

Memorandum 77-51

Subject: Study 39.160 - Attachment (Use of Court Commissioners)

The Commission distributed approximately 400 copies of the attached tentative recommendation relating to the performance of judicial duties by court commissioners under the Attachment Law. The copies went to persons and organizations that have indicated an interest in receiving tentative recommendations generally or tentative recommendations on the Attachment Law. We requested but received no comments from the State Bar on the tentative recommendation. When and if we receive comments from the State Bar, we will transmit them to you in a supplement to this memorandum.

You should read the attached tentative recommendation to refresh your memory on its contents.

General Reaction to Tentative Recommendation

Only a few comments were received. In view of the shortness of the tentative recommendation, it may be safe to assume that many of the persons who received the tentative recommendation reviewed it but sent in no comments either because they had no problem with it or because they did not care one way or the other about it. The Presiding Judge of the Superior Court of Los Angeles County (Exhibit 1), the Administrative Office of the Courts (Exhibit 2), and Mr. Joseph Wein, a practitioner in this field (Exhibit 3), all strongly support the tentative recommendation. On the other hand, three commentators (Exhibits 4, 5, and 6) object to the tentative recommendation because they object to the use of court commissioners as a matter of principle.

Technical Changes in Proposed Legislation

Presiding Judge Hogoboom of Los Angeles (Exhibit 1) suggests that all duties under the Attachment Law be designated subordinate judicial duties that may be performed by court commissioners. This was the Commission's original proposal to the Legislature in the Attachment Law, but the provision was deleted from the bill before it was enacted because of objections of legislative committee members. The tentative recommendation, which grants court commissioners a more limited authority, is the result of the Commission's further study of this matter.

Judge Hogoboom also suggests two technical revisions of the proposed legislation (set out on page 5 of the attached tentative recommendation):

(1) Strike from subdivision (b) "Unless otherwise stipulated by the parties in writing." He states: "The reason for this change is that the proposed language might suggest that the parties could stipulate that certain judicial duties are subordinate judicial duties. Stipulations entered into under Section 21 of Article VI of the California Constitution authorize temporary judges and do not define or relate to 'subordinate judicial duties.'"

(2) Strike from subdivision (c) "to hear and determine a matter arising under this title."

The staff believes both of these changes are improvements. We also suggest that the title be changed to: "Recommendation Relating to the Attachment Law--Use of Court Commissioners." As so revised, the staff recommends that the tentative recommendation be approved for printing.

Please mark any suggested editorial changes on the attached copy of the tentative recommendation so that your suggested changes can be taken into account when the recommendation is prepared for printing.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



Memo 77-51

EXHIBIT 1

The Superior Court

LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
WILLIAM F. HOGGSDON, PRESIDING JUDGE

TELEPHONE
(213) 874-1234

May 25, 1977

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I am responding to your request of March 15, 1977 regarding proposed revisions to the Attachment Law of California. These revisions relate to the performance of judicial duties by court commissioners. My recommendations in regard thereto are as follows:

1.

Under the interim Attachment Law which expired December 31, 1976, commissioners were authorized to determine all matters arising under that law. The experience of Los Angeles Superior Court was very satisfactory under the interim statute. All matters which fall within the present attachment statute were handled by a commissioner. Contested third party claims were not deemed to be proceedings under the attachment statute because they are treated under C.C.P. 689.

We, therefore, would recommend the addition to the present attachment statute of subdivision (a) only of the proposed Section 482.060:

"482.060. The judicial duties to be performed under this title are subordinate judicial duties within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners."

2.

In the event that the above recommendation is not adopted, we support the proposed Section 482.060 but suggest certain minor modifications as follows:

a. Strike from subdivision (b) "Unless otherwise stipulated by the parties in writing." The reason for this change is that the proposed language might suggest that the parties could stipulate that certain judicial duties are subordinate judicial duties. Stipulations entered into under Section 21 of

California Law Revision Commission

May 23, 1977

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Article VI of the California Constitution authorize temporary judges and do not define or relate to "subordinate judicial duties."

b. Amending proposed subdivision (c) to read as follows:

"(c) Nothing in subdivision (b) limits the power of a court to appoint a temporary judge pursuant to Section 21 of Article VI of the California Constitution."

OR strike (c) entirely since Section 21 of Article VI of the Constitution is not restricted to the performance of "subordinate judicial duties"; in which case reference in the Commission's comment on the full scope of Section 21 of Article VI would be appropriate.

Very truly yours,


William P. Hogoborn
Presiding Judge

WPH:jd

cc: Robert C. Lynch, Asst. Chief Deputy
County Counsel

CHIEF JUSTICE
HON. ELIZABETH BIRD
CHAIRPERSON



Memo 77-51

EXHIBIT 2

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS

4200 STATE BUILDING, SAN FRANCISCO 94102 • (415) 557-3203

100 Library and Courts Building, Sacramento 95814 • (916) 443-7525

June 13, 1977

RALPH N. KLEPS
DIRECTOR

RICHARD A. FRANK
DEPUTY DIRECTOR

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

We have received your "Tentative Recommendation Relating to the Attachment Law (Performance of Judicial Duties by Court Commissioners)," which would add a section 482.060 to the Code of Civil Procedure to specify that judicial duties under the attachment law may be performed by court commissioners, with four exceptions:

1. contested claims of exemption;
2. contested motions for determination of the liability and damages for wrongful attachment;
3. contested third party claims;
4. contested actions to enforce a garnishee's liability.

You have invited comment relating to the tentative recommendation.

The Judicial Council has generally favored proposals that would enable the courts to use subordinate judicial personnel more effectively (see, e.g., Judicial Council of Cal., Annual Rep. (1975) pp. 29-34), but it has not studied this specific issue. We have discussed the matter on a staff level, however, and transmit our informal views to you for whatever benefit you might find in them.

We agree with your estimation that the use of court commissioners to perform subordinate judicial duties under the attachment law will maximize its efficient and economical administration. At the same time, we appreciate the practical utility of the suggestion made by Presiding Judge William P. Hogoboom of the Los Angeles Superior Court in his letter to you dated May 25 that all judicial duties under the attachment law be declared subordinate judicial duties which may be performed by court commissioners.

June 13, 1977

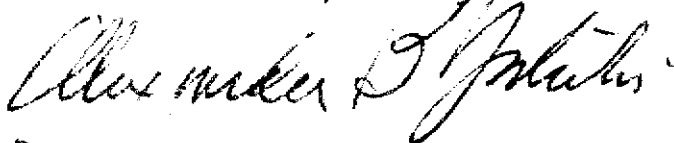
From our study of your tentative recommendation, we assume that you have concluded that it is necessary to spell out the four exceptions to the designation of "subordinate judicial duties" to avoid constitutional questions which might frustrate the enactment of the legislation. Apparently, Judge Hogoboom has considered the tentative recommendation in the same light, since the letter considers your proposal as it stands as an acceptable alternative, given the stated technical changes.

Our views can be summarized as follows: If the Legislature is not ready to adopt the broader statute relating to the powers of court commissioners under the attachment law as suggested by Judge Hogoboom, the narrower statute in the form of your tentative proposal would still be a desirable improvement of the present situation.

We hope the foregoing is of interest to you. We greatly appreciate the opportunity to review and comment upon proposals concerning court administration, practice and procedure.

Very truly yours,

Richard A. Frank, Acting Director



By

Alexander B. Yakutis
Attorney

ABY/cr

LAW OFFICES OF

Memo 77-51

EXHIBIT 3

BUCHALTER, NEMER, FIELDS & SAVITCH

< A PROFESSIONAL CORPORATION >

700 SOUTH FLOWER STREET • LOS ANGELES, CALIFORNIA 90017 • TELEPHONE (213) 626-6700

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CENTURY CITY OFFICE

SUITE 1780

1800 AVENUE OF THE STARS
CENTURY CITY, CALIFORNIA

PLEASE REFER YOUR REPLY TO:

Joseph Wein
LOS ANGELES OFFICE

April 21, 1977

Mr. Stan Ulrich
California Law Revision Commission
Stanford Law School
Stanford, CA 94308

Re: Tentative Recommendation Relating to
Attachment Law -- No. 39.160 dated March 15, 1977

Dear Stan:

I have reviewed the above tentative recommendation which relates to the utilization of Court Commissioners in most areas under the new Attachment Law and which is detailed specifically in the proposed new §482.060.

I am in accord with the tentative recommendation and would like to see it enacted as soon as possible on an emergency basis.

I am returning the pink form regarding receipt of publications and would appreciate if you would add my name to the mailing list and also the name of my partner, Joseph Weissman, as it now appears.

Sincerely,

BUCHALTER, NEMER, FIELDS & SAVITCH

By

Joseph Wein

JW:lm
Encl.

EXHIBIT 4

LAW OFFICES

KIPPERMAN, SHAWN, KEKER & BROCKETT

407 SANSOME STREET, SUITE 400

SAN FRANCISCO, CALIFORNIA 94111

STEVEN M. KIPPERMAN
JOEL A. SHAWN
JOHN W. KEKER
WILLIAM A. BROCKETT
CHRISTINE A. DOYLE

April 4, 1977

TELEPHONE
(415) 788-2200

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION [39.60] . . . : PERFORMANCE OF
JUDICIAL DUTIES BY COURT COMMISSIONERS

Dear Commissioners:

It may be that using commissioners will "maximize . . . efficient and economical administration" of the attachment law. I suspect that replacing all judges in all cases with commissioners would be "economical" with no loss of efficiency. The more fundamental question is should that be the goal of legislation or the judicial system. While heretical in these days of systems analysis and economy-oriented proposals, I continue to believe that inefficient justice is more important than the efficient and economical processing of cases and creating of statistics of dispositions. Indeed, most important is the public's (not lawyers' or law professors') perception that justice is done. How many times my own clients have expressed disbelief saying "you mean we didn't even get a judge to hear it?" referring to any number of proceedings now conducted by commissioners. The importance of attachment proceedings cannot be underestimated -- often the result is the death-knell of the litigation to one side or the other.

I think the notion that commissioners inevitably are economical and efficient must realistically be taken with a grain of salt. By the time two or more lawyers (often accompanied by client(s) and witness(es) taking time off from work) go to court only to find themselves re-setting, or choosing yet another date for, the appearance before a commissioner, coupled with the time-consuming process of sometimes seeking a judge to reverse or alter the commissioner's recommendations -- often with required brief-writing and another appearance -- the added cost to litigants may outweigh the budgeted savings seen by the Legislature.

Additionally, my experience is that the public's perception of the "justness" of the system is adversely affected generally by using commissioners.¹

I think the following comments, made with respect to the analogous use of Federal special masters by Federal courts, sums up my thoughts:

Litigants are entitled to a trial by the court, in every case, save where exceptional circumstances are shown. It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy. For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay. Likewise, the litigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge.

Adventures in Good Eating v. Best
Places to Eat, 131 F.2d 809, 814-15
(7th Cir. 1942).

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1. There are many creative and innovative ways that economies and efficiencies can be injected into the legal system without adversely affecting both the perception of justice and the reality of justice. I suggest that you review the possibility of experimenting with oral law and motion which would save litigants and court attaches many hours of time and expense in processing routine matters.

California Law Revision Commission
April 4, 1977
Page 3.

In conclusion, I think your Tentative Recommendations should be reconsidered and rejected completely.

Very truly yours,



STEVEN M. RIPPERSMAN

SMK/lb

To: California Law Revision Commission

April 30, 1977

From: Wanda Underhill

Re: Comments - Tentative Recommendation
relating to The Attachment Law,
"Performance of Judicial Duties by
Court Commissioners."

I. Is the efficient and economical administration of the court sufficient justification for allowing Court Commissioners to perform subordinate judicial duties under The Attachment Law?

A. Where the property of one person is being attached by another, it would seem that there is little justification for judicial cost cutting because:

1. Property ownership is basic to our free enterprise system, and,
2. Individual property rights are protected by our Federal and State Constitutions.

a. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
U.S. Constitution, amend. IV.

b. "... no person shall be deprived of life, liberty, or property, without due process of law. Nor shall private property be taken for public use, without just

To: Calif. Law Rev. Comm.
From: Wanda Underhill

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WANDA UNDERHILL
2079 Market Street, No. 27
San Francisco, California 94114

Compensation."

U.S. Constitution, amend. II.

C. "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

California Constitution, Sec. 7 (a).

B. Furthermore, the plaintiff using the Attachment Law may have an unfair advantage.

1. He has knowledge of the law and its remedies.

a. He knows where to go for help in collecting his debt. This service is available to him through a governmental agency.

b. Printed forms are provided for him, and a governmental employee will assist him in filling out the forms if needed.

C. The defendant, however, may have no knowledge of attachment procedures.

1. There is no governmental agency to help him.

2. No printed forms are available for his use.

3. No governmental employees are available to help him fill out the forms.

4. He is being placed in a seemingly unconstitutional position,

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens... nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV.

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From: Wanda Underhill

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WANDA UNDERHILL
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San Francisco, California 94114

5. Probably the greatest disadvantage is that defendant has no money.

D. Possibly a better solution, which focuses on court economy and the administration of justice, would be to assign two court Commissioners to attachment cases, one to the plaintiff and one to the defendant.

1. Then, each party would have equal representation.

a. "The Judicial Duties Under the Attachment Law," Exhibit 3C8/219 attached to "Tentative Recommendation" could be made available to all parties in the form of a Procedural Checklist.

b. Help from governmental agency employees should be available to all parties.

1/ Where governmental employees display a bias, conscious or subconscious, or possible identification with power and authority, they should be given the opportunity to work in other departments.

2/ Service to the public is of the highest order, it should be administered by dedicated public servants with care, reason, and fairness.

3/ Canon 5 might serve as a beacon, "A lawyer should exercise independent professional judgement on behalf of a client." EC5-1 "The professional judgement of a lawyer should be exercised, within the bonds of the law, solely for the benefit

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From: Wanda Underhill

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WANDA UNDERHILL
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San Francisco, California 94114

of his client and free of compromising influences and loyalties.¹ Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

1. Cf. ABA CANON 35.

"[A lawyer's] fiduciary duty...."

2. Justice and due process would be served through the "exercise of judicial power of the highest degree."

Tentative Recommendation relating to The Attachment Law. "Performance of Judicial Duties by Court Commissioners, P. 3.

- a. The use of Court Commissioners and "check list forms" (described above), would also serve as a screening device which would allow for the early disposition of cases where no substantial issues are involved.

II. The use of the term "ex parte" in connection with the Attachment Law seems ambiguous.

A. Definition -

EX PARTE - On the one part; an action which is not an adverse proceeding against some one else!

Wanda Underhill
April 30, 1977

KENNETH JAMES ARNOLD
ATTORNEY AT LAW
P. O. BOX 14216
SAN FRANCISCO, CALIFORNIA 94114

March 26, 1977

California Law Revision Commission
School of Law
Stanford, CA 94305

Attn: John H. DeMouilly, Executive Secretary

Mr. DeMouilly:

Enclosed is the pink slip to enable you to keep my name on your mailing list.

I have read over the tentative recommendations on commissioners and market value. With respect to the former, I suppose that is the way the law is going, but, personally, I am opposed to allowing commissioners to hear any contested matter absent a stipulation by the parties. I am firmly committed to the proposition that all people should have a constitutional right to have their disputes adjudicated by judges who are answerable to the people and can be recalled, impeached, or removed from office; I deplore the trend of adjudication by administrative hearing officers, boards of governors, commissioners, referees, and what have you who cannot be removed from office by the will of the people. This, of course, is a philosophical matter with which I suppose you are not concerned.

My reaction to your recommendation on market value is entirely different. I wholeheartedly support your efforts on this and believe your recommendation is a good one. My only criticism is with your amendment to Ev C § 812. My feeling is that the section as amended is confusing. You attempt to clarify it in your comment, but the comment is not part of the statute. Too, you state earlier in your explanation that the purpose of the law is to change some of the decisional law. If your intent is to change decisional as opposed to statutory law, I would also include a section defining market value as including such terms as "market price," "actual value," "full value," etc. as used in various statutes. (Unfortunately, while I was typing this paragraph I had a four interruption which has broken my train of thought, but I think if you reexamine the amended section and your comment vis a vis the text explanation, you will understand my objection.)

Very truly yours,

Kenneth James Arnold
Kenneth James Arnold

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March 15, 1977

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

THE ATTACHMENT LAW

Performance of Judicial Duties by Court Commissioners

CALIFORNIA LAW REVISION COMMISSION

School of Law

Stanford University

Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN JUNE 10, 1977.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

TENTATIVE RECOMMENDATION

relating to

THE ATTACHMENT LAW

Performance of Judicial Duties by Court Commissioners

BACKGROUND

The Commission's original recommendation proposing enactment of the Attachment Law contained a provision which would have permitted court commissioners to perform all the judicial duties under the Attachment Law.¹ This provision sought to implement the power of the Legislature under Section 22 of Article 6 of the California Constitution to provide for the appointment of officers such as commissioners to perform "subordinate judicial duties" and was derived in part from provisions in the interim attachment statute for the issuance of writs ex parte or after a noticed hearing.² However, the proposed provision was deleted from the bill before final passage.

The use of court commissioners to perform subordinate judicial duties under the Attachment Law will maximize its efficient and economical administration. Without a specific statutory designation of the judicial duties which may appropriately be performed by court commissioners, their use will remain limited by the general statutes pertain-

1. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973). The Attachment Law was enacted in 1974, was amended in 1976, and became operative on January 1, 1977. Cal. Stats. 1974, Ch. 1516, § 9 (original enactment); Cal. Stats. 1975, Ch. 200, § 2 (deferring operative date); Cal. Stats. 1976, Ch. 437 (amendments).
2. Former Code Civ. Proc. §§ 538.1, 538.4, as enacted by Cal. Stats. 1972, Ch. 550, §§ 9, 12, was repealed by Cal. Stats. 1974, Ch. 1516, § 12 (operative Jan. 1, 1977, pursuant to Cal. Stats. 1975, Ch. 200, § 2).

ing to the powers of court commissioners³ except in certain situations where the parties stipulate otherwise.⁴

In preparing proposed legislation to authorize the use of court commissioners under the Attachment Law, the Commission has attempted to satisfy the constitutional objections to the original proposal which were stated in an opinion of the Legislative Counsel.⁵ The Legislative Counsel concluded that a provision authorizing court commissioners to perform judicial duties under the Attachment Law

would be constitutional to the extent it authorized the determination of preliminary matters, even though contested, and a final determination on the merits of an issue in litigation, if uncontested. This general rule is subject to the qualification that the determination of a contested preliminary matter may, depending upon the facts of a particular case, so involve the exercise of due process rights that it would be required to be made by a judge rather than an officer such as a commissioner.

Whether a particular question involved a preliminary matter, with the exception of a recovery for wrongful attachment, which in all cases would be a determination on the merits, would depend upon the circumstances of a given case.

The Legislative Counsel concluded that preliminary or uncontested matters may be appropriately designated subordinate judicial duties by the Legislature on the authority of the California Supreme Court's decision in Rooney v. Vermont Investment Corporation.⁶

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3. General powers of superior court commissioners are provided in Code of Civil Procedure Section 259. Additional powers of superior court commissioners in Los Angeles County are provided by Code of Civil Procedure Section 259a which is made applicable to several other counties by Government Code Sections 70141.4-70141.12. Government Code Section 72190 authorizes municipal court commissioners to exercise the powers of superior court commissioners. Court commissioners are empowered to hear and determine certain ex parte motions for orders and writs, to approve undertakings, and in certain counties to act as judge pro tempore and hear uncontested actions and proceedings. See also 1 B. Witkin, California Procedure, Courts §§ 223-227, at 480-484 (2d ed. 1970).
 4. If appointed and qualified, a commissioner may act as a temporary judge pursuant to the stipulation of the parties. Cal. Const. Art. VI, § 21; Code Civ. Proc. § 259a, subd. 4; Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 359-360, 515 P.2d 297, 302-303, 110 Cal. Rptr. 353, 358-359 (1973). Where a court commissioner is permitted by statute to hear uncontested matters, the commissioner may enter a judgment on stipulation since the stipulation makes the matter uncontested. Id. at 367, 515 P.2d at 308, 110 Cal. Rptr. at 364.
 5. Opinion of Cal. Legislative Counsel (No. 8659, June 16, 1975) (unpublished).
 6. 10 Cal.3d 351, 366, 515 P.2d 297, 307, 110 Cal. Rptr. 353, 363 (1973).

The Legislative Counsel also suggested that the determination of a contested exemption claim, although a preliminary matter, is the sort of situation that in some cases may involve "due process rights" so as to require the "exercise of judicial power of the highest degree." This position is buttressed by recent decisions regarding prejudgment remedies rendered by the United States and the California Supreme Courts which emphasize the importance of the defendant's right to property necessary for the support of the defendant and his or her family.⁷

RECOMMENDATION

The Commission recommends that the Attachment Law be amended to provide for the maximum use of court commissioners within appropriate constitutional limitations. Accordingly, court commissioners should be generally authorized to preside over all contested and uncontested matters arising under the Attachment Law subject to several significant exceptions. The Commission has concluded, after a review of the judicial duties specified in the Attachment Law,⁸ that court commissioners should not be permitted to hear the following matters except where the parties properly stipulate otherwise:

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7. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-342 (1969); *Randone v. Appellate Department*, 5 Cal.3d 536, 558-563, 488 P.2d 13, 27-32, 96 Cal. Rptr. 709, 723-728 (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57, (1971); *McCallop v. Carberry*, 1 Cal.3d 903, 907, 464 P.2d 122, 125, 83 Cal. Rptr. 666, 669 (1970). Cf. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-606 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1972).
 8. An outline of the judicial duties specified in the Attachment Law is attached as an Exhibit hereto.

- (1) Contested claims of exemption.⁹
- (2) Contested motions for determination of liability and damages for wrongful attachment.¹⁰
- (3) Contested third party claims.¹¹
- (4) Contested actions to enforce a garnishee's liability.¹²

Contested exemption claims are preliminary matters, but in many cases these claims involve essential rights requiring judicial attention. The other matters specified above are not preliminary matters and so may be determined by a court commissioner only if uncontested, subject of course to stipulation of the parties in appropriate cases.

9. See Code Civ. Proc. §§ 482.100, 484.070, 484.350, 484.360, 484.530, 485.610, 492.040, 492.050. The proposed limitation on the power of court commissioners in situations where there is a contested exemption claim is not restricted to "necessities" claims because of the imprecision of that term and because property which may be a "necessity" may not actually be claimed under the necessities exemption (Code Civ. Proc. § 487.020(b))--e.g., a savings and loan account exempt pursuant to Code Civ. Proc. § 690.7 (applicable to attachment pursuant to § 487.020(a)).

10. See Code Civ. Proc. §§ 490.030, 490.050.

11. See Code Civ. Proc. § 488.090, incorporating the procedures of Code Civ. Proc. § 689.

12. See Code Civ. Proc. § 488.550.

PROPOSED LEGISLATION

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

An act to add Section 482.060 to the Code of Civil Procedure, relating to attachment.

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

SECTION 1. Section 482.060 is added to the Code of Civil Procedure, to read:

482.060. (a) Except as otherwise provided in subdivision (b), the judicial duties to be performed under this title are subordinate judicial duties within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.

(b) Unless otherwise stipulated by the parties in writing, the judicial duties to be performed in the determination of the following matters are not subordinate judicial duties:

- (1) A contested claim of exemption.
- (2) A contested motion for determination of the liability and damages for wrongful attachment.
- (3) A contested third party claim.
- (4) A contested action to enforce a garnishee's liability.

(c) Nothing in subdivision (b) limits the power of a court to appoint a temporary judge to hear and determine a matter arising under this title pursuant to Section 21 of Article VI of the California Constitution.

Comment. Section 482.060 authorizes the use of court commissioners to perform judicial duties arising under this title, subject to the exceptions noted in subdivision (b).

Contested exemption claims, described in paragraph (1) of subdivision (b), may arise under Sections 482.100 (postlevy exemption claims based on changed circumstances), 484.070 (claim of exemption and notice of opposition in procedure for issuance of writ of attachment after a noticed hearing), 484.350-484.360 (claim of exemption and notice of

opposition in procedure for issuance of additional writ after a noticed hearing), 484.530 (claim of exemption after levy of ex parte additional writ), 485.610 (claim of exemption after levy of ex parte writ or additional writ), 492.040-492.050 (release of exempt property where non-resident defendant files general appearance).

Motions for determination of liability and damages for wrongful attachment arise under Sections 490.030 and 490.050. Third-party claims are made and determined in the manner provided by Section 689 which is incorporated by Section 488.090. Actions to enforce a garnishee's liability may be brought pursuant to Section 488.550.

The provision in subdivision (b) of this section for the stipulation of the parties recognizes that the written stipulation of the parties authorizing entry of judgment on specified terms makes the action uncontested. See Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 367, 515 P.2d 297, 308, 110 Cal. Rptr. 353, 364 (1973) (applying this principle to Section 259a, subd. 6, which permits certain court commissioners to determine uncontested actions).

Subdivision (c) recognizes that a qualified commissioner or other person may be appointed as a temporary judge to determine the matter pursuant to the authority of Section 21 of Article VI of the California Constitution.

EXHIBIT

JUDICIAL DUTIES UNDER THE ATTACHMENT LAW

A. RIGHT TO ATTACH ORDERS, WRITS OF ATTACHMENT, AND DETERMINATION OF EXEMPTIONS.

1. Noticed hearing procedures and prelevy exemption claims. (Chapter 4.)

a. A right to attach order which states the amount to be secured by the attachment is issued if the court finds the following at a noticed hearing: (§ 484.090.)

(1) The claim is one upon which attachment may be issued.

(See § 483.010.)

(2) The plaintiff has established the probable validity of the claim. (See § 481.190 defining probable validity.)

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

b. A writ of attachment is also issued at the hearing, conditioned upon the filing of an undertaking, which describes property to be levied upon, property which is exempt, and states the amount to be secured by the attachment where: (§§ 484.090(b), 488.010(a).)

(1) The court has made the findings necessary to issue a right to attach order.

(2) The defendant has failed to prove all property sought to be attached is exempt.

c. Additional writs of attachment may be issued at a noticed hearing, conditioned upon the filing of an undertaking, if the court finds the following: (§ 484.370.)

(1) A right to attach order has been issued at a noticed hearing (§ 484.090) or the court has determined in a hearing on a motion to set aside an ex parte right to attach order that the plaintiff is entitled to the order (§§ 485.240, 492.050(d)).

- (2) The defendant has failed to prove that all property sought to be attached is exempt.

d. Continuances.

- (1) For good cause shown, the court may grant a continuance of the hearing on issuance of the order upon the defendant's or the plaintiff's application. (§ 484.080.) If the continuance is granted on the defendant's application, the effective period of any temporary protective order is extended. (§ 484.080(b) and Chapter 6.) If the continuance is granted on the plaintiff's application, the effective period of any temporary protective order may be extended. (§ 484.080(a) and Chapter 6.)
- (2) The court may continue the hearing on issuance of the order and writ for the production of additional evidence upon a showing of good cause. (§ 484.090(d).)

2. Ex parte procedures and prelevy determination of exemptions.

(Article 3 of Chapter 4, and Chapter 5.)

- a. A right to attach order and writ of attachment may be issued, conditioned upon the filing of an undertaking, if the court finds the following at an ex parte hearing: (§ 485.220.)
- (1) The claim is one upon which attachment may be issued. (See § 483.010.)
- (2) The plaintiff has established the probable validity of the claim. (See § 481.190.)
- (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
- (4) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)
- (5) The plaintiff will suffer great or irreparable injury if the order is delayed to be heard on notice. (See § 485.010 which provides that great or irreparable injury is shown where it may be inferred that there is a danger that the property would be concealed, made unavailable to levy, or substantially impaired in value, a bulk sales notice has been recorded and published, a liquor license escrow has been opened, or any other circumstance showing that great or irreparable injury would result to the plaintiff.)

- b. The court may deny the application for the ex parte right to attach order and writ of attachment in its discretion and instead issue a temporary protective order (§§ 486.010-486.110) and treat the application as an application for a right to attach order at a noticed hearing (§§ 484.010-484.110) if it finds that the requirements for issuance of an ex parte order and writ are satisfied (§ 485.220) but that it would be in the interest of justice and equity to the parties to follow the noticed hearing procedure (§ 486.030).
- c. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 485.540.)
- (1) An ex parte right to attach order and writ of attachment have been issued pursuant to § 485.220.
 - (2) The plaintiff's affidavit shows that the property sought to be attached, or part of it, is not exempt. (See § 487.020.)
 - (3) The plaintiff will suffer great or irreparable injury if the writ is delayed to be heard on notice. (See § 485.010.)
- d. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 484.520.)
- (1) A right to attach order has been issued after a noticed hearing (§ 484.090) or the court has determined in a hearing on a motion to set aside an ex parte right to attach order that the plaintiff is entitled to the order (§§ 485.240, 492.050(d)).
 - (2) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)
- e. Motion to set aside ex parte right to attach order and writ of attachment may be made by the defendant and is granted if the court determines at the hearing on the motion that the plaintiff is not entitled to the order. (§ 485.240.) The hearing on the motion may be continued for production of additional evidence.

3. Postlevy determination of exemptions.

- a. Exemptions provided by § 487.020 are claimed and determined after levy of an ex parte writ (§ 485.220), an ex parte additional writ (issued after issuance of an ex parte order and writ under § 485.540), or an ex parte additional writ (issued after issuance of a noticed hearing order and writ under § 484.520), as provided in Section 690.50. (§§ 484.530, 485.610.)
- b. Farm products or inventory levied upon pursuant to Section 488.360(a) may be claimed as essential for the support of the defendant or the defendant's family. (§§ 487.020(b), 488.360(b).) Upon the required showing, the court orders removal of the keeper and return of the property essential for support and may make such further order as the court deems appropriate to protect the plaintiff.
- c. Postlevy exemption claims based on change in circumstances (§ 482.100). The court orders the release of property shown to be exempt as a result of a change in circumstances occurring after (1) the denial of a claim earlier in the action or (2) the expiration of the time for claiming the exemption earlier in the action. (See §§ 488.100(c), 690.50 for procedures.)

4. Ex parte procedures in action against nonresident defendant.

- a. A right to attach order and writ of attachment may be issued, conditioned upon the filing of an undertaking, if the court finds the following at the ex parte hearing: (§ 492.030.)
 - (1) The claim is one upon which attachment may be issued.
(See § 492.010 which permits attachment in an action for the recovery of money against nonresident individuals and foreign corporations and partnerships.)
 - (2) The plaintiff has established the probable validity of the claim. (See § 481.190.)
 - (3) The defendant is a nonresident described by § 492.010.
 - (4) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(5) The plaintiff's affidavit shows that the property is subject to attachment. (See § 492.040 which provides that all property of a nonresident is subject to attachment if a method of levy is provided by § 488.310 et seq.)

b. Additional writs of attachment may be issued ex parte, conditioned upon the filing of an undertaking, if the court finds the following: (§ 492.090.)

(1) A right to attach order has been issued against the nonresident pursuant to § 492.030.

(2) The plaintiff's affidavit shows that the property sought to be attached is subject to attachment. (See § 492.040.)

c. Exempt property (see § 487.020) is released on order of the court when the nonresident defendant files a general appearance in the action. (§ 492.040.)

d. A motion to set aside the ex parte right to attach order and writ of attachment may be made by the defendant. (§ 492.050.)

The court sets aside the right to attach order if the defendant has filed a general appearance in the action and the plaintiff fails to show that the order is authorized by some other provision. If the court finds that the plaintiff is entitled to the right to attach order, it orders the release of property exempt pursuant to § 487.020.

5. Order directing transfer. If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer to the levying officer possession of the property to be taken into custody or documentary evidence of title of property to be attached. (§ 482.080.)

6. An order restricting amount of property to be levied upon or determining order of levy may be issued where the property described in the plaintiff's application clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 482.120.)

B. TEMPORARY PROTECTIVE ORDER. (Chapter 6.)

- 1. Issuance of temporary protective order.** A temporary protective order may be issued ex parte, conditioned upon the filing of an undertaking, if the court finds the following: (§ 486.020.)
 - a. The claim is one upon which attachment may be issued. (See § 483.010.)
 - b. The plaintiff has established the probable validity of his claim. (See § 481.190.)
 - c. The order is not sought for a purpose other than the recovery upon the claim upon which the application for the attachment is based.
 - d. The plaintiff will suffer great or irreparable injury if the order is not issued. (See § 485.010.)

- 2. Contents of temporary protective order.** The temporary protective order contains such provisions as the court determines are in the interest of equity and justice (§ 486.040) and may restrain the transfer of the defendant's property in the state (§ 486.050(a)) except that the defendant may sell farm products or inventory in the ordinary course of business (§ 486.050(b)) and may write checks for certain purposes (§ 486.060).

- 3. Duration of temporary protective order.**
 - a. The court may prescribe a date of expiration earlier than 40 days after issuance. (§ 486.090(a).)
 - b. The court may modify or vacate the temporary protective order on the defendant's ex parte application, or after a noticed hearing, if it determines that such action would be in the interest of justice and equity to the parties. (§ 486.100.)

- C. THIRD-PARTY CLAIMS.** After levy of a writ of attachment, a third person may make a third-party claim (which eventually may result in a hearing at which the court determines title to the property claimed) in the manner provided for third-party claims after levy of execution. (See §§ 488.090, 689.)

- D. EXTENSION OF LIEN OF ATTACHMENT.** Upon motion of the plaintiff, not less than 10 nor more than 60 days before the expiration of the

normal three-year period of the lien of attachment, the court may for good cause extend the duration of the lien for one year from the date the lien would otherwise expire. (§ 488.510.) The total of such extensions may not exceed five years.

E. SALE OR CARE OF ATTACHED PROPERTY.

1. Upon application of the plaintiff, defendant, or a third person whose interest has been determined, and reasonable notice to other parties, the court may order the sale of attached property or may appoint a receiver or direct the levying officer to take charge of, cultivate, care for, preserve, collect, harvest, pack, or sell attached property where it is shown that the property is perishable or will greatly deteriorate or depreciate in value or that such action will best serve the interests of the parties. (§ 488.530(a).)
2. The court fixes the daily fee of the receiver and may order the plaintiff to pay the receiver in advance or may direct that all or part of the receiver's fees and expenses be paid from the proceeds of the sale. (§ 488.530(c).)

F. RELEASE OF EXCESSIVE ATTACHMENT. An order releasing an attachment is made where the defendant shows on noticed motion that the value of the property attached clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 489.555.) The attachment is released to the extent that it is excessive.

G. UNDERTAKINGS. (Chapter 9.)

1. Approval of undertakings. All undertakings, other than those given with corporate surety, must be approved by the court before filing. (§ 489.060.)
2. Determination of objections to undertakings. The court determines objections to undertakings on noticed motion. (§ 489.080.) Objections may be made on the grounds that the sureties are insufficient or that the amount of the undertaking is insufficient. (§ 489.070.) See §§ 489.220 (increase to amount of probable recovery for wrongful attachment), 489.310 (undertaking to release attachment), 489.320 (undertaking to secure termination of protective order), 489.410 (postjudgment continuance of attachment), 489.420 (undertaking to release attachment on defendant's appeal).) The court

may permit witnesses to attend and evidence to be introduced as in a civil case. (§ 489.090(b).) The court may appoint appraisers to ascertain the value of property. (§ 489.090(b).) If the undertaking is determined to be insufficient, the court orders a sufficient undertaking to be filed. (§ 489.090(c).)

H. RECOVERY FOR WRONGFUL ATTACHMENT. (Chapter 10.) A motion for recovery on the plaintiff's undertaking for wrongful attachment may be made within a year after judgment by the defendant (§ 490.030) or a third person whose property is attached (§ 490.050) by the procedure provided in Section 1058a.

I. EXAMINATION OF THIRD PERSON INDEBTED TO DEFENDANT. (Chapter 11.)

A person owing debts to the defendant or having in his possession or under his control the defendant's personal property may be required to appear before the court and be examined regarding such property. (§ 491.010.) If the person fails to appear he may be brought before the court on a warrant. (§ 491.010(c).) If the person admits the debt or possession of the property, the court may order its attachment. (§ 491.010(d).) Witnesses may be required to appear and testify at the examination. (§ 491.040.)