

#39.10

5/19/71

Memorandum 71-38

Subject: Study 39.10 - Attachment, Garnishment Generally

Attached to this memorandum are four resolutions which are to be proposed by local bar associations for consideration by the Conference of Delegates at the 1971 State Bar Convention. (The handwritten notations indicate the position of the San Diego County Bar with respect to the proposed resolutions.) Commissioner Sandstrom was kind enough to forward them to us and we thought that the entire Commission would find them to be of interest. We do not plan to present them for discussion at the next meeting; however, if you believe any or all of them should be discussed, please feel free to do so then.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

RESOLUTION PROPOSED BY
SANTA CLARA COUNTY BAR ASSOCIATION

RESOLVED that the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to amend §690.6 of the Code of Civil Procedure to read as follows:

§690.6. Earnings for personal services: Determination of exemption and priorities: Hearing.-- (a) All the earnings of the debtor due or owing for his personal services shall be exempt from levy of attachment without filing a claim for exemption as provided in this section and Section 690.50.

(b) One-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor due or owing for his personal services rendered at any time within 30 days next preceding the levy of execution shall be exempt from execution without filing a claim for exemption as provided in this section and Section 690.50.

(c) All of such earnings, if necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor, unless the debts are: (1) Incurred by the debtor, his wife, or his family for the common necessities of life. (2) Incurred for personal services rendered by any employee or former employee of the debtor.

(d) The court shall determine the priority and division of payment among all of the creditors of a debtor who have levied an execution upon nonexempt earnings upon such basis as is just and equitable. (d) The plaintiff or judgment creditor (hereinafter referred to as "Creditor") who seeks to levy upon the earnings of the judgment debtor (hereinafter referred to as the "Debtor") due or owing for his personal services rendered at any time within thirty (30) days next preceding the levy of execution shall first, personally or by certified mail, serve a notice of intent to levy not less than ten (10) days prior to any such levy on the debtor. Such notice shall inform the debtor that he may avail himself of his right to claim exemptions granted by Code of Civil Procedure Section 690.6. Creditor shall forward to the officer authorized to levy (hereinafter referred to as "officer") a copy of said notice, together with proof of service. Such officer shall in no event levy on earnings rendered at any time within thirty (30) days next preceding the levy of execution unless such proof of service is received by the officer.

(e) Any creditor, upon motion, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the priority and division of payment among all the creditors of the debtor who have levied an execution upon nonexempt earnings pursuant to this section. (e) Without prejudice to the debtor filing a claim for exemption as provided in Section 690.50, the debtor may avail himself of his exemption rights as to such earnings prior to any levy thereon. The procedure for determining a claim for exemption of such earnings prior to any levy thereon shall be as follows: (1) The debtor shall, within ten (10) days from the

date of service of such notice, deliver to the officer an affidavit of himself or his agent, together with a copy thereof, alleging that the earnings sought to be levied upon are exempt, specifying the section or sections of this code on which he relies for his claim of exemption, and all facts necessary to support his claim, and also stating therein his address within this state for the purpose of permitting service by mail upon him of the counteraffidavit and any notice of the motion herein provided. (2) Forthwith upon receiving the affidavit of

exemption, the officer shall serve upon the creditor, either personally or by mail, a copy of the affidavit of exemption, together with a writing, signed by the said officer, stating that the claim of exemption has been received and that the officer will not levy upon the earnings except by order of the court in which the action is pending or from the writ issued. (3) If the creditor desires to contest the claim to exemption, he shall, within a period of five (5) days, file with the officer a counteraffidavit alleging that the earnings are not exempt within the meaning of the section or sections of this code relied upon, together with proof of service of a copy of such counteraffidavit upon the debtor. (4) If such counteraffidavit, with proof of service, is filed, either the creditor or the debtor shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the claim to exemption, the priority or division of payment between one or more creditors from nonexempt earnings, or the value of the property claimed to be exempt. Such hearing shall be granted by the court upon motion of either party made within five (5) days after the counteraffidavit is filed with the officer, and such hearing must be had within fifteen (15) days from the date of the making of such motion unless continued by the court for good cause. The party making the motion for hearing shall give not less than five (5) days notice in writing of such hearing to the officer and to the other party, and specify therein that the hearing is for the purpose of determining the claim to exemption. The notice may be a motion or of hearing and upon the filing of the notice with the Clerk of the Court, the motion is deemed made. (5) If no counteraffidavit is filed by the creditor or if neither party makes such motion within the time allowed, or if the officer shall not have been served with a copy of the notice of hearing within ten (10) days after the filing of the counteraffidavit, then the officer shall not proceed to levy. (6) At such hearing, the party claiming the exemption shall have the burden of proof. The affidavits and counteraffidavits shall be filed by the officer with the court and shall constitute the pleadings, subject to the power of the court to permit an amendment in the interests of justice. The affidavit of exemption shall be deemed to controverted by the counteraffidavit and both shall be received in evidence. Nothing therein shall be construed to deprive anyone

of the right to a jury trial in any case where, by the constitution, such right is given, but a jury trial may be waived in any such case in like manner as in the trial of an action. No findings shall be required in a proceeding under this section. When the hearing is before the Court sitting without a jury, and no evidence other than the affidavit and counteraffidavit is offered, the court, if satisfied that sufficient facts are shown thereby, may make its determination thereon. Otherwise, it shall order the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits. At the conclusion of the hearing, the court shall give judgment determining whether the claim to exemption shall be allowed or not, in whole or in part, and may give judgment determining the priority or division of payment between one or more creditors from nonexempt earnings upon such basis as is just and equitable, which judgment shall be determinative as to the right of the creditor to have the property taken and held by the officer or to subject the property to payment or other satisfaction of his judgment. In such judgment, the court shall make all proper orders for the disposition of such property or the proceeds thereof. (7) At any time while the proceedings are pending, upon motion of either party, or upon its own motion, the court may make such orders as may be proper and which protect the interests of both the creditor and the debtor under the particular circumstances of the case. Any orders so made may be modified or vacated by the court or Judge granting the same, or by the court in which the proceedings are pending, at any time during the pendency of the proceedings, upon such terms as may be just. (8) A copy of any judgment entered in the trial court shall be forthwith transmitted by the Clerk to the officer informing him as to the provisions of the judgment and authorizing him to act in accordance therewith. (9) When any documents required hereunder are served by mail, the provisions of this code relating to service by mail shall be applicable thereto. (10) Whenever the time allowed for an act to be done hereunder is extended by the court, written notice thereof shall be given promptly to the opposing party, unless such notice be waived, and to the officer. (11) Any order of a court sustaining or denying a debtor's claim to exemption shall remain in force for a period of four calendar months. The creditor who seeks to levy or the debtor who seeks exemption as to the same debt within four months of the hearing at which the debtor's claim to exemption was decided shall bear the burden of showing change of circumstances rendering the earnings exempt or non-exempt. (12) An appeal lies from any judgment under this section. Such appeal to be taken in the manner provided for appeals in the court in which the proceeding is had.

(f) Any creditor, upon motion, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the priority and division of payment among all the creditors of the debtor who have levied an execution upon nonexempt earnings pursuant to this section.

STATEMENT OF REASONS

Sections 690.6 and 690.50 presently provide that only after a levy on wages occurs may the debtor file a claim to exemption covering his wages. Not only are many debtors not aware of their right to exemption, but even if a claim to exemption is filed and is uncontested or sustained it takes two to four weeks to have the wages released.

In addition, the levy on wages is now often used to harass the debtor by jeopardizing his employment since, regardless of exemption rights, the employer is forced to process the levy and often has a firm policy dismissing personnel subject to more than one levy.

The wage exemption procedure should be changed to provide for an exemption hearing before the levy. This change would be in line with Sniadach and the recent decision in Gray v. Whitmore (C.A. 1st, January 28, 1971), and with the premise that once the substantive right of wage exemption is granted by the legislature it must answer procedurally to due process.

This change ought receive support from employers, who would save the effort of processing the substantial percentage of levies on wages which turn out to be exempt.

The proposed amendment to Section 690.6 would affect Code of Civil Procedure Section 710 in that employees of public entities must be given the same procedural rights to exemption claims as employees of private employers. [See separate proposed amended Section 710.]

RESOLUTION PROPOSED BY
SANTA CLARA COUNTY BAR ASSOCIATION

RESOLVED that the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to amend §2922 and §2924 of the Labor Code to read as follows:

1 §2922. Employment for unspecified term: Employment for specified
2 term defined. An employment, having no specified term, may be
3 terminated at the will of either party on notice to the other.
4 No employer may discharge or lay off any employee by reason of
5 the fact that his earnings have been subjected to garnishment-for
6 one or more garnishments. for one indebtedness; prior to a final
7 order-of-judgment-of-a-court. The wages of an individual whose
8 employment has been so terminated shall continue until rein-
9 statement if such termination is found to be in violation of this
10 section; but such wages shall not continue for more than 30 60
11 days. The employee shall give notice to his employer of his in-
12 tention to make such a wage claim with the Labor Commissioner
13 within 60 days of being laid off or discharged. The Labor Com-
14 missioner may take assignment of wage claims under this section
15 as provided for in Section 96. Any amount recovered by an em-
16 ployee under the provisions of this section shall be exempt from
17 execution and attachment under the provisions California Code of
18 Civil Procedure, §690.6. Employment for specified term means an
19 employment for a period greater than one month.

1 §2924. Employment for specified term: Termination by employer:
2 Grounds. An employment for specified term may be terminated at
3 any time by the employer in case of any willful breach of duty
4 by the employee in the course of his employment, or in case of
5 his neglect of his duty or continued incapacity to perform it.
6 No employer may discharge or lay off any employee by reason of
7 the fact that his earnings have been subjected to garnishment-for
8 one or more garnishments. for one indebtedness; prior to a final
9 order-of-judgment-of-a-court. The wages of an individual whose
10 employment has been so terminated shall continue until reinstate-
11 ment if such termination is found to be in violation of this
12 section; but such wages shall not continue for more than 30 60
13 days. The employee shall give notice to his employer of his in-
14 tention to make such a wage claim with the Labor Commissioner
15 within 60 days of being laid off or discharged. The Labor Com-
16 missioner may take assignment of wage claims under this section
17 as provided for in Section 96. Any amount recovered by an employee
18 under the provisions of this section shall be exempt from execu-
19 tion and attachment under the provisions California Code of Civil
20 Procedure, §690.6.

(Proposed new language underlined; language to be deleted stricken)

STATEMENT OF REASONS

At present Sections 2922 and 2924 of the Labor Code prohibit discharge of an employee whose earnings have been subjected to garnishment for one indebtedness prior to a court order or judgment.

Appendix
in Principal

These provisions have been completely obsolete since garnishments prior to judgment have been ruled unconstitutional in Snaidach v. Family Finance Corp., 395 U.S. 337 (1969) and McCallop v. Carberry, 1 C. 3rd 903 (1970).

Although the number of employers who have contractual provisions or specific company policies requiring discharge or layoff for garnishments is relatively small, nevertheless, the threat of jeopardizing a debtor's employment by garnishing his wages is a payment. This collection technique is often used successfully even when the employee's wages are exempt from attachment or execution under C.C.P. §690.6.

The use of wage garnishments for the purpose not of actually producing money, but to force voluntary payment because of the threat of discharge, is in theory actionable as an abuse of process (see White Lighting v. Wolfson, 68 C.2d 336 (1968); Czap v. Credit Bureau of Santa Clara, Civil No. 26367 (1st Appellate Dist., 1970)). In practice that is not an effective means of deterring the collection practices. The only practical way of preventing creditors from coercing payment through the threat of discharge is to prohibit the discharge itself.

Those employers who do discharge employees whose wages are garnished do so to avoid the expense and inconvenience of processing the levies. The change proposed here should advance their interests by reducing the number of garnishments. Moreover, the proposed amendment does not prevent an employer from agreeing with his employees that they pay the expense of garnishments.

In recent years several states have increased the protection afforded debtors against discharge by reason of garnishments. New York in 1969 amended Section 5252 of Civil Practice Law and Rules Code to prohibit any discharge or lay off for garnishments. As of July 1, 1970, the Federal Consumer Credit Protection Act has made it illegal to discharge an employee for garnishments resulting from any one indebtedness (15 U.S.C. 1674), and provided a penalty of up to \$1,000 and one (1) year in prison for willful violation. The federal law specifically authorizes states to enact further protections for the debtor wage earner (15 U.S.C. 1677).

Included in the proposed amendment is an increase from 30 to 60 days the period of back wages which an illegally discharged employee may recover. It is believed that the proposed figure is more realistic both as compensation for a discharged employee and as a means of deterring discharge for garnishments.

The proposal final sentence makes clear that if a debtor recovers back pay after being discharged, that recovery is protected from execution and attachment as though it had been received as wages. A similar provision is found in New York law.

RESOLUTION PROPOSED BY
SANTA CLARA COUNTY BAR ASSOCIATION

RESOLVED that the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to amend §710 of the Code of Civil Procedure to read as follows:

1 §710. Enforcement of judgment against debtor to whom money is
2 owed by State, county, etc.: Procedure.--(a) Whenever a judg-
3 ment for the payment of money is rendered by any court of this
4 state against a defendant to whom money is owing and unpaid by
5 this state or by any county, city and county, city or municipal-
6 ity, quasi-municipality, district or public corporation, the
7 judgment creditor may file a duly authenticated abstract or
8 transcript of such judgment together with an affidavit stating
9 the exact amount then due, owing and unpaid thereon and that he
10 desires to avail himself of the provisions of this section in the
11 manner as follows:

12 (1) If such money, wages or salary is owing and unpaid by this
13 state to such judgment debtor, said judgment creditor shall file
14 said abstract or transcript and affidavit with the state depart-
15 ment, board, office or commission owing such money, wages or
16 salary to said judgment debtor prior to the time such state de-
17 partment, board, office or commission presents the claim of such
18 judgment debtor therefor to the State Controller or to the State
19 Personnel Board. Said state department, board, office or commis-
20 sion in presenting such claim of such judgment debtor to said
21 State Controller shall note thereunder the fact that the filing
22 of such abstract or transcript and affidavit and state the amount
23 unpaid on said judgment as shown by said affidavit and shall also
24 note any amounts advanced the State of California by reason of
25 advances for expenses or for any other purpose. If the money
26 sought to be levied upon under this section are earnings of the
27 debtor due or owing for his personal services rendered at any
28 time within thirty (30) days next preceding the filing of the
29 abstract or transcript and affidavit, then the creditor shall
30 serve notice and the debtor may file a claim to exemption as pro-
31 vided in Section 690.6 of this code, except that the "officer" as
32 used in Section 690.6 shall be deemed to be the clerk of the
33 court from which the action originates or from which the writ
34 issued. If no such claim of exemption is filed, or if a hearing
35 is held pursuant to the procedure set forth in Section 690.6 and
36 the court finds that the earnings are not exempt, then thereupon
37 the State Controller, to discharge such claim of such judgment
38 debtor, shall pay into the court which issued such abstract or
39 transcript by his warrant or check payable to said court the
40 whole or such portion of the amount due such judgment debtor on
41 such claim, after deducting from such claim an amount sufficient
42 to reimburse the state department, board, officer or commission
43 for any amounts advanced to said judgment debtor or by him owed
44 to the State of California, and after deducting therefrom an
45 amount equal to one-half or such greater portion as is allowed by

statute of the United States, of the earnings owing to the judgment debtor for his personal services to the state rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(2) If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality, district or public corporation, said judgment creditor shall file said abstract or transcript and

affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality, district or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). If the money sought to be levied upon under this section are earnings of the debtor due or owing for his personal services rendered at any time within 30 days next preceding the filing of the abstract or transcript and affidavit, then the creditor shall serve notice and the debtor may file a claim to exemption as provided in Section 690.6 of this code, except that the "officer" as used in Section 690.6 shall be deemed to be the clerk of the court from which the action originates or from which the writ issued. If no such claim of exemption is filed, or if a hearing is held pursuant to the procedure set forth in Section 690.6 and the court finds that the earnings are not exempt, then Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor owing by the county, city and county, city, municipality, quasi-municipality, direct or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor. The procedure for determining the claim of exemption shall be governed by the procedure set forth in 690.26 of this code. Except as provided, the procedure for determining the claim to exemption shall be governed by the procedures set forth in Section 690.50 of this code.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation

proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination

and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General.

(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund.

STATEMENT OF REASONS

Sections 690.6 and 690.50 presently provide that only after a levy on wages occurs may the debtor file a claim to exemption covering his wages. Not only are many debtors not aware of their right to exemption, but even if a claim to exemption is filed and is uncontested or sustained it takes two to four weeks to have the wages released.

The proposed amendment Section 690.6 provides for a hearing before the levy and outlines the reasons therefor. The above proposed Section 710 gives to employees of public entities the same procedural rights to exemption claims as employees of private employers covered by the proposed amended Section 690.6.

RESOLUTION PROPOSED BY
...SAN FERNANDO VALLEY BAR ASSOCIATION...

disapproved

RESOLVED that the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to enact a new Section 690.65 of the Code of Civil Procedure as follows:

1015
10120

- 1 §690.65: EXEMPTIONS; FAMILY ALLOWANCE
- 2 All sums paid or payable to a recipient of a family allowance
- 3 under and by virtue of Probate Code §680.

(Proposed new language underlined; language to be deleted stricken)

STATEMENT OF REASONS

The present exemption statutes do not exempt payments by way of a family allowance. A family allowance is frequently the only means of support of a widow or children of a decedent during the pendency of a probate proceeding. Such sums should not be subject to creditors' levies since same is akin to the wages of the head of a household and is basic to the support of a decedent's family.

The proposed new section does not affect other laws or statutes.

Digest: Adds new section to exemption statutes for the purpose of exempting family allowance from levy.