

Memorandum 88-4

Subject: Study L-831 - Recording of Personal Property Affidavit in
Office of Recorder

An attorney in Orange County has brought to our attention a gap in the provisions relating to the collection of personal property of a small estate using the affidavit procedure under Probate Code Sections 13100-13116. He tells us that the office of the recorder of Orange County has refused to record the affidavit or declaration, with the result that the real property records do not reflect that a debt secured by a lien on real property has been transferred pursuant the small estate affidavit procedure. The office takes the position that the recorder has no authority to record the affidavit or declaration since there is no provision of law that provides for its recording. See Exhibit 1 (attached).

The affidavit procedure for the collection or transfer of personal property of a small estate (estate not exceeding \$60,000 in value) includes a provision (Prob. Code § 13100) that specifically permits the use of the affidavit procedure to:

(a) Collect any particular item of property that is money due the decedent.

* * *

(c) Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property [emphasis supplied].

Subdivision (a) of Section 13100 permits the successors in interest to collect money due on the note or other obligation secured by the lien on real property; subdivision (c) permits evidence of a debt or security to be transferred to the successors in interest.

There is a specific provision (Prob. Code § 13105(a)(2)) requiring the transfer agent of a security described in the affidavit or declaration to change the registered ownership on the books of the

corporation from the decedent to the person or persons executing the affidavit or declaration as successor of the decedent. There is no specific provision that deals with recording the affidavit or declaration to provide constructive notice under the recording laws of the transfer of the underlying obligation secured by the lien on real property.

It is a well established principle of law that the assignment of a debt carries with it the security for the payment of the debt. Thus, the assignment of a debt secured by a mortgage carries the mortgage with it (Civil Code § 2936); and, when a power to sell is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power is deemed a part of the security and vests in the person who by assignment becomes entitled to the money, and the power of sale may be executed by that person if the assignment is acknowledged and recorded (Civil Code § 858).

Civil Code Section 2934 provides:

Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property, (or by which any mortgage of, lien upon or interest in personal property a document evidence or creating which is required or permitted by law to be recorded), is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons.

2 Ogden's Revised California Real Property § 17.22, at 907 (Cal. Cont. Ed. Bar 1975) states in part:

As between separate assignees of the note and of the mortgage, the former controls because the mortgage follows the debt. As between the holder of both note and mortgage (duly assigned) and the holder of a duly recorded assignment, the former has the stronger position. [Citations omitted.] *Nevertheless, to establish of record the ultimate mortgage holder's authority to execute a satisfaction or release of the mortgage, he must hold record title by duly recorded mesne assignments.* This does not apply, however, to trust deeds, because the ultimate "reconveyance" is issued by the trustee, who acts on direction of the owner and holder of the note and trust deed, even if not established of record. [Emphasis supplied.]

Ogden points out another advantage of recording the assignment and states that a recorded assignment is required in order to obtain title insurance. 2 Ogden's Revised California Real Property § 17.23, at 907 (Cal. Cont. Ed. Bar 1975) states in part:

An additional advantage in recording the assignment is that it ensures that the assignee will be made a party to or receive notice of any later proceedings affecting the mortgaged property, e.g., partition suit, condemnation action, enforcement of prior lien.

Although a mortgage or trust deed note may be assigned by indorsement on the note, as a prerequisite to issuing title insurance in favor of an assignee, a separate assignment of the note and security instrument must be recorded.

Accordingly, where the personal property covered by the small estate personal property affidavit is a note secured by a lien on real property, the real property records should reflect the transfer to the successors of the decedent of the debt and of the security interest that follows the transfer of the debt.

The affidavit procedure for real property of small value (not exceeding \$10,000) includes a specific provision (Prob. Code § 13202) for recording the affidavit in the office of the county recorder of the county where the real property is located:

The certified copy [of the affidavit] shall be recorded in the office of the county recorder of the county where the real property is located. The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

The staff recommends that a provision be included in the affidavit procedure for personal property of a small estate to apply to the case where the particular item of property is a debt secured by a lien on real property. Specifically, we recommend that the affidavit or declaration be recorded in the office of the county recorder of the county where the real property is located and that it be made clear that the debtor has no duty to make payments to the successors in

interest of the decedent until a certified copy of the recorded affidavit or declaration has been delivered to the debtor. This recommendation would be effectuated by enactment of the following new section (to be added to the affidavit procedure for personal property of a small estate):

**Prob. Code § 13117. Recording of affidavit or declaration
where property is debt secured by lien on real property**

13117. (a) If the particular item of property transferred under this chapter is a debt secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration, and the affidavit or declaration shall be recorded in the office of the county recorder of that county.

(b) Any duty of the obligor under Section 13105 to pay the debt secured by the lien on the real property to the successor of the decedent does not arise until the debtor has been furnished with a certified copy of the affidavit or declaration that has been recorded under subdivision (a).

(c) The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Section 2934 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

(d) The county recorder shall index the affidavit or declaration recorded under subdivision (a) in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the affidavit or declaration shall be indexed as a grantee.

The proposed section makes the recording in the real property records mandatory in order that the title records will reflect the transfer of the debt and security interest to the successors of the decedent and to establish of record the authority of the decedent's successors in interest to execute a satisfaction or release of the mortgage where the debt is secured by a mortgage. Subdivision (b) is consistent with Civil Code Section 2935 which provides that the recording of an assignment of a mortgage or of the beneficial interest under a deed of trust is not of itself notice to the debtor so as to invalidate any payments made by the debtor to the person holding the note.

The staff believes that the proposed section should be included in the urgency bill so that it will be clear as soon as possible that a recording shall be made in the real property records to reflect the transfer of the debt and security interest in the real property.

Respectfully submitted,

John H. DeMouly
Executive Secretary

LAW OFFICES OF

Reid & Hellyer

A PROFESSIONAL CORPORATION
POST OFFICE BOX 6086
SAN BERNARDINO, CALIFORNIA 92412
(714) 884-4704 • 824-5325
TELECOPIER (714) 381-4285

599 N. ARROWHEAD AVENUE
SAN BERNARDINO, CA 92401

3880 LEMON STREET, FIFTH FLOOR
RIVERSIDE, CA 92501
(714) 682-1771

27710 JEFFERSON AVENUE
TEMECULA, CA 92390
(714) 676-1424

695 TOWN CENTER DRIVE, SUITE 800
COSTA MESA, CA 92626
(714) 966-2590

OUR FILE NUMBER

HOWARD SURR (1869-1947)
GEO. W. HELLYER (1886-1969)
JOHN B. SURR (1906-1971)
JAMES R. EDWARDS (1920-1977)

December 18, 1987

WILLIAM S. HELLYER
ENOS C. REID
JOHN D. BABBAGE
ROBERT J. BIERSCHBACH
HORACE O. COIL
JOE SAX
DONALD F. POWELL
DAVID G. MOORE
FRANK J. DELANY
JOHN K. MIRAU
JAMES J. MANNING, JR.
JANE W. CARNEY
RALPH B. PALMER
DIANE S. BREWER
RICHARD D. ROTH
CATHERINE E. S. IRWIN
DAN G. MCKINNEY
DARYL D. HANSEN
MARK C. EDWARDS
ALEXANDRA S. WARD
WILLIAM J. WARD
CHARLES T. SCHULTZ
NICHOLAS SCHOUTEN
KENNETH C. JONES
ROBERT W. CANNON
JAMES E. COFFIN
MICHAEL J. GILLIGAN
KEVIN P. BJERREGAARD

WILLIAM H. SULLIVAN
NORMAN W. ACHEN
OF COUNSEL

Mr. John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

CALIF. LAW REV. COMMISSION
DEC 21 1987
RECEIVED

Re: California Probate Code
Division 8, Chapter 3
Section 13100, et seq.

Dear Mr. DeMouilly:

You may recall that my office spoke with you recently concerning a difficulty that has arisen in the application of the affidavit procedure for collection or transfer of personal property sponsored by the Law Revision Commission and codified effective July 1, 1987 as referenced above.

Though useful, former Probate Code Section 630 was limited because of its specific exclusion as to the transferability of obligations secured by liens on real property. I believe my colleagues practicing in the probate area will agree that in the past, many needless and expensive probate proceedings were initiated in order to transfer secured obligations of negligible value. For that reason, we were extremely pleased when Section 13100 et seq. was adopted in July. As is common in daily practice, an opportunity to utilize the new statute immediately presented itself. Specifically, we sought to evidence the transfer of a 1.0050% interest in a secured promissory note valued at approximately \$900.00, to a decedent's two children and sole heirs at law by recording an affidavit pursuant to Section 13101.

Mr. John H. DeMouilly, Esq.
December 18, 1987
Page 2

I am enclosing letter dated December 14, 1987 signed by the Assistant Orange County Recorder stating that office's opinion that the affidavit is unrecordable because there is no specific statutory authority providing for its recordation. We have not encountered this policy yet in other counties. However, given the size of Orange County and the likelihood that this position may be taken up by other counties, we believe that technical amendment of the statute on an urgency basis is merited.

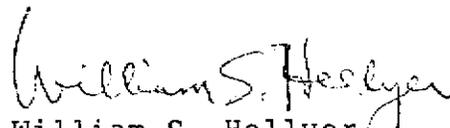
In the absence of an ability to record these affidavits, the utility of the new law will be destroyed since evidence of transfer of security interests in real property in this state is accomplished by the recording of an appropriate instrument.

I would appreciate your submitting this unexpected problem for immediate consideration by the proper legislative authorities for adoption of an urgency statute.

Yours very truly,

REID & HELLYER
A Professional Corporation

By

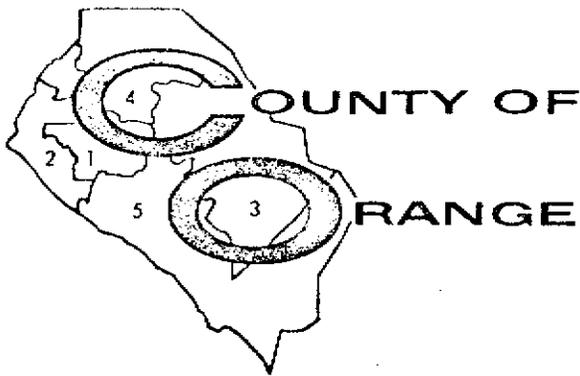

William S. Hellyer

3/S/6579h/slg

Encl.

Cpy: D. Keith Bilter, Chairman
Estate Planning, Trust and Probate
Law Section
California State Bar

Adian Kuyper
Orange County Counsel



COUNTY RECORDER:
630 N. Broadway, Rm. 101
P.O. Box 238
Santa Ana, CA 92702
Telephone: 714/834-2500

LEE A. BRANCH
COUNTY RECORDER

December 14, 1987

William S. Hellyer
Reid & Hellyer
P.O. Box 6086
San Bernardino, CA 92412

Dear Mr. Hellyer:

I am in receipt of your letter of December 11, 1987 regarding the recording of an affidavit executed pursuant to Probate Code 13101.

Government Code 27201 provides that the Recorder shall accept any "instrument, paper or notice authorized or required by law to be recorded." Although the Law Revision Commission may have intended the subject affidavit to be recorded, no such authorization or requirement is contained in the statute or any related sections of the chapter. Without enabling legislation, we are unable to record the affidavit.

I hope this clarifies the position explained to you by Susan Grilley, our supervising recordable documents examiner, in her letter of December 9, 1987.

Sincerely,

Ella M. Smith
Assistant County Recorder

EMS:mea