

6/18/86

First Supplement to Memorandum 86-59

Subject: Study L-1038 - Estate and Trust Code (Sale of Specific
Devise to Exonerate Encumbered Devise)

In connection with the abatement provisions in the basic Memo, we need to dispose of Section 736 of the Probate Code, which provides:

When a testator devises real property subject to a mortgage, deed of trust or other lien and the intention is indicated by the will that the mortgage, deed of trust, or other lien is to be exonerated, other property specifically devised or bequeathed shall not be sold for the purpose of exonerating the encumbered property unless a contrary intention that the other property be sold is indicated by the will.

Ordinarily, an encumbrance on specifically devised property is not exonerated (paid). Prob. Code § 6170. But if the will requires the encumbrance to be paid, other estate property will have to be used for this purpose. Section 736 may be useful, since it seems unlikely that the average testator would want other specifically devised property sold to pay the encumbrance.

If Section 736 is continued, it will state an exception to the general rule in the draft statute that, after intestate and residuary property is exhausted, general and specific devises to nonrelatives of the testator are reduced proportionately until exhausted, then general and specific devises to the testators' spouse and kindred are reduced proportionately. See proposed Section 6192 (attached to basic Memo). To reduce a specific devise, either the property must be sold or the specific devisee must agree to contribute cash in lieu of sale. But if Section 736 is continued, specifically devised property will not be sold to pay off an encumbrance on other specifically devised property.

A draft of a section continuing Section 736 is attached to this Supplement. Does the Commission want to continue Section 736?

Respectfully submitted,

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§ 6195. No sale of specific devise to exonerate other devise

6195. When a testator devises real property subject to a mortgage, deed of trust, or other lien and the intention is indicated by the will that the mortgage, deed of trust, or other lien is to be exonerated, other property specifically devised shall not be sold for the purpose of exonerating the encumbered property.

Comment. Section 6195 continues former Probate code Section 736 without substantive change. Under Section 6195, other property specifically devised shall not be sold for the purpose of exonerating the encumbered property unless the will indicates a contrary intention. Section 6190.

CROSS-REFERENCES

Definitions

Devise § 32

Real property § 68

Will § 88

Specific devise not exonerated § 6170

[Note. If Section 6195 is approved, the introductory clause of Section 6192 should be revised to read: "Except as provided in ~~Section~~ Sections 6193 and 6195, . . ."]