

Fourth Supplement to Memorandum 82-9

Subject: Study L-603 - Probate Law (Apportionment of Blanket Encumbrance Among Several Devisees)

At the September 1981 meeting, the Commission adopted the UPC rule abolishing the doctrine of exoneration and providing instead that, unless the will indicates otherwise, a devisee should take encumbered property subject to the encumbrance. The Commission asked the staff to research the question of how an encumbrance which blankets several parcels is apportioned among two or more devisees.

The accepted rule appears to be that a blanket mortgage is apportioned to each devisee in proportion to the value of the property received by each. See 80 Am. Jur.2d Wills § 1761, at 814 (1975); Annot., 168 A.L.R. 702 (1947). Due-on-sale clauses in the loan agreement are generally construed not to apply to transfers at death, although an explicitly-drafted agreement will be given effect. See R. Bernhardt, California Mortgage and Deed of Trust Practice § 2.40, at 49-50 (Cal. Cont. Ed. Bar 1979). See also id. § 2.34, at 47 (applicability of Wellenkamp rule).

Although under the probate decree an individual devisee will be liable for the proportionate share of the encumbrance assigned to him or her, ordinarily a probate decree cannot diminish the lender's security. See 7 B. Witkin, Summary of California Law Wills and Probate § 505, at 5927-28 (8th ed. 1974); cf. Noble v. Beach, 21 Cal.2d 91, 96, 130 P.2d 426 (1942) (rights of judgment lien creditor). See also Code Civ. Proc. § 873.260 (partition judgment limits lien to share allotted to debtor). If on default of one devisee the lender proceeds against property of other devisees which was subject to the original blanket mortgage, the estate may be reopened to compel the defaulting devisee to make reimbursement. See Prob. Code § 1067; A. Marshall, California Probate Procedure § 1094, at 19-364 (4th ed. 1981).

Respectfully submitted,

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