

Note. Changes may be made in this
Agenda. For meeting information,
please call John H. DeMouilly
(415) 494-1335

January 18, 1984

Time

January 21 (Saturday) - 10:00 a.m. - 5:00 p.m.

Place

Airport Executive Inn
275 So. Airport Blvd.
So. San Francisco, CA
(415) 873-3550

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

January 21, 1984

1. Minutes of November 4-5, 1983, Meeting (sent 12/21/83)
2. Administrative Matters
 - ✓ 1984 Legislative Program
Oral report by Executive Secretary
 - ✓ Election of New Vice Chairperson
3. Study L-626 - Wills and Intestate Succession
 - Memorandum 84-2 (sent 1/5/84)
 - ✓ Representation
First Supplement to Memorandum 84-2 (enclosed)
 - ✓ Transitional Problems
Second Supplement to Memorandum 84-2 (sent 1/12/84)
 - ✓ Omitted Spouse or Child
Third Supplement to Memorandum 84-2 (sent 1/5/84)
Fifth Supplement to Memorandum 84-2 (sent 1/12/84)
 - ✓ Right of Nonresident Aliens
Fourth Supplement to Memorandum 84-2 (sent 1/5/84)
 - ✓ Technical Corrections Suggested by State Bar Section
Sixth Supplement to Memorandum 84-2 (enclosed)
 - Additional Matters
Discussion of additional matters raised at meeting
4. Study L-650 - Probate Law and Procedure (Execution of Witnessed Will)
 - ✓ Memorandum 84-13 (sent 1/5/84)

5. Study L-810 - Administration Without Court Supervision (Advice of Proposed Action Form)
 - Memorandum 84-3 (sent 1/5/84)
6. Study L-656 - Bonds for Personal Representatives
 - ✓ Memorandum 84-14 (sent 1/13/84)
7. Study L-827 - Waiver of Probate Accounting
 - ✓ Memorandum 84-4 (sent 1/12/84)
8. Study L-653 - Notice of Will
 - ✓ Memorandum 84-7 (sent 1/5/84)
9. Study L - Review of Comments Received on Probate Law Recommendations to 1984 Session (if any)
10. Study L-618 - Uniform Transfers to Minors Act
 - ✓ Memorandum 84-1 (enclosed)
 - Draft of Recommendation (attached to Memorandum)
 - Comments to Sections of Recommended Legislation (handout at meeting)
11. Study M-100 - Statute of Limitations for Felonies
 - Memorandum 84-16 (sent 1/12/84)
- (12. Study D-302 - Creditors' Remedies (Comments of UCC Committee; Procedure for Levy of Execution on Rights Under a Judgment; Levy on Joint Bank Account)
 - (✓ Memorandum 84-6 (sent 1/12/84)
 - (Additional matters to be presented at meeting
13. Study F - Review of Comments Received on Family Law Recommendations to 1984 Session
 - ✓ Memorandum 84-12 (sent 1/13/84)
14. Study F-521 - Community Property in Joint Tenancy Form
 - ✓ Memorandum 84-8 (sent 1/12/84)
15. Study F-642 - Combined Separate and Community Property
 - Memorandum 83-68 (sent 8/23/83; another copy sent 1/5/84)
16. Study F-633 - Division of Pensions
 - ✓ Memorandum 84-9 (sent 1/5/84)
17. Study F-634 - Support
 - ✓ Memorandum 84-11 (sent 1/12/84)

Special
order of
business
at 1:30 p.m.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 21, 1984

SOUTH SAN FRANCISCO

A meeting of the California Law Revision Commission was held in South San Francisco on January 21, 1984.

Law Revision Commission

Present: David Rosenberg, Chairperson
 James H. Davis, Vice Chairperson
 John B. Emerson
 Bion M. Gregory

Absent: Barry Keene, Member of Senate
 Alister McAlister, Member of Assembly

Staff Members Present

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

Consultants Present

Susan French, Property and Probate Law
Edward C. Halbach, Jr., Property and Probate Law
Russell Niles, Property and Probate Law

Other Persons Present

Edward V. Brennan, California Probate Referee, San Diego
Ted Cranston, State Bar Estate Planning, Trust and Probate Law
 Section, San Diego
Jan C. Gabrielson, State Bar Family Law Section, Executive
 Committee, Los Angeles
Pamela Jester, Continuing Education of the Bar, Berkeley
Gerald L. Scott, California Probate Referees, San Jose
Margaret Sheneman, State Bar, U.C.C. Commitee, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF NOVEMBER 4-5, 1983, MEETING

The Minutes of the November 4-5, 1983, Meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The following revised schedule was adopted for future meetings:

April 1984

April 26 (Thursday) - 7:00 p.m. - 10:00 p.m.	Sacramento
April 27 (Friday) - 9:00 a.m. - 5:00 p.m.	
April 28 (Saturday) - 9:00 a.m. - 12:00 noon	

June 1984

June 21 (Thursday) - 7:00 p.m. - 10:00 p.m.	San Francisco
June 22 (Friday) - 9:00 a.m. - 5:00 p.m.	
June 23 (Saturday) - 9:00 a.m. - 12:00 noon	

September 1984

September 27 (Thursday) - 7:00 p.m. - 10:00 p.m.	Los Angeles
September 28 (Friday) - 9:00 a.m. - 5:00 p.m.	
September 29 (Saturday) - 9:00 a.m. - 12:00 noon	

November 1984

November 10 (Saturday) - 9:00 a.m. - 5:00 p.m.	Los Angeles
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December 1984

December 8 (Saturday) - 10:00 a.m. - 4:00 p.m.	San Francisco
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ELECTION OF OFFICERS

James H. Davis was elected as Vice Chairperson of the Commission to fill the remainder of the term of David Rosenberg who had become Chairman. The term of the new Vice Chairperson expires on December 31, 1984.

1984 LEGISLATIVE PROGRAM

The Executive Secretary made the following report on the 1984 legislative program:

Bills Approved by Committee in First House

- (1) Assembly Bill 810 - Quiet Title and Partition Judgments (McAlister)
- (2) Assembly Bill 1460 - Liability of Marital Property (McAlister)

Bills Introduced

- (3) Assembly Bill 2255 - Affidavits of Death (McAlister)
- (4) Assembly Bill 2270 - Independent Administration; Disposition Without Administration; Bonds for Personal Representatives (McAlister)
- (5) Assembly Bill 2272 - Notice of Will (McAlister)
- (6) Assembly Bill 2274 - Marital Property Presumptions (McAlister)
- (7) Assembly Bill 2276 - Severance of Joint Tenancy (McAlister)
- (8) Assembly Bill 2278 - Dormant Mineral Rights (McAlister)
- (9) Assembly Bill 2282 - Garnishment of Payments from Trust (McAlister)
- (10) Assembly Bill 2286 - Special Appearance in Family Law Proceedings (McAlister)
- (11) Assembly Bill 2288 - Simultaneous Deaths (McAlister)
- (12) Assembly Bill 2290 - Wills and Intestate Succession (McAlister)
- (13) Assembly Bill 2294 - Witnessed Wills (McAlister)
- (14) Assembly Bill 2295 - Creditors' Remedies (McAlister)
- (15) Assembly Bill 2343 - Rights Between Cotenants (Moore)
- (16) Assembly Concurrent Resolution 102 - Continues authority to study previously authorized topics (McAlister)
- (17) Senate Bill 1365 - Statutory Form for Power of Attorney for Health Care (Keene)
- (18) Senate Bill 1366 - Dismissal of Civil Action for Lack of Prosecution (Keene)
- (19) Senate Bill 1367 - Statutory Form for General Power of Attorney (Keene)
- (20) Senate Bill 1392 - Disposition of Community Property (Lockyer)

Bill to Be Introduced by Assembly Member Sher

- (21) Uniform Transfers to Minors Act

Bill Being Considered by Assembly Member Sher

- (22) Statute of Limitations for Felonies (will not introduce bill in presently recommended form)

Bill to Be Introduced by Assembly Member Harris

- (23) Reimbursement for Educational Expenses

Author Being Sought

- (24) Liability of Earnings of Stepparent for Child Support
- (25) Award of Family Home to Spouse Having Child Custody

Bill (Not Introduced at Request of Commission) Passed Second House
in Amended Form

- (26) Assembly Bill 781 - amended to effectuate substance of Commission recommendation concerning insurance on life of support obligor to provide for continued support of former spouse. (McAlister)

Bill that Will Not Be Introduced

- (27) Conforming Amendments to Living Wills Statute

DESIGNATION OF SUBCOMMITTEE

The Executive Secretary reported that it appears that 25 measures will be included in the 1984 legislative program. During February and March, it is anticipated that substantially all of the time of the Executive Secretary and Assistant Executive Secretary will be devoted to presenting Commission recommended measures to legislative committees and to preparing amendments needed to satisfy the committees. The Executive Secretary suggested that the meeting schedule be revised to allow more time for the staff to prepare materials for the next meeting.

The Commission revised the schedule for future meetings as set out above in these Minutes. The Chairman and Commissioner Gregory were designated as a subcommittee to review amendments made or to be made prior to the next meeting.

STUDY D-302 - CREDITORS' REMEDIES

The Commission considered Memorandum 84-6 relating to creditors' remedies and approved the amendments to Assembly Bill 2295 suggested in the memorandum. The Commission also considered additional material distributed at the meeting, and made the following decisions concerning additional amendments to Assembly Bill 2295:

Code Civ. Proc. § 697.590; Com. Code § 9301. Priority of judgment lien on personal property

The Commission reconsidered whether to amend the Enforcement of Judgments Law to apply the first-to-file rule of Commercial Code Section 9312 to contests between security interests and judgment liens on personal property. The Commission heard the views of the UCC Committee and the Debtor-Creditor Relations and Bankruptcy Committee of the State Bar Business Law Section as presented by Ms. Margaret Sheneman, Chair of the UCC Committee. (See the Report of these Committees attached as Exhibit 1 to these minutes.) A letter from Professor Lloyd Tevis in support of this change was also distributed at the meeting. (See copy attached as

Exhibit 2 to these minutes.) The Commission approved the proposal to adopt the first-to-file rule. The staff will work out any technical problems in the staff draft presented at the November meeting (see Memorandum 83-95) in consultation with the UCC Committee.

Code Civ. Proc. §§ 704.740, 704.780. Homestead exemption

In response to a letter from Mr. Conrad D. Breece (copy attached as Exhibit 3 to these minutes), the Commission approved the following amendments:

Code of Civil Procedure § 704.740 (amended). Court order for sale; exemption claim where court order for sale not required

704.740. (a) Except as provided in subdivision (b), the interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Comment. Subdivision (a) of Section 704.740 is amended to make clear that the requirements of this article do not apply to the sale of an interest in a dwelling owned by a corporation or other artificial person. Subdivision (a) is also amended to

make clear that this article provides the exclusive procedure for determining real property dwelling exemptions (other than leaseholds of less than two years). Accordingly, the general procedures for claiming exemptions from execution are not applicable, except as otherwise provided.

Code of Civil Procedure § 704.780 (amended). Hearing

704.780. (a) The burden of proof at the hearing is determined in the following manner:

(1) If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county tax assessor indicate that there is not a current homeowner's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption, if any, and the fair market value of the dwelling and shall make an order for sale of the dwelling subject to the homestead exemption. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling and shall include the name and address of each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

Comment. Subdivision (b) of Section 704.780 is amended to make clear that the court is not required to determine fair market value and the amount of liens to be satisfied where the dwelling is not an exempt homestead. These determinations are relevant only where the special

minimum bid requirements provided by Section 704.800 apply--that is, where a dwelling has been found to qualify for a homestead exemption. The sale of a non-exempt dwelling is governed by the general procedures applicable to other types of property. It should be noted, however, that the special procedures of Section 704.790 applicable where the order for sale is obtained by default continue to apply even though the property is found not to qualify for an exemption.

Code Civ. Proc. § 729.060. Redemption price

In response to a letter from Professor Stefan A. Riesenfeld (copy attached as Exhibit 4 to these minutes), the Commission approved the following amendment:

Code of Civil Procedure § 729.060 (amended). Deposit of redemption price

729.060. (a) A person who seeks to redeem the property shall deposit the redemption price with the levying officer who conducted the sale before the expiration of the redemption period. If a successor in interest to the judgment debtor seeks to redeem the property, the successor in interest shall, at the time the redemption price is deposited, file with the levying officer either (1) a certified copy of a recorded conveyance or (2) a copy of an assignment or any other evidence of the interest verified by an affidavit of the successor in interest or of a subscribing witness thereto.

(b) The redemption price is the total of the following amounts, less any offset allowed under subdivision (c).

(1) The purchase price at the sale.

(2) The amount of any assessments or taxes and reasonable amounts for fire insurance, maintenance, upkeep, and repair of improvements on the property.

(3) Any amount paid by the purchaser on a prior obligation secured by the property to the extent that the payment was necessary for the protection of the purchaser's interest.

(4) Interest on the amounts described in paragraphs (1), (2), and (3) at the rate of interest on money judgments from the time such amount was paid until the date the deposit is made.

(5) If the purchaser at the sale has any liens subordinate to the lien under which the property was sold, the amount of the purchaser's lien, plus interest at the rate of interest on money judgments from the date of the sale until the date the deposit is made.

(c) Rents and profits from the property paid to the purchaser or the value of the use and occupation of the property to the purchaser may be offset against the amounts described in subdivision (b).

Comment. Subdivision (b) of Section 729.060 is amended to require the satisfaction of liens of the purchaser at the sale when the judgment debtor redeems the property. If the judgment debtor wants to avoid having to satisfy liens of a junior lienholder who purchased the property at the foreclosure sale, the judgment debtor may bid at the sale. If successful, the judgment debtor will take the property free of any liens that are junior to the lien under which the sale is made without the need to satisfy them as provided in Section 726(c). A redemption from a junior lienholder who purchased the property at the foreclosure sale does not have the effect of reviving or satisfying liens that are senior to the purchaser's lien but junior to the lien under which the sale is made.

STUDY D-312 - LIABILITY OF MARITAL PROPERTY FOR DEBTS

The Commission considered Memorandum 84-12. With respect to the recommendation on liability of marital property for debts (Assembly Bill 1460), the Commission directed the staff not to make compromises on issues raised by Professor Bruch merely for the sake of obtaining enactment of the bill, but to deal with the issues on the merits.

STUDY F--REVIEW OF COMMENTS RECEIVED ON FAMILY LAW RECOMMENDATIONS TO 1984 SESSION

The Commission commenced, but did not complete, consideration of Memorandum 84-12, raising issues in connection with the Commission's 1984 family law legislative program. For decisions made on particular matters, see portions of these Minutes relating to Study D-312 and Study F-632. As to matters not considered or other matters that require Commission action before the next Commission meeting, the staff is to consult with the Commission's legislative subcommittee, consisting of the Chairman and the Legislative Counsel.

STUDY F-521 - COMMUNITY PROPERTY IN JOINT TENANCY FORM

The Commission considered Memorandum 84-8 relating to problems in developing a recommendation on community property in joint tenancy form. The Commission decided to distribute for comment a revised tentative recommendation along the lines suggested by the staff--that community property in joint tenancy form would be treated as community for all purposes except at death. At death, in order to make a testamentary disposition of the property, the testator would have to make a specific devise either of the particular property or of property held in joint tenancy form; a general devise of "all property" of the testator would not be adequate for this purpose.

STUDY F-632 - REIMBURSEMENT FOR EDUCATIONAL EXPENSES

The Commission considered Memorandum 84-12. With respect to the recommendation on reimbursement for educational expenses, the Commission approved the addition of language proposed by Lettie Young, Assembly Judiciary Committee consultant. See Exhibit 5 to these Minutes.

STUDY F-633 - DIVISION OF PENSIONS

The Commission directed the staff to solicit comments from interested persons on the issues raised in Memorandum 84-9 (division of pensions at dissolution of marriage). The Commission will consider the issues and the comments received at a future meeting.

STUDY F-634 - SUPPORT

The Commission noted the communications relating to support attached to Memorandum 84-11, but took no action on this matter.

STUDY L-618 - UNIFORM TRANSFERS TO MINORS ACT

The Commission considered Memorandum 84-1 and the attached preliminary portion of a recommendation and the attached draft statute. The Commission also considered the Comments to the sections of the recommended legislation which were distributed at the meeting.

With the change indicated below, the Commission approved the Recommendation (including the recommended legislation and Comments) for printing and submission to the 1984 Legislature. The material is to be conformed to the change indicated below and the staff is to make any necessary technical or editorial changes prior to printing.

Subdivision (b) of Section 3912 of the recommended legislation was revised to read in substance as set out below:

(b) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries, except that:

(1) If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise.

(2) However, a If a custodian is not compensated for his or her services, the custodian is not liable for losses to custodial property unless they result from the custodian's bad faith, inten-

tional wrong-doing, or gross negligence or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in this section.

(3) A custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

The revision set out above includes paragraph (2) which continues the substance of subdivision (e) of Civil Code Section 1159.

STUDY L-626 - WILLS AND INTESTATE SUCCESSION

The Commission considered Memorandum 84-2, the First through Sixth Supplements, and attached exhibits, concerning wills and intestate succession. The Commission made the following decisions:

Representation

The Commission decided to revise Section 240 substantially as follows (see First Supplement to Memorandum 84-2):

240. If representation is called for by this code, or if a will or trust that expresses no contrary intention ~~calls for distribution per stirpes or by representation~~ or provides for issue or descendants to take without specifying the manner, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue.

The staff should draft statutory definitions to provide shorthand terminology for testators and settlors who want to use (1) pure stirpital distribution (division at children's generation whether or not any are living) or (2) the distribution scheme used in Section 240. (At the November 1983 meeting, the Commission approved a section defining "per capita at each generation" that a will or trust could incorporate by reference--this provision is now in AB 2290 as Section 241.) The staff should consider whether these definitions should apply only to a will or trust executed after January 1, 1985.

The Commission reaffirmed its previous decision not to use per capita at each generation as the general representation rule under Section 240.

Survivorship of Devisee

The Commission decided to revise Section 6146 substantially as follows (see Memorandum 84-2):

6146. (a) A devisee who fails to survive the testator or until any future time required by the will does not take under the will. ~~For the purposes of this subdivision, unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devisee is to take effect in enjoyment.~~

(b) In the absence of a contrary provision in the will:

(1) If it cannot be established by clear and convincing evidence that the devisee has survived the testator, it is deemed that the devisee did not survive the testator.

(2) If it cannot be established by clear and convincing evidence that the devisee survived until a future time required by the will, it is deemed that the devisee did not survive until the required future time.

The Commission will review the question of whether there should be a rule of construction for wills, trusts, and other instruments, requiring survivorship to take a future interest, both for class gifts and for gifts to a named individual, when Professor Susan French completes her article on this subject.

Antilapse

The Commission decided to keep Section 6147 (antilapse) as it was enacted last session, and to take another look at the desirability of the last sentence of subdivision (c) (multiple devisees or class of devisees) when Professor French completes her article. The Commission decided not to adopt proposed Section 6147.5 (antilapse in trusts) at this time, but to reconsider the matter when we have Professor French's article. (See Memorandum 84-2.)

Inheritance by Great-Grandparents and Issue of Great-Grandparents

The Commission decided to make no change in the order of inheritance under Section 6402. The Commission approved the amendment to Section 6402 contained in Exhibit 1 to Memorandum 84-2 carrying out the Commission's decision at the November 1983 meeting to repeal unlimited inheritance and to limit inheritance to the decedent's great-grandparents and the issue of great-grandparents.

Inheritance by Relatives of Child Born out of Wedlock

The Commission revised the staff draft of the amendment to subdivision (b) of Section 6408.5 (see Memorandum 84-2) to make the statute sex-neutral and to add the words "or the care." As thus revised, the provision would be amended as follows:

(b) Neither If a child is born out of wedlock, neither a parent nor a relative of a parent inherits from or through a child on the basis of the relationship of parent and child between that parent and child if the child was born out of wedlock and has neither been acknowledged by nor supported by that parent unless the parent has both (1) acknowledged the child and (2) has contributed to the support or the care of the child.

The Commission approved the staff recommendation not to use an abandonment standard in subdivision (b) of Section 6408.5. It was thought that since abandonment requires an intent to abandon, that test would undesirably limit the application of subdivision (b).

Right of Nonresident Aliens to Take by Will or Intestate Succession

The Commission determined not to propose legislation to restrict the right of nonresident aliens to take by will or intestate succession. (See Fourth Supplement to Memorandum 84-2.)

Share of Spouse Omitted From Will

The Commission approved the staff proposal to revise Section 6560 as follows (see Fifth Supplement to Memorandum 84-2):

Probate Code § 6560 (amended). Share of omitted spouse

6560. Except as provided in Section 6561, if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive a share in the estate consisting of the following property in the estate:

(a) The one-half of the community property that belongs to the testator under Section 100.

(b) The one-half of the quasi-community property that belongs to the testator under Section 101.

(c) One-half of the separate property of the testator A share of the separate property of the testator equal in value to that which the spouse would have received if the testator had died intestate, but in no event is the share to be more than one-half the value of the separate property in the estate.

Comment. Section 6560 is amended to provide that, with respect to the testator's separate property, the omitted spouse shall receive the lesser of an intestate share or one-half. This eliminates the possibility that the statutory shares may add up to more than one hundred per cent if the testator's will omits to provide for a spouse and two or more children.

Omission of Developmentally Disabled Child From Testator's Will

The Commission approved the staff recommendation not to provide a special rule for a pretermitted heir who is developmentally disabled. The staff should write a letter to the Director of Developmental Services informing him of this decision and the reasons for it as set out in the Third Supplement to Memorandum 84-2.

Transitional Problems

The Commission approved the staff recommendation to revise Section 3 to apply all substantive provisions of old law where the decedent dies before January 1, 1985. (See Second Supplement to Memorandum 84-2.) Under the law as enacted, some old and some new provisions would apply in such a case.

The Commission approved proposed new Sections 649.6 and 665 and the proposed revision to Section 6122 as follows:

Probate Code § 649.6 (added). References in instruments

649.6. After December 31, 1984, a reference in a written instrument, including a will or trust, to a provision of former Section 202 shall be deemed to be a reference to the comparable provision of Section 649.1.

Comment. Section 649.6 is new and is a special exception to the rule of Section 3. See also Section 665.

Probate Code § 665 (added). References in instruments

665. After December 31, 1984, a reference in a written instrument, including a will or trust, to a provision of former Chapter 8 (commencing with Section 160) (Legacies and Interest) of former Division 1 shall be deemed to be a reference to the corresponding provision of this chapter.

Comment. Section 665 is new and is a special exception to the rule of Section 3. See also Section 649.6.

Probate Code § 6122 (amended). Revocation by annulment or dissolution of marriage; no revocation by other changes of circumstances

6122. (a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

- (1) Any disposition or appointment of property made by the will to the former spouse.
 - (2) Any provision of the will conferring a general or special power of appointment on the former spouse.
 - (3) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.
- (b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.
- (c) In case of revocation by dissolution or annulment:
- (1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.
 - (2) Other provisions of the will conferring some power or office on the former spouse shall be interpreted as if the former spouse failed to survive the testator.

(d) For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(e) No change of circumstances other than as described in this section revokes a will.

(f) Subdivisions (a) to (d), inclusive, do not apply to any case where the final judgment of dissolution or annulment of marriage occurs before January 1, 1985. Such case is governed by the law in effect prior to January 1, 1985.

Comment. Subdivision (f) is added to Section 6122 to apply the section only to the case where the final judgment of dissolution or annulment of marriage occurs on or after the operative date of the section. Subdivision (f) is a special exception to the rule of Section 3.

Notice to Natural Parent in Case of Stepparent Adoption

The Commission approved the staff recommendation to make the following technical change to Civil Code Section 226.12 (see Memorandum 84-2):

Civil Code § 226.12 (technical amendment). Notice to natural parent in case of stepparent adoption

226.12. In the case of a stepparent adoption, the form prescribed by the State Department of Social Services for the consent of the natural parent shall contain substantially the following notice: "Notice to the natural parent who relinquishes the child for adoption: ~~Adoption~~ If you and your child lived together at any time as parent and child, the adoption of your child by a stepparent does not affect the child's right to inherit your property or the property of other blood relatives."

Comment. Section 226.12 is amended to conform the notice to the provisions of Probate Code Section 6408, the applicable inheritance statute.

Technical Revisions

The Commission approved the technical revisions to the wills and intestate succession law set forth in Exhibits 2 and 3 to the Sixth Supplement to Memorandum 84-2.

STUDY L-650 - EXECUTION OF WITNESSED WILL

The Commission considered Memorandum 84-13 and attached exhibits concerning execution of witnessed wills. The Commission decided to make the following revision to Section 6110 as the section now appears in AB 2294:

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

~~(c) The will shall be witnessed by one of the following methods:~~

~~(1) Be~~

(c) The will shall be witnessed by being signed, before the testator's death and not later than 30 days after the will is signed pursuant to subdivision (b), by at least two persons each of whom ~~(4)~~ (1) witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and ~~(4)~~ (2) understand that the instrument they sign is the testator's will.

~~(2) Be acknowledged before a notary public at any place within this state.~~

Consistent with the foregoing decision to abandon the proposal to permit a will to be witnessed by a notary, proposed Section 6110.5 (form of notarial acknowledgment) should be dropped from the bill as should the revisions to the California Statutory Will (Sections 6240 and 6241).

STUDY L-653 - NOTICE OF WILL

The Commission considered Memorandum 84-7 and approved the suggested revision of Probate Code Section 6364 in Assembly Bill 2272. This change would make voluntary the filing in probate proceedings of a Secretary of State's certificate pertaining to will information on file.

STUDY L-656 - BONDS FOR PERSONAL REPRESENTATIVES

The Commission considered Memorandum 84-14 and attached exhibits concerning bonds for personal representatives. The Commission approved the staff-proposed revisions to Sections 541 and 543.

STUDY L-810 - FORM FOR ADVICE OF PROPOSED ACTION UNDER INDEPENDENT ADMINISTRATION OF ESTATES ACT

The Commission considered Memorandum 84-3 and the attached staff draft of a form for advice of proposed action under the Independent Administration of Estates Act. The Commission decided that the form should not go in the statute. Instead, the form should go in a Comment, perhaps the Comment to Section 591.4. The form would not be mandatory. The Comment should indicate that the advice of proposed action is sufficient if it is substantially in the suggested form. The Commission asked the staff to revise the form as follows:

(1) The language of the form should be revised to make it more user-friendly and to avoid the stilted legalese. Professor Susan French agreed to ask the cognizant faculty member at U.C. Davis Law School to review the revised staff draft to help accomplish this purpose.

(2) The form should indicate that failure to return the form is equivalent to consent to the proposed action and is a waiver of the right to object later.

(3) The statement that objection "will" cause delay should be softened to "may" cause delay.

(4) The form should not require both the personal representative and the attorney for the personal representative to sign. Signature by one or the other should suffice.

(5) Provision for acknowledgment of receipt of the advice of proposed action should be deleted.

(6) The objection or consent to proposed action should be deleted, and in its place there should be a statement that if the recipient objects to the proposed action, the recipient should notify the executor or administrator at the address indicated in the form.

STUDY L-827 - WAIVER OF ACCOUNTING

The Commission considered Memorandum 84-4 and attached exhibits concerning waiver of accounting. The Commission approved the staff draft of new Section 933 of the Probate Code. This section would go into AB 2270 which includes the provisions on independent administration of estates and other probate cost-reducing provisions.

STUDY M-100 - STATUTES OF LIMITATION FOR FELONIES

The Commission considered Memorandum 84-16 together with the letter from the Commission's consultant, Professor Uelmen, attached as Exhibit 6 to these Minutes. The Commission decided to withdraw the previously approved recommendation for a single six-year limitation period for felonies, and to adopt the approach of the staff draft as set out in Exhibit 2 of the Memorandum, with the following changes:

(1) Section 800--felonies subject to a six-year limitation period--should be revised to read as set out on page 3 of the Memorandum. This would impose a six-year limitation period on crimes punishable by eight years or more imprisonment.

(2) Section 803--tolling of limitation period--should be revised to make clear whether all types of grand theft are included or only grand theft involving fraud or breach of a fiduciary obligation. The provision should also include a maximum nine-year limitation period.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

**BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA**

Executive Committee
ALLAN L. ALEXANDER, Los Angeles
DEAN V. AMBROSE, Los Angeles
WILLIE R. BARNES, Los Angeles
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January 18, 1984

REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE
AND
THE COMMITTEE ON DEBTOR-CREDITOR RELATIONS AND
BANKRUPTCY
OF THE
BUSINESS LAW SECTION OF THE
STATE BAR OF CALIFORNIA

Re: Proposals before the California Law Revision Commission for amendments to California Code of Civil Procedure §697.590 and Commercial Code §9301; Enforcement of Judgments Statute

The Problem:

California has recently created a new type of lien creditor, one who acquires his interest in property by the filing of a notice with the Secretary of State, rather than by attachment, levy, or seizure of personal property. This new type of lien creditor relies on the public notice system by filing with the Secretary of State to perfect his rights against other creditors and secured parties, and to notify the rest of the world of his rights.

The question is whether this new type of lien creditor ought to be subject to the first to file rule of the public notice system, as is the holder of a consensual security interest.

As stated in Professor Lloyd Tevis' letter to the Commission staff dated October 3, 1983, current law does not indicate what the priority is between a lien creditor and a security interest when the security interest is perfected by the filing of a UCC-1 before the loan funds are advanced. There is a gap in the drafting of current Cal. Comm. Code §9301 and Cal. Code Civ. Pro. §697.590. Neither statute answers the

question of whether the secured party or the judgment lien would be prior in that circumstance or to what extent the priorities or subordination may exist.

Recommendation:

The Uniform Commercial Code Committee and the Committee on Debtor-Creditor Relations and Bankruptcy of the Business Law Section of the State Bar of California support the amendments to California Code of Civil Procedure §697.590 and California Commercial Code §9301, substantially as set forth in the attached amendments proposed by the staff of the California Law Revision Commission in July, 1983 (Commission Memorandum 83-53).

Current Law:

The Commission staff proposal deals with the following problem:

January 1:	Secured party files UCC-1
January 10:	Judgment creditor files notice of lien
January 25:	Secured party attaches and perfects security interest by having debtor sign security agreement and by advancing funds

Upon filing his UCC-1, the secured party orders a UCC and lien search report from the California Secretary of State. The California Secretary of State currently requires approximately 12 business days to complete a search report. Consequently, a search report dated as of January 1 is not received by the secured party until 16 to 18 calendar days after it is ordered. It does not show lien filings after January 1 and therefore does not show the January 10 judgment lien. In reliance upon the public report, secured party makes the loan on January 25.

As between the judgment lien creditor (who filed but did not rely upon the public record in extending credit) and the secured party (who advanced funds on the basis of the search report), who should have priority?

Cal. Comm. Code §9312(5) provides for a first to file rule to determine priorities among conflicting security interests in the same collateral. That section provides that the first security interest for which a UCC financing statement is filed takes priority over all other security interests with respect to which UCC financing statements are later filed. The following hypothetical illustrates the way that Cal. Comm. Code §9312(5) operates:

Assume that Secured Party No. 1 files a UCC financing statement on January 1, but does not have the debtor sign a security agreement or advance loan funds on that date. Secured Party No. 2 files a UCC financing statement on January 10, and on that date, has the debtor sign a security agreement and advances loan funds. Secured Party No. 1 advances his loan funds and has the debtor sign a security agreement on January 25. Under §9312(5), Secured Party No. 1 has priority over Secured Party No. 2.

This first to file priority rule has been included in the Official Text of the Uniform Commercial Code since 1962, and has been adopted in all 49 states. The reason for this priority rule is that Secured Party No. 1 will usually search the UCC filing records immediately upon the filing of his financing statement to determine that no financing statement was filed ahead of him. He will then rely upon that search report, which shows him in first place, before advancing funds. Secured Party No. 2, on the other hand, could have discovered Secured Party No. 1 before advancing funds, had he taken the precaution of searching the records. The Uniform Commercial Code was drafted to protect those secured lenders who make advances in reliance upon the public records.

The California Commercial Code also governs the priorities between a secured party and a person who becomes a lien creditor. Cal. Comm. Code §9301 now provides:

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien. [emphasis added.]

Section 9301 does not say whether or to what extent a lien creditor is subordinate to a security interest when his lien is acquired during the gap in time between the filing of the financing statement and the making of the loan. (?)

California Law Revision Commission Proposal:

The staff of the California Law Revision Commission has proposed amendments to Cal. Comm. Code §9301 and Cal. Code Civ. Pro. §697.590 to deal with the ambiguity in the existing statute. The proposed Cal. Comm. Code §9301 redefines a "lien creditor" to exclude a creditor who files a notice of attachment or judgment lien with the Secretary of State, thus limiting the definition to a creditor who has enforced his lien rights by attachment, levy, or seizure. The remainder of §9301 would track current law.

If the Commission staff proposal were adopted, the effect would be that if the judgment creditor levied upon or seized personal property during the gap between filing of the UCC financing statement and the funding of the loan, the judgment creditor would have a prior interest over the secured party. (Proposed §9301(b).) This result is not offensive to the notice filing provisions of the Uniform Commercial Code, because the judgment creditor who seizes is not relying on a filing system to create his lien or to notify other creditors of the existence of his lien. The secured creditor should be put on inquiry notice when his borrower suffers such a drastic remedy as the seizure of property. The secured creditor is alerted that another person claims a right in the property in which he intends to take a security interest.

Under the Commission staff proposal, if the judgment lien creditor levied or seized after the security interest was perfected (that is, after loan funds had been advanced, the security agreement signed, and the UCC-1 had been filed), the rule would be as set forth in Comm. Code §9301(4). That is, the rights of the judgment lien creditor would be subordinate to the rights of the secured party, but only to the extent that the security interest secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

The amendments to Cal. Code Civ. Pro. §697.590 proposed by the Commission staff deal with the rights of a judgment lien creditor who acquires his lien by the filing of a notice with the Secretary of State. Section 697.590(d) provides a first to file rule. If the judgment creditor filed his notice during the gap between the filing of a UCC-1 and the funding of the loan, the judgment lien would be subordinate to the rights of the secured party, because the secured party filed first, even though the loan funds were advanced and the security interest attached at a later date. However, the judgment lien creditor would be subordinate only on the same terms as his brethren who seizes would be subordinate under Cal. Comm. Code §9301(4), that is, "only to the extent the security interest secures advances made before the judgment lien attached or within 45 days thereafter or made without knowledge of a judgment lien or pursuant to a commitment entered into with knowledge of the judgment lien." Proposed Cal. Code Civ. Pro. §697.590 (draft July 18, 1983).

It should be noted that neither present law nor the Commission proposal provides that the later-filed judgment lien is invalid or lost. Both current law and the proposed amendments merely provide that the later-filed judgment lien is junior in priority as to advances already made and as to certain later advances.

Comments of the Uniform Commercial Code Committee and the
Committee on Debtor-Creditor Relations and Bankruptcy:

The two Committees support the proposed July 1983 amendments to Cal. Code of Civ. Pro. §697.590 and Cal. Comm. Code §9301 because the new Enforcement of Judgments Statute, as presently drafted, would seriously undermine the long-standing first to file principle of the Uniform Commercial Code as adopted in California. The proposed amendments facilitate secured financing in California and provide equal treatment to secured lenders and judgment lien creditors who file with the Secretary of State.

1. The Delay in Obtaining Search Reports.

A major concern of the two State Bar Committees is the substantial delay involved in obtaining a UCC and lien search report from the California Secretary of State. Currently, it takes approximately 16 to 18 calendar days after a search is ordered from the Secretary of State to receive the search report. Moreover, the report will show only those liens and financing statements which were on file 12 working days prior to the date the search was ordered. Referring to the hypothetical stated at the beginning of this report, if the secured party ordered a search on January 1, it would not arrive until 16 to 18 calendar days thereafter (approximately January 17). The search report would show filings only through December 15 and would not show the judgment lien which had been filed on January 10.

As a practical matter, what many lenders do in such a circumstance is file a UCC-1 about a month in advance of the time they expect to make the loan. The lender can then request a search report which shows its UCC-1 of record and no liens or UCC-1's filed ahead of it, before advancing funds.

The UCC Committee of the State Bar has, for many years, attempted to get more funds appropriated for modernization of the computer and recordkeeping system in the Secretary of State's office. However, given the current battles over state budgeting, we do not expect that the delay in obtaining UCC search reports will become shorter in the near future. Indeed, the increase in filings under the new Enforcement of Judgments Law and the new Attachment Law may result in further delays.

2. Reliance on Public Filing System.

The secured party needs to be able to rely on the results of a search report in order to advance funds. It is impossible for him to delay advancing funds until he receives a UCC search report showing no judgment liens of record. The reason is that every search report will have at least a 12-day

gap between the date of the report and the date it is received, during which time another judgment lien could have been filed. The secured party is in the dilemma of never being able to receive a search report that will carry him through to the day of funding. Commercial transactions require more certainty.

While the secured lender relies on a clean search report in order to advance funds, the judgment creditor, on the other hand, has not relied on the public record. His debt has already been incurred at the time that he files the notice of judgment lien. He, therefore, has no reliance reason to obtain priority over a secured lender who has already filed his financing statement.

3. Encouraging Filing Rather Than Levy.

The major argument in favor of granting priority to a judgment creditor who files his notice of lien is to encourage the judgment creditor to file a notice rather than seizing assets. The filing of a notice gives the debtor and his other creditors an opportunity to work out an orderly repayment plan and is a less drastic remedy than seizure of personal property assets.

The two Committees of the State Bar considered and agreed with the suggestion that we ought to encourage judgment creditors to file notice rather than seize. However, the Committees believe that the primary reason that judgment creditors will begin to use the notice system is that it is relatively inexpensive and easy compared to seizure. For a \$6.00 filing fee and a 20¢ stamp, the judgment creditor can mail his notice to Sacramento and thereby obtain a lien on substantially all of the debtor's property. This lien would be senior to all security interests and judgment liens which are subsequently perfected by the filing of notice, and, under the staff proposal, would be senior even as to certain prior filed security interests under the conditions of C.C.P. §697.590(f). Compared to the cost of locating property, hiring a process server or local sheriff, giving instructions for seizure and then disposing of the property after seizure, the notice filing system has much to commend it from the standpoint of a judgment creditor.

The Committees believe judgment creditors will be inclined to file their notices as a matter of course, regardless of whether they are subject to the first to file rule of the California Commercial Code. In contrast, the first to file rule is absolutely essential to secured lending in California, due to the time delay in receiving the UCC and lien search report from the California Secretary of State.

4. The 45-day Rule Protects the Judgment Creditor.

The amendments to §9301(4) and §697.590(f), as proposed in July 1983, protect the judgment creditor against an unreasonable delay between the time the secured party files his UCC financing statement and the time the loan is funded. An attaching or judgment creditor who files his notice during that gap in time and mails a copy of his notice to the secured party, is junior to the secured party only for advances made by the secured party within 45 days after his notice of lien is filed, unless there is a loan commitment.

The 45-day rule is also important to provide consistency between California law and the Federal Tax Lien Act. Internal Revenue Code §§6321-6323 (26 U.S.C. §§ 621-6323), provides that in certain circumstances a first-filed security interest has priority over a later filed federal tax lien for advances made within 45 days after the tax lien filing, but only if the security interest is protected under state law against a judgment lien arising in the same period of time. See, I.R.C. §6323(c)(2) and (d). The two State Bar Committees are concerned that if California law creates a new class of judgment lien which is not subject to the 45-day rule, secured lenders in this state will be vulnerable to losing the 45-day grace period which they currently enjoy under the Federal Tax Lien Act. (See attached letter from Professor Lloyd Tevis, January 12, 1983.)

5. Historical Considerations.

Professor Riesenfeld has opposed the Commission staff's proposed changes on the ground the first to file rule is proper for determining priorities among security interests but not for the "determination of other priorities." However, the current Code of Civil Procedure § 697.590(b) utilizes the first to file approach between secured creditors and judgment creditors. Subsection (b) provides that as to after acquired property the first to file has priority, with the exception of purchase money security interests. (See attached letter of Professor Lloyd Tevis, January 12, 1983.)

Neither existing § 697.590 nor the Legislative Committee Comment - Assembly reject the first to file approach for determining priority. Subsection (a) merely states that a judgment lien on personal property has the priority of a judgment lien under Commercial Code § 9301. The Comment to subsection (b) notes that it follows the general rule of Commercial Code § 9312, i.e., the first to file governs priorities.

Until the attachment law was recently amended, the priorities between an attaching creditor and a secured party were governed by the first to file rule. Former Code of Civil

Procedure § 488.360(c) authorized a creditor to attach inventory of a going business by filing a notice with the Secretary of State. Under the old statute, the attachment lien obtained by such filing gave the creditor the same rights and priorities as a secured party would obtain by filing a financing statement at the same time as the notice of the attachment lien.

Conclusion:

The rights of an attaching or judgment lien creditor who files with the Secretary of State should be compared with the rights of the voluntary secured party who files a UCC financing statement. In contrast, a lien creditor who perfects by levy and seizure is taking a more drastic step which provides immediate notice to the entire world that the debtor is experiencing financial difficulties and that the secured lender proceeds at his own risk. Therefore, a judgment or attachment lien on personal property which is perfected by filing, rather than by levy and seizure, should be viewed in the nature of a competing security interest. It should not be entitled to priority as against the secured party, under the first-filed financing statement, whose search of the public records cannot disclose the lien filing until after the loan is made.

The Uniform Commercial Code Committee and the Committee on Debtor-Creditor Relations and Bankruptcy of the Business Law Section of the State Bar of California support the amendments to Cal. Code Civ. Pro. §697.590 and Cal. Comm. Code §9301, as proposed in July 1983, by the staff of the California Law Revision Commission. Their passage would permit the protection and integrity of the filing system and the facilitation of secured lending in California. Judgment creditors who choose to file notices with the Secretary of State will be treated on an equal basis with secured lenders. Levy and seizure will still be available to judgment creditors, should they choose to exercise those remedies.

201/134801:tob



LOYOLA LAW SCHOOL

January 12, 1984

Mr. Stan G. Ulrich, Staff Counsel
California Law Revision Commission
4000 Middlefield Road (Suite D-2)
Palo Alto, California 94306

Dear Stan:

Re: CCP §697.590

I understand that the proposal to amend the above section, which was considered at the November, 1983 meeting of the Commission, may again be considered at the January, 1984 meeting. I sincerely hope that this will occur and that upon reconsideration the staff proposal will be adopted. I regret that I will be unable to attend the meeting. I am writing to express my continuing belief that the changes would benefit both the debtor and the creditor involved in a secured loan transaction and that Professor Riesenfeld's concerns for the debtor are misplaced.

In a recent telephone conversation with Margaret Sheneman, Chair of the Uniform Commercial Code Committee of the Business Law Section of the State Bar, I was told that it has been suggested that the 45-day rule of §9301(4) of the Commercial Code should be deleted at least as regards a judgment lien on personal property. I think that such a change would be most unfortunate. As indicated in Comment (7) of the Official Comments to §9301, the 45-day rule is needed to insure the priority of a secured lender over a federal tax lien as regards future advances made during the 45-day period following the filing of a federal tax lien. If, under state law, the security interest does not enjoy priority over a "judgment lien" during this 45-day period, then it does not enjoy priority over the tax lien. See §§6323(c)(2) and (d) of the Internal Revenue Code.

At the November, 1983 meeting of the Commission I raised a point that was not raised in my earlier correspondence with you. Since it illustrates what I perceive to be the inconsistent policy of CCP §697.590 as regards priority, I thought it best to point it out again in this letter. Assume the following facts:

- 8/1/83 - Financing statement filed re inventory and accounts
- 8/3/83 - Notice of judgment lien filed
- 8/10/83 - Security Agreement containing an afteracquired property clause re inventory and accounts executed

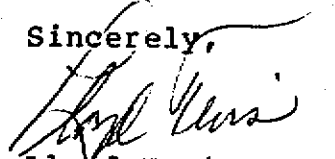
Under §697.590(a) as it now reads, the judgment lien has priority over the security interest. If the inventory and accounts turn over, as they will, both the judgment lien and security interest will attach to afteracquired property. It seems to me that under §697.590(b) the negative implication is that the security interest has priority over the judgment lien as to the afteracquired property. If I am correct in this reading of subsection (b) we have a situation that really makes no sense: The first to file is subordinate as to the original collateral but achieves priority as to afteracquired property.

Assume the facts were as follows:

- 8/1/83 - Security agreement containing an afteracquired property clause re inventory and accounts executed
- 8/3/83 - Notice of judgment lien filed
- 8/5/83 - Financing statement filed

Here the judgment lien would have priority both as to the original collateral (subsection [a]) and also as to afteracquired property (subsection [b]) as the first-to-file. To me it seems that consistency requires that both of the above fact situations should be governed by the same simple rule that the first-to-file has priority.

Sincerely,



Lloyd Tevis
Professor of Law

cc: Margaret Sheneman, Chair,
U.C.C. Committee

LT:yg

Exhibit 3

JORDAN, KEELER & SELIGMAN

ATTORNEYS AT LAW

1400 ALCOA BUILDING

ONE MARITIME PLAZA

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ERIC G. SCHEIE

January 12, 1984

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Needed Changes to CCP §704.740, et seq.

Dear Mr. DeMouilly:

Thank you for speaking with me last week regarding the problems I have experienced in seeking to obtain an order for sale of dwelling from the Los Angeles Superior Court.

In the case in question, the judgment debtor is a corporation that owns the residence which we are seeking to sell at an execution sale. I prepared an application for order for sale of dwelling in accordance with the requirements of CCP §704.760 and asked that the Court relieve the judgment creditor from further compliance with the homestead exemption execution procedure on the ground that no exemption was available because the judgment debtor is a corporation and not a natural person and, accordingly, may not avail itself of such an exemption. For your convenience, I enclose a copy of the memorandum of points and authorities submitted in support of the application.

At the hearing on the application, the Commissioner advised me that he felt CCP §704.780(b) required that he make a determination of the fair market value of the dwelling and that he also specify the amount of the proceeds of the sale to be distributed to each person having a lien or encumbrance on the dwelling. He agreed with me that neither a homestead nor a homestead exemption was available to the judgment debtor in this case but felt that the clear requirement of CCP §704.780(b) mandated that he make these determinations even though the only purpose for such determinations is in connection with CCP §704.800 and 704.850, involving sale of a homestead, which is not involved in this case.

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
January 13, 1984
Page Two

Re: Needed Changes to CCP §704.740, et seq.

Providing evidence of the fair market value of the dwelling and obtaining information regarding the outstanding amount of liens against the dwelling, not just superior liens, is, under the circumstances of our case, time consuming, expensive and, in the final analysis, a needless exercise.

As I pointed out when we were speaking, a judgment creditor seeking to levy upon an apartment building owned by a corporation or a partnership would be required to follow the lengthy and cumbersome procedure for execution against a dwelling house even though no exemption would be available to the judgment debtor corporation or partnership.

I suggest that the sections pertaining to homestead exemption under CCP §704.710, et seq. be amended to provide that once the Court has determined that there is no homestead exemption or declared homestead available to the judgment debtor, that the Court need not determine the fair market value of the dwelling or the amount of the proceeds of the sale to be distributed to each person having a lien or encumbrance on the dwelling and that an execution sale of such property shall proceed in accordance with the provisions of CCP §701.510, et seq.

Assuming that a homestead exemption is available to a judgment debtor, the current procedure does not take into account that the amount owed on liens and encumbrances against the property may be reduced between the date that the judgment creditor is furnished with information from the lien holder, regarding the amount owed on the lien and the date that an execution sale is held, some 60 to 90 days in the future. Accordingly, a lien holder may be paid an amount in excess of that actually owing to the lien holder because the Court's order requires the Sheriff to do so.

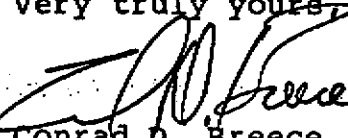
I would hope that proposed amendments to these sections of the Code of Civil Procedure will address the issues I have raised.

JORDAN, KEELER & SELIGMAN

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
January 13, 1984
Page Three

Re: Needed Changes to CCP §704.740, et seq.

Again, thank you for your assistance and please do not hesitate to call on me if you require supplementary information in this regard.

Very truly yours

Conrad D. Breece

CDB:dlc
Enclosure

cc: Mr. Rick Schwartz, Esq.
(w/Encl.)

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720
TELEPHONE [415] 642- 0330

12 January 1984

Mr. John DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D2
Palo Alto CA 94306

Dear John,

Following up our telephone conversation of January 11, 1984 I would like to call your attention to an apparent inequity caused by the new provisions governing redemption.

Cal. C.C.P. Sections 729.010 et seq. provide for redemption from a judicial foreclosure sale of a mortgage or deed of trust in the cases where California law permits ordering a deficiency judgment. The right of redemption is restricted to the judgment debtor and such debtor's successor in interest. The redemption terminates the foreclosure sale free from the reattachment of closed-out junior liens. All this is appropriate and fair.

The redemption price consists of items specified in Section 729.060(b). My dissatisfaction pertains to the application of Sec. 729.060(b)(1) in a case where a junior lienor is the purchaser at the foreclosure sale, bidding the amount of the foreclosed lien and the additions specified in Section 729.060(b)(2)-(4) and obtaining the certificate of sale. According to the wording of the statute the judgment debtor can redeem from the purchasing lienor by paying the purchase price without adding the amount of the liens (junior to the foreclosed mortgage or deed of trust) held by the purchaser. This would deprive the purchasing lienor of the property and of the security of such purchaser's junior liens, although the judgment debtor failed to outbid that lienor. This is very unfair. If the purchaser holds junior liens their amounts should be tacked on to the redemption price. This was prior law (*Salsberry v. Ritter*, 48 C.2d 1) and should be retained.

Section 729.060(b)(1) should read

1. "The purchase price at the sale and if the purchaser be also creditor holding a lien or liens junior to the mortgage or deed of trust under which the sale was made the amount of such lien or liens,

Example: The property is encumbered by TD₁ (\$20,000), TD₂ (\$10,000) and JL (\$5,000). TD₁ is foreclosed and JL buys at the sale, bidding the amount of TD₁. The judgment debtor wishes to redeem. The redemption price should be the amounts specified in present §729.060(b) and, in addition, the amount of the lien held by JL plus interest.

Sincerely yours,



Stefan A. Riesenfeld

SAR/ehs

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CALIFORNIA LEGISLATURE

Assembly Committee

on

Judiciary

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CHAIRMAN

STAFF

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CHIEF COUNSEL

LETTIE YOUNG
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COMMITTEE SECRETARY



January 18, 1984

TO: Maggie Roth
FROM: Lettie Young
RE: Sullivan proposal

Please discard the draft proposal for lump-sum spousal support. In its place, insert the following amendment to Civil Code Section 4801(a)(1):

and the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse.

The California Law Revision Commission's proposal for reimbursement for educational expenses will be retained in the draft verbatim as submitted by the Commission.

If you have any questions, please call me.

Thanks again for your invaluable help and moral support!



LOYOLA LAW SCHOOL

January 13, 1984

Nathaniel Sterling
Assistant Executive Secretary
State of California
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

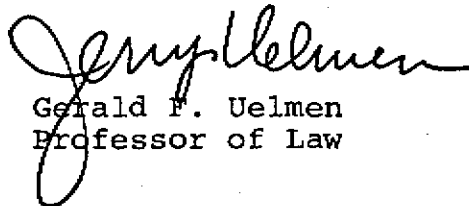
Dear Nat:

Thank you for the advance copy of your staff memo 84-16. I think you did a magnificent job of coming up with a compromise to salvage this project.

I see only one problem with the draft. Section 803 provides for tolling of any offense "a material element of which is fraud or breach of fiduciary obligation or the basis of which is misconduct in office...." Each of the offenses specified thereafter has one of those elements, but "grand theft" may be committed by other means as well. You may create an ambiguity whether all forms of grand theft are included, or only those forms which involve an element of fraud or breach of fiduciary duty. Present law clearly includes all forms of grand theft.

I strongly endorse your criticism of §800 and its lack of rationale for the 6 year period. Its an open invitation for future ad hoc legislation moving additional crimes from the 3 year category to the 6 year category, with no rational pattern. Tying the 6 year period to the seriousness of the penalty would preclude the kind of patch-work changes that led to the current dissatisfaction with the statute of limitations. The alternative draft of §800 in your memorandum makes much more sense.

Warm regards,



Gerald F. Uelman
Professor of Law

GFU:plb