

## Memorandum 81-59

Subject: Study L-603 - Probate Code (Exoneration)

If a will devises land which is subject to a mortgage, deed of trust, or other lien, and the will makes clear whether the testator intended that the devisee take the land subject to or free of the encumbrance, the clearly expressed intention controls. However, if the testator's intention does not appear from the will, the common law and California case law rule provides that if the debt is one for which the testator is personally liable, the devisee is entitled to "exoneration," that is, to receive the land free of the encumbrance by having the debt paid out of other assets of the estate. 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 379-80 (1976). The impact of this rule is diminished in California because of anti-deficiency legislation which provides that on a purchase money mortgage or deed of trust for real property, no personal liability may be imposed on the debtor (Code Civ. Proc. § 580b), and hence in such a case no exoneration is required. 7 B. Witkin, supra § 457, at 5896; French & Fletcher, supra at 380. Moreover, exoneration does not apply to one who takes as a surviving joint tenant and not as devisee unless the will so provides, and a direction in the will to pay all debts is not a sufficient statement of the testator's desire that the surviving joint tenant should take the property free and clear of the encumbrance. 7 B. Witkin, supra.

The Uniform Probate Code abolishes the doctrine of exoneration by Section 2-609 which provides:

**Section 2-609. [Non-Exoneration.]**

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

**COMMENT**

See Section 3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted. For the rule as to exempt property, see Section 2-402.

"Mortgage" is a defined term in the UPC, and means "any conveyance, agreement or arrangement in which property is used as security." UPC § 1-201. The rule of Section 2-609 yields to a contrary intention expressed in the testator's will. UPC § 2-603.

Professors French and Fletcher point out that because of California's anti-deficiency rule, adoption of UPC Section 2-609 would have a relatively small impact on California law. French & Fletcher, supra at 380. For this reason, Professor Niles was of the view that the present California case law is satisfactory. Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 n.192 (1979). Professor Turrentine, however, was of the view that California law should be revised "to provide against exoneration of realty or personalty from mortgages and deeds of trust unless the will indicates an intent for such exoneration; and a mere direction to pay debts should not of itself be sufficient evidence of that intent." Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 40 (1956).

The staff is of the view that UPC Section 2-609 should be adopted in California. If the mortgage or deed of trust is not a purchase money instrument and a deficiency judgment could be had, the devisee will be entitled to exoneration under present California law. This is probably not what the testator would have intended: "[I]t is unrealistic to presume the testator's intent to give encumbered property free of a trust deed which the testator himself had no thought of discharging." 7 B. Witkin, supra § 457, at 5896.

If the UPC Section 2-609 is adopted as the staff recommends, Section 736 of the Probate Code will ultimately have to be replaced. Section 736 provides that property specifically devised or bequeathed by the will shall not be sold for the purpose of exonerating other property. Section 736 is inconsistent with UPC Section 3-902 which provides for the order of resort to property in the estate and permits resort to property specifically devised, but only as a last priority. See also Prob. Code §§ 750, 751 (order of resort to property for payment of debts and legacies). UPC Section 3-902 will be considered when we get to Article III of the UPC (estate administration).

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel