

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 15, 1980
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on February 15, 1980.

Law Revision Commission

Present:	Beatrice P. Lawson, Chairperson	George Y. Chinn
	Jean C. Love, Vice Chairperson	Ernest M. Hiroshige
Absent:	Omer L. Rains, Senate Member	Warren M. Stanton
	Alister McAlister, Assembly Member	Bion M. Gregory, <u>Ex Officio</u>
	Judith Meisels Ashmann	

Staff Members Present

John H. DeMouilly	Robert J. Murphy III
Nathaniel Sterling	Stan G. Ulrich

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY 1980 MEETING

The Minutes of the January 1980 meeting were approved without change.

RESIGNATION OF COMMISSIONER HIROSHIGE

Commissioner Ernest M. Hiroshige announced his resignation from the Commission. He has been appointed a judge.

CONTRACT WITH PROFESSOR WILLIAM A. REPPY, JR.

The Commission approved the addition of \$500 to the contract with Professor William A. Reppy, Jr., to cover his travel expenses for another trip to attend a future meeting of the Commission when the Commission considers the proposal resulting from his study.

FUTURE MEETING SCHEDULE

The Commission cancelled the meeting previously scheduled for Friday, March 14, 1980, in Los Angeles, and decided to move the meeting scheduled for Friday, April 11, 1980, from San Francisco to Los Angeles. With these revisions, the schedule for future meetings is as follows:

March 1980

No meeting.

April 1980

April 11 (Friday) - 10:00 a.m. - 5:00 p.m. Los Angeles

May 1980

May 16 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco

June 1980

June 13 (Friday) - 10:00 a.m. - 5:00 p.m. Los Angeles

June 14 (Saturday) - 9:00 a.m. - 12:00 noon

July 1980

July 18 (Friday) - 10:00 a.m. - 5:00 p.m. San Francisco

July 19 (Saturday) - 9:00 a.m. - 12:00 noon

August 1980

No meeting.

STUDY D-300 - CREDITORS' REMEDIES
(PROPERTY SUBJECT TO ENFORCEMENT)

The Commission considered Memorandum 80-16, relating to the property of a judgment debtor that can be reached to satisfy a money judgment. The Commission approved the draft statute attached to the memorandum for inclusion in the comprehensive statute, with the exception of Section 695.030(b) (franchise of being a corporation not subject to enforcement), which was deleted.

The Commission also considered the first supplement to Memorandum 80-16, relating to enforcement of judgments against equitable, contingent, and leasehold interests, as well as against property held under

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guardianship or conservatorship. The Commission made the following decisions:

Beneficial interest in a trust. Subdivision (a) of Section 695.050 should be revised to make clear that it applies only to the interest of the beneficiary under the trust. Subdivision (b), providing an exemption for the beneficiary's interest to the extent necessary for support, should be deleted and should be replaced by a provision to the effect that nothing in the section affects the law relating to spendthrift trusts.

Interest under executory contract of sale. The judgment lien provision should make clear that a judgment lien attaches to the equitable interest of the judgment debtor as a purchaser under an executory contract for sale of real property.

Contingent interests. Section 695.060, as set out on page 4 of the memorandum, should be included in the comprehensive statute. Language should be added to the judgment lien provisions making clear that a judgment lien attaches to a contingent interest in real property; however, the judgment creditor cannot apply the interest to the judgment except pursuant to Section 695.060.

Leaseholds. The definition of real property should include "all rights and interests in real property, including but not limited to leasehold interests." The Comment to the judgment lien provisions should note that the judgment lien attaches to real property, including leasehold interests.

Property in guardianship or conservatorship estate. Section 695.070 should be added to the comprehensive statute as set out on page 5 of the memorandum.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS (TIME FOR
ENFORCEMENT OF JUDGMENTS)

The Commission considered Memorandum 80-21 and the attached staff draft of provisions governing the period for enforcement and renewal of judgments and the First Supplement to Memorandum 80-21. The Commission approved the draft statute subject to the following revisions:

§ 683.050. Right of action on judgment preserved. The right to bring an action on a judgment to renew it should be preserved. The statute should make clear that the 10-year period for statutory renewal is not tolled for any reason, but the tolling provisions applicable to the 10-year statute of limitations provided by Code of Civil Procedure Section 337.5 should remain undisturbed. Under this scheme, a judgment will become unenforceable 10 years after entry unless it is renewed through the statutory procedure or by an action within the 10-year period. However, the creditor may be able to bring an action after the 10-year period if the statute of limitations has been tolled, even though the judgment would be otherwise unenforceable.

§ 683.160. Service of notice of renewal. The judgment creditor should be required to file proof of service of notice of renewal on the judgment debtor with the court clerk before a writ of execution may be issued if the first 10-year period of enforceability has expired.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS
(INTEREST ON JUDGMENTS)

The Commission considered Memorandum 80-20 and the attached staff draft of provisions governing the accrual of interest on money judgments. The draft statute was approved.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS (POSTJUDGMENT
INTERROGATORIES AND EXAMINATION PROCEDURES)

The Commission considered Memorandum 80-5 and the attached staff redraft of provisions relating to postjudgment interrogatories and examination proceedings, and the First Supplement to Memorandum 80-5 and the attached letter from Edward N. Jackson.

Section 708.110

The Commission revised Section 708.110 to provide that the judgment creditor shall cause a copy of the order for an examination to be personally served on the judgment debtor "not less than ~~three~~ 10 days prior to the date set for the examination."

Section 708.180

The Commission revised subdivision (b) of Section 708.180 substantially as follows:

§ 708.180. Determination of third person's adverse claim

708.180. (a)

(b) The court may not make the determination provided in subdivision (a) in any of the following cases:

(1)

(2) If the issue is one which the third person would be entitled to have tried by a jury in an independent action and the third person objects to the determination of the matter pursuant to subdivision (a).

~~(2)~~ (3)

~~(3)~~ (4)

Technical Revisions

The Commission approved the technical revisions suggested by Mr. Jackson.

STUDY D-300 - CREDITORS' REMEDIES
(ENFORCEMENT OF JUDGMENT AGAINST FRANCHISE)

The Commission considered Memorandum 80-15, relating to application of a governmental franchise to satisfaction of a judgment. The Commission approved the draft statute appended as Exhibit 1 for inclusion in the comprehensive statute.

STUDY D-312 - DEBTOR-CREDITOR RELATIONS
(COMMUNITY PROPERTY)

The Commission commenced, but did not complete, consideration of Memorandum 80-19 along with a letter from its consultant, Professor William A. Reppy, Jr. (a copy of which is attached hereto), relating to a draft of the basic liability rules governing liability of property of married persons to satisfy debts. Commissioner Love expressed concern about the Commission proceeding to work on the rules governing liability

of property of married persons without the benefit of the study being prepared for it concerning equal management and control and equal division problems of marital property. The Executive Secretary stated that in order to complete the creditors' remedies study, the Commission must make the best decisions and prepare the best draft it is able based on the information now available to it; if the Commission later decides to recommend changes affecting equal management and control and equal division of community property, the Commission can review the creditors' remedies proposal at that time and make any necessary conforming changes.

The Commission made the following determinations concerning the draft statute attached as Exhibit 1 to the memorandum:

§ 5120.010. Liability of community property. Subdivision (b), which exempts earnings of a spouse after marriage from the debts of the other spouse before marriage, should be refined as follows:

(1) "Earnings" should be defined to include earnings from employment or self-employment and to exclude income from property.

(2) Earnings placed in a deposit account should be exempt only if the deposit account is the sole and separate account of the nondebtor spouse. "Deposit account" should have the same meaning as under the enforcement of judgments statute.

(3) The "equivalent" of cash should be clarified.

(4) The language creating an "exemption" for the earnings should be reviewed and the staff should prepare a memorandum relating to the effect of such an exemption in bankruptcy.

§ 5120.020. Liability of separate property. This section was approved without change.

§ 5120.030. Liability for necessities. Subdivision (a) should be revised to make clear that the separate property of a spouse is liable only for the necessities debts of the other spouse incurred after, and not before, marriage. The word "common" should be deleted from the phrase "common necessities" so that while the spouses are living together, each is responsible for all necessities of the other. The staff should prepare a separate report concerning liability of property for obligations incurred after the spouses are separated but before they are divorced. The staff should also consider drafting the liability provi-

sions by cross-referencing to substantive support provisions rather than by attempting to specify the support obligations in the property liability provisions.

§ 5120.060. Liability of property after interspousal transfer.

The Commission requested that the staff attempt to integrate the rules governing interspousal transfers with the Uniform Fraudulent Conveyance Act. The staff should prepare a memorandum analyzing the Act and how it would be applied to interspousal transfers of property. The staff should check other jurisdictions to determine whether they impose writing, recording, or other formalities for a valid interspousal transfer.

STUDY D-550 - TAX LIENS

The Commission considered Memorandum 80-23 and the attached exhibits relating to state tax liens. The Commission approved the technical revisions to the tentative recommendation as suggested by the Franchise Tax Board and the Employment Development Department and recommended by the staff.

The Commission also considered the First Supplement to Memorandum 80-23 and the attached exhibits. The staff reported orally that it had just received a letter from the Attorney General's office suggesting that, instead of requiring a taxing agency to deliver an acknowledgment of satisfaction to the taxpayer for recording by the taxpayer as proposed by the staff, the recording should be accomplished by the agency and the \$6 recording fee should be recoverable from the taxpayer in the same manner as other taxes. See Rev. & Tax. Code § 18888. The staff recommended this suggestion as preferable to the approach proposed in the First Supplement to Memorandum 80-23, and the Commission agreed. The staff was directed to draft appropriate language. The Commission approved the other recommendations of the First Supplement.

The staff will make the above revisions by amendments to the state tax lien bill and will distribute copies of the bill as amended to the Commissioners for review.

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STUDY F-100 - GUARDIANSHIP-CONSERVATORSHIP
STUDY F-101 - UNIFORM VETERANS' GUARDIANSHIP ACT

The Commission considered Memorandum 80-12 and the attached exhibits relating to the Commission's guardianship-conservatorship corrective bill (AB 2118) and the bill to repeal and continue certain portions of the Uniform Veterans' Guardianship Act (AB 2119).

Assembly Bill 2119

The Commission revised the proposed transition provision for the Uniform Veteran's Guardianship Act repealer as follows:

SEC. 8. (a) As used in this section:

(1) "General guardianship or conservatorship" means a guardianship or conservatorship of the estate in this state other than a veterans' guardianship.

(2) "Veterans' benefits" means money received from the Veterans Administration, revenue or profits from such money or from property acquired wholly or in part from such money, and property acquired wholly or in part with such money or from such property.

(3) "Veterans' guardianship" means a guardianship created under Chapter 15 (commencing with Section 1650) of the Probate Code prior to ~~the operative date of this act~~ January 1, 1981, where the guardianship estate consists entirely of veterans' benefits.

(b) A veterans' guardianship for an unmarried minor ward in existence on ~~the operative date of this act~~ December 31, 1980, shall continue in existence after ~~the operative date of this act~~ December 31, 1980, as a guardianship of the estate and is governed by Division 4 (commencing with Section 1400) of the Probate Code on and after ~~the operative date of this act~~ January 1, 1981.

(c) A veterans' guardianship for an adult ward or a married minor ward in existence on ~~the operative date of this act~~ December 31, 1980, shall continue in existence after ~~the operative date of this act~~ December 31, 1980, as a conservatorship of the estate. Except as provided in subdivision (d), such a conservatorship is governed by Division 4 (commencing with Section 1400) of the Probate Code on and after ~~the operative date of this act~~ January 1, 1981.

(d) Notwithstanding Sections 1485 and 1872 of the Probate Code and Section 40 of the Civil Code, if ~~immediately prior to the operative date of this act~~ on December 31, 1980, an adult or married minor is subject to a veterans' guardianship but is not subject to a general guardianship or conservatorship, on and after ~~the operative date of this act~~ January 1, 1981, such adult or married minor is deemed to have been adjudicated to lack legal capacity as provided in Section 40 of the Civil Code and Section 1872 of the Probate Code only with respect to veterans' benefits.

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(e) If ~~immediately prior to the operative date of this act on December 31, 1980~~, a person is subject both to a veterans' guardianship and a general guardianship or conservatorship, the general guardianship or conservatorship shall continue on and after the operative date of this act January 1, 1981, and the estate subject to the general guardianship or conservatorship shall include the veterans' benefits. The court in which the general guardianship or conservatorship proceeding is pending shall make any orders necessary or convenient to implement this subdivision.

Comment. Section 8 continues a guardianship created under the former Uniform Veterans' Guardianship Act ~~prior to the operative date of this act~~ as a guardianship or conservatorship of the estate ~~after the operative date of this act~~. Subdivision (d) preserves the effect of Estate of Vaell, 158 Cal. App.2d 204, 322 P.2d 579 (1958) ("the appointment of a guardian under the uniform act has been held not to affect the legal capacity of the ward with respect to various matters other than the administration of property received from the United States under veterans' legislation"). Although under subdivision (d) the conversion of a veteran's guardianship into a conservatorship of the estate does not affect the legal capacity of the conservatee with respect to matters or property other than veterans' benefits, the conservatee may nonetheless lack legal capacity for particular transactions under other provisions of law. See, e.g., Civil Code §§ 38, 39.

Subdivision (e) recognizes that in some cases there may be both a veteran's guardianship and a general guardianship or conservatorship pending for one VA beneficiary. In such a case, the general guardianship or conservatorship ~~is continued after January 1, 1981, as provided in Section 1481 or continues (see Sections 1481 and 1485 of the Probate Code)~~, and subdivision (e) makes clear that the general guardianship or conservatorship estate includes the veteran's benefits. The veteran's guardianship does not continue.

As thus revised, Section 8 was approved for inclusion in AB 2119.

Assembly Bill 2118

The Commission accepted in principle the revision to Probate Code Section 2580(a)(10)—proposed by the California Bankers Association and set forth in Exhibit 2 to Memorandum 80-12—which would limit the power of the conservator to exercise the right of the conservatee to revoke a revocable trust to cases where the trust instrument does not evidence an intent to reserve the right to the trustor-conservatee personally. However, the Commission requested the staff to tighten up the language proposed by the bankers.

STUDY K-100 - EVIDENCE OF MARKET VALUE

The Commission considered Memorandum 80-18, relating to the persons entitled to given an opinion of the value of property as owners. The Commission approved the amendments to Evidence Code Section 813 set out in the memorandum for inclusion in the Commission's bill on evidence of market value.

STUDY L-500 - DURABLE POWER OF ATTORNEY

The Commission considered Memorandum 80-24, the attached copy of the Uniform Durable Power of Attorney Act and the staff draft of a proposal to codify the uniform act in California, and attached exhibits with background on the uniform Act.

The Commission discussed the possibility of revising subdivision (c) of Civil Code Section 2356 to read: "(c) Nothing in this section shall affect the provisions of Section 1216 or shall affect or limit the provisions of Article 3 (commencing with Section 2400) of Chapter 2 in the cases dealt with by that article ." This revision was not adopted by the Commission but the staff will examine further whether the relationship between general agency rules and the proposed Uniform Durable Power of Attorney Act could be made clearer. The staff will also review the preliminary part of the recommendation to see if it can be improved.

Subject to the foregoing, the Commission approved the staff draft of a tentative recommendation relating the Uniform Durable Power of Attorney Act to be circulated to the State Bar Estate Planning, Trust, and Probate Law Section and others for review and comment. The cross-reference to Probate Code Section 1751.5 in Civil Code Section 2356 should be corrected to refer to Probate Code Section 1403 ("absentee" defined).

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary

February 11, 1980

Mr. Nat Sterling
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Memorandum No. 80-19

Dear Nat:

I have the following comments regarding the legislation proposed in the above memo.

Section 5120.030. Unless a contract of separation between H and W waives the support obligation, I feel one spouse should be liable for the common necessities of life supplied the other (i.e., his separate property should be liable, including post-separation earnings under Civil Code section 5118), subject to a "pecking order" of liability. One who marries another undertakes a support obligation that cannot be waived by contract antenuptially nor during marriage and cohabitation; at separation waiver is now allowed. I believe the necessities doctrine must apply to separated spouses, for this reason, absent the permitted waiver. However, if there has been a separation the creditor should be required to first exhaust all separate property of the spouse who received the necessities and all community property before asserting liability of the other spouse's separate property. Thus I would urge striking lines four and five of subdivision (a) and replacing them with the proposed "pecking order" provision.

Section 5120.060. Why should there be a special and harsh constructive fraud rule for married people not applicable to others? If unmarried X gives a gift to his girl friend Y not with intent to defeat creditors and not so as to render him then insolvent, the gift is binding on existing creditors and future, as I understand the law. If H makes a gift of his separate property or of his half of community property to W and H remains solvent, why should a creditor of H be able to impeach the new title in W? Is your proposal (patterned after one of my own) penalizing the state of marriage? I just suggest the staff and Commission consider this.

Section 5120.070. I am afraid this proposal is going to invite considerable litigation over issues of agency. On its face it seems to make creditors' rights turn on which spouse signs the contract, commits the tort, orders goods, etc. Yet if the acting spouse is in fact operating as an agent for a type of joint venture (e.g., both H and W work at the business for which H signs a contract), agency law will make the other spouse's property liable, too. At present the liability of all community property has practically eliminated to a considerable degree the attractiveness of the agency claim. Section 5120.070 would create a new situation where the claim will be made not only where H and W

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work in the same business but in the nonbusiness context. For example, if H and W are driving to a social function and W, who usually drives, says she has a headache and asks H to drive, and he commits a tort, why at divorce should community property awarded to W be exempt from liability? The social function was a joint venture for H and W and it was a fortuity H was driving.

The proposed statute will put pressure on credit vendors to get the signature of both spouses so after divorce both are liable. This is contrary to the purpose of the federal equal credit legislation (which compels a credit vendor to grant W alone credit if she has management power over enough property to pay the vendor unless there is some state law that makes the signature of H necessary to protect the credit vendor -- a reason which I think your proposed section 5120.070 creates).

A final note: Should not rewording of proposed section 5120 in the new section 5120.020 be coupled with repeal of Civil Code section 5123?

Yours truly,



William A. Reppy, Jr.
Professor of Law

WAR:jma