 10 15 days after the date the documents are filed with the court clerk by the levying officer. The court clerk shall send a notice of the time and place of the hearing to the judgment debtor and judgment creditor by first-class mail, postage prepaid. The notice shall be deposited in the mail at least 5 10 days before the day set for hearing.

(g) If, after hearing the court orders that the earnings withholding order be modified or terminated, the clerk shall promptly transmit a certified copy of the order to the levying officer who shall serve on the employer of the judgment debtor (1) a copy of the modified earnings withholding order or (2) a notice that the earnings withholding order has been terminated. The court may order that the earnings withholding order be terminated as of a date which precedes the date of hearing. If the court determines that any amount withheld pursuant to the earnings withholding order shall be paid to the judgment debtor, the court may shall make an order directing the person who holds such amount to pay it to the judgment debtor/ within 5 days.

(h) If the earnings withholding order is terminated by the court, unless the court otherwise orders or unless there is a material change of circumstances since the time of the last prior hearing on the earnings withholding order, the judgment creditor may not apply for another earnings withholding order directed to the same employer with respect to the same judgment for a period of 130 days following the date of service of the earnings withholding order or 60 days after the date of the termination of the order, whichever is later.

(i) If an employer has withheld and paid over amounts pursuant to an earnings withholding order after the date of termination of such order but prior to the receipt of notice of its termination, the judgment debtor may recover such amounts only from the levying officer if he still holds such amounts or, if such amounts have been paid over to the judgment creditor, from the judgment creditor. If the employer has withheld amounts pursuant to an earnings withholding order after termination of the order but has not paid over such amounts to the levying officer, the employer shall promptly pay over such amounts to the judgment debtor.

(j) An appeal lies from any court order under this section denying a claim of exemption or modifying or terminating an earnings withholding order. Such appeal shall be taken in the manner provided for appeals in the court in which the proceeding is had. An appeal by the judgment creditor from an order modifying or terminating the earnings withholding order does not stay the order from which the appeal is taken. Notwithstanding the appeal, until such time as the order modifying or terminating the earnings withholding order is set aside or modified, the order allowing the claim or exemption in whole or in part shall be given the same effect as if the appeal had not been taken.

§723.105 Cont'd.

Committee Comment: The majority of the Committee feels that "promptly" is not easily interpreted and that the hearing should be held as soon as practicable. The minority feels that "promptly" has a plain meaning and that 15 days is the minimum time that can be imposed on a crowded court calendar.

§723.121. Application for earnings withholding order

723.121. The "application for issuance of earnings withholding order" shall be executed under oath or by declaration under penalty of perjury and shall include all of the following:

- (a) The name and last address of the judgment debtor and, if known, his social security number.
- (b) The name and address of the judgment creditor.
- (c) The court where the judgment was entered and the date the judgment was entered.
- (d) The date of issuance of a writ of execution to the county where the earnings withholding order is sought and the date of the writ is returnable under subdivision (a) of Section 683.
- (e) The amount sought to be collected, indicating the amount of the judgment, plus additional accrued items, less partial satisfactions, if any.
- (f) The name and address of the employer to whom the order will be directed.
- (g) The name and address of the person to whom the withheld money is to be paid by the levying officer.

Committee Comment: It is the experience of the Committee members that lay persons will take the added precaution of notarial certification of official documents unless it is clearly indicated otherwise. The LRC comment indicates that a declaration is all that is necessary and the statute should as well. See CP 2015.5.

§723.122. Notice to employee.

723.122. The "notice to employee of earnings withholding order" shall inform the judgment debtor of all of the following:

(a) The named employer has been ordered to withhold from the earnings of the judgment debtor the maximum amounts allowed by law, or such other amounts as are specified in the earnings withholding order, and to pay these amounts over to the levying officer for transmittal to the person specified in the order in payment of the judgment described in the order.

(b) The maximum amounts allowed by law to be withheld pursuant to Section 723.050 on illustrative amounts of earnings.

(c) No amount can be withheld from the earnings of a judgment debtor which he can prove is necessary for his support or for the support of his family.

(d) If a judgment debtor wishes a court hearing to prove that amounts should not be withheld from his earnings because they are necessary for his support or for the support of his family, he shall file with the levying officer an original and one copy of the "judgment debtor's claim of exemption" and an original and one copy of the "judgment debtor's financial statement". ~~The notice shall also advise the judgment debtor that the claim of exemption form and the financial statement form may be obtained at the office of the levying officer who shall have the forms available at his office/~~

(e) Under Section 300 of the Labor Code, the judgment debtor may revoke an assignment of wages or salary to be earned after the time of the revocation unless the assignment is made pursuant to Section 4701 of the Civil Code.

(f) The notice shall be in English and Spanish and such other language as the levying officer deems appropriate in order to give reasonable notice to a substantial non-English speaking segment of the population served by the levying officer.

Committee Comment: Subsection (d) is amended to conform with the Committee recommendation with respect to service of blank forms under §723.103.

Subsection (f) is added and the majority of the committee recommends that the notice state:

(1) What a garnishment is; (2) the legal right to claim exemption and an explanation thereof; (3) how to file a claim of exemption; (4) the availability of legal assistance and where to find it: (a) the yellow pages, (b) lawyers reference, (c) Legal Aid Society [A copy of a form used in San Francisco is attached elsewhere as Appendix C to the main report]. The minority opposes such an extensive notice as 1) an unnecessary burden on the serving party in what is actually a supplemental proceeding following judgment; 2) an act of solicitation by legal aid attorneys.

§723.123. Form of Claim of Exemption

723.123. The "judgment debtor's claim of exemption" shall be executed under oath or by declaration under penalty of perjury. The claim of exemption shall indicate how much the judgment debtor believes should be withheld from his earnings each pay period by his employer pursuant to the earnings withholding order/and shall state the debtor's present mailing address, not necessarily his residence address.

Committee Comment: The Committee feels that the interest of the debtor in privacy and the interest of the creditor in having a current address are balanced by requiring the debtor to state a mailing address.

The Committee recommends that the section be amended to provide for a declaration so as not to mislead a debtor into believing the claim of exemption must be executed before a notary. See CCP §2015.5.

§723.125. Earnings withholding order

723.125. The "earnings withholding order" shall include all of the following:

- (a) The name and address of the judgment debtor and, if known, his social security number.
- (b) The name and address of the employer to whom the order is directed.
- (c) The court where the judgment was entered, the date the judgment was entered, and the name of the judgment creditor.
- (d) The date of issuance of the writ of execution to the county where the earnings withholding order is sought and the date the writ is returnable under subdivision (a) of Section 683.
- (e) The maximum amount that may be withheld pursuant to the order (the amount of the judgment, plus additional accrued items, less partial satisfactions, if any).
- (f) A description of the withholding period and an order to the employer to withhold from the earnings of the judgment debtor the amount required by law to withheld or the amount specified in the order, as the case may be, during such period.
- (g) An order to the employer to pay over to the levying officer at a specified address the amount required to be withheld pursuant to the order in the manner and within the times provided by the law.

§723.125 Cont'd.

(h) An order that the employer fill out the " employer's return" and return it by first-class mail, postage prepaid, to the levying officer at a specified address within 15 days after service of the earnings withholding order.

(i) An order that the employer deliver to the judgment debtor a copy of ~~the-earnings-withholding-order-and-the-"notice-to-employee-of-earnings-withholding"~~:

- (1) the earnings withholding order;
- (2) the notice to employee of earnings withholding order;
- (3) the blank claim of exemption form; and
- (4) the blank financial statement form,

within 10 days after service of the earnings withholding order; but, if the judgment debtor is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

(j) The name and address of the levying officer.

Committee Comment: The section is amended to conform with previous recommendations under §723.103 relating to service of blank forms.

§723.152. Fraudulent withholding by employer

723.152. If an employer withholds earnings pursuant to this chapter and, with the intent to defraud either the judgment creditor or the judgment debtor, fails to pay such withheld earnings to the levying officer, the employer is guilty of a misdemeanor.

Committee Comment: One member of the Committee felt that misdemeanors are too freely assigned to control conduct that is probably easier to control through civil actions. Other members noted that the conduct here forbidden is probably a theft offense anyway, and that the State is in a better position to deter such conduct.

LABOR CODE

§ 300 (amended). Wage assignments

SEC. 9. Section 300 of the Labor Code is amended to read:

300. (a) As used in this section, the phrase "assignment of wages" includes the sale or assignment of, or giving of an order for, wages or salary but does not include an order or assignment made pursuant to Section 4701 of the Civil Code.

(b) No assignment of, ~~or order for~~ wages or salary earned or to be earned, shall be valid unless all of the following conditions are satisfied:

~~(a)~~ (1) The assignment is contained in a separate written instrument, signed by the person by whom the said wages or salary have been earned or are to be earned, and identifying specifically the transaction to which the assignment relates; and.

~~(b)~~ (2) Where such the assignment is of, or order for wages or salary is made by a married person, the written consent of the husband or wife spouse of the person making such the assignment or order is attached to such the assignment or order; and, No such consent is not required of any married person. ~~(i) after entry of a judgment decreeing his legal separation from his spouse or (ii) if the married person and his spouse are living separate and apart after entry of an interlocutory judgment of dissolution of their marriage; if a written statement by the person making the assignment, setting forth such facts, is attached to or included in the assignment.~~

~~(c)~~ (3) Where such the assignment or order for wages or salary is made by a minor, the written consent of a parent or guardian of such the minor is attached to such order or the assignment; and.

~~(d)~~ (4) Where such the assignment of or order for wages or salary is made by a person who is unmarried or who is an adult or who is both unmarried and adult, a written statement by the person making such the assignment or order, setting forth such facts, is attached to or included in such the assignment or order.

~~(e)~~ (5) No other assignment or order exists in connection with the same transaction or series of transactions and a written statement by the person making such the assignment or order to that effect, is attached thereto to or included therein, and in the assignment.

~~(f)~~ (6) A copy of such an the assignment or order and of the written statement provided for in subdivision (d) hereof paragraphs (2), (4), and (5), ~~authenticated by a notary public~~ executed under penalty or perjury, shall have been is filed with the employer, accompanied by an itemized statment of the amount then due to the assignee.

(7) provided that at such time At the time the assignment is filed with the employer, no other assignment or order for the payment of any wages or salary of the employee is subject to payment, and no levy on execution earnings withholding order against said his wages or salary is in force. Any valid assignment, when filed in accordance with the provisions contained herein, shall have priority with respect to any subsequently filed assignment or order or subsequent levy on execution. Any power of attorney to assign or collect wages by the maker thereof.

No assignment of, or order for wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned except for the necessities of life and then only to the person or persons furnishing such necessities of life directly and then only for the amount needed to furnish such necessities.

(8) Provided, that if a wage assignment is otherwise valid, the absence of filing with the employer does not make it invalid for all purposes, but only for the purpose of priority under the Code of Civil Procedure.

(c) A valid assignment of wages in effect at the time an earnings withholding order is served suspends the operation of the earnings withholding order which the earnings withholding order is served. Thereafter the employer shall withhold from the employee's wages or salary pursuant to the earnings withholding order without regard to whether assignment remains in effect.

(d) Under any assignment of, or order for wages or salary to be earned, a sum not to exceed 50 percentum of the assignor's wages or salary, and not to exceed 25 percentum of the assignor's wages or salary, upon showing that such wages are necessary for the support of his mother, father, spouse, children or other members of his family, residing in this State and supported in whole or in part by his labor, shall be withheld by, and be collectible from, the assignor's employer at the time of each payment of such wages of salary.

(e) The employer shall be is entitled to rely upon the statements of fact in the written statement provided for in subdivisions (d) and (e) hereof paragraphs (2), (4), and (5) of subdivision (b), without the necessity of inquiring into the truth thereof, and the employer shall incur no liability whatsoever by reason of any payments made by him to an assignee under any assignment or order, in reliance upon the facts so stated.

(f) An assignment of wages to be earned is revocable at any time by the maker thereof. Any power of attorney to assign or collect wages of salary is revocable at any time by the maker thereof. No revocation of such an assignment or power of attorney is effective as to the employer until he receives written notice of revocation from the maker.

(g) No assignment or ~~or order~~ for wages or salary earned or to be earned, ~~shall be~~ is valid under any circumstances, if the wages or salary earned or to be earned are paid under a plan for payment at a central place or places established under the provisions of Section 204a of this code.

(h) This section ~~shall~~ does not apply to deductions which the employer may be requested by the employee to make for the payment of life, retirement, disability or unemployment insurance premiums, for contribution to funds, plans or systems providing for death, retirement, disability, unemployment, or other benefits, for the payment for goods or services furnished by the employer to the employee of his family at the request of the employee, or for charitable, educational, patriotic, or similar purposes.

(i) No assignment of wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned, except for necessities of life and then only to the person or persons furnishing such necessities of life directly and then only for the amount needed to furnish such necessities.

Committee Comment: The wage assignment should be allowed to be executed under penalty of perjury. The committee feels that the laws relating to community property allow the assignment to be made separately by either spouse without consent from the other. The Committee also feels that the requirement of filing with the employer only relates to priority of the of the assignment and not to its validity.

The LRC amendments are shown by single underlining or striking. State Bar Committee amendments are double underlined or striken. See paragraphs (b)(6) and (b)(8).

ADDITIONS RECOMMENDED BY STATE BAR COMMITTEE:

Civil Code §4701

(a).....[unchanged].

(b) Notwithstanding the provisions of subdivision (a), in any proceeding where the court has ordered either or both parents, or either spouse to pay any amount for the support of the other spouse or a minor child, upon both a petition by the person to whom support has been ordered to have been paid and a finding by the court that the parent or spouse so ordered is in arrears in payment in a sum equal to the amount of two months of such payments within the 24-month period immediately preceding submission of such petition, the court shall order the defaulting parent or spouse to assign either to the person to whom support has been ordered to have been paid or to a county officer designated by the court to receive such payment, that portion of the salary or wages of the parent or spouse due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support, maintenance, and education of the other spouse or minor child. Such an order shall operate as an assignment and shall be binding upon any existing or future employer of the defaulting parent or spouse upon whom a copy of such order is served. The Judicial Council shall prescribe forms for such orders. The employer may deduct the sum of one dollar (\$1) for each payment made pursuant to the order. Any such assignment made pursuant to court order shall have priority as against any attachment, execution, or other assignment, unless otherwise ordered by the court.

The parent or spouse to whom support has been ordered to be paid shall notify the court and the employer of the ~~parent~~ person ordered to pay support, by any form of mail requiring a return receipt, of any change of address within a reasonable time after such change. In instances in which payments have been ordered to be made to a county officer designated by the court, the ~~parent~~ person to whom support has been ordered to be paid shall notify the court and such county officer, by any form of mail requiring a return receipt, of any address change within a reasonable period of time after such change. If the employer or county officer is unable to deliver payments under the assignment for a period of three months due to the failure of the person to whom support has been ordered to be paid to notify the employer or county officer of a change or address, the employer or county officer shall not make any further payments under assignment and shall return all undeliverable payments to the employee.

For purposes of this subdivision, arrearages in payment shall be computed on the basis of the payments owed and unpaid on the date that the defaulting parent or spouse has been given notice pursuant to law of application for the order of assignment, and the fact that the defaulting parent or spouse may have subsequently paid such arrearages shall not relieve the court of its duty under this subdivision to order the assignment.

Upon a petition by the defaulting parent or spouse, the court shall terminate such order of assignment entered pursuant to this sub-

Civil Code §4701 Cont'd.

division if (1) there has been 18 continuous and uninterrupted months of full payment under the wage assignment or (2) the employer or county officer has been unable to deliver payments under the assignments for a period of three months due to the failure of the person to whom support has been ordered to be paid to notify the employer or county officer of a change in address.

(c) through (f) [unchanged].

Committee Comment: The amendments are designed to extend the benefits granted under a CC 4701 wage assignment to a spouse, as well as a child. A minority of the Committee noted that a spouse could arrange such as assignment in order to defeat the legitimate interests of general creditors, since the support would take precedence over general credit extended if reduced to an assignment under LRC proposed CCP §723.031. A substantial minority of the Committee is opposed to any scheme of priority among creditors, no matter what means they use to obtain the wages of the debtor. The Committee notes that CC 4701 is in a title of the Code relating to child support exclusively, but prefers to amend the existing statute rather than draft a new one.

LABOR CODE

§2929 "Garnishment", wages, defined; prohibition against discharge for threat of garnishment or for garnishment for payment of one judgment

(a) As used in this section:

(1) "Garnishment" means any judicial procedure through which the wages of an employee are required to be withheld for the payment of any debt.

(2) "Wages" has the same meaning as that term has under Section 200.

(b) No employer may discharge any employee by reason of the fact that the garnishment of his wages has been threatened. No employer may discharge any employee by reason of the fact that his wages have been subjected to garnishment for the payment of one judgment. A provision of a contract of employment that provides an employee with less protection than is provided by this subdivision is against public policy and void.

§2929 Cont'd.

(c) Unless the employee has greater rights under the contract of employment, the wages of an employee who is discharged in violation of this section shall continue until reinstatement notwithstanding such discharge, but such wages shall not continue for more than 30 days and shall not exceed the amount of wages earned during the 30 days immediately preceding the date of the levy of execution upon the employee's wages which resulted in his discharge. The employee shall give notice to his employer of his intention to make a wage claim under this subdivision within 30 days after being discharged; and, if he desires to have the Labor Commissioner take an assignment of his wage claim, the employee shall file a wage claim with the Labor Commissioner within 60 days after being discharged. The Labor Commissioner may, in his discretion, take assignment of wage claims under this subdivision as provided for in Section 96. A discharged employee shall not be permitted to recover wages under this subdivision if a criminal prosecution based on the same discharge has been commenced for violation of Section 304 of the Consumer Credit Protection Act of 1968 (15 U.S.C. Sec. 1674).

(d) Nothing in this section affects any other rights the employee may have against his employer.

(e) This section is intended to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided in the Consumer Credit Protection Act of 1968 (15 U.S.C. Secs. 1671-1677) and shall be interpreted and applied in a manner which is consistent with the corresponding provisions of such act.

(f) Notwithstanding subsection (b) above, an employer may discharge an employee whose lack of financial responsibility is demonstrated by garnishment, where financial responsibility is job-related.

(g) Notwithstanding subsection (c) above, an employee who is wrongfully discharged in violation of this section may bring a civil action against the employer for actual damages, plus up to \$1,000 exemplary damages, plus attorney's fees.

Committee Comment: This is a majority recommendation. The minority feels that the threat of criminal prosecution under Federal and State laws, and possibly an action for abuse of process is a sufficient deterrent for a firing. The minority also notes that levy only occurs after the debtor-employee has had an opportunity to make his peace with his creditors, and the employer should have some opportunity to discharge him.

APPENDIX B-1

This portion of the report relates to pre-levy notice to debtors and is the area of sharpest dispute among the Committee members. The Section affected by the proposal, CCP §723.102, is proposed as an alternative to the CCP §723.102 proposed by the LRC. Therefore, it is not presented in the usual underline - strikeout format.

Your Board may consider this as a separate recommendation of the Committee. If this particular recommendation of the Committee majority is not accepted by your Board, the Committee recommends support of §723.102 as proposed by the LRC.

723.102 is added to read:

723.102

(a) No earnings withholding order shall be applied for until twenty (20) days shall have elapsed after a written notice shall have been mailed to the judgment debtor by certified mail, return receipt requested, addressed to his or her last known place of residence stating that unless the amounts due are paid within twenty (20) days from the date of mailing, the creditor will apply for the issuance of an earnings withholding order. If the aforesaid notice is returned undelivered it shall be mailed to the judgment debtor by certified mail, return receipt requested, addressed to the judgment debtor at the address where he or she is employed.

(b) The written notice required by subdivision (a) of this section shall include a written notice prominently situated which shall contain substantially the following language:

"If you believe that all of your earnings are necessary for the use of your family which is supported in whole or in part by you, then you may request a court hearing to protect your earnings.

"If you wish a court hearing, then within ten (10) days after receipt of the aforesaid notice, you must complete, sign and return the following notice by mail to the judgment creditor at the following address:

(address to be filled in by judgment debtor)

"I (insert name), residing at (insert address), hereby affirm that I believe that I need all of my income for the ongoing expenses of my family and I therefore request a hearing to protect my income."

The judgment debtor shall also fill out, sign and return a claim of exemption form and a financial statement. Both of

these forms shall be provided to the judgment debtor by the judgment creditor.

Upon receipt of such notice the judgment creditor shall be precluded from obtaining an earnings withholding order until he or she received an order of the court which entered the judgment authorizing such issuance. The judgment creditor shall be entitled to institute a special proceeding in the court which entered the judgment to obtain such an order. At least ten (10) days' notice of the application for such order shall be given to the judgment debtor.

(c) If a writ of execution has been issued to the county where the judgment debtor's employer is to be served, the time for the return of the writ under subdivision (a) of Section 683 has not expired, and a judgment creditor has complied with (a) and (b) above, then he may apply for the issuance of an earnings withholding order by filing an application, in the form prescribed by the Judicial Council, with a levying officer in such county who shall promptly issue an earnings withholding order in the form prescribed pursuant to Sections 723.120 and 723.125.

(d) This section does not apply where the earnings withholding order is a withholding order for taxes.

723.121 is amended by adding:

"(h) a signed statement that the judgment creditor has complied with §723.102(a) and (b)."

Comment:

The amendment requires a judgment creditor to notify a judgment debtor that he or she will have his wages garnished prior to the time of garnishment. The amendment allows the debtor to assert that his or her wages are exempt prior to the taking of those wages. The proposal was approved by an 8 to 3 margin. If parties given notice do not avail themselves of the prelevy hearing, the post-levy hearing provided by the LRC proposal is still available. The majority felt that judicial process should not be used to force arrangements by a debtor with a creditor. The minority felt that lawful debts should be paid, and that execution on wages after judgment should not be hampered by a multiplicity of further hearings in the name of due process.