

Memorandum 79-61

Subject: Study D-315 - Enforcement of Obligations After Death

BACKGROUND AND GENERAL REACTION

The staff prepared a draft of a recommendation on this subject. The Commission indicated that it wanted to consider comments on the staff draft before the Commission determined whether to submit a recommendation on this subject to the Legislature.

We attach as exhibits to this memorandum the letters we received commenting on the staff draft. You should read the letters so you will be aware of the precise nature of the comments received.

The staff draft collected the existing provisions relating to enforcement of judgments after death and codified those provisions in the Probate Code. It also codified the law concerning the effect on a judgment lien of the death of the defendant. None of the commentators objected to these aspects of the staff draft.

The staff draft also proposed to change existing law with respect to two matters:

- (1) Effect on attachment of death of defendant.
- (2) Effect of death of joint tenant on lien on joint tenant's interest in real property.

The general reaction was favorable. The entire staff draft proposal was approved without qualification by the following:

Professor Richard Powell (Exhibit 2)

Marshal of San Diego County (Exhibit 3)

Professor Orrin B. Evans (Exhibit 5)

Professor Paul E. Basye (Exhibit 10) (suggests technical revision)

Professor Richard C. Maxwell (Exhibit 11)

Trust State Governmental Affairs Committee of the California Bankers Association (Exhibit 14)

Robert J. Scolnik (Exhibit 1) approved the first proposal (attachment) but reported he did not have time to study the second (joint tenancy).

Professor William M. Coskran commented only on the joint tenancy proposal and indicated that, while he did not object to the proposal, he

was concerned that the proposal did not deal with the problem of a lease by a joint tenant and other aspects of joint tenancy.

Judge Arthur K. Marshall (Exhibit 6) raised no objection to the staff draft, but suggested that the recommendation deal with additional matters. The staff considers these matters beyond the scope of this recommendation. We have, however, written to Judge Marshall asking for his suggestions as to the specific amendments needed in existing law to deal with the problems he identifies in his article. When and if we receive his suggestions, we will present them to the Commission for its consideration.

Commissioner Arthur L. Close (Exhibit 7) of the Law Reform Commission of British Columbia sent us an extract of a recommendation of that Commission that is consistent with the staff draft proposal relating to joint tenancy but provides more detail as to the content of proposed legislation.

A letter from Raymond D. Kelly, a lawyer for the Safeco Title Insurance Company, expresses concern in Exhibit 9 about the joint tenancy and attachment proposals. He fears they will create uncertainty in the law that will require resolution by judicial decisions.

Two letters from members of the State Bar Estate Planning, Trust, and Probate Law Section (Exhibits 12 and 13) indicate concern with the proposals. One takes the view that the problems are not significant and that the writer is not inclined to support them. The other takes the view that the proposals are inconsistent with the concept that a probate proceeding is the equivalent of a bankruptcy proceeding if the estate is insolvent and opposes the proposals for that reason. Professor Blawie (Exhibit 8) objects to the joint tenancy proposal on the grounds that a probate proceeding for an insolvent estate is comparable to a bankruptcy proceeding.

EFFECT OF DEATH OF JOINT TENANT

The staff believes that there is substantial support from the leading property law professors and others for the entire staff draft. However, although we believe that the proposal on joint tenancy is basically sound, we recommend that this proposal be deleted from this

recommendation so that the remainder of the recommendation can be printed in our Annual Report and submitted to the 1980 session. We believe that the joint tenancy proposal should be given further study by the Commission and, if possible, a separate recommendation on this aspect should be submitted to the 1980 session. We believe that the policy considerations with respect to the joint tenancy proposal need to be more fully developed and that the draft legislation provided by the Law Reform Commission of British Columbia (Exhibit 7) need to be studied carefully.

EFFECT ON ATTACHMENT OF DEATH OF DEFENDANT

The proposal to have an attachment survive the death of the defendant met the general approval of the persons who commented. Some concern was expressed that the provision might deal with a problem of no great significance or might create some uncertainty in the law. However, it is grossly unfair to the plaintiff who has run the expense and risk of an attachment to terminate the attachment upon the death of the defendant and to give a subsequent judgment lienholder or other lienholder a priority that otherwise would not exist. We believe that it would be useful to describe in the recommendation the limited circumstances and conditions under which an attachment may be obtained against property of an individual defendant. This would help persons understand more fully the implications of the recommendation. Accordingly, we suggest that the following material be added in place of the last full paragraph on page 2 of the staff draft:

The risks⁴ and burdens of obtaining an attachment in an action against an individual defendant discourage its use except where the defendant has no substantial defense to the action.⁵ The attach-

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4. An attachment exposes the plaintiff to the hazards of suit by the defendant or a third person for wrongful attachment, malicious attachment, or abuse of process. Some lawyers believe that these risks outweigh the benefits of an attachment. See discussion in Attachment, in California Debt Collection Manual § 5.3, at 311-12 (Cal. Cont. Bar 1978).
 5. The trial delay in civil cases may motivate the defendant to resist payment of a justly due debt. The defendant may seek to coerce the creditor to accept less than the amount justly due rather than to wait until judgment can be obtained. In addition, the defendant may resist payment until a judgment is obtained because the value to the defendant of the use of the money justly due the creditor outweighs the cost of having to pay interest on the debt.

ment may be issued only upon a claim of an unsecured creditor⁶ which arises out of the defendant's conduct of a trade, business, or profession.⁷ The claim must be for money, based on a contract, express or implied, and the claim must be for a fixed or readily ascertainable amount and for not less than \$500 (exclusive of costs, interest, and attorney fees).⁸ The attachment may be issued only if⁹ the plaintiff establishes the probable validity of the claim, and provides an undertaking to pay the defendant¹⁰ any amount the defendant may recover for any wrongful attachment.

The attachment results in the seizure by the levying officer of specific property or in depriving the defendant of the ability to transfer or encumber specific property.¹¹ But the property of an individual defendant that may be attached is severely limited by statute. Only those types of property specifically listed in the statute may be attached.¹² The statute also exempts from attachment any property which is necessary for the support of the defendant or the defendant's family.¹³ In addition, property is exempt from attachment if it would be exempt from execution.¹⁴

Where a creditor has sustained the burdens and risks that are involved in attaching property of a defendant, the Commission believes that it is unfair to deprive the creditor of his priority over other creditors and his lien on the specific property attached merely because the defendant dies before judgment can be obtained. Accordingly, the Commission recommends that the law be changed to provide that the death of the defendant whose property is attached does not terminate the attachment.

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6. An attachment is available only to the extent the claim is not secured. Code Civ. Proc. § 483.010(b).
 7. Code Civ. Proc. § 483.010(c).
 8. Code Civ. Proc. § 493.010(a). Claims may be aggregated, but the total amount claimed in the action must be not less than \$500.
 9. See Code Civ. Proc. §§ 484.090(a)(2), 485.220(b)(2). See also Code Civ. Proc. §§ 486.020(b) (temporary protective order), 492.030(a)(2) (nonresident attachment).
 10. Code Civ. Proc. § 489.210.
 11. See, e.g., Code Civ. Proc. §§ 482.080, 488.010, 488.310-488.430, 488.500-488.550. See also discussion in Attachment, in California Debt Collection Manual §§ 5.68-5.71, at 361-65 (Cal. Cont. Ed. Bar 1978).
 12. Code Civ. Proc. § 487.010(c).
 13. Code Civ. Proc. § 487.020(b).
 14. Code Civ. Proc. § 487.020(a).

Professor Paul E. Basye notes a technical problem with proposed Probate Code Section 732 (page 17 of the staff draft). The problem is that the real property records in the office of the county recorder need to reflect the entry of the judgment so that an examination of the record will show that the judgment was obtained while the attachment lien was still in effect. To deal with this problem, the staff suggests that Section 732 be revised to read:

732. (a) Subject to subdivision (b):

(1) If a judgment is entered against the decedent during the decedent's lifetime in an action in which property was attached, at the time of the decedent's death the judgment becomes a lien upon the property of the estate subject to the attachment lien and has the same priority as the attachment lien. ~~This subdivision applies only if the attachment lien is in effect at the time the decedent dies.~~

(2) If a judgment is entered after the death of the decedent in an action in which property was attached, at the time of entry the judgment becomes a lien on the property of the estate subject to the attachment lien and has the same priority as the attachment lien. ~~This subdivision applies only if the attachment lien is in effect at the time of entry of the judgment.~~

(b) This section applies only if, prior to the expiration of the attachment lien, the levying officer serves an abstract of the judgment and a notice that the attachment lien has become a judgment lien upon the person holding property pursuant to the attachment or records or files an abstract of the judgment and a notice that the attachment lien has become a judgment lien in any office where the writ and notice of attachment are recorded or filed. Where the attached property is real property, the plaintiff or the plaintiff's attorney, instead of the levying officer, may record the required abstract and notice.

Subdivision (b) is drawn from subdivision (c) of Section 588.510 (set out on page 10 of the staff draft). Subdivision (b), together with Section 488.510(c), will provide for clear real property records. This should deal with one of the concerns expressed by the title company attorney in Exhibit 9.

STAFF RECOMMENDATION

With the revisions and additions recommended above and the deletion of the proposal concerning joint tenancy property, the staff recommends

that the Commission approve this recommendation for printing and submission to the 1980 Legislature. We can then include this recommendation in our Annual Report.

Respectfully submitted,

John H. DeMouly
Executive Secretary

EXHIBIT 1

ROBERT J. SCOLNIK
ATTORNEY AT LAW
100 BUSH STREET
SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104
GARFIELD 1-2346

November 7, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Gentlemen:

I have been out of town in a civil trial for the past three weeks, and during my absence your four Tentative Recommendations arrived. (#D-310, -315, -320, -501.)

With all the work that has piled up and the shortness of time before your November 10 deadline, I cannot review all of these recommendations.

I have looked over #D-501 and am enclosing my comments.

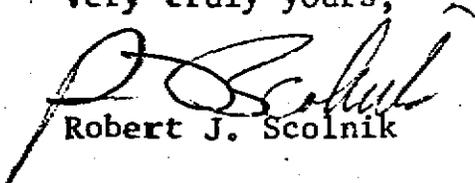
I have only been able to look over a portion of #D-315. I am in complete agreement with the first two matters dealt with, but I have not had a chance to review the third.

I will not have the time to review the other two recommendations.

I apologize for not being able to review this matter and submit detailed comments.

However, I hope you will send me the final recommendations on all of these matters; and please keep me on your list to receive future material.

Very truly yours,



Robert J. Scolnik

encl.

RJS/nj

2657 Cowper Street
Palo Alto, California 94306
October 12, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

I have read with interest the Staff Draft, dated October 2, 1979, with respect to the enforcement of obligations after death.

In my judgment the objective of this proposal (pages 1-8) is sound. It seeks to eliminate some of the less desirable aspects of joint tenancy in California. Equally important, I believe that pages 9-18 of the draft embody legislative enactments, which, if recommended by the Commission, and adopted by the Legislature, will accomplish the objectives of the proposal.

I am grateful for this opportunity to express my approval of a very careful job of constructive thinking done by the Commission and its staff.

Respectfully,



Richard R. Powell

RRP/atp.



DEPARTMENT OF THE MARSHAL
MUNICIPAL COURT OF CALIFORNIA
County of San Diego
MICHAEL SGOBBA, MARSHAL

October 15, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA. 94305

Gentlemen:

We have reviewed the tentative recommendations relating to:

1. The Probate Homestead Dated 09-14-79
2. Enforcement of Claims and Judgements
Against Public Entities Dated 09-17-79
3. Agreements for Entry of Paternity and
Support Judgements Dated 09-17-79
4. Enforcement of Obligations after Death Dated 10-02-79

The proposals appear to be appropriate reforms in their respective areas and we have no comment on them other than to indicate our approval.

Yours truly,

MICHAEL SGOBBA, Marshal

by

R.A. Aguilar
R.A. Aguilar, Lieutenant

SAN DIEGO DISTRICT
P. O. Box 81104
320 W. Broadway
San Diego, Ca. 92138
388-2711

CHULA VISTA DISTRICT
430 Davidson Street
Chula Vista, Ca. 92010
575-4781

EL CAJON DISTRICT
110 E. Lexington
El Cajon, Ca. 92020
579-4466

ESCONDIDO DISTRICT
600 E. Valley Parkway
Escondido, Ca. 92025
741-4411

VISTA DISTRICT
325 S. Melrose
Vista, Ca. 92083
758-6561



LOYOLA LAW SCHOOL

October 16, 1979

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

Re: Staff Draft--Enforcement of Obligations After Death

Dear John:

I have a couple of comments related only to the "Effect of Lien on Joint Tenancy Real Property When Joint Tenant Dies."

The background discussion states that a joint tenant who needs funds is forced to sell his interest to raise needed funds because a lender will not lend money upon the security of the interest of one tenant alone (pg. 4). There is another alternative which should be mentioned. The prospective borrowing joint tenant can sever the joint tenancy and convert it into a tenancy in common without selling his interest, and thus give the lender sure security. This could be accomplished by a deed out by the prospective borrowing joint tenant to a straw man, and a deed back to him as tenant in common.

The proposed legislation will present an incongruity that I think should be considered. If the legislation is adopted, one who receives a lien interest from or against a joint tenant will be fully protected. However, one who receives a greater interest, a leasehold, will remain unprotected--Tenhet v. Boswell, 18 Cal. 3d 150 (1976).

In Tenhet, the Supreme Court determined that a lease by one joint tenant did not sever, and upon death of the leasing joint tenant, the leasehold was extinguished.

In determining that the leasehold was terminated and the tenant out of luck, the court said that any other result would defeat the justifiable expectations of the surviving

John H. DeMouilly
October 16, 1979
Page Two.

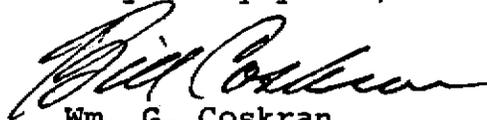
joint tenant--the surviving joint tenant would take the whole estate but its market value would be substantially impaired. "This circumstance would effectively nullify the benefits of the right of survivorship, the basic attribute of the joint tenancy."

It seems the same reasoning would apply if a surviving joint tenant takes the estate subject to a lien which substantially impairs the net market value. Is there a sound reason to protect a creditor but not a lessee, who might suffer an even greater loss? For example, consider a long term lease with substantial investment in the location.

The draft points out that the present rule is unfair to an uninformed lender who loans in reliance upon the security of a joint tenancy interest (pg. 4). The Tenhet court recognized a similar concern in stating that it is not insensitive to the potential injury that may be sustained by a person in good faith who leases from one joint tenant. But the court says that this result would be avoided by a prudent lessee who conducts a title search prior to leasing. The court appreciates that such a course would often be economically burdensome but it states that nevertheless it must always be recognized that every lessee (and it could be said, every creditor) may one day face the unhappy revelation that his lessor's estate is less than a fee simple.

I am not saying that your proposed legislation is not fair and reasonable. I am only saying that before tinkering with one aspect of joint tenancies, consideration should be given to all aspects of that type of co-tenancy in order to avoid unfair and unnecessary inconsistencies.

Very truly yours,



Wm. G. Coskran
Professor of Law

WGC:m'e



ORRIN B. EVANS
Pfeiffer Professor of Law

October 16, 1979

Mr. John H. DeMouilly
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear John:

I think all the proposals relating to enforcement of obligation after death are well conceived and well born.

I must confess that at first I had some misgivings about the section concerning joint tenancy property but after some meditation I now think it may be the most desirable of all.

Faithfully yours,


Orrin B. Evans

OBE/sd

EXHIBIT 6



The Superior Court

LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
ARTHUR K. MARSHALL, JUDGETELEPHONE
(213) 974-1234

October 16, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94350

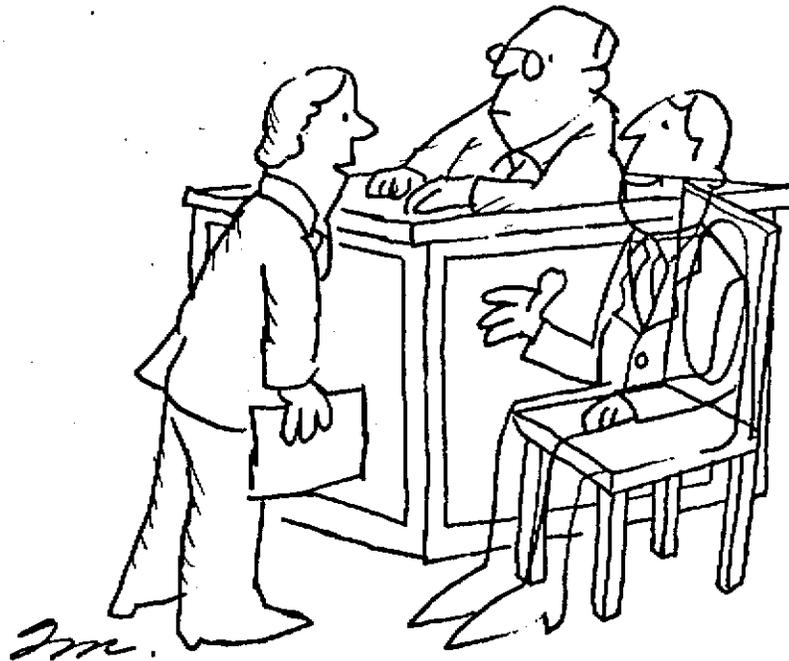
Dear Sirs:

I am in receipt of your draft relating to enforcement of obligations after death. As you requested my suggestions with respect thereto may I call your attention to the enclosed article which deals with a topic certainly related to your draft wherein I find no reference to such article. I would think that the problems raised in such article should be resolved by a proposed revision.

Very sincerely yours,


Arthur K. Marshall

AKM:s
Enclosure



Suits Against Decedents

by Arthur K. Marshall

ARTHUR K. MARSHALL is a Judge of the Superior Court; former Supervising Judge of the Probate Department, Los Angeles County, Central District; author of "California Probate Procedure" (Parker & Son, 3d ed.); lecturer on probate procedure in graduate and professional programs of University of Southern California Law School since 1955; lecturer in the paraprofessional probate programs of both UCLA and USC.



NORMALLY, presenting a creditor's claim in an estate and getting it paid is a routine affair which rarely needs much attention from the attorney. In fact, a bright secretary or, preferably, a paraprofessional, can handle such claims with aplomb. However, there are some complexities in the law dealing with suits which are pending or which are about to be commenced against the person who, rather uncooperatively, passed away, and a short discussion of the problems may clarify them.

The several aspects of the applicable law will be better pinpointed by dividing them into four parts:

1. Actions Pending at Date of Death of Decedent
2. No Action Pending at Date of Death and Personal Injury was Allegedly Caused by the Decedent
3. No Action Pending at Date of Death for Claim Other than Personal Injury
4. No Action Pending at Date of Death and the Decedent's Insurance is the Plaintiff's Target

1. Actions Pending at Date of Death of Decedent

If an action is pending against the decedent at the time of his death, the plaintiff must file a claim against the estate either by filing with the clerk, or by presentation to the representative, it being authenticated in the normal manner.

Plaintiff cannot recover any judgment from the estate unless he makes proof of such filing or presentation. If, however, the pending action is one for damages, the decedent was insured against such damages, the insurer has accepted the defense of the case and made an appearance on behalf of the decedent, the plaintiff can dispense with the claim unless he wishes an amount in excess of, or not covered by, such insurance. (Sec. 709, Probate Code.)

In addition to the exclusion just described, Section 709* also breaches the four-month limitation for presentation of claims by providing that if an action is pending at the death and a claim has not been filed or presented during the prescribed period, nevertheless the court may allow the filing of the claim on "such terms as may be just and equitable." Certain conditions must be fulfilled before the filing is allowed: The claimant must file a verified petition giving notice of hearing pursuant to § 1200, Probate Code, and the court must find that the claim was not filed or presented during the four-month period because neither the claimant nor his lawyer had actual knowledge of the decedent's death at least fifteen days before the prescribed period expired. It should be noted that property already dis-

*All statutory references are to the Probate Code unless otherwise noted.

tributed pursuant to court order or by payments which have been properly made by the representative cannot be affected by such claim. Since 1969 the section no longer limits relief to those cases in which the decedent made an appearance.

Reasonable Time Rule

A further limitation on the enlargement of the four-month period is imposed by the Legislature in that a petition for relief will not be granted unless it is filed within a reasonable time after discovery of the decedent's death and, in any event, within one year after the expiration of the prescribed period and before the petition for final distribution has been filed (§ 709). It will also be denied if there has been preliminary distribution or payment to general creditors or the new claim would tend to cause unequal treatment between heirs, devisees, legatees and creditors. (§ 709)

All these restrictions on the extension of the four-month period make it clear that the Legislature did not want the breach in the wall to be extended beyond the knocking off of a few bricks on top.

Suit Pending

Section 709.1 was enacted by the 1971 Legislature. Its purpose is to permit a pending law suit to continue against the decedent in the name of "Estate of _____, Deceased." In order to secure permission to so continue, the plaintiff must petition the court (presumably the Probate Court) pursuant to the procedure in Section 721 which the same Legislature set up for cases *not* pending at date of death. However, the Legislature did not wish this statute to apply to actions pending on the statute's effective date (March 4, 1972), nor

may the section revive any claim previously barred by the Probate Code (Statutes of 1971, Ch. 1638, § 4).

This section would permit the continuance of the action without the opening of an estate. If, however, a claim is urged against an estate not *solely* for insurance coverage, a probate proceeding would still be required and Sections 709.1 as well as 721 would not be applicable. Recourse must then be had to Section 709, whereunder recovery is sought from a decedent's "estate."

Personal Injury

The 1971 Legislature also amended Section 385 of the Code of Civil Procedure to permit the continuance of a pending personal injury action against the decedent as the original party defendant without need for the appointment of a representative of the estate of the decedent. This section is even more limited than Section 709.1. It declares that if only insurance coverage is claimed and the estate qualifies for summary probate proceedings under Section 630 of the Probate Code (estate assets less than \$5,000), this action can be continued after death. The insurer must be served with a complaint. In any case, the court upon motion of an interested person or on its own motion may order the appointment of a representative and substitute him for the decedent. (The 1971 Legislature amended Section 707 by adding Subdivision (b) which dealt with *commencement* of the actions and reiterated the provisions of Section 385, Code of Civil Procedure.)

2. No Action Pending at Date of Death and Personal Injury was Allegedly Caused by the Decedent

Where a claim for damages for injuries to, or death of a person is

not the subject of an action which was pending at date of death of a decedent and is also not a claim filed as provided in the Probate Code, the court "shall" upon application of the claimant, permit such claim to be filed and, if required, appoint or reappoint a personal representative to receive and act upon the claim. (§ 720) The application must be made within one year after accrual of the claimant's cause of action and upon such notice and hearing as the court may require. As noted in the previous section, the Legislature is solicitous for those who have received property under a distribution pursuant to court order and for recipients of any "payments properly made" before the estate had notice of the application of the claimant. Further, the personal representative, distributee or payee is not liable on account of such prior distribution and payment and the court "shall" impose reasonable conditions upon the filing of the claim to avoid unequal treatment between the heirs, devisees, legatees or creditors of the estate.

Public Entities

Claims by public entities with certain exceptions indicated in Section 707.5, Probate Code, must follow the same route as private claimants (§ 720).

It is to be noted that Section 720 provides for "applications" by the claimant, not "petitions." Can an "application" be made to the *civil* side of the Superior Court? As the action to be taken with respect to the application (the filing of a claim) is within the purview of the Probate Court, it would therefore appear that the application should consist of a petition to the Probate Court.

3. *No Action Pending at Date of Death for Claim Other than Personal Injury*

It would appear that if no action is pending with respect to claims *other* than for personal injury and no claim has been filed within the requisite period, the claim is barred unless there is insurance coverage of which the claimant may avail himself via Section 721.

4. *No Action Pending at Date of Death and Claimant Seeks Only Decedent's Insurance Coverage*

Section 721 was also enacted by the 1971 Legislature. It makes presentation or filing of a claim unnecessary when the claimant seeks only to establish the liability of the decedent to the extent of the latter's insurance coverage. To do so, the claimant must file a verified petition in Superior Court in the county where the estate is pending or, if not pending, where it may be administered. He must allege: (1) the nature and amount of the claim, (2) that the decedent was protected by liability insurance in whole or in part, (3) that the interests of the estate will not be prejudiced, and (4) that claimant's recovery is limited solely to the amount of the insurance coverage.

The Court may, upon "such hearing and notice, if any, as it may order," grant leave to file an action unless it finds that the interests of the estate would be prejudiced by so doing or if it appears that the insurer denies coverage or admits liability only conditionally or with any reservation.

Insurance Claim

Action under this section will lie when *no* action is pending and *only* the insurance coverage is sought. Leave to file the action may be granted *ex parte* and the petition may not necessarily be addressed to the Probate Court. A hearing may be eliminated and the petition may be denied if there is any question

as to coverage or there is any possibility that the "interests of the estate" may be prejudiced.

The action by the claimant names the "Estate of _____, Deceased" as the defendant but the summons is served on a person designated in writing by the insurer or, if none is designated, upon the insurer. The court may, "for good cause" (meaning the existence of any prejudice to the estate's interests), on a motion of an interested party or on the court's own motion, appoint a representative and substitute him as the defendant. (§ 721 (c))

The insurer may deny or contest liability by a cross-complaint or by an independent action against claimant but a judgment on such cross-complaint or action does not adjudicate the rights of persons who are not parties to the action. (§ 721 (d))

A judgment in favor of the claimant is only collectible from the insurance coverage; such judgment creates no lien on real or other property of the estate (§ 721 (e)).

This section does not give the claimant as extensive a remedy as does Section 720, it being only for insurance coverage. Furthermore, this section is not retroactive beyond the effective date, March 4, 1972 (Statutes of 1971, Ch. 1638, § 4). Sec. 707(b) is applicable if the estate is less than \$5,000.00. (Sec. 630.)

Conclusions

Now that we have reviewed the various types of claims, and the statutory remedies provided, we can reach certain conclusions:

1. Where an action is filed before March 4, 1972, and is pending on the date of death of the defendant, and only insurance coverage is sought, a petition should be filed for

the appointment of a representative to serve as defendant (§ 709).

2. If an action is filed after March 4, 1972, and is pending at date of death and, again, the insurance coverage is all that is sought, a petition may be filed to appoint the "Estate of _____, Deceased" via Section 709.1, using the procedure set up on Section 721.

3. If an action is pending at date of death and insurance coverage is not sought, the plaintiff must file a claim against the estate. If no claim was filed before the prescribed claim period elapsed, the plaintiff must petition for leave to file. Permission to file will be granted if neither claimant nor his attorney knew of the death at least 15 days before the prescribed period elapsed. (Section 709) However, once the petition for final distribution has been filed, no relief can be granted to the claimant.

In *Factor v. Superior Court* (1970) 9 C.A.3d 345, 88 Cal.Rptr. 493, an attempt to set aside a final decree was unsuccessful although defendant had been dead for nearly eight months before his attorney informed plaintiff, during which time the period to file creditor's claims expired. Furthermore, the court held that Section 709 permits no late claims after the petition for final distribution has been filed. Unfortunately, the plaintiff raised the question of extrinsic fraud only on appeal and for that reason, the court declined consideration of that issue.

4. If no action is pending at date of death and a claim for injuries or death has not been filed, and insurance coverage is not sought, the prospective plaintiff may apply for permission to file a claim not later than one year after accrual of his cause of action. The claim has no effect on prior distributions or pay-

ments by the estate, and in fact the court will impose "reasonable conditions" to prevent unequal treatment between distributees and creditors. (§ 720, P.C.)

5. If no action is pending and only insurance coverage is sought, and no claim has been filed prior to March 4, 1972, the prospective plaintiff may petition in the Superior Court for permission to sue the "Estate of _____, Deceased." Such petition may be *ex parte* (§ 721; see Sec. 707(b)) for procedure for personal injury or death if the estate is less than \$5,000.00.

6. Where the estate comes within Section 630, Probate Code (less than \$5,000), and only insurance coverage is sought, a "pending action" may proceed against the decedent without the appointment of a representative. (§ 385, C.C.P.) The procedure to be followed is not described in the section but inasmuch as a determination as to the applicability of § 630, Probate Code,

must be made, it would appear that a petition should be filed in Probate Court to so proceed.

7. There would appear to be no time limitation with respect to the commencement of proceedings under Section 721 (seeking only insurance coverage). The identity of the person or entity to serve as a defendant in a pending action in which insurance only is sought is not made clear by Section 709.

8. As to actions filed after March 4, 1972, Section 709.1 describes the entity which will serve as the defendant, i.e., "Estate of _____, Decedent." Lacking anyone else, it would appear that a proceeding under Section 709 for insurance coverage only should, once the plaintiff is informed of the death, proceed against a representative of the estate, which means that a petition would have to be filed in probate court to appoint such representative if one does not already hold letters. ~~TA~~



23 October 1979

California Law Revision Commission,
Stanford Law School,
Stanford, CA 94350
U.S.A.

Dear Sirs:

Re: Enforcement of Obligations after Death

I have noted the recommendation set out on page 7 of your "Staff Draft." I wonder if the Wisconsin provision is detailed enough and would draw your attention to the discussion and recommendations set out in this Commission's Report on Execution Against Land at pp. 22-26. (Copy enclosed).

Yours sincerely,

Arthur L. Close,
Commissioner

/encl.

A. Joint Tenancies

1. SURVIVORSHIP

A basic feature of our land law is a form of ownership known as joint tenancy. This arises when property is conveyed or transmitted to two or more persons as "joint tenants"¹ giving them identical and undivided interests in that property. The most important incident of joint tenancy is the right of survivorship—the rule that when one joint tenant dies his interest in the property is transmitted to the surviving joint tenant(s). Thus, if land is owned by A and B as joint tenants, upon A's death B becomes the sole owner of the land and A's share does not become part of his estate for distribution to his heirs.

But a joint tenancy can be "severed" or terminated. This may happen when a party sells or encumbers his share or does some other act which is inconsistent with a joint tenancy. When that occurs the tenancy becomes one known as a "tenancy in common." A tenancy in common also involves ownership of an undivided interest by two or more persons but the right of survivorship does not exist in relation to it. Thus, in our previous example, if A and B owned the land as tenants in common, upon A's death his interest in the land would become part of his estate and as such liable for his debts and available for distribution to his heirs.

What is the legal position when a creditor obtains a judgment against a joint tenant and registers that judgment under the *Execution Act*? This question was considered by the British Columbia Court of Appeal in *Re Young*.² In that case land was jointly owned by a husband and wife. A creditor of the husband obtained a judgment against him which was duly registered. Four months later the husband died. No further proceedings were taken (apart from periodic renewals of the judgment) by the judgment creditor and three years later the wife died. The Public Trustee then applied for registration, as administrator of the wife's estate, with respect to the property. The Registrar of Titles then lodged a caveat³ forbidding registration. The issue before the court was whether the Registrar's caveat should be discharged and that issue turned on the legal effect of the registered judgment.

The judgment creditor argued that the registration of the judgment had the effect of severing the joint tenancy or, alternatively, putting the right of survivorship into suspension.⁴ A majority of the Court of Appeal held that it did neither. A view was adopted that:⁵

The trend of the authorities is that a mere lien or charge on the land, either by a co-tenant or by operation of law, is not sufficient to sever the joint tenancy; there must be something that amounts to an alienation of title. (6)

This led the majority to conclude that the registration of the judgment did not sever the joint tenancy.

The second argument advanced by the judgment creditor—that the right of survivorship was "suspended"—was raised in the earlier British Columbia

¹ Normally the words "joint tenants" must appear in the instrument creating or conveying the interest. Unless a contrary intention appears in an instrument a conveyance to co-owners creates a tenancy in common. See *Land Registry Act*, s. 21.

² (1968) 70 D.L.R. 594.

³ Under s. 212 of the *Land Registry Act*.

⁴ *Supra* n. 2 at 601.

⁵ *Ibid.* at 602.

⁶ *Per* Maclean, J. A. Quoting Widdifield, Co. Ct. J. in *Power v. Grace*, [1932] 1 D.L.R. 801.

Supreme Court decision of *Re Penn*.⁷ It is difficult to see its basis. On what legal theory may rights of survivorship become "suspended" and "unsuspended" as circumstances change? Maclean J. A. examined the relevant legislation and concluded:⁸

In my view the *Land Registry Act* and the *Execution Act* do not provide a basis for a finding that the rights of the surviving joint tenant under the *jus accrescendi* [right of survivorship] are so modified or abrogated that he must take subject to a judgment registered under s. 35 of the *Execution Act* and on which no further proceedings have been taken.

I think that if I were to hold that the mere registration of a judgment under s. 35 of the *Execution Act* constituted an encroachment of the *jus accrescendi*, I would be straying into the legislative field.

Thus it was held that the mere registration of a judgment neither severs a joint tenancy nor suspends the right of survivorship and the interest of a surviving tenant will defeat that of a judgment creditor.

When, if ever, will the rights of the creditor crystallize into an interest which will survive the death of his debtor who is a joint owner of land, if registration is not enough? At the time proceedings are commenced under section 38? At the time of *lis pendens* issued under section 44 is registered? At the time an order for sale is made? At the time the land is sold? *Re Young* is singularly unhelpful on this point. The only reference to the issue is in the judgment of Maclean, J. A.:⁹

Appellant admits that if the execution procedure under ss. 33 to 59 of the *Execution Act* had been carried to a point where an order for sale was made, the *jus accrescendi* would have been extinguished. It is not necessary to make a finding on this point here.

Are the policies embodied in *Re Young* ones which should be continued?

Professor Dunlop suggests not:¹⁰

This decision may be sound law, but it seems unjust when considered on the level of policy. In any case other than joint tenancy, the *Execution Act* permits a creditor to file a judgment in the land registry office and to take no further proceedings until the debtor either transfers his land or dies. In either case, assuming that the judgment has been properly filed and renewed, it attaches to the land in the hands of the purchaser or the executor or administrator. If the land in *Re Young* had been held in tenancy in common, and the deceased debtor had left his interest in the land to the other tenant, the judgment would have travelled with the land. . . . As a matter of policy, it seems difficult to explain why the judgment creditor should be completely defeated in the situation where the debtor joint tenant predeceases his co-tenant. The creditor has taken the necessary steps to create a charge against the land of his judgment debtor but, in the case of land held in joint tenancy, the effectiveness of his charge turns on the complexities of the law governing severance of joint tenancy and on the accident of which joint tenant dies first.

Davey, C.J.B.C., the dissenting member of the Court of Appeal in *Re Young*, also questioned the policy of the majority view:¹¹

I must say I find . . . [the severance of a joint tenancy by registration of a judgment] satisfactory, because it makes answerable for a judgment the judgment debtor's interest in a joint tenancy over which he had in himself complete power of disposal in his lifetime, and avoids one of the highly technical consequences of a joint tenancy, as contrasted with a tenancy in common, that has little to commend it in the light of modern needs.

The legal position created by *Re Young* is such that a creditor who wishes to fully protect himself and preserve his position with respect to

⁷ (1951) 4 W.W.R. 452.

⁸ *Supra* n. 2 at 604.

⁹ *Ibid.* at 603.

¹⁰ Dunlop, "Execution Against Real Property in British Columbia", (1973) 8 U.B.C. L. Rev. 246.

¹¹ *Supra* n. 2 at 599.

jointly owned land cannot rely on registration only. He must take further steps. How far he must go is uncertain, but at the very least he must commence proceedings under section 38 whether he wishes to do so or not. In Chapter III it was noted that the *Execution Act*, as it applies to land, encourages voluntary payments by the debtor and we approve of that effect. To the extent that *Re Young* encourages the unnecessary commencement of enforcement proceedings it is counter-productive.

But what is the proper approach? Should the registration of a judgment sever a joint tenancy? The dangers of this approach are illustrated by *Re Penn*¹² (now overruled by *Re Young*). In that case a husband and wife were joint owners of land, and at the time of the wife's death a judgment had been registered against her. After her death the surviving husband discharged the judgment and filed the discharge in the Land Registry Office. He then applied to have the land registered in his name. The refusal of that application was upheld by the Supreme Court of British Columbia on the ground that there was no joint tenancy in existence at the time of the wife's death and her interest became part of her estate. The Court left open the possibility that the joint tenancy might have revived had the judgment been discharged during the wife's lifetime.¹³

It is difficult to see why the act of registration by a creditor should create rights in favour of third parties (e.g. the debtor's heirs) as against the surviving joint tenant; but that would be the effect of a rule that registration of a judgment severs or suspends a joint tenancy. The preferable rule would seem to be that registration of a judgment should not sever a joint tenancy, but if a joint owner, against whom a judgment has been registered, dies, the judgment should continue to charge the debtor's interest in the hands of the surviving owner.

But this raises a number of other problems. The suggested rule may leave the surviving owner in the unhappy position of being unable to ascertain the value of what it is he has received. It may be important that he be able to do so for a number of reasons. If it is clear that the survivor is the only person who may be called upon to satisfy the judgment, its value might be discounted from the value of the joint interest transmitted. But if the deceased has other assets, the judgment creditor may make a claim against the estate to satisfy his judgment in whole or in part. This contingency makes the value of the interest transmitted to the survivor uncertain.

The possibility of a claim against the estate may raise other problems. Consider the following situation.

A and B (husband and wife) are joint owners of land worth \$40,000. C obtains a judgment for \$10,000 against A which is registered. A dies leaving an estate (of assets other than his interest in the land) worth \$10,000. A's personal representative is B. A had one other creditor, E, whose debt is for \$10,000. E's debt is unsecured and he has not taken judgment on it.

The following results are possible:

1. C makes no claim in the estate but looks to the land to satisfy his judgment. E gets the full estate of \$10,000 to satisfy his claim. C gets paid \$10,000, either directly by B or from the proceeds of a sale of A's interest in the land.

¹² *Supra* n. 7.
¹³ *Ibid.* at 454.

or

2. C claims in the estate and is paid \$5,000. E also receives \$5,000. C then looks to the land for the remaining \$5,000 and it is sold (or the remaining \$5,000 is paid directly to C by B) to discharge the judgment (and E gets no further payment).

If the second result occurs E will be understandably aggrieved. E will have lost \$5,000 and B will have obtained a corresponding benefit.

We see a possible solution to these difficulties in the equitable doctrine of marshalling. This is described in Hanbury as follows:¹⁴

The doctrine of marshalling is a principle of equity by virtue of which a secured creditor, B, can require a prior creditor, A, to take satisfaction out of assets upon which creditor B has no lien; thus leaving B's security available for him. "If a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien."

For example: if A mortgages Blackacre and Whiteacre to B; then mortgages Blackacre to C; C can require B to satisfy himself in the first instance out of Whiteacre.

The doctrine of marshalling has been a feature of the law concerning the administration of estates for many years.¹⁵

In the context under discussion, the application of the doctrine of marshalling would require that a claim of a registered judgment creditor against a debtor's estate should be subordinated to the claims of ordinary unsecured creditors except to the extent that a deficiency exists (or is likely to arise) such that the proceeds of a sale of the land are (or will be) insufficient to satisfy the judgment.

If, on the other hand, there is sufficient money to satisfy both the judgment debt (in whole or in part) and all ordinary creditors, it is our view that the judgment creditor should look first to the estate and proceed against the land (or call upon the surviving joint owner for payment) only if the estate is unable to satisfy his claim in full.¹⁶ A clear rule along the lines described above would be fair to ordinary creditors and would assist in quantifying the value of the joint interest transmitted to the surviving owner.

The Commission recommends that:

9. *If a judgment is registered against a debtor who has an interest, as a joint tenant, in land, the joint tenancy is not severed but if the debtor dies and the judgment remains unsatisfied then the judgment continues to charge the interest of the debtor in the hands of the surviving owner(s); and*

(a) *if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is greater than the claims of ALL creditors, then*

(i) *a registered judgment creditor should look first to the estate of the debtor for satisfaction of his judgment, but his claim is subordinated to the claims of ordinary creditors who have not registered a judgment against the debtor's interest in land, and*

(ii) *if the debtor's estate, after satisfying the claims of ordinary creditors, is insufficient to satisfy a registered judg-*

¹⁴ Maudsley, *Hanbury's Modern Equity* 558 (9th ed.; 1969).

¹⁵ See Williams and Mortimer, *Executors, Administrators and Probate* 791 *et seq.*, (Williams, 15th ed.; Mortimer, 3rd ed.).

¹⁶ The effect of this approach would be to place the surviving joint tenant, *vis-à-vis* the registered judgment creditor, in a legal position similar to that of a specific devisee of land.

ment the judgment creditor should then be entitled to look to the debtor's interest in land in the hands of the surviving joint owner; and

(b) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is less than the claims of ALL creditors, then

(i) a registered judgment creditor may share rateably in the estate, but his claim therein is reduced by the value of the debtor's land which is available to satisfy his claim, and

(ii) a registered judgment creditor is entitled to look to the debtor's interest in land in the hands of a surviving joint tenant to satisfy the deficiency.

(c) notwithstanding (a) and (b) if, at the time of the debtor's death, the judgment creditor had commenced proceedings under section 38 of the Execution Act to enforce the charge created by registration of his judgment he may continue those proceedings.

10. A joint tenancy be severed by a sale of a joint owner's interest in land pursuant to the Execution Act.

This recommendation reflects a proposal that was set out in our working paper. The proposal has since been tentatively adopted by the Manitoba Law Reform Commission in their working paper¹⁷ on Exemptions under *The Judgments Act*.¹⁸

¹⁷ Law Reform Commission of Manitoba, Working Paper on The Enforcement of Judgments: Part II: Exemptions under "The Judgments Act" 19 (January 1978).

¹⁸ C.C.S.M. c. 510.

37H (1) The registration of a judgment against the interest in land of a judgment debtor who is a joint tenant

(a) does not sever the joint tenancy, and

(b) if the joint tenancy is subsisting at the date of the death of the judgment debtor, the lien and charge, unless expired or satisfied, continue against the title of the surviving joint tenant to the extent of the deceased joint tenant's former interest in the land.

(2) A joint tenancy is severed by an actual sale under this Act of the interest of a joint tenant in the land affected.

37I (1) In this section

"continuing charge" means a lien and charge which continues against an interest transmitted to a surviving joint tenant under section 37H

(1) (b), and

"unsecured creditor" includes

(a) a judgment creditor who has the benefit of a continuing charge, and

(b) a secured creditor to the extent that the obligation secured exceeds the value of his security.

(2) Where a judgment creditor has a continuing charge

(a) if the total value of

(i) the judgment debtor's estate which is available for distribution among his unsecured creditors, and

(ii) the interest subject to the continuing charge

is greater than the total value of the claims of all unsecured creditors, then

(iii) the judgment creditor should proceed first against the judgment debtor's estate for the satisfaction of his judgment but his claim therein is subordinate to the claims of unsecured creditors who do not have a continuing charge, and

(iv) if the judgment debtor's estate, after satisfying the claims of unsecured creditors who do not have a continuing charge, is insufficient to satisfy the claim of a judgment creditor who has a continuing charge that creditor may then proceed on the continuing charge.

(b) if the total value of

(i) the judgment debtor's estate which is available for distribution among his unsecured creditors, and

(ii) the interest subject to the continuing charge is less than the total value of the claims of all unsecured creditors, then

(iii) a judgment creditor who has a continuing charge may share rateably in the estate but his claim therein is reduced by the value of the interest subject to the continuing charge, and

(iv) the judgment creditor may proceed on his continuing charge to satisfy the deficiency.

(3) Notwithstanding subsection (2) if, at the time of the judgment debtor's death, the judgment creditor had commenced proceedings under section 38 to enforce the charge created by registration of his judgment, he may continue those proceedings.

373 (1) Where a judgment debtor has an interest in a special tenure the judgment creditor may apply to the Supreme Court for an order appointing a receiver of the judgment debtor's interest in, and rights relating to, the special tenure.

(2) A receiver appointed under subsection (1) has the same powers and is subject to the same duties as a receiver appointed by the court in the exercise of its jurisdiction relating to equitable execution.

4. Section 38 is amended by adding the following after subsection (3):

(4) Where the judgment debtor's interest in land is an undivided interest as a joint tenant or tenant in common, the judgment creditor may maintain a proceeding for partition to which the Partition Act applies and a motion under subsection (1) may include a claim for relief under that Act.



DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS
630 Sansome Street, Room 1216
San Francisco, California 94111

October 24, 1979

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

Dear John:

Thank you for your prompt reply. True enough, I forgot in my second letter that the draft statute referred only to real property.

Essentially, the choice involved is political in the best sense. The present law favors the widow and oldest child who is almost always the tenant who holds jointly with spouse or parent. The proposed statute would eliminate the automatic bankruptcy aspects of probate, as to the creditor's lien on real property. My populist views lead me to say to hell with the creditor in this context. I suspect that this is the view of the old common law judges as well, and hence the present state of the law.

Enough for that. I will expect to be at the commission meeting on Friday prepared to answer any questions and with a fifteen or twenty minute summary of the study, as suggested by Nat.

Best wishes,

A handwritten signature in dark ink, appearing to read "Blawie", is written over the typed name.

James L. Blawie

Asst. Division Counsel, Acting

HOME OFFICE

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P.O. BOX 2233
LOS ANGELES, CALIFORNIA 90051

November 6, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305Attention: John H. DeMouly
Executive Secretary

Gentlemen:

On October 4 you addressed a draft relating to enforcement of obligations after death to Sean McCarthy of the California Land Title Association. A copy has filtered down through various higher levels to my attention as a Vice Chairman of the Legislative Committee. I feel the impulse to respond, but please note that the response is strictly personal.

A fantasy reoccurs in which I am handed for review a complete revision of the ten commandments. In this fantasy two notable incidents identify the work as that of the Law Revision Commission. The first is that the draft is expertly done, and the second that the delivery is made on my judgment day. Neither the time nor the occasion permits an objective review.

Nevertheless, two shallowly considered thoughts do occur. At the moment I would be inclined to resist the effort to have the voluntary and involuntary liens upon the interest of a joint tenant survive his death. I have no quarrel with the sociological benefits asserted for this proposal although I suspect that attributing "windfall" profits to the surviving joint tenant under present law to overstate the case.

My objection is the intrusion of uncertainty. One may denigrate the rule of conveyances that traces the property of the surviving joint tenant from the original conveyance, but that is dependably and predictably the present law. Consequently, the proposed "survival" of liens is in actuality a legislated encumbrance of an existing interest of the other joint tenant as security for the obligations of the debtor joint tenant.



California Law Revision Committee
Attention: John H. DeMouilly

November 6, 1979
Page -2-

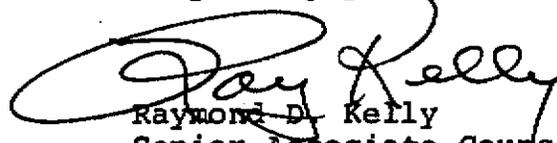
I'm not at all convinced that that can be done even as to property acquired in joint tenancy after the act, let alone existing property owned in joint tenancy. I do believe however that every effort will be made to sustain the proposed legislation if enacted. I would expect that four to five years would result of very agonized decisions, but eventually a determination would be made that the legislature had changed the nature of joint tenancy. Joint tenancy would be determined to be a rule of succession and the interest of the deceased joint tenant determined to "pass to" the survivor. This in turn will raise the question of the availability of that interest to other obligations of the deceased joint tenant and the need for administration.

In short, your proposal is not compatible with the nature of joint tenancy. Whenever such incompatibility is enacted it is ordained that down the line a revolutionary change must occur in one or the other of the warring principals. The period of time until that battle is fought is called uncertainty.

I also have some concern about the survival of attachment upon the death of the attachment debtor or at least the survival in the form of a lien upon the attached property. I would have no such concern if a special priority of payment was legislated. However to accomplish this mechanically by the perpetuation of this inchoate lien securing an undetermined obligation that cannot be made choate by the judicial process through which the lien was secured must confound the administration of estates.

These are my immediate thoughts and again they are strictly personal. They will be circulated back through the chairs of the Legislative Committee and perhaps a more considered response can be made to your inquiry. In the meantime, please allow me to take this opportunity to personally extend appreciation for the very valued studies and work product that we have always identified with the Law Revision Committee.

Very truly yours,


Raymond D. Kelly
Senior Associate Counsel

RDK/mp
cc: Sean McCarthy
Floyd Cerini
Steve Walker

EXHIBIT 10

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
198 McALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102

November 7, 1979

Mr. JOHN H. DeMOULLY
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

This letter is in reply to your Staff Draft of October 2, relating to Enforcement of Obligations after Death of a decedent. In general I very much approve of the objective of your proposal and have only a very few comments to make with respect to your draft:

1. Effect on Attachment of Death of Defendant. Your objective and proposal seem to be desirable and clear in detail.

2. Effect on Judgment Lien of Death of Judgment Debtor. The objective and proposal here also are desirable and clear.

3. Effect on Lien on Joint Tenancy Real Property When Joint Tenant Dies. This is a very difficult area of law to keep straight in order to resolve competing claims of a surviving joint tenant and creditors, particularly under existing California decisions. As you know, California has gone too far in protecting a surviving joint tenant at the expense of creditors and the like. It has placed the right of survivorship above the rights of creditors, lessees and mortgagees; and all too often without good reason.

The solution of these problems in the past has been to decide whether there has been a severance in the case of a mortgage, lease, judgment, etc. and then to resolve the rights of the parties on that basis. It seems absurd to decide that a severance has occurred when a \$10 judgment has been rendered against a joint tenant; and at the same time it seems wrong to favor a surviving joint tenant at the complete expense of the creditor.

-2-

Mr. JOHN H. DeMOULLY

The fair solution would be to recognize the rights of the creditor, lessee, or mortgagee in one-half of the property (corresponding to the interest of the deceased joint tenant), but otherwise to preserve the right of survivorship in the surviving joint tenant as to the remainder of interests in the property. This is essentially your proposal, as I understand it.

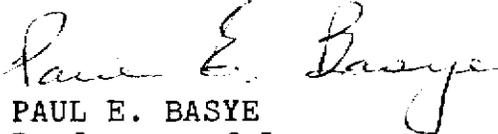
There are limited discussions of this problem in

Swenson and Degnan, Severance of Joint Tenancies,
38 Minn. L. Rev. 466 (1954); Comment, 66 Cal. L.
Rev. 69 (1978).

On your page 17, Probate Code §732 as proposed seems to envisage that a judgment shall become a lien on real property upon the entry of such judgment. Of course, the attachment itself has created a tentative lien which becomes crystallized in the judgment. However, Cal. Code Civ. Proc. §674 presently provides that a judgment shall become a lien upon real property only upon being recorded in the office of the recorder of deeds. Should this not be made plain by being incorporated into your proposed Section 732 of the Probate Code?

Certainly your objectives in clarifying and giving proper significance to the various subjects included in your study are to be commended. If I can be of any further help, please let me know.

Sincerely yours,



PAUL E. BASYE
Professor of Law

PEB:HK

EXHIBIT 11
Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

November 6, 1979

POSTAL CODE 27706

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

Dear John:

Communication with my usual place of business is somewhat blunted by my East Coast visit this year. Thus, I was late in getting the draft of the Commission's proposal on enforcement of obligations after death. I have not made a detailed analysis of the statutory language to determine whether it carries out the policies you have proposed. I have, however, reviewed the proposed policies and find no fault there.

The law as you have proposed it seems more in accord with the usual expectations of intelligent human beings whose interests are at stake than the present state of things. Results contrary to such expectations are interesting subjects for law classes but rarely in the best interests of the public or the profession in the long run.

It was a pleasure to hear from you and I hope that some fair wind brings you to UCLA after I return.

Sincerely yours,



Richard C. Maxwell

RCM/r
enclosure

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November 7, 1979

Mrs. Coleen M. Claire
Gibson, Dunn & Crutcher
Attorneys-at-Law
Post Office Box 2490
Newport Beach, California 92660

Re: California Law Revision Commission
Proposed Legislation Relating to
Enforcement of Obligations After Death

Dear Coleen:

I have reviewed the Staff Draft relating to the above-mentioned subject, Neal Wells' letter of October 29, 1979 and have done limited research.

The statements in the document about existing California law appear to be correct and, to the limited extent of my review, I believe the proposed legislation accomplishes the stated purposes.

The real question is, as discussed in Neal's letter, whether the legislation is a good idea. The proposed legislation basically accomplishes three purposes:

1. Allowing an attachment lien to survive the death of an attachment debtor so that such lien can be perfected by judgment after death.
2. Clarifies that a judgment lien does not terminate on the death of a judgment debtor.

Mrs. Coleen M. Claire
November 7, 1979
Page 2

3. Allowing a mortgage or other lien on the interest of a joint tenant to survive the death of the joint tenant so that the surviving joint tenant takes the decedent's interest subject to the lien.

I have not experienced in my practice any of the problems dealt with in the proposed legislation. Therefore, at least from my standpoint, I must assume that the problems are so insignificant in scope that the legislation does not have high priority. I would be interested in hearing from persons who have had problems in this area.

As noted in Neal's letter the underlying question as to the attachment creditor is whether his lien should have priority over the family allowance and unsecured creditors. I don't have great conviction that the proposed change is correct.

With reference to the lien against a joint tenants' interest, again I have a difficult time believing that this is a significant problem with reference to voluntary liens such as a deed of trust. No thoughtful lender will loan money secured by the interest of only one joint tenant. In the case of involuntary liens, such as judgment liens, again, I have no conviction that the problem is significant or that the law, which is clearly established, should be changed.

In summary, I would really like to talk with persons who have been experiencing problems in this area. If there are significant problems, then perhaps the legislation should be considered further. At this point, based on my experience, I would see no particular reason to support the legislation.

Cordially,



Edmond R. Davis

ERD/gg

cc: Mr. William E. Ferguson
Mr. Fred L. Leydorf
Mr. H. Neal Wells, III

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October 29, 1979

WRITER'S DIRECT DIAL NO.
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Re: California Law Revision Commission's Proposed
Legislation Relating to Enforcement of
Obligations After Death

Dear Ed, Bill and Fred:

In accordance with Colleen Claire's assignment of October 10, 1979, I have reviewed the California Law Revision Commission Staff Draft Relating to Enforcement of Obligations After Death. Set forth below are my preliminary comments concerning the same.

The initial premise of the staff is that an attachment lien creditor of an insolvent deceased debtor should have priority in the attached property over i) a subsequent lien creditor; ii) the family of the decedent entitled to

Mr. Edmond R. Davis
Mr. William E. Ferguson
Mr. Frederick L. Leydorf
October 29, 1979
Page Two

a family allowance; and iii) the general unsecured creditors of the insolvent deceased. The secondary premise of the staff is that the attachment creditor should have priority in the attached property over a surviving joint tenant even in the absence of fraud.

Both premises are contrary to the existing policies of the state and of the United States. Such policies have not been adequately reviewed by the staff and no substantial reasons have been given for change.

A change in policy is not in order.

An attachment lien creditor should not be favored over the general unsecured creditors of the insolvent deceased person. Had the decedent filed bankruptcy before death, the attachment lien would be void as against the trustee in bankruptcy and the general unsecured creditors. There is no reason for an attachment creditor to be treated better in the disposition of assets upon death than in a bankruptcy.

An attachment lien creditor should not be favored over the family of the insolvent decedent. The property subject to the attachment should be used for the family allowance of a surviving spouse and minor children rather than relinquished to the attaching creditor.

An attachment lien creditor should not be favored over a surviving joint tenant. The attachment lien

Mr. Edmond R. Davis
Mr. William E. Ferguson
Mr. Frederick L. Leydorf
October 29, 1979
Page Three

creditor should have no greater rights in joint tenancy property than the debtor whose interest is attached and should take the same gamble as the debtor. Thus, if the debtor dies first, in the absence of fraud, the property belongs to the surviving joint tenant. If the other joint tenant dies first, the attaching creditor has the entire joint tenancy parcel available to satisfy the surviving joint tenant's debt.

In the absence of fraud, there is no reason to give a creditor of one joint tenant the right to sever the joint tenancy prior to judgment. To the contrary, it would appear to be a denial of due process to permit the severance of joint tenancy before a final judgment is obtained. Also, the surviving joint tenant who risked survival should be favored over a creditor who extended credit without sufficient collateral. This is particularly true in situations where the surviving joint tenant may have provided all the consideration for the acquisition of the joint tenancy property.

Accordingly, I do not favor any code changes permitting an attachment lien creditor to perfect the lien after death.

The foregoing comments are for purposes of

Mr. Edmond R. Davis
Mr. William E. Ferguson
Mr. Frederick L. Leydorf
October 29, 1979
Page Four

discussion. I look forward to consulting with you in the
premises.

Best regards.

Sincerely,

H. NEAL WELLS, III

cc: Mrs. Colleen M. Claire



EXHIBIT 14
UNITED CALIFORNIA BANK

TRUST DIVISION • 405 MONTGOMERY STREET • SAN FRANCISCO, CALIFORNIA

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November 15, 1979

Mr. John DeMouly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

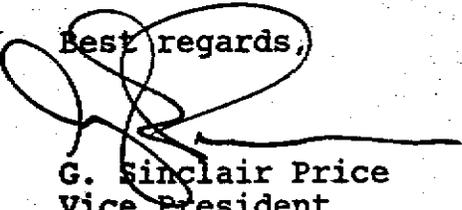
Dear John:

At a recent meeting of the Trust State Governmental Affairs Committee of the California Bankers Association, discussion was had concerning the tentative recommendation relating to the Probate Homestead and the Staff Draft relating to Enforcement of Obligations After Death.

Several comments were made by members of the committee concerning the Probate Homestead recommendation which I am relaying to you by way of the attached sheets. The committee expressed general approval of the Staff Draft on Enforcement of Obligations, but had no specific comments regarding same.

Again, we very much appreciate the opportunity to present our input for consideration.

Best regards,



G. Sinclair Price
Vice President
Regional Trust Counsel
(415) 544-5641

GSP:fay4/1

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

STAFF DRAFT

relating to

ENFORCEMENT OF OBLIGATIONS AFTER DEATH

October 2, 1979

Important Note. The Law Revision Commission has directed that this staff draft be distributed to interested persons and organizations for review and comment. The Commission has not determined whether it will submit a recommendation on this subject to the 1980 session of the Legislature. The Commission will make that determination after reviewing the comments received on this staff draft.

Enactment of the legislation proposed in the staff draft would make significant changes in existing law, and the Commission will be greatly influenced by your comments when it determines what action to take on this matter. Accordingly, if you approve the staff draft as proposed or with revisions, it is important that you communicate that fact to the Commission. If you do not approve the changes in existing law proposed by the staff draft, it is equally important that you so advise the Commission.

The Commission needs to receive your comments not later than November 10, 1979, so that your comments can be reviewed when the Commission determines later in November whether it will submit this recommendation or a revised recommendation to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94350

STAFF DRAFT

relating to

ENFORCEMENT OF OBLIGATIONS AFTER DEATH

Introduction

As a part of its overall review of the law relating to creditors' remedies,¹ the Commission has reviewed the existing statutory and decisional law that governs the enforcement of obligations after death. This recommendation is the result. It deals with the following matters: (1) the effect on an attachment when the defendant in the action in which the attachment was obtained dies, (2) the effect on a judgment lien when the judgment debtor dies, and (3) the effect on a lien on joint tenancy property when a joint tenant dies.

Effect on Attachment of Death of Defendant

The death of the defendant destroys an attachment lien on the defendant's property. A divided California Supreme Court reached this decision in 1866 based on a construction of the statutes in effect at that time.² Since then, the cases have merely followed the Supreme Court decision.³

The existing rule operates to change the priorities given to creditors upon the death of the defendant. Compare the following examples.

Example 1. Attachment creditor has priority. Plaintiff A attaches real property in an action against D. Plaintiff B then secures a judgment against D, records an abstract of judgment, and obtains a judgment lien on the attached real property. Plaintiff A then obtains judgment

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1. The Commission is preparing a comprehensive statute relating to the enforcement of judgments. The comprehensive statute will be recommended for enactment at the 1981 legislative session. However, recommendations dealing with some aspects of this topic will be submitted to the 1980 Legislature. For further discussion, see 15 Cal. L. Revision Comm'n Reports ____ (1980).
 2. Myers v. Mott, 29 Cal. 359, 367-70 (1866).
 3. E.g., Clary v. Rupert, 93 Cal. App.2d 844, 210 P.2d 44 (1949). See also Everett v. Hayes, 94 Cal. App. 31, 270 P. 458 (1928) (when property does not fall into probate estate because it has been conveyed before death of defendant, the attachment lien continues and can be enforced after judgment by a suit in equity).

in the action against D. Plaintiff A (the attachment creditor) has priority over Plaintiff B when levy of execution is made on the attached property.

Example 2. Judgment lien creditor has priority. Assume the same facts as in Example 1 except that D dies before Plaintiff A (the attachment creditor) obtains judgment against D. After death of D, Plaintiff A obtains judgment against D. Both creditors present their claims against D's estate. Plaintiff B (the judgment lien creditor) is a priority creditor with respect to the real property covered by the judgment lien. Plaintiff A (the attachment creditor) is treated as a general creditor; the attachment terminated when D died.

No policy reasons have been advanced why the death of the defendant should result in a change in the priorities afforded the two judgment creditors against the estate. The only justification given is that there is no provision in the existing statutes that makes clear that the attachment continues after the death of the defendant.

The Commission recommends that the existing rule be changed to provide that the death of the defendant whose property is attached does not terminate the attachment.⁴

Effect on Judgment Lien of Death of Judgment Debtor

The death of the judgment debtor does not terminate a judgment lien on the real property of the decedent.⁵ However, a claim must be presented in the estate proceedings and the judgment is entitled to a

4. There is a technical problem to be dealt with if an attachment lien is to continue after the death of the defendant or judgment debtor. The ordinary way that a judgment creditor preserves the priority of an attachment lien is to levy execution on the attached property. See Code Civ. Proc. § 684.2. The levy of execution creates an execution lien on the attached property which has the same priority as the attachment lien. See *Bank of South San Francisco v. Pike*, 53 Cal. App. 524, 200 P. 752 (1921). However, when the judgment debtor dies, levy of execution on property of the estate is generally prohibited; instead, claims must be presented in the estate proceedings. See Code Civ. Proc. § 686; Prob. Code §§ 732, 950. To provide a method of preserving the effect of the attachment lien after the death of the defendant, the recommended legislation provides that the judgment shall be a lien on the attached property and have the same priority as the attachment lien if (1) the defendant dies after judgment is entered but while the attachment lien is still in effect or (2) the defendant dies before judgment is entered but the attachment lien is still in effect at the time of entry of the judgment.

5. *Corporation of America v. Marks*, 10 Cal.2d 218, 73 P.2d 1215 (1937).

priority to the extent it can be satisfied by the property subject to the judgment lien and, to the extent not so satisfied, the judgment is treated as other claims of general creditors against the estate.⁶ In addition, the judgment creditor can foreclose the judgment lien without presenting a claim against the estate if the judgment creditor waives in the complaint all right to payment from any other property of the estate.⁷ The Commission recommends that these rules be continued and be codified in the Probate Code.

Effect on Lien on Joint Tenancy Real Property When Joint Tenant Dies

Mortgage or deed of trust by one joint tenant. A joint tenant has the right to execute a mortgage or deed of trust on his interest.⁸ The lien created by the mortgage or deed of trust does not effect a severance of the joint tenancy.⁹ If the mortgage lien is foreclosed during the life of the joint tenant, the transfer by the foreclosure sale results in severance of the joint tenancy and the purchaser and the other joint tenant hold the property as tenants in common.¹⁰ However, if one joint tenant executes a mortgage of his interest and dies before the mortgage is paid or is foreclosed, the surviving joint tenant takes the interest of the deceased joint tenant free of the lien created by the mortgage.¹¹ The same is true where a deed of trust is executed by one joint tenant and that joint tenant dies.¹²

6. Prob. Code § 950.

7. Prob. Code § 716; *Corporation of America v. Marks*, 10 Cal.2d 218, 73 P.2d 1215 (1937).

8. 1 A. Bowman, *Ogden's Revised California Real Property Law* § 7.22, at 286 (Cal. Cont. Ed. Bar 1974).

9. Id.

10. Id.

11. *People ex rel. Dep't of Pub. Works v. Nogarr*, 164 Cal. App.2d 591, 330 P.2d 858 (1958), cited with approval in *Tenhet v. Boswell*, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976).

12. *Hamel v. Gootkin*, 202 Cal. App.2d 27, 20 Cal. Rptr. 372 (1962), cited with approval in *Tenhet v. Boswell*, 18 Cal.2d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976).

The existing California rule operates to the detriment of joint tenants. No knowledgeable lender will lend money upon the security of the interest of one joint tenant alone. The joint tenant who needs funds is forced to sell his interest to raise needed funds.¹³ This defeats the purpose of the joint tenancy and may have adverse tax consequences for the selling joint tenant.

The existing rule also operates unfairly where an uninformed lender loans money in reliance upon the security of the interest of one joint tenant. Upon the death of that joint tenant, the lender loses his security and the surviving joint tenant (who takes the deceased joint tenant's interest free from the lien) receives a windfall.¹⁴

Mechanics' liens and tax liens. The reasoning in the cases involving trust deeds and mortgages would appear to apply in the case of a nonconsensual lien, such as a mechanics' lien or a tax lien.¹⁵ Accordingly, the surviving joint tenant would take free from the lien on the deceased joint tenant's interest, thereby receiving a windfall at the expense of the lienholder.

Judgment lien on interest of one joint tenant. An execution sale during the judgment debtor's lifetime severs the joint tenancy, leaving title in the execution purchaser and the other joint tenant as tenants

13. A joint tenant may, with or without the knowledge or consent of the other joint tenant or tenants, convey his interest to a stranger. Such a conveyance terminates the joint tenancy as to the interest conveyed. If there were two joint tenants, the stranger and the other joint tenant hold as tenants in common. See 1 A. Bowman, Ogden's Revised California Real Property Law § 7.19, at 283-85 (Cal. Cont. Ed. Bar 1974).

14. See notes 11 and 12 supra.

15. No California cases have been found involving mechanics' or tax liens.

in common.¹⁶ However, a judgment lien upon the interest of only one joint tenant terminates upon the death of the joint tenant.¹⁷ The result is that the surviving joint tenant receives a windfall at the expense of the judgment creditor.

In Zeigler v. Bonnell,¹⁸ the court gave the following justification for the existing rule:

This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien.

This reasoning would not apply to a lien created by a mortgage or deed of trust because the lender cannot resort to the security during the joint tenant's lifetime unless there is a default. Even in the case of a judgment lien, the judgment creditor may be unaware of the ownership of the property by the judgment debtor (as where the conveyance to the judgment debtor in joint tenancy is unrecorded) during the lifetime of the judgment debtor and may fail to levy execution on the property

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16. Pepin v. Stricklin, 114 Cal. App. 32, 299 P. 557 (1931); Hilborn v. Soale, 44 Cal. App. 115, 185 P. 982 (1919). It is uncertain under existing law whether the joint tenancy is revived if the judgment debtor redeems from the execution sale. No California decision has been found on the effect of a levy of execution on jointly-held property where no sale occurs before the judgment debtor's death, and the decisions in other states are divided. See I A. Bowman, Ogden's Revised California Real Property Law § 7.23, at 287 (Cal. Cont. Ed. Bar 1974).
 17. Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942), cited with approval in Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976).
 18. Zeigler v. Bonnell, 52 Cal. App.2d 217, 221-22, 126 P.2d 118, ____ (1942).

during the judgment debtor's lifetime for this reason. Also, the judgment creditor may be unable to levy on the interest of the judgment debtor during the judgment debtor's lifetime because the property held in joint tenancy is exempt from execution under the homestead exemption. As for the possibility of the judgment creditor being able to levy execution on the entire property if the judgment debtor survives the other joint tenant, this situation is no different than one where a judgment creditor waits for the debtor to receive an inheritance or otherwise to increase his assets.

Recommendation. The existing rule that the creation of a lien, whether voluntary or by operation of law, on the interest of one joint tenant in real property does not survive the death of the joint tenant is based on a technical application of real property law concepts.¹⁹

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19. In *Zeigler v. Bonnell*, 52 Cal. App.2d 217, 126 P.2d 118 (1942), the court held that a judgment lien upon the interest of one joint tenant terminates on the death of that joint tenant. In so holding, the court stated:

The right of survivorship is the chief characteristic that distinguishes a joint tenant from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. [Citation omitted.] While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the interest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon. Although the title of the execution purchaser dates back to the date of his lien, that doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights. [52 Cal. App.2d at 219-20, 126 P.2d at ____.]

The rule has been criticized²⁰ and should be changed. Legislation, based on a recently enacted Wisconsin statute,²¹ should be enacted in California to provide that a mortgage or deed of trust lien, a mechanics' lien, or a tax or other lien on real property does not defeat the right of survivorship on the death of the joint tenant but that the surviving joint tenant takes the interest of the joint tenant subject to

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20. In Kahn & Frimmer, Management, Probate and Estate Planning Under California's New Community Property Laws, 49 Cal. St. B.J. 516, 570 (1974), it was said:

Although the general rule is that one takes property from a decedent subject to the claims against the property, this rule does not apply in the joint tenancy context, and the surviving joint tenant apparently takes the property free from the rights of the decedent's creditors. In the authors' opinion, there is no sound policy reason for treating community property differently from joint tenancy property vis a vis the rights of creditors, and legislation in this area is needed to equate the rights of creditors in both types of property.

In Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509, 545 (1970), it was said:

[I]t is difficult to perceive the social policy underlying a rule that denies the enforcement of a lien simply because the decedent to whose property the lien attached happened to be a joint tenant.

21. Wis. Stat. Ann. § 700.24 (West 1979) provides that a mortgage, contractor's lien, or a lien on the interest of a joint tenant resulting from acceptance of old age benefits, assistance to war veterans, and unpaid income, franchise, or gift taxes, does not defeat the right of survivorship on the death of the joint tenant, and that the surviving joint tenant takes the interest of the deceased joint tenant subject to the lien or mortgage.

the lien on the interest taken. This rule is a practical compromise which generally preserves the right of survivorship but does not defeat the legitimate rights of the lienholder.²²

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22. Some states have preserved the lien upon the death of the joint tenant by holding that the creation of a voluntary or involuntary lien or encumbrance on the interest of one joint tenant operates to sever the joint tenancy. See 20 Am. Jur.2d Cotenancy and Joint Ownership §§ 17-18, 21 (1965). In these jurisdictions, the death of the joint tenant whose interest is encumbered does not impair the lien or encumbrance, and it remains enforceable against the deceased joint tenant's interest. The Commission does not recommend this approach to the solution of the problem, since it defeats the right of survivorship which is usually the primary purpose of a joint tenancy. At least one jurisdiction has adopted the rule that a mortgage will destroy the right of survivorship only to the extent of the mortgage lien. See *Wilkins v. Young*, 144 Ind. 1, 41 N.E. 68, 590 (1895); Annot., 129 A.L.R. 813, 817 (1940). The result is that on the death of the joint tenant whose interest is subject to a mortgage, the surviving joint tenant takes the unencumbered portion of the interest of the deceased joint tenant and the equity of redemption with respect to the encumbered portion. Id. The Commission does not recommend this approach because it is not clear that the encumbered interest remains in joint tenancy to the extent that the encumbrance was paid off during the lifetime of the deceased joint tenant.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 2893 to the Civil Code, to amend Sections 488.510 and 669 of, to add Sections 686.010 and 686.020 to, and to repeal Section 686 of, the Code of Civil Procedure, and to amend Section 716 of, and to repeal and add Sections 730, 731, and 732 of, and to add Section 732.5 to, the Probate Code, relating to enforcement of obligations after death.

The people of the State of California do enact as follows:

969/007

Civil Code § 2893 (added). Death of joint tenant; effect of liens

SECTION 1. Section 2893 is added to the Civil Code, to read:

2893. (a) As used in this section, "lien" includes but is not limited to an execution lien, a lien resulting from the recording of an abstract or certified copy of a judgment, a mortgage, a deed of trust, a mechanics' lien, and a tax lien.

(b) A lien on or against the interest of a joint tenant in real property does not defeat the right of survivorship in the event of the death of the joint tenant, but the surviving joint tenant or tenants take the interest the deceased joint tenant could have transferred prior to death subject to the lien.

Comment. Section 2893 is new and is drawn from Section 700.24 of the Wisconsin statutes. Unlike the Wisconsin statute, Section 2893 is limited to liens on real property and does not extend to liens on personal property. Section 2893 changes the former rule in California that a lien on the interest of a joint tenant in real property was extinguished on the death of that joint tenant. See *Zeigler v. Bonnell*, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (judgment lien); *People ex rel. Dep't of Pub. Works v. Nogarr*, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (mortgage); *Hamel v. Gootkin*, 202 Cal. App.2d 27, 20 Cal. Rptr. 372 (1962) (trust deed). Section 2893 does not change the rule of *Tenhet v. Boswell*, 18 Cal.3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976) (lease of interest of one joint tenant terminated by death of lessor).

A judgment lien on the interest of a joint tenant who dies extends only to the interest of the decedent which is taken by the surviving joint tenant. However, a judgment lien on the interest of the a joint tenant who survives extends not only to the surviving joint tenant's original interest in the property but also to the interest in the property acquired by survivorship. *Zeigler v. Bonnell*, supra. In such a

case, the effective date of the lien on the surviving joint tenant's original interest in the property differs from the effective date of the lien on the interest the surviving joint tenant receives on the death of the deceased joint tenant. With respect to the surviving joint tenant's original interest, the lien dates from the time the judgment lien was created on that interest and relates back to the date of any prior attachment lien on that interest. With respect to the interest the surviving joint tenant receives upon the death of the deceased joint tenant, the lien dates from the time of the death. See *Hertweck v. Fearon*, 180 Cal. 71, 179 P. 190 (1919).

969/008

Code of Civil Procedure § 488.510 (amended). Lien of attachment

SEC. 2. Section 488.510 of the Code of Civil Procedure is amended to read:

488.510. (a) Unless sooner released or discharged, any attachment shall cease to be of any force or effect, and the property levied upon shall be released from the operation of such attachment at the expiration of three years from the date of issuance of the writ of attachment under which such levy was made.

(b) Notwithstanding subdivision (a), upon motion of the plaintiff, made not less than 10 or more than 60 days before the expiration of the three-year period and upon notice of not less than five days to the defendant who property is attached, the court in which the action is pending may, by order filed prior to the expiration of the period and for good cause, extend the time of such attachment for a period not exceeding one year from the date on which the attachment would otherwise expire.

(c) The levying officer shall serve notice of such order upon any person holding property pursuant to an attachment and shall record or file such notice in any office where the writ and notice of attachment are recorded or filed prior to the expiration of the period described in subdivision (a) or any extension thereof. Where the attached property is real property, the plaintiff or ~~his~~ the plaintiff's attorney, instead of the levying officer, may record the required notice.

(d) Any attachment may be extended from time to time in the manner herein prescribed, but the ~~aggregate~~ maximum period of the attachment, including such extensions , shall not exceed ~~five~~ eight years from the

date of issuance of the writ of attachment under which the levy of attachment was made .

(e) The death of the defendant whose property is attached does not terminate the attachment.

Comment. The amendment of subdivision (d) of Section 488.510 makes no substantive change. See subdivision (a) (three-year duration) and (b)-(d) (one-year extension up to five years). Under subdivision (d), as revised, the total period for existence of an attachment may never exceed eight years. Subject to this limitation, during the period the attachment lien continues, the plaintiff may preserve the effect of the attachment by levy of execution (after entry of judgment) on the attached property and thereby obtain an execution lien which has the same priority as the attachment lien. If the attached property is real property, the plaintiff may preserve the effect of the attachment by recording (after entry of judgment) an abstract of judgment to obtain a judgment lien which also has the same priority as the attachment lien. Subject to the maximum eight-year limitation, where good cause exists, the court has authority under Section 488.510 to extend the period of the attachment lien, before or after entry of judgment, in order to allow the plaintiff time to levy on the attached property or to record an abstract of judgment.

Subdivision (e) is added to reverse the former case law rule that the death of the defendant destroyed the lien of an attachment on the defendant's property. *Myers v. Mott*, 29 Cal. 359, 367-70 (1866); *Clary v. Rupert*, 93 Cal. App.2d 844, 210 P.2d 44 (1949). See also *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928) (when property does not fall into probate estate because it has been conveyed before death, the attachment lien continues and can be enforced after judgment by a suit in equity). Under Probate Code Section 732, if the defendant dies after judgment is entered but while the attachment lien is still in effect, or if the defendant dies before the judgment is entered but the attachment lien is still in effect at the time of entry of the judgment, the judgment becomes a lien on the property for the purposes of Probate Code Sections 716 (action to enforce judgment lien) and 950 (payment of claims against probate estate) and has the same priority as the attachment lien.

969/010

Code of Civil Procedure § 669 (amended). Death of party after submission of case or after verdict but before judgment

SEC. 3. Section 669 of the Code of Civil Procedure is amended to read:

669. If a party dies after trial and submission of ~~his~~ the case to a judge sitting without a jury for decision or after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. ~~Such judgment is not a lien on the real~~

~~property of the deceased party, but is payable in the course of administration on his estate.~~

Comment. Section 669 is amended to delete the second sentence. Enforcement of a judgment against a deceased party is governed by the Probate Code. See Section 686.020. See also Prob. Code §§ 730, 732 (enforcement of judgments after death).

969/014 N/Z

Code of Civil Procedure § 686 (repealed). Execution on judgment after death of judgment creditor or judgment debtor

SEC. 4. Section 686 of the Code of Civil Procedure is repealed.

~~686. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:~~

~~1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest;~~

~~2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.~~

Comment. Former Section 686 is superseded by Sections 686.010 and 686.020.

969/025

Code of Civil Procedure § 686.010 (added). Enforcement after death of judgment creditor

SEC. 5. Section 686.010 is added to the Code of Civil Procedure, to read:

686.010. After the death of the judgment creditor, the judgment may be enforced as provided in this title by the judgment creditor's executor or administrator or successor in interest.

Comment. Section 686.010 continues the substance of subdivision 1 of former Section 686. The judgment is enforceable by the executor or administrator or successor in interest in the same manner as by a judgment creditor.

969/016

Code of Civil Procedure § 686.020 (added). Enforcement after death of judgment debtor

SEC. 6. Section 686.020 is added to the Code of Civil Procedure, to read:

686.020. After the death of the judgment debtor, enforcement of a judgment against the judgment debtor is governed by the provisions of the Probate Code.

Comment. Section 686.020 makes clear that, although various provisions of the Probate Code permit use of enforcement procedures provided in this title, the enforcement of a judgment against the judgment debtor after the death of the judgment debtor is governed by the Probate Code. See, e.g., Prob. Code §§ 716, 730, 732, 950.

969/017

Probate Code § 716 (amended). Action against estate; action to enforce lien

SEC. 7. Section 716 of the Probate Code is amended to read:

716. ~~No~~ (a) Except as provided in subdivision (b), no holder of a claim against an estate shall maintain an action thereon ~~;~~ unless the claim is first filed with the clerk or presented to the executor or administrator ~~;~~ except in the following cases:

(b) An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. The action may be brought whether or not the claim was filed or presented as provided in subdivision (a); but no counsel fees shall be recovered in such the action unless the claim was filed or presented as aforesaid provided in subdivision (a).

(c) As used in this section, "lien" includes but is not limited to a judgment that is a lien.

Comment. Section 716 is amended to make nonsubstantive, technical changes and to add subdivision (c). Subdivision (c) codifies prior case law with respect to a judgment lien created by the recording of an abstract or certified copy of the judgment (Code Civ. Proc. §§ 674, 674.5, 674.7). *Corporation of America v. Marks*, 10 Cal.2d 218, 73 P.2d 1215 (1937). If a judgment debtor dies after the abstract of judgment is recorded, the judgment lien is not terminated. Execution cannot issue on the judgment after death (see Section 730), but the judgment creditor can present a claim against the estate and is entitled to priority to the extent of the judgment lien and to payment of any amount not thereby satisfied as a general creditor of the estate (Section 950). Or the judgment creditor may waive the claim against any other estate property and enforce the judgment lien under subdivision (b) of Section 716 through an equitable action to foreclose the lien. *Corporation of America v. Marks*, supra. As to a judgment which is made a lien by Section 732 (judgment becomes a lien on attached property), see the Comment to that section.

Probate Code § 730 (repealed)

SEC. 8. Section 730 of the Probate Code is repealed.

~~730. A judgment rendered against an executor or administrator, upon any claim for money, against the estate of his testator or intestate, when it comes final, conclusively establishes the validity of the claim for the amount of the judgment, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment, if there is one, otherwise an abstract of the judgment must be filed in the administration proceedings. No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment.~~

Comment. The first sentence of former Section 730 is continued in Section 731. The substance of the second sentence is continued in Section 731, but the reference to the "certified transcript of the original docket of the judgment" has been omitted to conform to the 1927 amendment to Code of Civil Procedure Section 674 which substituted the filing of an abstract of judgment for the filing of a certified transcript of the docket of a judgment as a means of creating a judgment lien. The last sentence is superseded by Section 730 which provides that, after the death of the decedent, the judgment is generally not enforceable under the Code of Civil Procedure. The provision that the judgment does not create a lien or give the judgment creditor any priority of payment is not continued; this provision is unnecessary since the judgment does not become a lien upon property of the estate and hence has no priority except as provided in Section 732 (judgment becomes lien on property attached prior to decedent's death in action originally brought against decedent). See Section 950.

Probate Code § 730 (added). Enforcement of judgments after death of decedent

SEC. 9. Section 730 is added to the Probate Code, to read:

730. (a) Except as provided in subdivision (c), after the death of the decedent, the following judgments are not enforceable under the Code of Civil Procedure but are payable in the due course of administration:

(1) A judgment upon a claim for money rendered against the decedent during the decedent's lifetime.

(2) A judgment upon a claim for money rendered against a decedent who died after trial and submission of the case to a judge sitting without a jury for decision or after a verdict.

(3) A judgment rendered against the executor or administrator, upon a claim for money, against the estate of the decedent.

(b) Except as provided in Section 731, a judgment referred to in subdivision (a) shall be filed or presented in the same manner as other claims.

(c) If execution is actually levied upon any property of the decedent before the decedent dies, the property levied upon may be sold to satisfy the judgment. The officer making the sale shall account to the executor or administrator for any surplus. To the extent the judgment is not so satisfied, the balance of the judgment remaining unsatisfied is payable in the due course of administration.

(d) Notwithstanding the death of the decedent, a judgment for the possession of property or a judgment that requires a sale of property may be enforced under the Code of Civil Procedure. Nothing in this subdivision authorizes enforcement under the Code of Civil Procedure against any property of the decedent other than the property described in the judgment for possession or sale. After the death of the decedent, any demand for money against the estate that is not satisfied from the property described in the judgment for possession or sale shall be filed or presented in the same manner as other claims and is payable in the due course of administration.

Comment. Section 730 collects in one section various provisions of former law relating to enforcement of judgments after the death of the decedent.

The provision of subdivision (a) that the judgment is payable in the due course of administration is drawn from portions of former Sections 730 and 731 and from the second sentence of former Section 732. The provision of subdivision (a) that the judgment is not enforceable under the Code of Civil Procedure is drawn from the last sentence of former Section 730 and the first sentence of former Section 732. Paragraph (1) of subdivision (a) continues the substance of the first sentence of former Section 732; paragraph (2) continues the substance of former Section 731; paragraph (3) continues the substance of the last sentence of former Section 730.

Subdivision (b) is drawn from the second sentence of former Section 732. Subdivision (c) continues the substance of the third sentence of former Section 732.

Subdivision (d) continues the substance of subdivision 2 of former Section 686 of the Code of Civil Procedure. The first sentence permits

the use of the Code of Civil Procedure provisions for the enforcement of an order for sale in a judgment foreclosing a lien under Section 716 and for other judgments for possession or sale of property. The remainder of the subdivision recognizes, for example, that a judgment for possession of property may include damages and costs which ordinarily would be recovered by levy on other property of the judgment debtor. Also there may be accrued costs, interest, and the levying officer's costs in enforcing a judgment for possession that ordinarily would be recovered by the judgment creditor by levy on other property of the judgment debtor. After the death of the judgment debtor, however, these claims for money cannot be enforced by levy against other property of the decedent; instead, a claim must be filed or presented in the same manner as other claims.

969/021

Probate Code § 731 (repealed)

SEC. 10. Section 731 of the Probate Code is repealed.

~~731. A judgment against a person who dies after trial and submission of his case to a judge sitting without a jury for decision or after a verdict is not a lien on the real property of the decedent, but is payable in due course of administration.~~

Comment. Former Section 731 is superseded by Section 730. The reference to a lien on the real property of the decedent is not continued; a judgment does not become a lien on the property of the decedent except as provided in Section 732 (judgment becomes lien on attached property).

969/022

Probate Code § 731 (added). Judgment on claim against estate conclusive

SEC. 11. Section 731 is added to the Probate Code, to read:

731. A judgment rendered against an executor or administrator, upon a claim for money, against the estate of the decedent, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment. The judgment shall provide that it is payable in the due course of administration. An abstract of the judgment shall be filed in the administration proceedings.

Comment. Section 731 continues the substance of the first two sentences of former Section 730.

Probate Code § 732 (repealed)

SEC. 12. Section 732 of the Probate Code is repealed.

~~732. When a judgment has been rendered against the testator or intestate, no execution shall issue thereon after his death, except as provided in the Code of Civil Procedure. A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real property of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.~~

Comment. The first three sentences of former Section 732 are superseded by Section 730. The last sentence is continued in Section 732.5.

969/024

Probate Code § 732 (added). When judgment becomes lien on attached property

SEC. 13. Section 732 is added to the Probate Code, to read:

732. (a) If a judgment is entered against the decedent during the decedent's lifetime in an action in which property was attached, at the time of the decedent's death the judgment becomes a lien upon the property of the estate subject to the attachment lien and has the same priority as the attachment lien. This subdivision applies only if the attachment lien is in effect at the time the decedent dies.

(b) If a judgment is entered after the death of the decedent in an action in which property was attached, at the time of entry the judgment becomes a lien on the property of the estate subject to the attachment lien and has the same priority as the attachment lien. This subdivision applies only if the attachment lien is in effect at the time of entry of the judgment.

Comment. Section 732 is a new provision which makes the judgment a lien on the attached property for the purpose of determining order of

priority for payment of claims against the estate under Section 950 and for the purpose of permitting foreclosure of the lien under Section 716. Section 732 implements Code of Civil Procedure Section 488.510(e) which reversed the former case law rule that the death of the defendant destroyed the lien of an attachment on his property. See the Comment to Section 488.510. The judgment does not become a lien under Section 732 on property subject to the attachment lien that is not included in the decedent's estate because it was transferred by the decedent; the attachment lien continues on the property transferred and can be enforced after judgment by a suit in equity notwithstanding the death of the decedent. *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928).

969/026

Probate Code § 732.5 (added). Judgment creditor's right of redemption

SEC. 14. Section 732.5 is added to the Probate Code, to read:

732.5. A judgment creditor having a judgment which was rendered against the decedent during the decedent's lifetime may redeem any real property of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Comment. Section 732.5 continues the last sentence of former Section 732 without substantive change.

969/027

Transitional Provision

SEC. 15. This act does not apply to any case where the joint tenant or judgment creditor or judgment debtor or defendant in an action in which property was attached dies prior to the effective date of this act, and, notwithstanding the provisions of this act, such cases are governed by the law in effect on December 31, 1980.

Comment. Section 15 makes clear that this act does not apply where the death occurs prior to the effective date. See also Prob. Code § 11 (added by 1979 Cal. Stats. ch. 165) (provisions severable if provision or application held unconstitutional).