

Memorandum 80-30

Subject: Study D-300 - Enforcement of Judgments (Procedure and Exemptions in Enforcement of Support Judgments and Tax Liability)

This memorandum concerns the procedure and availability of exemptions in the enforcement of support judgments and tax liability.

Enforcement of Support Judgments

Requirement of prior court authorization to enforce support judgment by levy of execution. Under Civil Code Section 4380, the court has discretion over the method of enforcement of a support judgment, and the support creditor must obtain court authorization before a writ of execution may be issued. This requirement imposes an unnecessary and costly burden on the support creditor and places the support creditor in a less favorable position than other creditors who can obtain a writ of execution without the need for prior court authorization.

The staff recommends that support creditors be entitled to resort to execution without the necessity of obtaining prior court approval so long as the obligations to be enforced are not more than 10 years overdue. This not only would avoid the burden and expense of the existing requirement but also would avoid the need to have a court hearing both on the issuance of the writ and later on an exemption claim if the property levied upon is claimed to be exempt. While it would be possible to attempt to resolve the exemption issue at the hearing on the issuance of the writ if the property to be levied on is identified at the time of that hearing, the debtor (armed with advance knowledge of which property the creditor will seek to levy upon) may attempt to defeat the levy by selling, exhausting, or hiding the property.

The following provision implements the staff recommendation:

Civil Code § 4383. Execution to enforce support

4383. (a) Notwithstanding Section 4380, a judgment, order, or decree for the payment of child or spousal support may be enforced by a writ of execution without prior court approval for amounts that are not more than 10 years overdue.

(b) The application for a writ of execution made pursuant to Section 699.510 of the Code of Civil Procedure shall be accompanied by the affidavit of the judgment creditor showing the amount of

each due and unpaid installment and the date it became due. The affidavit shall be filed in the action and a copy shall be attached to the writ of execution delivered to the levying officer. The levying officer shall serve the copy of the affidavit on the judgment debtor when the writ of execution is first served on the judgment debtor pursuant to a levy under the writ.

Comment. Section 4383 is a new provision permitting enforcement of child and spousal support judgments by execution without the necessity of obtaining prior court approval under Section 4380, so long as the amounts sought to be collected are not more than 10 years overdue. See Section 4382 (showing of diligence required before amounts due more than 10 years may be enforced).

Subdivision (b) provides technical requirements that must be complied with in addition to the general provisions governing execution. The affidavit of amounts due and owing provides the court clerk with the information needed to issue the writ and informs the judgment debtor concerning the nature of the debt sought to be collected.

Exemptions from enforcement of support obligations. Under existing law, the standard exemptions from enforcement of money judgments apply where the judgment is for child or spousal support unless there is a specific statutory exception. See *Miller v. Superior Court*, 69 Cal.2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968) (retirement funds); *Yager v. Yager*, 7 Cal.2d 213, 218, 60 P.2d 422 (1936) (homestead). Two exceptions are now provided by statute: A support creditor can reach one-half of a debtor's earnings pursuant to Section 723.052 (instead of the usual one-quarter standard), subject to the power of the court to increase or decrease the exemption in the interest of equity. Certain retirement benefits are not subject to any exemption in support cases pursuant to Section 690.18. (Assembly Bill 145, currently pending, would extend this exception to additional types of retirement benefits.) It also appears that a court may avoid the potential application of an exemption by imposing a lien on specific property to secure the payment of a support obligation by exercise of its powers under Civil Code Section 4380. See *Willen v. Willen*, 121 Cal. App. 351, 6 P.2d 554 (1932) (no exemption where lien created on money payable under husband's insurance policies and enforced by execution).

The Tentative Recommendation Relating to Enforcement of Judgments (distributed for comment in March 1979) contains a provision excepting support judgments from the application of exemptions, but gives the

court authority to make an equitable division of the debtor's property that takes into account the needs of all the persons the debtor is required to support. See Section 707.170. This provision is based on the recognition that exemptions are intended in large part to protect property needed by the debtor's family and thus should not be used to shield that property when the former family is the creditor.

The staff has concluded that the recommended change in the tentative recommendation is too drastic a change in existing law. It eliminates all exemptions and places on the judgment debtor the burden of establishing need in every case. The staff believes a better solution is to retain the existing exemptions but to give the court authority to apply otherwise exempt property to the satisfaction of the support obligation to the extent that the court determines to be equitable. This change will encourage the judgment creditor to levy on nonexempt property in preference to levying on property that is exempt. It will also avoid placing on the judgment debtor the burden of establishing that property should be exempt on the basis of the equities of the situation; instead, the court will determine the extent to which otherwise exempt property should nevertheless be applied to the satisfaction of the support obligation. We believe the staff proposal provides reasonable protection to the judgment debtor and at the same time recognizes the unique character of a support obligation.

The following provision implements the staff recommendation:

Civil Code § 4384. Property exempt from enforcement of support obligation

4384. (a) Except as otherwise provided by statute, a person obligated to pay child or spousal support pursuant to a judgment, order, or decree of the court made or entered pursuant to this part is entitled to the exemptions from enforcement of a money judgment available to judgment debtors generally.

(b) If property sought to be applied to the satisfaction of the support obligation is shown to be exempt under subdivision (a) in appropriate proceedings, the court shall, upon noticed motion of the judgment creditor, determine the extent to which the exempt property nevertheless shall be applied to the satisfaction of the support obligation. In making this determination, the court shall take into account the needs of the judgment creditor, the needs of the judgment debtor and all the persons the judgment debtor is required to support, and all other relevant circumstances. The court shall effectuate its determination by an order specifying the

extent to which the otherwise exempt property is to be applied to the satisfaction of the support obligation.

Comment. Subdivision (a) of Section 4384 codifies the case law rule that exemptions apply in the enforcement of support unless there is a specific exception. See, e.g., *Miller v. Superior Court*, 69 Cal.2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968); *Ogle v. Heim*, 69 Cal.2d 7, 442 P.2d 659, 69 Cal. Rptr. 579 (1968); *Yager v. Yager*, 7 Cal.2d 213, 60 P.2d 422 (1936). See also Code Civ. Proc. §§ 704.010-704. (exemptions from enforcement of money judgments generally).

Subdivision (b) permits the court, upon noticed motion by the judgment creditor, to make an equitable division of otherwise exempt property based on the needs of the parties. This provision is drawn from older case law concerning the equitable division of earnings levied upon to enforce a support judgment. See *Rankins v. Rankins*, 52 Cal. App.2d 231, 126 P.2d 125 (1942). See also Code Civ. Proc. § 723.052 (equitable division of earnings).

Exemptions and Tax Liability Enforcement

The tentative recommendation contains a provision that applies exemptions where a tax liability is sought to be collected except with regard to property assessed for a property tax. See Section 707.210. Existing law applies the exemptions in Code of Civil Procedure Sections 690.1-690.31 in cases where the tax liability is enforced by a warrant or a notice of levy issued by a state agency pursuant to certain provisions in the Revenue and Taxation Code and the Unemployment Insurance Code. See Section 690.51. Existing law does not apply exemptions in some tax enforcement situations, however, such as where the agency issues a notice to withhold. See Rev. & Tax. Code § 18817; *Greene v. Franchise Tax Bd.*, 27 Cal. App.3d 38, 103 Cal. Rptr. 483 (1972). As a general rule, it has been held that exemptions are not applicable against the state or a city or county seeking to collect taxes. *Morrison v. Barham*, 184 Cal. App.2d 267, 7 Cal. Rptr. 442 (1960) (ad valorem tax on homestead property). However, if the law gives a tax lien the effect of a judgment lien, the tax lien does not have priority over a prior homestead declaration. *Curtis v. County of Kern*, 37 Cal. App.3d 704, 113 Cal. Rptr. 41 (1974) (collection of personal property tax by assertion of lien on real property).

The principle embodied in the tentative recommendation is that a taxing agency should not be able to avoid the application of exemption

statutes merely by the process of selecting which enforcement procedure to use. The Franchise Tax Board has objected to the proposed section because the processing of exemption claims would significantly add to administrative costs and because there would be substantial revenue loss from the exemption of small bank accounts, dwellings, and motor vehicles.

The staff believes that this problem requires further study. We suggest that the substance of existing law be continued in the proposed legislation. The application of exemptions to tax enforcement should be the subject of a separate study and recommendation.

Respectfully submitted,

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